
ARTICLES

DUTY WARS

W. JONATHAN CARDI* & MICHAEL D. GREEN†

I. INTRODUCTION

The concept of duty in tort law remains in turmoil. Courts say and do things that seem wildly inconsistent, sometimes proclaiming the existence of a general duty of reasonable care¹ and then, often in the same case, engaging in a full-scale inquiry into whether the defendant owed the plaintiff a duty.² Duty is often said to be categorical, and yet duty decisions sometimes appear to be narrowly dependent on the specific facts of the case at hand—although so far the duty inquiry has not turned on the color of the parties’ eyes. Academics also continue to battle over the proper role for duty in contemporary tort law. The Restatement (Third) of Torts (“Third Restatement”) confronts the duty question head on, but has received stinging criticism for failing to restate the law.³ To a significant

* Dorothy Salmon Chair and Associate Professor of Law, University of Kentucky College of Law.

† Williams Professor of Law, Wake Forest University School of Law. We would like to thank Shannon Gatlin and James Jennings for their excellent research support for this Article.

1. *E.g.*, *Widlowski v. Durkee Foods, Div. of SCM Corp.*, 562 N.E.2d 967, 968 (Ill. 1990) (addressing a situation in which defendant’s employee, delirious from oxygen deprivation after a workplace injury, bit off a portion of plaintiff nurse’s finger, the court stated a basic duty rule: “[i]t is well settled that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons”).

2. *See id.* at 968–70 (holding, nonetheless, that defendant, the employer of the patient, owed no duty to plaintiff nurse after a lengthy analysis of foreseeability, relationship between the parties, public policy, and factors that inform Learned Hand’s reasonableness formula, $B < PL$).

3. *E.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 736 (2001) [hereinafter Goldberg & Zipursky, *Place of Duty*] (“The Restatement (Third) of Torts: General Principles has studiously avoided the concept of

extent, the credit or blame for the current state of duty law belongs to the California Supreme Court. Through much of the latter half of the twentieth century, the California Supreme Court played a leading role in the development of the modern law of duty (indeed much of contemporary tort law), first sweeping aside a variety of no-duty impediments to liability and then reinvigorating duty (more accurately, no-duty) as an instrument for limiting liability as the expansion of tort law ground to a halt and reversed course in the 1980s and 1990s.

Prominent torts scholars' commentary on the California Supreme Court's duty jurisprudence has recently occupied the pages of this journal. We wish to join the rich discussion already begun by John Goldberg and Benjamin Zipursky, and Dilan Esper and Gregory Keating.⁴ We also want to enter the fray on the appropriate role for duty in contemporary tort law and offer a conceptual grounding for the current Restatement's treatment of duty.⁵

In Part II of this Article, we begin with a stylized explanation of the development of California duty jurisprudence through the formative and expansionary period, including landmark decisions on the relevant factors for determining whether a duty exists, the duties of land possessors to those on the land, and the affirmative duty of psychotherapists to third parties. In Part III, we offer an explanation of the treatment of duty in the Third Restatement and its evolution to its current form—at various stages it has been a moving target, responding to the criticism and commentary that it generated. Its basic form has not changed, but it has undergone revision during its incubation. After laying out the California and Third Restatement treatments of duty—and the two should not be conflated, as some suggest⁶—we summarize in Part IV our understanding of Esper and

duty and the language expressing it. In doing so, it has disempowered itself from *restating* our actual law . . .”).

4. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006); John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases,* 79 S. CAL. L. REV. 329 (2006) [hereinafter Goldberg & Zipursky, *Shielding Duty*].

5. One of us (Green) is an interested party in the Third Restatement, having served as a co-reporter for the now-titled *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* since 2000. The duty provisions under discussion were originally drafted by Gary Schwartz, who was the original and sole reporter for this portion of the Third Restatement until he was joined by Green in 2000. Since Schwartz's untimely death on July 25, 2001, Green has carried forward Schwartz's drafting of the duty provisions in this Restatement, along with now-President Bill Powers, who joined as a co-reporter in 2001. Harvey Perlman, who briefly served as a co-reporter in 1999–2000, drafted provisions that have not been carried forward and are thus no longer a part of the current Restatement and which, consequently, we do not address in this Article.

6. See Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 333 (claiming that the Third

Keating's critique of California law and that of Goldberg and Zipursky on California and the Third Restatement. Finally, in Part V we join issue with these scholars and offer our substantive views on duty. Specifically, in Part V.A, we examine Goldberg and Zipursky's claim that the essence of duty is obligation and not instrumentalism; in Part V.B, we discuss the extent to which duty is relational; in Part V.C, we elucidate the Third Restatement's rejection of foreseeability in the duty context; and in Part V.D, we conclude with a general defense of the Third Restatement's approach.

II. CALIFORNIA DUTY LAW

We begin our account of the development of modern California duty law with its adoption, in the middle of the twentieth century, of a default duty of reasonable care to avoid causing physical harm. *Hilyar v. Union Ice Co.*⁷ and *Warner v. Santa Catalina Island Co.*⁸ are the California equivalent of Britain's *Heaven v. Pender*⁹ and *Donoghue v. Stevenson*.¹⁰ These California cases express the idea that everyone owes a duty of reasonable care when engaging in conduct that might harm others.¹¹ This default duty reflected an evolution from a day when tort liability was limited to specific relationships to one based on risky behavior.¹² The default duty remains the law in California today,¹³ albeit with a heavy hand on the no-duty tiller under certain circumstances, a matter we defer to later in this Part.

Biakanja v. Irving,¹⁴ decided on the heels of *Hilyar* and *Warner*, revealed that duty had a greater role to play than suggested in the earlier

Restatement "impose[s] California's brand of instrumentalism on the entire nation's negligence law"). All instrumental accounts of tort law (or duty) are not the same, and the Third Restatement is quietly agnostic as to whether the source of the obligation in tort law is some brand of instrumentalism, moral-justice concerns, other justifications, or a combination of some or all of these reasons.

7. *Hilyar v. Union Ice Co.*, 286 P.2d 21 (Cal. 1955).

8. *Warner v. Santa Catalina Island Co.*, 282 P.2d 12 (Cal. 1955). Although neither *Hilyar* nor *Warner* limited its statement of the default duty to physical harm, such a limit was implicit in those decisions.

9. *Heaven v. Pender*, (1883) 11 Q.B.D. 503, 509 (U.K.). Holmes articulated the same principle in his well-known dictum that tort law imposes a duty of all the world to all the world. *The Theory of Torts*, 7 AM. L. REV. 652, 662 (1873) (author not named but widely believed to be Oliver Wendell Holmes (2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES 81–82 (1963))).

10. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (U.K.).

11. *Hilyar*, 286 P.2d at 24 ("All persons are required to use ordinary care to prevent others being injured as the result of their conduct . . ."); *Warner*, 282 P.2d at 16 ("All persons are required to use ordinary care to prevent others being injured as the result of their acts . . .").

12. See DAN B. DOBBS, *THE LAW OF TORTS* § 111, at 260–63 (2000).

13. See *John B. v. Superior Court*, 137 P.3d 153, 160 (Cal. 2006).

14. *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).

cases, especially when the harm was not physical. In *Biakanja*, the plaintiff lost out on most of an inheritance because the defendant, a notary public, prepared an invalid will for the testator who left his entire estate to plaintiff.¹⁵ The privity doctrine, which had been employed to deny recovery to anyone harmed in the performance of a contract who was not a party to that contract, had been previously discarded and was no longer a basis for a no-duty ruling.¹⁶ Yet the harm suffered by the plaintiff was economic loss, not property damage or personal injury, an interest that tort law has been reluctant to recognize as a basis for liability. Moreover, the denial of negligence liability for economic harm had been and still is accomplished with no-duty—that is, a defendant owes no duty to protect against such harm. Nevertheless, the court delved further, ultimately adopting one of the enduring exceptions to the no-duty rule for negligently inflicted economic loss—the duty of an attorney preparing a will to third-party intended beneficiaries. The enduring legacy of *Biakanja*, however, is its catalog of factors to be employed in determining whether a duty exists in a specific case. These factors are:

[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.¹⁷

Thus, a factor approach to determining duty was born, one to give substance to the “policy” determination that Prosser had famously stated—and to which the court cited—was what duty was all about.¹⁸ These factors were employed in *Biakanja* to expand liability by imposing a duty where one had not previously existed. The factors' significance was destined to expand, however, and they provided a legacy for future duty law in California. Notably, the *Biakanja* approach employed foreseeability as an element of duty—one that soon was to become its primary element.¹⁹

Foreseeability proved useful to the California Supreme Court in

15. *Id.* at 17.

16. *See id.* at 18.

17. *Id.* at 19.

18. Contained in the first edition of his treatise, and carried forward in each subsequent edition, is Prosser's precept that “‘duty’ is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 180 (1st ed. 1941). The caselaw is replete with citations to this statement.

19. It was christened as such in *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968) (“In the absence of ‘overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty.’” (quoting *Grafton v. Mollica*, 42 Cal. Rptr. 306, 310 (Ct. App. 1965))).

expanding liability to another interest that tort law had never fully embraced in *Dillon v. Legg*,²⁰ the seminal California case permitting claims for emotional harm by bystanders who observe a family member suffer physical injury. The court's duty analysis began with that well-worn phrase from Prosser: "[I]t should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."²¹ With regard to foreseeability, one can readily anticipate a mother suffering emotional harm when a negligent motorist runs down her child, and the court relied on that observation to overturn precedent and expand the scope of liability for causing stand-alone emotional harm. In the process, foreseeability became the "chief element" in determining whether a duty existed.²²

Rowland v. Christian, decided the same year as *Dillon*, addressed the duties of land owners to others entering their land, duties which to that point varied based on the status of the entrant.²³ *Rowland* afforded the court an opportunity to reconcile the default duty of reasonable care adopted in the 1950s with the factor approach articulated in *Biakanja* and employed in *Dillon*. The beginning of duty analysis, said the court, is whether the defendant caused an injury to the plaintiff.²⁴ If so, a duty of reasonable care applies, save for the extraordinary case in which the *Biakanja* factors should be the basis for the duty analysis.²⁵ After thus cabining the *Biakanja* factors, the court was free to begin and end its duty inquiry with the default duty of reasonable care, pausing only to explain why the bases for the traditional status-based duties were outdated and did not justify modification of the ordinary duty.²⁶ With *Rowland*, the California Supreme Court once again influenced other states to expand the duty of land

20. *Id. Dillon*, consistent with its elevation of foreseeability to primacy status, employed it as the basis for the scope of liability for bystander emotional harm; the limits of liability for causing a bystander emotional harm would be the court's assessment, on the facts of the case, whether a person of ordinary sensibilities would suffer serious emotional harm. The foreseeability standard turned out to be a calamity, requiring restructuring of the law to impose more rigid and nonforeseeability-based rules to limit recovery in bystander cases. See *Thing v. La Chusa*, 771 P.2d 814, 828 (Cal. 1989); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8 (Tentative Draft No. 5, 2007).

21. *Dillon*, 441 P.2d at 916 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 332–33 (3d ed. 1964)).

22. *Id.* at 920.

23. *Rowland v. Christian*, 443 P.2d 561, 564–65 (Cal. 1968).

24. *Id.* at 564.

25. *Id.*

26. *Id.* at 564–68.

possessors to entrants on the land.²⁷ Ironically, however, *Rowland*'s most far-reaching effect was not to cabin the use of the *Biakanja* factors or even to expand the realm of tort duty, but rather to plant the seeds for a movement in the opposite direction. With *Rowland*, courts saw that the *Biakanja* factors might be the basis not only for the imposition of a previously unrecognized duty, but also for a withdrawal of tort liability through a no-duty determination.

The court again employed the *Biakanja* factors in another of its pathbreaking expansionary cases, *Tarasoff v. Regents of the University of California*, and again affirmed the central role of foreseeability.²⁸ In *Tarasoff*, the defendant psychotherapist became concerned that his patient posed a threat of violence to a former girlfriend.²⁹ Indeed, the psychotherapist was so concerned that he took actions that led to the police taking custody of the patient—but only briefly.³⁰ When the patient was released, he killed the former girlfriend.³¹ Her parents brought suit alleging that the psychotherapist should have warned her or them and that the failure to do so constituted negligence.³²

The court addressed the question of duty.³³ Although the court did not directly address the matter, the psychotherapist had not done anything to create the risk of harm that his patient posed to the deceased, and therefore the default duty to refrain from harming others did not apply.³⁴ The parents were seeking liability that the law has shied from imposing—an area of tort law, sometimes denominated as “nonfeasance,” cordoned off by employing a no-duty rule that is subject to exceptions known as affirmative duties.³⁵ Affirmative duties are often described as being based on whether a “special relationship” exists.³⁶ The *Tarasoff* court thus concluded that it did not have to rely on foreseeability—although the direction in which it pointed was clear to even the dimmest consumer of the opinion—because a special

27. About half the states have adopted some form of a unitary standard. For the latest compilation of where states stand, see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters' note to cmt. a (Council Draft No. 7, 2007).

28. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

29. *Id.* at 340.

30. *Id.* at 341.

31. *Id.*

32. *Id.*

33. *Id.* at 342.

34. *See id.* at 343.

35. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005).

36. *See id.* §§ 38–44. A determination that a “special relationship” exists simply reflects a conclusion that, based on the factual context, an affirmative duty should be imposed.

relationship existed between the psychotherapist and his patient, the murderer.³⁷

This handful of cases illustrates a number of fundamental and familiar principles about duty doctrine in both California and, more widely, throughout American tort law.³⁸ First, there is a general duty of reasonable care if one acts in a way to create a risk of harm of physical injury to another.³⁹ Second, interests other than bodily and property integrity, such as economic loss and emotional distress, do not receive the same protection as the former interests, and those limitations on tort liability are enforced with no- or limited-duty rules.⁴⁰ Third, duty is employed to cordon off any obligation to rescue or otherwise take precautions on behalf of someone who is subject to risk that the defendant had no role in creating.⁴¹

An important aspect of California duty law is left out of the preceding summary—that is the role of the *Biakanja* factors in duty determinations. We set this out separately both to facilitate later explanation of the difference between California duty law and the Third Restatement, and to emphasize that although California’s factorial analysis has gained a substantial following among American courts, it has not yet achieved the widespread acceptance that some other aspects of California tort law have. The current use of the *Biakanja* factors is this: when the duty seas become “rocky,” the factors are invoked to determine whether a duty exists.⁴² What we mean by “rocky” is that the court invoking the *Biakanja* factors has some concern about whether liability should be imposed. The *Biakanja* factors are often employed whether the harm was emotional, economic, or physical, and whether the negligence alleged was nonfeasance or misfeasance.⁴³ Although we have not studied empirically the frequency

37. *Tarasoff*, 551 P.2d at 343.

38. California duty doctrine remains largely where we found it in *Tarasoff* some thirty years ago. Just last year, the California Supreme Court declared that “[i]n California, the general rule is that all persons have a duty ‘to use ordinary care to prevent others being injured as the result of their conduct’” *John B. v. Superior Court*, 137 P.3d 153, 160 (Cal. 2006) (quoting *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)). The court also reiterated that the rare exceptions to this fundamental principle were to be based on policy and informed by the *Biakanja* factors. *Id.* at 161–62.

39. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) & reporters’ note to cmt. a (Proposed Final Draft No. 1, 2005).

40. See MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES* 264 (8th ed. 2006).

41. DOBBS, *supra* note 12, § 314, at 853.

42. See Carl J. Circo, *Placing the Commercial and Economic Loss Problem in the Construction Industry Context*, 41 J. MARSHALL L. REV. (forthcoming) (manuscript at 15, on file with authors) (“Contemporary tort cases frequently apply the *Biakanja* factors when the question is whether liability should extend to a situation of first impression.”).

43. See, e.g., *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 126–30 (Cal. 1999) (holding that owners

with which courts rely on a *Biakanja*-like duty analysis in negligence cases, our sense is that many courts, including those in California, seem increasingly ready to depart from default rules of duty or no-duty and to engage instead in a loose multifactorial analysis that features foreseeability. Finally, we note that courts' discussions of foreseeability (or lack thereof) in this context are specific to the facts of the individual case.⁴⁴ Yet foreseeability may be present in cases in which there are good grounds nevertheless to deny liability—such as in cases involving economic loss or stand-alone emotional harm—where for other reasons of policy, liability is foreclosed or limited.⁴⁵

III. THE THIRD RESTATEMENT'S TREATMENT OF DUTY

The Third Restatement is being prepared in a different fashion than the first two torts Restatements, each of which was prepared as a unitary endeavor that encompassed the entirety of tort law. Instead, the American Law Institute ("ALI") has prepared and is preparing pieces of the Third Restatement discretely. Two projects have already been completed and

of a parking garage did not have a duty to prevent attack on plaintiff). Other courts may employ a somewhat different set of factors, although foreseeability tends to be universal. *See, e.g.*, *Bus. to Bus. Mkts., Inc. v. Zurich Specialties London Ltd.*, 37 Cal. Rptr. 3d 295, 299–300 (Ct. App. 2005) ("When the third person's injuries arise from the defendant's rendering of professional services, several additional factors beyond the *Biakanja* factors come to mind in our deciding whether to find a duty[:]. . . the degree to which clients and third parties ordinarily relinquish control for decisionmaking to the professional[.] . . . the degree to which the defendant works under professional standards established and maintained by the profession[.] . . . the defendant's ability to spread its costs by raising its fees or buying liability insurance[.] . . . [and] the expected and customary reliance by clients and others on the skillfulness and expertise of the defendant's profession."). *Rowland* also considered: "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

44. *See, e.g.*, *Langle v. Kurkul*, 510 A.2d 1301, 1306 (Vt. 1986) (holding that social host owes no duty unless host "furnishes alcoholic beverages to one who is visibly intoxicated and it is foreseeable to the host that the guest will thereafter drive an automobile . . ."); *Nivens v. 7–11 Hoagy's Corner*, 920 P.2d 241 (Wash. Ct. App. 1996) (holding that the store operator owed no duty to invitee customers because reasonable store operator would not have foreseen danger posed by loitering teenagers in parking lot), *aff'd*, 943 P.2d 286 (Wash. 1997).

45. This is a matter the California Supreme Court appreciated five years after *Biakanja*, in *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963). *Amaya* was a suit by a bystander who suffered emotional harm when her child was physically injured in an automobile accident. Recognizing that foreseeability would result in a conclusion that a duty to the mother existed, but not yet ready to accept bystander claims for emotional harm, the court constricted the role of foreseeability in determining duty. *See id.* at 521–24. As John Fleming has observed, while foreseeability is a necessary condition for liability, it is not sufficient. JOHN G. FLEMING, *THE LAW OF TORTS* 131 (6th ed. 1983). While we agree that foreseeability is a necessary condition for liability, we do not believe that it should play any role in the duty determination. *See infra* text accompanying notes 268–92.

published; two more were in progress as this Article was written. The portion of the Third Restatement that addresses tort duty generally was begun in the latter half of the 1990s, entitled at the time “General Principles,”⁴⁶ with Gary Schwartz as its reporter. That project, despite its unfortunate title, was to address only the basic elements of a tort claim for personal injury or property damage. Although its title has changed several times and its coverage modestly expanded, the core of this portion of the Third Restatement is the law applicable to a claim for accidental bodily injury or property damage.⁴⁷ Accordingly, that Restatement project does not address liability for economic loss, emotional harm, or dignitary and privacy harms,⁴⁸ instead focusing on what Schwartz (and others) believes is the core of modern tort law.⁴⁹

Reflecting disagreement and tensions that existed within the ALI about whether to prepare a Restatement that would address the basic building block principles applicable to all of torts or to prepare a Restatement of the more conventional model that states discrete and highly specific rules, now-Chancellor Harvey Perlman joined Schwartz and prepared additional materials designed to bridge the Schwartz project with all of the other specific torts Restatement projects that would comprise the Third Restatement. After some of those materials were published in a preliminary draft in 2000, that effort was abandoned. We mention these materials because they were published shortly before a conference at Vanderbilt Law School at which a number of scholars commented on this Restatement project. The Perlman provisions were critiqued by several of

46. That title was a result of several currents: (1) disagreements within the ALI about whether it should be preparing a “top down” Restatement containing the essential principles of tort law applicable to all tort claims or a “bottom up” building block Restatement, characteristic of earlier Restatements; (2) Schwartz’s desire to limit the scope of the project, so as to avoid addressing details such as land possessor duties; and (3) an intent to signal that the Third Restatement would not take the form of the earlier Restatements with numerous highly specific rules of law (the chapter on land possessors’ duties in the Second Restatement comprises fifty-six sections). The project’s title was subsequently changed to “Liability for Physical Harm (Basic Principles),” and with the addition of chapters on emotional harm and land possessor duties, has acquired the title “Liability for Physical and Emotional Harm,” which will be its published title.

47. Compare RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES xxi (Discussion Draft 1999) (explaining the scope of the project and that it constituted “the core of problems facing modern tort law”), with RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM xli (Proposed Final Draft No. 1, 2005) (describing a similar scope). That Restatement project also addressed the different culpability states, including intent and recklessness. The former is not and the latter is rarely implicated in a tort suit for accidental injury.

48. Some time around 2004, the scope of that Restatement project was expanded to address land possessor duties (which had been omitted from the scope of the original project) and liability for emotional harm.

49. See FRANKLIN ET AL., *supra* note 40, at 2.

those in attendance, including Goldberg and Zipursky. Since those materials have been abandoned, we do not address them here.

The initial Third Restatement treatment of duty and the subject of Goldberg and Zipursky's Vanderbilt critique is contained in a "Discussion Draft," published in 1999. The Discussion Draft reiterated what was stated in the original prospectus for the project and in every version until the expansion to emotional harm in 2006: that the subject matter was limited to accidental personal injury and property damage.⁵⁰ Moreover, the Discussion Draft did not address, deferring for later, the issue of affirmative duties to rescue or provide protection.⁵¹ Given its limited scope in terms of issues addressed, the Discussion Draft was not and did not purport to be a restatement of the law of negligence.⁵²

Chapter 2 of the Discussion Draft addressed negligence, and in section 3 provided that an actor is "subject to liability" for negligently causing physical harm.⁵³ The "subject to liability" language signifies that negligence is a necessary, but not sufficient, condition for liability.⁵⁴ Other elements of a case, such as an absence of duty or affirmative defenses, might defeat liability. Section 6 then confronted duty and explained it as a limit on liability, yet one infrequently invoked:

Even if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the plaintiff is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of

50. Gary T. Schwartz, Prospectus for Restatement (Third) of Torts: Basic Principles, Report to the American Law Institute 5 (Oct. 17, 1995); RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES xxi, § 3 cmt. a (Discussion Draft 1999).

51. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES xxi (Discussion Draft 1999) ("Subsequent parts of the project are expected to address affirmative duty doctrines . . .").

52. Several statements by Goldberg and Zipursky fail to recognize this fact. See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 663 ("[A] sound restatement of negligence cannot simply neglect duty."); *id.* at 669 (stating that "Sections 3 and 6 [are disabled] from fairly restating whole areas of negligence case law"). After the latter quotation, Goldberg and Zipursky continue with a list of tort claims for which sections 3 and 6 are inadequate, including, for example, suits for pure economic harm. *Id.* at 669. Not one of the tort claims listed by Goldberg & Zipursky is within the scope of the Discussion Draft, on which they were commenting. So yes, sections 3 and 6 do not restate law that they do not purport to restate.

53. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 (Discussion Draft 1999). "Subject to liability" is a term of art employed in torts Restatements to clarify that the condition addressed in a black letter provision is a necessary, but not sufficient, basis for liability. See RESTATEMENT (SECOND) OF TORTS § 5 (1965).

54. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 cmt. a (Discussion Draft 1999).

special problems of principle or policy that justify the withholding of liability.⁵⁵

Comment a elaborated on the role of duty: “While courts frequently say that establishing ‘duty is the first prerequisite in an individual tort case, courts commonly go on to say that there is a ‘general duty’ to ‘exercise reasonable care,’”⁵⁶

The successor of the section on liability for negligence, which received final approval in May 2005, includes an explicit reference to duty: liability for negligently caused physical harm exists “unless the court determines that the ordinary duty of reasonable care is inapplicable.”⁵⁷ Section 7 then elaborates that when an actor’s conduct creates a risk of harm, there is ordinarily a duty to exercise reasonable care.⁵⁸ In “exceptional cases,” however, if there is an “articulated countervailing principle or policy [that] warrants denying or limiting liability,” the court may rule that no duty exists or that the duty is other than one of reasonable care.⁵⁹ Commentary explains a sample of those principles and policies that have led courts to modify the ordinary duty of reasonable care.⁶⁰

In summary, the Third Restatement’s treatment of duty is limited to the duty to avoid unreasonably causing bodily injury or property damage. It mirrors California law in this respect, and adopts a default duty of reasonable care to avoid such harm. It further counsels courts that in the ordinary case, the existence of that duty of care need not require further analysis. Unlike California’s invocation of factors whenever the duty seas become roiled, the Third Restatement allows only a narrow exception to the default principle: in unusual cases in which countervailing policies or principles justify a court withdrawing a case from the jury—creating an exemption from liability—the court may determine that no duty or a limited duty exists. Seeking transparency, the Third Restatement states that the policy or principle employed for the exemption should be “articulated.” Unlike California, the Third Restatement contains no list of factors to be

55. *Id.* § 6.

56. *Id.* § 6 cmt. a.

57. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 (Proposed Final Draft No. 1, 2005).

58. *Id.* § 7(a).

59. *Id.* § 7(b).

60. For example, the commentary identifies conflicts with other areas of law, such as contract law, as the basis for limiting duty when only economic harm is suffered. Similarly, when a tort is based on purely representational conduct, protecting First Amendment concerns could justify limiting duty regardless of whether the First Amendment would require such as a constitutional matter. *See id.* § 7 cmt. d.

employed for making such determinations and adamantly declares that foreseeability has no role in duty determinations.⁶¹

IV. ESPER & KEATING AND GOLDBERG & ZIPURSKY ON DUTY

Both the California approach to duty and that of the Third Restatement have drawn recent criticism on a number of grounds.⁶² The primary criticisms are that each approach misstates (and misshapes) negligence law and reflects an understanding of duty that is instrumentalist and dismissive of duty's grounding in categorical obligation. The comments of Esper and Keating (to whom, for the sake of parsimony, we refer as "E&K" in the remainder of this Article) on California law and Goldberg and Zipursky (to whom we refer as "G&Z") on California and the Third Restatement sharpen such criticisms, although the pairs approach the matter from divergent perspectives. We offer our own understanding of their accounts before responding.

A. ESPER AND KEATING

E&K properly (in our view) explain that duty is the step in the negligence analysis at which courts assign "general norms for the guidance of conduct."⁶³ According to E&K, the essence of this inquiry is moral, not instrumental.⁶⁴ Rather than conduct an examination of whether negligence liability would promote the general good, E&K view duty as a matter of obligation, a consideration of the respect owed to people's claims regarding the security of their persons and their property.⁶⁵ Notwithstanding this decidedly noninstrumentalist explanation of the substance of duty, E&K's critique of California law stems from their conception of duty's *purpose* in negligence law. According to this conception, duty is a tool used to achieve two ends that, while related to negligence, are conceptually separate from it.

The first function of duty, in E&K's view, is to serve as a type of railroad switch, guiding a plaintiff's claim onto the proper legal track—that of tort, contract, or property law—or off the track entirely, into the realm of "harm [that] is legally unregulated."⁶⁶ A ruling that the defendant owed a

61. *Id.* § 7 cmt. j.

62. *See* Esper & Keating, *supra* note 4; Goldberg & Zipursky, *Place of Duty*, *supra* note 3.

63. Esper & Keating, *supra* note 4, at 282 (emphasis omitted).

64. *See id.* at 282, 325.

65. *See id.* at 325–26.

66. *Id.* at 273.

duty of care is to hold that “the norms of negligence law determine the rights and obligations of the parties”⁶⁷ and, therefore, that the plaintiff’s negligence action may proceed. A ruling that the defendant did not owe a duty is to “cede control over the conduct at issue to some other legal field . . . or leave that conduct legally unregulated.”⁶⁸ This aspect of duty is not part of the substantive inquiry into negligence liability at all, but rather precedes it. According to E&K, duty is in this sense the field for macroanalysis, the step at which a court takes the broad view of a plaintiff’s allegations and decides whether the general principles of tort, contract, or property (or none at all) provide the best Dworkinian “fit.”

The second function of duty, according to E&K, is to divide the negligence inquiry by principled means between judge and jury, with the judge interpreting norms of conduct to determine duty, and the jury evaluating the conduct to decide breach.⁶⁹ This assertion is more substantial than the observation that duty is the only element of negligence reserved in the first instance for the court.⁷⁰ The pivotal aspect of this point is not that duty divides the negligence inquiry between judge and jury, but the principle by which E&K assert that duty divides it—the principle of generality. Although it is universally agreed that duty is, as noted above, the means by which courts assign “*general* norms for the guidance of conduct,”⁷¹ E&K seem to envision a fairly restrained role for duty in this regard. E&K understand duty to set broad boundaries, leaving the bulk of the negligence inquiry to be decided by juries.⁷² The jury, according to E&K, is the better entity for determining the particularly fact-specific judgments inherent in negligence.⁷³ This understanding of duty proves central to E&K’s attack on the duty decisions of the California courts—although it proves ironically fatal, in our view, to E&K’s proposed alternative.⁷⁴

With these dual purposes in mind, E&K survey California tort doctrine to argue that California courts have, for roughly three decades,

67. *Id.*

68. *Id.* at 270.

69. *Id.* at 282.

70. See RESTATEMENT (SECOND) OF TORTS § 328B (1965); DOBBS, *supra* note 12, § 149, at 355.

71. See *supra* text accompanying note 63.

72. See Esper & Keating, *supra* note 4, at 326 (“The fundamental problem is that courts are distorting the role of duty in negligence law by proceeding as though the existence of obligation in tort is always an open question. Duty cannot be an eternally open question in this way, and duty decisions must be made categorically, not on a case-by-case basis.”).

73. See *id.* at 279–82.

74. See *infra* Part V.D (addressing the proper role for foreseeability).

increasingly gotten duty analysis wrong.⁷⁵ Generally, E&K assert that California's approach to duty (1) shrinks the established domain of tort law while expanding the realms of property and contract, thereby improperly giving the values of "freedom of contract and the free use of property precedence over the physical integrity of the person";⁷⁶ (2) expands the power of the judge at the expense of the traditional and fitting role of the jury;⁷⁷ and (3) works an unwelcome return to the liability-restrictive jurisprudence that existed before the 1960s.⁷⁸

E&K conclude their critique of California duty law with a brief discussion of how duty might be put "back in its proper place."⁷⁹ Broadly, in E&K's view, courts must stop seeing duty as an open question in every case, and should instead stick to the pre-1980s balance between the domains of tort, contract, and property, with a return to deciding duty "in an appropriately categorical way."⁸⁰ Furthermore, in areas where tort, and not contract or property, regulates the obligations of the parties, E&K urge (without elaboration) that the *Rowland-Biakanja* factors for determining duty ought to be abandoned and that "reasonable foreseeability of injury and reasonable foreseeability alone should be the touchstone of duty."⁸¹ In such a system, E&K envision that "duty must be used sparingly"—that if any injury at all was reasonably foreseeable, then the court must conclude that the defendant owed a duty of care.⁸²

B. GOLDBERG AND ZIPURSKY

G&Z concur in E&K's condemnation of the recent duty decisions rendered by California courts, but from a markedly different perspective. Before explaining, it is helpful first to understand G&Z's take on the basic nature of tort law generally, and duty's role in that framework. G&Z offer

75. See Esper & Keating, *supra* note 4, at 289–328.

76. *Id.* at 327.

77. *Id.* at 296–300, 323–24.

78. See *id.* at 289–90. E&K point to two doctrinal manifestations of these problems: California's expansion of the assumption of risk doctrine, and its reinvigoration of the categorical approach to landowner duties previously abandoned by the California Supreme Court in *Rowland v. Christian*. *Id.* at 290–305, 313–21. Each development, according to E&K, evidences a contraction of the realm of tort—the expansion of assumption of risk acting in favor of the freedom to contract, and the resurrection of categorical landowner duties representing the increased influence of property interests. *Id.* at 290–305, 318–21. E&K also argue that these developments unduly impose on the province of the jury in deciding the element of breach. *Id.* at 296–300, 323–24.

79. *Id.* at 323.

80. *Id.* at 327.

81. *Id.*

82. *Id.*

the following as a descriptive account of tort law, not as an aspirational or normative one.

According to G&Z, tort law is a constitutionally mandated means of empowering wronged parties to seek redress for their injuries⁸³—it provides, in other words, a “civilized alternative to vengeance.”⁸⁴ The focus of tort law is therefore entirely on resolving the rights and obligations as between parties to a tort action. The extent to which tort decisions achieve social benefits external to a particular dispute (or fail to do so) is, at best, incidental to understanding tort law and is similarly irrelevant to courts’ decisionmaking in tort cases.⁸⁵

Particular tort doctrines, in G&Z’s view, exist as the embodiment of the principles pursuant to which courts arm a plaintiff with the ability to seek and receive redress from a defendant. The five elements of negligence thus represent the conceptual prerequisites to a plaintiff’s request for a remedy where the plaintiff has been unintentionally harmed by another. The role of duty in this design, according to G&Z, is to determine “whether the defendant owed a duty to the plaintiff to use a particular level of care to avoid the sort of injury the plaintiff suffered.”⁸⁶ It is revealing to unpack this assertion with some precision.

Duty, according to G&Z, refers to one’s obligation in the most common, intuitive sense—in G&Z’s words, duty is “the set of obligations that matches, roughly, what citizens believe about the care they owe one another.”⁸⁷ This assertion is of consequence not only for its indication of the proper source of duty’s content—community notions of obligation—but also for its implication that other sources—most notably, instrumental or policy considerations—are improper.

G&Z also assert that duty is an inquiry into a defendant’s obligation to

83. 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) (arguing that citizens have a constitutional right to public redress for private wrongs). See also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 739 (2003) (“[T]he very question of whether the defendant will be held liable is a question of whether the plaintiff is genuinely entitled to an avenue of recourse—to an action—against the defendant.”).

84. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1581 (2006) [hereinafter Goldberg & Zipursky, *Seeing Tort Law*].

85. See generally John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) [hereinafter Goldberg & Zipursky, *Moral*] (questioning the instrumentalist explanation of negligence).

86. *Id.* at 1828.

87. *Id.* at 1744.

the plaintiff.⁸⁸ This represents G&Z's understanding that the concept of obligation is both relational and relationship-sensitive. It is relational in the sense that it is not sufficient that the defendant owed a duty of care to the plaintiff and that the defendant breached some duty of care. The defendant must be said to have breached *the duty of care owed to the plaintiff*.⁸⁹ G&Z refer to this as the "duty-breach 'nexus,'" ⁹⁰ a concept represented most clearly in Cardozo's opinion in *Palsgraf v. Long Island Railroad*.⁹¹ In that case, the defendant railroad owed a duty of care to each of its passengers, including the plaintiff. The railroad also breached its duty of care with respect to one of its passengers by negligently helping him board the departing train. In Cardozo's view, however, the railroad did not breach its duty to the plaintiff, who was standing on the station platform some distance from the train.⁹²

Duty is relationship-sensitive, in G&Z's view, in that a duty's content depends on the particular relationship between the parties.⁹³ A tort defendant might therefore owe a duty to a class of people with whom the defendant has a sufficient relationship, and not owe a duty to others with whom no such relationship exists. The contours of a physician's duty of care, for example, differ depending on whether the plaintiff was a patient. G&Z's notion of "relationship," however, does not merely refer to the type of preexisting personal connections one typically associates with the word. According to G&Z, the concept of "relationship" as it relates to duty encompasses the circumstantial and spatio-temporal relationship of each of us to every other person.⁹⁴ For example, as one drives one's car to work, one has a certain relationship to those who are also driving or walking within the car's immediate vicinity. One does not share that same relationship with drivers and pedestrians several miles away. Similarly, although the railroad employees in *Palsgraf* had an employee-customer relationship both with Mrs. Palsgraf and the man whom they were helping to board the train, the relationship was not identical because Mrs. Palsgraf was standing some distance from the others. According to G&Z (and Cardozo), the additional distance made the relationship attenuated enough that the railroad owed no duty to Mrs. Palsgraf that covered the

88. *Id.* at 1828.

89. *Id.* at 1829.

90. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 685.

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

92. *Id.*

93. See Goldberg & Zipursky, *Moral*, *supra* note 85, at 1830–37 (explaining the dependence of duty analysis on the relationship between the parties).

94. See *id.* at 1822.

circumstances of her injury.⁹⁵

In deciding which types of relationships entail an obligation of care, G&Z assert that the concept of foreseeability plays an important role.⁹⁶ In G&Z's view, if the relationship between the parties is such that the defendant is particularly capable (or incapable) of foreseeing a risk of injury to a class of plaintiffs, such a fact is relevant to one's intuition regarding whether that defendant owed an obligation of care regarding that risk.⁹⁷ Defendants can only be said to owe an obligation to those plaintiffs whose harm was reasonably foreseeable. G&Z's analytical support for this assertion is as follows: One has neither the time nor the skill necessary to take the same high level of care toward each person in every circumstance. Each of us therefore constructs, in our daily activities, differentiated notions of obligation in order to prioritize our caretaking efforts. The foreseeability of injury to a particular class of people is a relevant factor in our decision whether to prioritize our caretaking efforts toward that group. Thus, foreseeability is integral to our individual and community notions of obligation. As G&Z explain:

Because the possibility of duty serving a prioritizing role is compromised by casting the duty net too wide, the question arises as to which types of persons are obligated to be vigilant to avoid causing certain types of harm to certain others. The ease or difficulty for persons in the defendant's category to anticipate those harms is relevant to whether it makes sense for such persons to be said to have a duty to be vigilant against causing them.⁹⁸

The preceding examination of G&Z's basic understanding of negligence, and of duty in particular, should help to explain the core of their critique of the treatment of duty by California courts and the Third Restatement. We begin with the former. As a general matter, G&Z decry the California courts' treatment of duty as an "open-ended, policy-driven question of whether there are any reasons to deny juries the ability to impose liability."⁹⁹ According to G&Z, the problem with such an understanding of duty is twofold. First, in so doing, courts ignore (and thereby erode) the carefully drawn doctrines that have for many years given

95. *See id.* at 1820.

96. *See id.* at 1838–39.

97. *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727–28 (“[C]ourts predicate their recognition of a duty of care in part on the ground that the defendants as a class are uniquely well-positioned to foresee the risk of injury to members of the plaintiff class. Thus, the obligation question turns in part on the degree to which a type of defendant can foresee a certain kind of harm.”).

98. Goldberg & Zipursky, *Moral*, *supra* note 85, at 1838.

99. Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 334.

shape to negligence liability. These doctrines have had a place in tort law for distinct reasons, and these reasons are lost when the doctrines are collapsed into what G&Z describe as the “sloppy legal reasoning”¹⁰⁰ of a “blunderbuss policy inquiry.”¹⁰¹

The second problem with California’s general approach, according to G&Z, is that by abandoning established legal doctrines for open-ended policy inquiries, the California courts leave tort law “vulnerable to political capture.”¹⁰² Thus, although G&Z agree with E&K that recent California decisions are the common-law expression of tort reform, they disagree with E&K on the mechanism responsible for this political shift. Whereas E&K argue that the California courts have wrongly given precedence to the realms of property and contract over tort and have properly abandoned categorical-duty decisions,¹⁰³ G&Z suggest that by solution, E&K would merely substitute their own judgments on politics and categorical-duty for those of the California courts.¹⁰⁴ According to G&Z, it is the careful preservation of tort doctrine, shaped by slow accretion of the common law, that better guards against the ebb and flow of politics.¹⁰⁵

G&Z have engaged in a sustained criticism of the Third Restatement on substantially similar grounds. The essence of G&Z’s argument is that the Third Restatement, like the California courts, has adopted a view of duty as a concept devoid of internal meaning, a placeholder for courts’ instrumental reasoning regarding liability.¹⁰⁶ The reporters likely derived

100. *Id.* at 340.

101. *Id.* at 333. For example, G&Z assert that the doctrine of assumption of risk is meant to give legal substance to the idea that plaintiffs are not entitled to recover when injured pursuant to risks that they subjectively understood and voluntarily chose to undertake. *Id.* at 344. According to G&Z, by treating assumption of risk as a no-duty rule, the California courts have lost the contours of this narrowly applicable defense in favor of California’s vague, multifactor duty inquiry. *See id.* at 351. G&Z make similar claims about the California courts’ abandonment of a separate category for trespassers in landowner liability cases. *Id.* at 351–59.

102. *Id.* at 361.

103. *See* discussion *supra* Part IV.A.

104. Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 360–61.

105. *Id.* at 361. It is not surprising, in light of their *Fordham Law Review* article, Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, that G&Z’s argument against E&K embraces an important facet of H.L.A. Hart’s position in the Hart-Fuller debates. There, Hart took the position that firm adherence to rules would serve as the best defense against shifting political trends. *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). For Fuller’s side of the argument, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

106. In the *Southern California Law Review*, for example, G&Z accuse the Third Restatement of imposing “California’s brand of instrumentalism on the entire nation’s negligence law,” and they criticize the Third Restatement reporters’ “dogmatic insistence on collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability.” Goldberg &

this nihilistic understanding of duty, according to G&Z, from the “duty-skeptical” scholarship of Oliver Wendell Holmes, Jr. and the reporter for the Restatement (Second) of Torts, William Prosser.¹⁰⁷ Pursuant to the Holmes/Prosser approach, duty is not a contestable issue in the typical physical injury negligence case because, as a general matter, each of us owes a duty of care to the world. Thus, any duty analysis (or more accurately, no-duty analysis) in a particular case is merely an expression of the court’s “policy judgments that liability for unreasonable conduct sometimes ha[s] to be limited in the name of the public good.”¹⁰⁸ This theory, in G&Z’s view, is reflected in the Discussion Draft of the Third Restatement by the absence of duty as an affirmative element in the prima facie case for negligence, and by the Third Restatement’s explanation that “[f]indings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.”¹⁰⁹

Although it was later revised to include an explicit duty section defined by the defendant’s creation of a risk,¹¹⁰ G&Z claim that the Third Restatement’s current approach still suffers from the same conceptual flaws. Its primary mistakes, according to G&Z, are as follows: (1) it disregards courts’ discussions of duty as a matter of substantive obligation, rather than as merely a tool for social engineering;¹¹¹ (2) it rejects courts’ treatment of duty as relational and relationship-sensitive;¹¹² (3) it fails to capture the behavior-prioritizing function of foreseeability in duty considerations;¹¹³ and (4) it ignores the reality that courts see duty as a contestable issue in many cases, not in a relative few, even where it may be said that the defendant created a risk.¹¹⁴

In the remainder of this Article, we respond to these criticisms, to the

Zipursky, *Shielding Duty*, *supra* note 4, at 333. *See also* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 663 (describing the initial draft of the Third Restatement as an attempt to “re-describe the law of negligence in terms of unreasonableness, causation, and injury, with duty serving merely as a question-begging label for the absence of a policy-based exemption”).

107. *See* Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1571 (ascribing to these scholars the idea that duty is simply a liability rule that is “most likely to achieve desired results such as deterrence of antisocial conduct or compensation of the injured”). *See also* Goldberg & Zipursky, *Moral*, *supra* note 85, at 1752–61 (tracing “duty-skepticism” to the work of Holmes and Prosser).

108. Goldberg & Zipursky, *Moral*, *supra* note 85, at 1764.

109. *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 665–69 (discussing sections 3 and 6 of RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft 1999)).

110. *See supra* notes 57–61 and accompanying text.

111. *See* Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 334.

112. *See* Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1584.

113. *See* Goldberg & Zipursky, *Moral*, *supra* note 85, at 1831–32.

114. *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 669–73.

doctrinal and conceptual issues underlying them, and to the normative alternatives proffered by E&K and G&Z.

V. A RESPONSE TO GOLDBERG & ZIPURSKY AND ESPER & KEATING ON THE SUBSTANCE OF DUTY

A. THE INTEGRITY OF THE THIRD RESTATEMENT'S BASIC DUTY PROVISIONS

G&Z have crafted an interesting, provocative theory of duty in the law of negligence. That is something that scholars should do, and they are to be commended for the remarkable energy and creativity that they have given to this important topic. But they have done more by claiming that their theory accurately describes current tort law. As a concomitant to that claim, they have criticized the Third Restatement's treatment of duty for failing to restate current tort doctrine and for making a dramatic break with prior Restatements.¹¹⁵ We disagree with these criticisms, as we explain below. We first address G&Z's claim that the Third Restatement's basic duty provisions depart radically from those of the Restatement (Second) of Torts ("Second Restatement").

1. The Congruence of the Second and Third Restatements on Duty in Physical Harm Cases

G&Z recognize that with their theory of duty they are swimming against the contemporary academic tide.¹¹⁶ Although they trace this tide to the work of Prosser,¹¹⁷ G&Z nevertheless claim support for their theory in

115. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 736 ("The *Restatement (Third) of Torts: General Principles* has studiously avoided the concept of duty and the language expressing it. In doing so, it has disempowered itself from *restating* our actual law Yet our current Reporters, Professors Schwartz and Perlman, have calmly, quietly, and professionally proposed to do something none of their ancestors were willing to do—wipe the concept of duty right out of the law of negligence."); *id.* at 698 ("[The Third Restatement] distort[s] the law of negligence").

We find it curious that while criticizing the Third Restatement for failing to restate the law, G&Z at the same time criticize it for stating obvious or routine matters such as that liability may exist for facilitating another's wrongdoing that causes harm, or that failing to warn of dangers may constitute negligence. *See id.* at 681 (characterizing the Third Restatement's treatment of failure to warn as a form of unreasonable conduct as "banal"). *See also id.* at 682 (stating that Discussion Draft explanation of negligently facilitating another's conduct would "only make[] sense" if courts routinely held otherwise).

116. *See* Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1564 ("[O]verwhelmingly, modern mainstream American tort scholarship is 'Holmesian' in embracing duty skepticism and the implications of that skepticism.").

117. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 662.

Prosser's most enduring legacy, the Second Restatement.¹¹⁸ G&Z view Prosser as a duty skeptic, but they also believe that he was able to set aside his academic inclinations when wearing the hat of Restatement reporter. Thus, G&Z assert that the Second Restatement is permeated with duty provisions, the bulk of which have been abandoned by the Third Restatement.¹¹⁹

In our view, the Second Restatement's treatment of duty is quite similar to the Third Restatement's treatment of duty with regard to physical harm; and again, we emphasize that, here, we are only talking about a physical harm case. Like Gary Schwartz's initial Third Restatement draft,¹²⁰ section 281 of the Second Restatement contains the elements of a cause of action for negligence and nowhere states that a duty is required.¹²¹ Rather, it contains only the requirements of a legally protected interest; negligence; that the actor's conduct poses a risk to a class of person that includes the plaintiff (harm within the scope of the risk); and legal cause (which includes both factual cause and proximate cause¹²²).¹²³ G&Z argue

118. *Id.* at 673–74. G&Z also find support for their position that duty is central to negligence in a quotation from Prosser that duty “is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised.” PROSSER, *supra* note 18, § 31, at 180 (footnote omitted). They believe this quotation is contrary to the Third Restatement's treatment of duty. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 674. That is not the case, we contend, with regard to the default duty of reasonable care the Third Restatement adopts. Importantly, right after the quotation cited by G&Z, Prosser quotes both *Heaven v. Pender*, (1883) 11 Q.B.D. 503, 509 (U.K.), and *Donoghue v. Stevenson*, [1932] A.C. 562, 580 (H.L.) (appeal taken from Scot.) (U.K.), the two classic British cases that express a duty of care owed by all to those foreseeably put at risk by the actor's conduct. PROSSER, *supra* note 18, § 31, at 180–81. Thus, although Prosser recognized that duty is an important (if ultimately liability-limiting) part of negligence law, he also recognized that in the typical case, a court may assume that a duty exists without requiring further analysis.

119. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 674.

120. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 (Discussion Draft 1999) (“An actor is subject to liability for conduct that is a legal cause of physical harm.”).

121. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

122. And therefore overlaps with the prior requirement. Given, however, the smorgasbord-like quality of the Second Amendment with regard to proximate cause, this overlap becomes less surprising.

123. RESTATEMENT (SECOND) OF TORTS § 281 (1965). G&Z argue that section 281 contains no policy-based exemption from duty. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 673. Of course, that claim does not address the absence of duty from section 281. And, as they should recognize, both the first and second Restatements were drafted in the formalist style that omitted policy discussions in explaining the bases for the rules adopted. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 676 (2d ed. 1985). Realists, however, long ago changed that, and the language of the law is suffused with policy. And although the earlier Restatements did not include policy language, they had exemptions from liability, such as for emotional harm and economic loss, which can be understood as policy driven, and modifications of the ordinary duty of care, such as strict liability for manufacturing defects, that are explicitly policy driven. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 436A (1965).

that the requirement of a “legally protected interest” in section 281 is an alternative articulation of the requirement of duty—an odd choice of language as a substitute for duty, but a choice they explain was made by Frances Bohlen in the first Restatement of Torts (“First Restatement”) and only carried forward by Prosser.¹²⁴ True enough that Prosser continued the First Restatement’s formula, but the fact that section 281 of the First Restatement also omits listing duty as an element hardly supports G&Z’s claim that the Third Restatement’s Discussion Draft deviated from the earlier two Restatements. More significantly, section 1 of both of the earlier Restatements defines “interest” as an object of human desire¹²⁵ and explains in comment d that a “legally protected interest” is an interest that is given legal protection.¹²⁶ The interest of bodily security, comment d observes, is protected against both intentional and negligent invasion and, thus, there is a universal duty not to invade it.¹²⁷

We find it curious that section 281 omits any mention of duty, a term that the Second Restatement explicitly defines and employs in other places.¹²⁸ Perhaps the explanation lies in comment a to section 302, which—like both the Discussion Draft and “Proposed Final Draft” of the Third Restatement—makes plain that duty is a matter that does not ordinarily arise in a physical harm case: “In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.”¹²⁹

Similarly, an explanation of the role of duty is contained in the scope note preceding topic 4 of the chapter on negligence:

Conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent. Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act.¹³⁰

124. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 673.

125. RESTATEMENT OF TORTS § 1 (1934); RESTATEMENT (SECOND) OF TORTS § 1 (1965).

126. RESTATEMENT OF TORTS § 1 cmt. d (1934); RESTATEMENT (SECOND) OF TORTS § 1 cmt. d (1965).

127. RESTATEMENT OF TORTS § 1 cmt. d (1934); RESTATEMENT (SECOND) OF TORTS § 1 cmt. d (1965).

128. *See* RESTATEMENT (SECOND) OF TORTS § 4 (1965). Like the Second Restatement, the First Restatement also contained a definition of duty, which was also omitted from the list of elements of a negligence claim in section 281. RESTATEMENT OF TORTS § 4 (1934).

129. RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965).

130. RESTATEMENT (SECOND) OF TORTS ch. 12 scope note to topic 4 (1965).

The congruence of the Second and Third Restatements can best be appreciated by placing side-by-side the statements above from the Second Restatement with statements about duty in the Discussion Draft and Proposed Final Draft of the Third Restatement, which G&Z accuse of being inconsistent with the Second Restatement:¹³¹

TABLE 1. Comparison of the duty element.

Second Restatement	Third Restatement
<p>“In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.”¹³²</p>	<p>“While courts frequently say that establishing ‘duty’ is the first prerequisite in an individual tort case, courts commonly go on to say that there is a ‘general duty’ to ‘exercise reasonable care,’ to avoid subjecting others to ‘an unreasonable risk of harm,’ or to comply with the ‘legal standard of reasonable conduct.’”¹³³</p>
<p>“Conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent. Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the</p>	<p>“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”¹³⁵</p>

131. See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 673–74. Although G&Z have not reiterated, in published work, their concerns with regard to the Proposed Final Draft, they have voiced their concerns at ALI meetings and in many conversations with the authors of this Article.

132. RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965).

133. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 cmt. a (Discussion Draft 1999). For a listing of cases from jurisdictions that make just such a statement that there is ordinarily a duty of reasonable care, see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 reporters’ note to cmt. a (Proposed Final Draft No. 1, 2005). *Davis v. Witt*, 851 So. 2d 1119, 1128 (La. 2003) (“Generally, there is an almost universal legal duty on the part of a defendant in a negligence case to conform to the standard of conduct of a reasonable person in like circumstances.”), is a random example of the cases contained therein.

134. RESTATEMENT (SECOND) OF TORTS ch. 12 scope note to topic 4 (1965).

135. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) (Proposed Final

doing of the act.” ¹³⁴	
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This comparison is useful in two respects. First, it reveals that the Third Restatement’s explanation of the basic duty of care is not a dramatic break from that of the Second Restatement, but is remarkably similar to it, not only in substance, but also in tone. In fact, with its affirmative black letter statement of duty, the Proposed Final Draft of the Third Restatement arguably places duty in a more prominent light than did the Second Restatement.¹³⁶ This point is bolstered by the fact that we find in the Second Restatement only half a dozen references—in the some 220 black letter sections covering negligence—that employ duty to refer to tort obligations of care, half of which are about affirmative duties.¹³⁷ This is a long way from duty “permeat[ing]” the Second Restatement, as G&Z claim.¹³⁸ The second point made clear by this comparison is that both Restatements describe the existence of a duty as the default position where a defendant’s “affirmative act” or “conduct” creates a risk of harm.¹³⁹ This duty, as G&Z have argued, was the basis for Prosser’s so-called “duty-skepticism,” and as we shall urge below, it is of central importance to G&Z’s critique of the Third Restatement.

2. G&Z’s Failure to Engage the Third Restatement on Its Own, Expressly Limited Terms

Beyond the Second Restatement, G&Z assert that the Third Restatement fails to paint an accurate picture of the law of negligence.¹⁴⁰ Before addressing the merits of this claim, we feel compelled to point out that G&Z fail, in large part, to engage the Third Restatement on its own

Draft No. 1, 2005).

136. It is true, as G&Z point out, that section 328A of the Second Restatement states that it is the plaintiff’s burden to prove the facts that give rise to a legal duty by the defendant. RESTATEMENT (SECOND) OF TORTS § 328A (1965). *See also* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 673–74. Yet that section, which, with its partner section 328B, addresses the respective functions of judge and jury, is an odd place to locate a previously unidentified element of a claim, undermining G&Z’s position. Comment c to section 328B further reveals that it is not addressing the default duty of reasonable care for risks created by one’s conduct, but those unusual situations in which the ordinary duty of reasonable care is modified. RESTATEMENT (SECOND) OF TORTS § 328B cmt. c (1965).

137. Other uses are in connection with narrow situations, such as when a landowner attempts to delegate a duty owed to independent contractors. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 411 (1965).

138. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 674.

139. *See supra* notes 132–35 and accompanying text.

140. *See id.*

terms in this regard. G&Z are clearly frustrated that the Third Restatement does not explicitly embrace their claims that “duty as obligation” is central to negligence law and that duty doctrine reflects the “twists and turns of the duties that are accepted within everyday morality”¹⁴¹ It is our suspicion that this frustration may have led them to make light of the Third Restatement’s express limitations of its scope. The Discussion Draft was limited to actions alleging misfeasance that cause physical harm, excluding malpractice and landowner cases.¹⁴² The Proposed Final Draft, while extending to affirmative duties, begins its treatment of that subject with the general proposition that there is “no duty of care” owed to rescue or protect another, subject to specified exceptions.¹⁴³ This project of the Third Restatement does not address economic harm and neither the Discussion Draft nor the Proposed Final Draft address emotional harm.¹⁴⁴ Although G&Z at times specifically recognize these limitations,¹⁴⁵ their critique repeatedly ignores them by relying on cases that are explicitly excepted from the Third Restatement.

As an example of this pattern, G&Z cite three cases in which courts allegedly struggled with the existence of a duty despite the defendant having created a risk of harm.¹⁴⁶ In *Parmely v. Hildebrand*, the court refused to impose a duty where the defendant built a house for his family, then sold it years later without disclosing certain defects to the plaintiff.¹⁴⁷ In *Hopping v. College Block Partners*, the court imposed a duty on a landowner in the context of a plaintiff’s fall due to the melting snow dripping from the landowner’s building onto a public sidewalk.¹⁴⁸ G&Z’s discussion of these first two cases is inapposite to any critique of the basic duty provisions of the Third Restatement because the cases are expressly not governed by those provisions. *Parmely* was a claim for economic harm, and *Hopping* was a case alleging landowner liability.¹⁴⁹ The existence of a

141. Goldberg & Zipursky, *Moral*, *supra* note 85, at 1832.

142. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES xxi (Discussion Draft 1999).

143. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005).

144. In 2005, the ALI decided to extend the original scope of this Restatement project to include emotional harm and land possessor duties. Neither of those subjects is contained in the Discussion Draft or Proposed Final Draft.

145. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 674.

146. *Id.* at 678–80.

147. *Parmely v. Hildebrand*, 603 N.W.2d 713, 714–18 (S.D. 1999).

148. *Hopping v. Coll. Block Partners*, 599 N.W.2d 703, 704–05 (Iowa 1999).

149. It is also worth noting that *Hopping* is likely best explained by a distinction, present in landowner cases, based on the defendant’s creation of the risk. In *Frantz v. Knights of Columbus*, 205 N.W.2d 705 (Iowa 1973), a case cited in *Hopping*, the court required notice of the condition before imposing a duty, distinguishing a case in which “the possessor of the premises involved created the

duty in these cases is only now being considered by the ALI in drafting chapter 9, “Duty of Land Possessors,”¹⁵⁰ and in a separate project devoted to economic loss.¹⁵¹

3. The Third Restatement’s Accuracy in Describing Existing Duty Law

We turn now to a discussion of the merits of G&Z’s claim that the Third Restatement fails to restate the law. Initially, G&Z insisted that the Discussion Draft of the Third Restatement did not accurately describe the law because it omitted duty as an element of a prima facie case for negligence.¹⁵² In support of their position, they cited cases from forty-eight

alleged dangerous condition by its own activity as in *Hanson* where the condition complained of was created by the possessor’s activity in piling snow on the walkway.” *Id.* at 712. In light of that quotation, consider the following language from *Hopping*: “In the present case, the district court expressly found ‘[d]efendants College Block Partners and Bushnell’s Turtle had a . . . responsibility because it was the parapet on their building that caused the condition.’” *Hopping*, 599 N.W.2d at 705 (alteration in original).

Mussivand v. David, 544 N.E.2d 265 (Ohio 1989), the third case cited by G&Z, fits more squarely within the subject matter governed by the relevant Third Restatement sections. In that case, the plaintiff sued his wife’s adulterous lover for having passed a sexually-transmitted disease to his wife, which she then passed to the plaintiff. *Id.* at 266–67. The court readily found that a duty exists on the part of someone with an STD to abstain from sex, or at least to warn one’s partner before engaging in sex. *Id.* at 270. The court, however, saw the issue to be whether the defendant owed a duty to *his partner’s husband*. *Id.* at 272. The court proceeded to determine that because harm to the partner’s husband was foreseeable, the defendant owed him a duty. *Id.* By determining foreseeability of the plaintiff to be a question of duty, the *Mussivand* court’s analysis does indeed conflict with the Third Restatement’s provisions. The Third Restatement transparently addresses this issue and adopts a rule that is also present in the case law—that foreseeability of plaintiff is appropriately considered as part of proximate cause, not duty. For further discussion, see *infra* notes 259–80 and accompanying text.

150. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 9 (Council Draft No. 7, 2007).

151. See RESTATEMENT (THIRD) OF TORTS: ECONOMIC TORTS AND RELATED WRONGS (Council Draft No. 2, 2007). Similarly, by criticizing the Discussion Draft for failure to employ duty as a limit on affirmative obligations, see Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 665–66, G&Z simply miss the explanation in the “Reporter’s Introductory Note” stating that later provisions would address that subject. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES xxi (Discussion Draft 1999) (“Subsequent parts of the project are expected to address affirmative duty doctrines . . .”).

152. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 660–62. See also *id.* at 662 (stating there is “no justification for [Schwartz and Perlman’s] decision to . . . depart[] from standard judicial usage”); *id.* (“drafts of the *Restatement (Third)* do not capture the law”); *id.* at 669, 673–74 (stating that the Second Restatement and Prosser are contrary to the position of the Discussion Draft); *id.* at 678–80 (providing examples of cases to demonstrate the centrality of duty to negligence law); *id.* at 663 (discussing the “wholesale revision embodied in the current draft”); *id.* at 680 (stating that it is “not possible without duty to give a fair restatement of the law of ‘accidental personal injury and property damage.’”) (internal citation omitted); Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 333 (asserting that the Discussion Draft imposes “California’s brand of instrumentalism on the entire nation’s negligence law” and “does not follow the usage of the courts”).

states that include “duty” in their rubric for the elements of a negligence claim.¹⁵³ Yet, as evidenced by the passages detailed above, the Discussion Draft made precisely the same point.¹⁵⁴ It also explains, as routinely stated by courts, that in physical injury cases there is ordinarily a duty of reasonable care, rendering attention to duty in such cases superfluous.¹⁵⁵ The Discussion Draft cited a sample of such cases, which has been expanded to over two dozen in the final published version.¹⁵⁶ In addition, both of the two major contemporary torts treatises are in accord with the Third Restatement on this point, observing that a default duty of reasonable care exists.¹⁵⁷

Although section 7(a) of the Proposed Final Draft of the Third Restatement now contains an affirmative black letter statement that a defendant “ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm,”¹⁵⁸ G&Z remain dissatisfied.¹⁵⁹ Their dissatisfaction does not appear to lie with the Third Restatement’s recognition of this “ordinary” duty. In fact, they have conceded as much: “we thus cheerfully acknowledge a general or universal duty to take care to avoid causing physical harm to another’s person or property”¹⁶⁰ Instead, G&Z seem to believe that the Third Restatement’s mistake is in presenting the section 7(a) duty as a strong default. Even where the defendant’s conduct created a risk, G&Z assert that often, courts have nevertheless analyzed the theoretical foundations of duty in deciding whether or not to impose a duty.¹⁶¹ We see a fundamental tension in this position, but we leave discussion of its normative merits to Parts V.C–V.E below. First, we address G&Z’s historical and descriptive claims.

153. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 658 n.1.

154. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 cmt. a (Discussion Draft 1999).

155. *Id.*

156. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (forthcoming) (manuscript § 7 reporters’ note to cmt. a, on file with authors).

157. DOBBS, *supra* note 12, § 227, at 578 (“Among strangers . . . the default rule is that everyone owes a duty of reasonable care to others to avoid physical harms.”); 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 18.6, at 712 (2d ed. 1986) (“By and large, then, people owe a duty to use care in connection with their affirmative conduct, and they owe it to all who may foreseeably be injured if that conduct is negligently carried out.”).

158. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

159. Cf. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.

160. *Id.*

161. See *id.* at 678 (“[D]uty in the obligation sense often is at issue in straightforward cases involving accidental personal injury or physical damage.”) (internal quotations omitted).

As E&K point out, tort cases did not rely on any affirmative analysis of duty until the mid-nineteenth century.¹⁶² The classic historical account is that of Percy Winfield, who reported that: “In not one of [the many sets of circumstances in which a man was civilly liable for inadvertent harm] can it be said that there was any formal and conscious postulation of a precedent duty on the defendant’s part to take care. Such duty was repeatedly taken for granted”¹⁶³ Thus, although it might be argued that these early cases relied on an unstated premise that one owed a legal obligation not to injure others, this premise was neither expressed nor modified until industrial times.

According to many historians, the industrial revolution led courts to impose limits on negligence liability in order to foster burgeoning industry.¹⁶⁴ Privity—a concept not coincidentally originating in contract law—became a popular tool in accomplishing this end, and it was in the context of privity that courts first discussed duty as an explicit doctrinal force.¹⁶⁵ Courts used privity as a limitation on liability by holding that one’s duty of care ought to be limited to those with whom one had a contractual relationship.¹⁶⁶ To be clear, courts did not hold that a defendant’s duty sprung from the contractual relationship, but rather that the defendant’s duty—which existed implicitly—ought to be limited according to privity.¹⁶⁷ Thus, duty’s first doctrinal appearance was not as a

162. Esper & Keating, *supra* note 4, at 267 n.7.

163. Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 48 (1934). *See also id.* at 54 (“duty was not then thought of as an essential of liability for inadvertence”). Gary Schwartz’s work examining nineteenth century tort cases in California and New Hampshire supports Winfield with regard to early American law:

In any event, the general duty issue played almost no encumbering role in nineteenth-century tort law in New Hampshire and California. From the beginning, each state’s Court, in cases involving accidents between strangers, routinely granted recoveries on a showing of negligence, without the slightest concern for any problem of duty.

Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1765–66 (1981).

164. *See* Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605–07 (1993) (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977)); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 151–52 (1946). *See also* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1975); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 45 (“[A] risk of aberrant, emotional decisionmaking in tort actions may be to deter investment in activities that are exposed to tort liability. Economic activity of all kinds is a function of social and political stability that facilitates planning; nineteenth-century American law was much concerned with encouraging economic activity.”).

165. *See* Winfield, *supra* note 163, at 54–56.

166. Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright*, 27 AM. J. LEGAL HIST. 85, 86–87 (1983).

167. *See* Winfield, *supra* note 163, at 55, 58.

necessary element for liability, but merely as a means of limiting liability.¹⁶⁸

The best known early privity case is *Winterbottom v. Wright*, decided in 1842, in which a mailcoach driver was injured due to improper construction of the coach by the defendant.¹⁶⁹ The driver sued the builder of the coach, but because the driver was not a party to the sale of the coach, the court denied him recovery.¹⁷⁰ Thus, privity of contract was established as a limit on liability. Baron Rolfe, one of the deciding justices, explained that in his view, whatever duty the builder may have owed to others, no duty was owed to the driver.¹⁷¹ Lord Abinger, on the other hand, largely eschewed duty language, instead expressing a policy concern about the potential scope of liability to which a builder like the defendant would be liable without some practical limits imposed by the court.¹⁷²

This history is important in understanding both the development of the basic duty of care and its current strength as a default rule. The negligence duty did not arise due to courts' sudden realization of the importance of the relationship between parties. Rather, for many years a default duty of care was always presumed to exist, and was never explicitly discussed or challenged when tort liability was imposed. It was only when courts saw reasons to limit liability that duty became an issue.

Not surprisingly, G&Z dismiss this interpretation of tort history, and specifically the work of Percy Winfield, describing it as "anachronistic and profoundly wrong-headed."¹⁷³ They rely entirely on an article by Robert Rabin for this criticism.¹⁷⁴ Rabin's article, however, is not about the historical role of duty in tort law, but addresses the debate surrounding

168. *See id.* It is worth noting that in the products liability project of the Third Restatement, which is predominantly based on liability of a manufacturer for negligence in designing or warning about its products, none of the main liability provisions relies on "duty" as an element of a claim. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998). Likewise, we have no notion of duty for intentional torts causing physical harm, although there is no doubt an *obligation* to refrain from intentionally causing physical harm to another. This is likely because the notion of obligation in each of these areas of law is presumed and because courts have seen no compelling policy reason to limit this obligation.

169. *Winterbottom v. Wright*, 10 M. & W. 109, 110, 152 Eng. Rep. 402, 403 (1842).

170. *Id.* at 116, 152 Eng. Rep. at 405.

171. *Id.* G&Z cite this reasoning as support for their relationality thesis, discussed *infra* Part V.C.

172. *Id.* at 113–14, 152 Eng. Rep. at 404–05. In this respect, *Winterbottom* was an early version of *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (1985).

173. Goldberg & Zipursky, *Moral*, *supra* note 85, at 1761 n.104.

174. *Id.* (citing Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. Rev. 925 (1981) [hereinafter Rabin, *Historical Development*]).

whether fault or strict liability was the historical basis for tort liability.¹⁷⁵ Rabin's claim is that this debate misses the fact that important swaths of accidental injury were exempt from tort liability—where neither strict liability nor negligence was employed because liability was precluded altogether.¹⁷⁶ Rabin cites three areas in which tort liability was limited: the liability of landowners to entrants injured on the land, the privity requirement, and the liability of employers for occupational injuries.¹⁷⁷ But these examples do not contradict Winfield's account. That *Winterbottom* provided an exemption from liability—and employed duty to do so—is precisely what Winfield said: it was the beginning of the recognition of duty by way of the use of no-duty rules as an exemption from liability.¹⁷⁸ That no duty to the plaintiff was employed to limit liability says nothing about whether duty was employed before *Winterbottom* as a condition for liability to be imposed. We further note that the basis for exemption in *Winterbottom*—the concern about too far-reaching liability—is precisely the type of instrumental concern on which G&Z expend considerable vitriol. The other exemptions from liability discussed by Rabin similarly do not provide any evidence about the role of duty in *imposing* liability in the early days of tort law. Moreover, Rabin simply was not interested in the question that is central to G&Z's attempted refutation of Winfield. Thus, the historical basis for the tort liability imposed on landowners may have been based on duty notions, but one cannot find any evidence of that in Rabin's article.

In addition to noting the historical strength of the duty presumption in America, it is also notable that Continental tort cases are largely devoid of any analysis of duty in imposing liability for negligence. In fact, the presumption of an obligation of care is so strong that duty is not even an element of a claim for accidental injury.¹⁷⁹ While duty remains an element of negligence under English law, it appears to be a residual phenomenon of the historical use of civil juries in tort cases and is employed to map judicial limitations on liability for inadvertent harm.¹⁸⁰

175. Rabin, *Historical Development*, *supra* note 174, at 927.

176. *See id.* at 928.

177. *See id.* at 933–43.

178. Winfield, *supra* note 163, at 48–49.

179. European Group on Tort Law, Principles of European Tort Law, in RESEARCH UNIT FOR EUROPEAN TORT LAW, EUROPEAN CENTRE OF TORT AND INSURANCE LAW, UNIFICATION OF TORT LAW: FAULT 369, 372 (Pierre Widmer ed., 2005). *See also* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12 (1953) (stating that “the concept [of duty] is unknown to the continental law”).

180. *See generally* W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT §§ 5.2–5.4, at 104–08 (16th ed. 2002). Ken Oliphant, who teaches at Bristol University, suggested to one of us that the use of duty in English law is an historical anomaly because juries are no longer routinely used in tort cases, save for

Notwithstanding G&Z's inaccurate historical claims, G&Z are correct that in recent decades courts have felt increasingly free to depart from the default duty rule. Some courts even expressly embrace the paradoxical position endorsed by G&Z, recognizing a "general or universal duty to take care to avoid causing physical harm to another's person or property,"¹⁸¹ but then holding that a defendant who in fact caused such harm to the plaintiff owed the plaintiff no duty.¹⁸² The fact that courts sometimes depart from the default rule, however, does not interfere with the Third Restatement's accuracy in describing the rule as a default. In the overwhelming majority of negligence cases, courts today still do not address the existence of a duty. This is not because courts fail to see duty as an element of negligence, but because they presume the existence of a duty where the defendant's conduct created a risk. Again, G&Z's criticism must stem from the Third Restatement's estimation of the strength of the default rule and its description of the conditions pursuant to which courts properly depart from the rule.

This brings us to G&Z's critique of the Third Restatement's section 7(b), which provides that in "exceptional cases," a court may decline to impose a duty if there is an "articulated countervailing principle or policy [that] warrants denying or limiting liability."¹⁸³ In G&Z's view, this language, when paired with the default duty in section 7(a), erroneously reduces duty to a freewheeling, legislative-like policy inquiry.¹⁸⁴ In this regard, G&Z claim that the Third Restatement attempts to foist California's instrumentalist duty law on the rest of the nation.¹⁸⁵ This assertion is misguided in two respects. First, implicit in such a claim is the notion that California law is aberrational and does not reflect the law in the remainder

defamation cases. Moreover, current English law is in accord with the Third Restatement's default of an ordinary duty of reasonable care subject to exceptions based on principle or policy. See David Howarth, *Duty of Care*, in *THE LAW OF TORT* 629, 629 (Ken Oliphant ed., 2d ed. 2007) (suggesting that duty operates in a negative manner to relieve a defendant of negligent conduct based on arguments of "principle" or "policy").

181. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.

182. See, e.g., *Widowski v. Durkee Foods, Div. of SCM Corp.*, 562 N.E.2d 967, 968-70 (Ill. 1990) (noting that "[i]t is well settled that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons," then holding, nonetheless, that the defendant owed no duty to the particular plaintiff after lengthy analysis of foreseeability, relationship between the parties, public policy, and Learned Hand-like factors).

183. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

184. See Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 333.

185. *Id.*

of the country. Whether or not one agrees with its decisions, the California Supreme Court has for over three decades been a leader in American tort jurisprudence.¹⁸⁶ Its initial foray in adopting strict products liability was followed by virtually every state. Its decision in *Rowland v. Christian*, rejecting the traditional status-based duties of landowners,¹⁸⁷ has now been accepted in about half of the states.¹⁸⁸ Its decision in *Tarasoff v. Regents of the University of California*, imposing an affirmative duty on mental health workers,¹⁸⁹ has been accepted in all but a single handful of states that have confronted the issue.¹⁹⁰ The same may be said by its decision in *Dillon v. Legg*, which permits stand-alone emotional harm claims by bystanders.¹⁹¹ *Biakanja v. Irving* paved the way for will beneficiaries to sue lawyers whose malpractice in preparing a will harms the nonclient beneficiary across the country.¹⁹² Dozens and dozens of jurisdictions state that there is a default duty of reasonable care in physical harm cases, as has the California Supreme Court.¹⁹³ Moreover, many states cite the *Biakanja* factors when deciding whether or not to impose a duty.¹⁹⁴ Purely on a descriptive level, to accuse the Third Restatement of foisting California's brand of duty jurisprudence on the rest of the country gets it wrong: the rest of the country has willingly accepted California's brand of duty; to the extent that the Third Restatement is commensurate with California law, it merely documents the nation's trend in this regard.

More importantly, however, G&Z do not faithfully represent the structure and effect of section 7 in claiming that it reduces duty to a matter of inchoate policy. On the contrary, by presenting the standard duty of care as a strong default where the defendant's conduct created a risk, the Third Restatement joins G&Z in rejecting the California and nationwide trend

186. See Jake Dear & Edward W. Jessen, "Followed Rates" and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683 (2007) (finding the California Supreme Court to be the most influential of all state supreme courts based on the frequency with which its opinions have been adopted by other courts).

187. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

188. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters' note to cmt. a tbl. (Council Draft No. 7, 2007).

189. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

190. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 41 reporters' note to cmt. g (Proposed Final Draft No. 1, 2005).

191. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 reporters' note to cmt. a (Tentative Draft No. 5, 2007).

192. See *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 18.5A, at 847–49 (3d ed. 2007).

193. See *supra* note 156 and accompanying text.

194. See, e.g., *Ashburn v. Anne Arundel County*, 510 A.2d 1078 (Md. 1986) (employing *Biakanja* factors to determine if an affirmative duty exists).

toward applying the *Biakanja-Rowland*'s multifactorial duty analysis as a routine matter in negligence cases. (Ironically, G&Z's charge that the Third Restatement runs contrary to prevailing law may, in this respect, be correct.) Rather than encouraging rampant instrumentalism—or even frequent, noninstrumental no-duty inquiries—section 7 limits no-duty rules where the defendant created a risk to the “exceptional case.”¹⁹⁵ It exhorts courts to make no-duty rulings on a categorical basis.¹⁹⁶ Further, it instructs courts to articulate the policy or principle on which they are acting.¹⁹⁷ These measures provide a considerable defense against the case-by-case duty determinations decried by G&Z and, for that matter, E&K. Indeed, we find G&Z's protestations against California's case-by-case duty determinations to be paradoxical. As we argue in further detail below, it is G&Z's conception of duty that is more likely to leave courts free to render conceptually squishy, case-by-case duty determinations—determinations based on the fact-dependent and arguably contingent considerations of moral obligation, interpersonal and spatio-temporal relationships, and foreseeability.¹⁹⁸

B. DUTY AS OBLIGATION OR INSTRUMENT?

The starting point for G&Z's conceptual dispute with California and the Third Restatement is G&Z's belief that tort law is essentially private. It is a means of resolving common disputes between citizens with the twin goals of achieving justice and avoiding vigilantism.¹⁹⁹ Tort's focus is thus purely linear and, in a case involving only one plaintiff and one defendant, bimodal—in other words, tort law is concerned only with the parties to the case at hand. The converse of G&Z's view of tort would be the position of Landes and Posner: that tort law is best understood as a system to provide optimal incentives for care,²⁰⁰ or a New Zealand-style compensation system in which tort liability is reduced to a tax on behavior that causes

195. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

196. *Id.* § 7 cmt. a.

197. *See id.* § 7 cmts. c & j.

198. *See infra* Parts V.C–E.

199. *See supra* notes 83–94 and accompanying text.

200. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 312 (1987). *See also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 256 (1970) (taking “it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents”).

injury.²⁰¹ In G&Z's view, California and the Third Restatement move too far toward such a system by providing for the resolution of duty as a matter of external policy considerations.²⁰²

As a natural extension of their explanation of tort law, G&Z assert that the essence of duty in negligence cases is obligation.²⁰³ According to G&Z, courts' duty holdings closely track the moral obligations that each of us feels toward others in various circumstances.²⁰⁴ G&Z are less clear, however, regarding the purity of courts' decisions in this regard. Are community-based or moral notions of obligation properly the *sole* source for a court's duty analysis? G&Z's answer to this crucial question is unclear. On the one hand, G&Z consistently criticize California and the Third Restatement for any consideration of instrumental concerns in duty determinations. On the other, G&Z do recognize a distinction between moral and legal duties,²⁰⁵ and as to the difference between them, G&Z state:

[B]ecause law comes with consequences that morality does not (most obviously state-enforced sanctions), and because there are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges, there will be times at which it is appropriate for legislatures and judges and jurors to decline to elevate certain moral norms to legal norms. Similarly, there are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.²⁰⁶

This language suggests that G&Z acknowledge that some limited instrumental concerns properly influence courts' duty decisions: concerns that a rule should achieve its desired end, shape the daily actions of citizens, and be applied by the relevant decision maker with some facility and consistency.²⁰⁷ If this is indeed G&Z's position, then the distance

201. See James C. Harris, Comment, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the U.S.*, 100 N.W. L. REV. 1367, 1373-76 (2006).

202. Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 334.

203. Goldberg & Zipursky, *Moral*, *supra* note 85, at 1744.

204. See *supra* note 87 and accompanying text. See also Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1572-77 (endorsing H.L.A. Hart's understanding that "a moral duty informs lawyers' and judges' judgments as to whether there ought to be a parallel legal duty").

205. See Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1585-88.

206. *Id.* at 1586.

207. Goldberg has endorsed a similar approach in his interpretation of Cardozo's judicial analysis: Although in each case Cardozo felt obligated to consider whether his legal analysis would generate results and rules that would promote highly undesirable consequences, Cardozo saw his first task as interpreting and applying the concept of "duty" as he found it in precedent and the basic structure of negligence law.

between us is a matter of degree—a significant degree, to be sure—rather than of kind.²⁰⁸

We agree with G&Z that many a court's duty analysis is informed by community norms regarding whether an obligation of care is owed in the relevant category of factual circumstance—and in our view, this is properly so.²⁰⁹ We suspect that as part of this interpretation of community norms, judges also engage in independent moral reasoning. Although we are less sanguine about the propriety of this latter practice, we recognize that at some level it is unavoidable.²¹⁰ We also concur with G&Z's understanding that a court's duty analysis consists not merely of whether a moral or community-based obligation exists, but whether such an obligation ought to be afforded legal status. We are also of the view that this question necessarily implicates instrumental concerns, as G&Z acknowledge in the statement above.

In light of all this agreement, from whence come G&Z's pages and pages of strenuous objection to the Third Restatement's understanding of duty? G&Z might first respond that although instrumental concerns at times play some limited role in courts' duty decisions, those decisions

John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1469 (1999) (book review).

208. We note that the Third Restatement does not endorse any particular theoretical understanding of duty. This Article presents our personal response to G&Z's critique of a document that one of us participated in crafting as a co-reporter and which the other has supported in previous scholarly writings.

209. To say this, given the amorphousness of the concept of community norms, is to leave much unsaid. We could well imagine, for example, that community standards might themselves take into account the social implications of obligations, thereby recognizing the sort of instrumental concerns that we believe are also operative in courts' duty decisions.

210. Yet we should confess that experimental psychology research into jury decision making—conducted both with student and legally-trained subjects—suggests that only a minority—some 15 to 33 percent—took into account deterrence considerations in several hypothetical problems designed to examine this question. See Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17, 31 (1993) (“Our results suggest that intuitions about punishment and compensation, in the context of tort law, are variable from person to person and are not typically consequentialist.”). See also Thomas R. Shultz et al., *Judgments of Causation, Responsibility, and Punishment in Cases of Harm-doing*, 13 CAN. J. BEHAV. SCI. 238, 251 (1981) (“The present results . . . support those philosophers who have defended the use of causal and moral concepts against those who have argued for the abandonment of these concepts in favour of social policy considerations.”) (internal citations omitted). This is a step removed from how people think about their moral obligations, but we do not see any compelling reasons why that step would change their thinking about consequentialist matters. G&Z seem to share this suspicion and warn judges against such a practice. See Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1587 (“[I]t is critical that the judge accurately identify and apply the legal norms that she is interpreting and that she not simply assume that she has been delegated the all-things-considered moral question of how to resolve the dispute or class of disputes before her.”).

remain fundamentally about obligation.²¹¹ G&Z might further argue that only limited, administrative-type policy considerations are relevant to the duty inquiry. Policy objectives wholly external to the parties to the suit—such as the desire for societal wealth maximization, deterrence, or the spreading of loss—are not properly considered.²¹² Finally, G&Z clearly do assert that the Third Restatement misstates negligence doctrine in a way that fails to capture these distinctions.

Our general response to each of these challenges is the same. In our view, the Achilles' heel of G&Z's critique is that it stems from an intellectually vibrant, but underinclusive and ultimately misguided attempt to provide a unified theory of tort law. Although G&Z make no empirical claim that courts more often discuss obligation than invoke instrumentalism, they do imply that the cases they cite are representative of courts' analyses of duty as obligation.²¹³ But such evidence is a numerator without a denominator. To say that duty is "fundamentally about obligat[ion]"²¹⁴ is to ignore the many cases that suggest the opposite. As one admittedly imprecise and limited example, a Westlaw search of state negligence cases in whose duty discussions the word "deterrence" appears produces hundreds of results.²¹⁵ In fact, large swaths of negligence law—

211. Goldberg has in fact made this argument in several conversations with one of the authors of this Article.

212. This argument would not fly not only because it is descriptively inaccurate, but also because the list of policy considerations that G&Z deem acceptable are broad enough to encompass the ones they seek to exclude.

213. See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 669–72 (describing types of tort cases embodying the concept of duty as an obligation).

214. Goldberg & Zipursky, *Seeing Tort Law*, *supra* note 84, at 1565.

215. The following is a sample of the resulting cases, with parentheticals illustrating that each court considers instrumental considerations in its duty analysis: *Graffiti-Valenzuela ex rel. Graffiti v. City of Phoenix*, 167 P.3d 711, 714 (Ariz. Ct. App. 2007) ("Public policy may support the recognition of a duty of care."); *Bartley v. Sweetser*, 890 S.W.2d 250, 252 (Ark. 1994) (refusing to impose on a landlord a duty to protect tenants from crime due to policy reasons such as "the economic consequences of the imposition of the duty; and the conflict with public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector"); *Shin v. Ahn*, 165 P.3d 581, 587 (Cal. 2007) (holding that the primary assumption of risk doctrine applies to golf, and therefore, that the defendant did not owe a duty of ordinary care, in part because "[h]olding [golf] participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport") (internal citation omitted); *Century Sur. Co. v. Crosby Ins., Inc.*, 21 Cal. Rptr. 3d 115, 125 (Ct. App. 2004) (imposing a duty on insurance brokers for misrepresentations in insurance applications in part because to do so "would act as a deterrent in preventing future harm"); *Monk v. Temple George Assocs.*, 869 A.2d 179, 187 (Conn. 2005) (recognizing that analysis of duty necessarily includes public policy considerations such as "(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions") (internal citation omitted); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 218 (Del. Ch. 2006) (refusing to impose a duty on the part of the directors, officers, and advisors of a litigation

rescue, emotional harm, and economic loss—are regulated through duty, based substantially on instrumentalist concerns.²¹⁶ Furthermore, the jurisprudence of modern products liability—whether based on negligence or strict liability—is replete with instrumentalist considerations. Duty is not fundamentally about obligation to the exclusion of instrumentalist concerns; it is clearly about both. In feudal England, tort law no doubt began as a simple means of resolving disputes between individuals—and it continues to serve that function. Today, however, there is far too much purpose in the pens of judges, and far too much concern for the social implications of decisions to claim that tort law is limited to correcting individualized wrongdoing.²¹⁷ In light of considerable evidence that policy

trust in part because “the deterrent to healthy risk taking by businesses would undermine the wealth-creating potential of capitalist endeavors”); *NCP Litig. Trust v. KPMG LLP*, 901 A.2d 871, 882–83 (N.J. 2006) (holding that “a claim for negligence may be brought on behalf of a corporation against the corporation’s allegedly negligent third-party auditors” in part because “auditor liability would create an incentive for auditors to be ‘more diligent and honest in the future’”) (internal citation omitted).

216. See *infra* text accompanying notes 307–11.

217. We are not the only ones to recognize this trend. In fact, even without the benefit of a straw poll, we venture to say that most torts scholars would concur. See generally MARK A. GEISTFELD, *TORT LAW: THE ESSENTIALS* (forthcoming 2008) (manuscript at 38, on file with the author) (“In addressing the social problem of accidental harms, tort law is understandably concerned about the deterrence capabilities of a liability rule.”); Guido Calabresi, *Toward a Unified Theory of Torts*, 1 J. TORT L. 1 (2007) (urging that both corrective justice and instrumental considerations have for centuries played a role in tort decisions); William E. Nelson, *From Fairness to Efficiency: The Transformation of Tort Law in New York, 1920–1980*, 47 BUFF. L. REV. 117 (1999) (discussing the shift in New York’s tort law from an analysis based on fairness and moral blameworthiness to one influenced by efficiency and deterrence); Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59, 90 (1999) (“As we reach the twenty-first century, . . . it seems appropriate we acknowledge that modern corrective justice scholarship with its nineteenth-century conceptual apparatus is . . . an anachronism and should be treated as such.”); Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 802 (2001) [hereinafter Rabin, *Duty Concept*] (commenting on Goldberg and Zipursky’s critique as follows: “One can certainly take exception to this polycentrism from a normative perspective, but it is nonetheless the reality of duty jurisprudence”); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (offering a reconciliation of the instrumentalist and noninstrumentalist understandings of tort law); Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1556–57 (2006) (“But tort law’s finely articulated incidence of obligations does not simply track moral duty, a point illustrated by the absence of a duty to attempt an easy rescue of a helpless stranger. Moreover, some aspects of tort law seem very much more easily rationalized on instrumental grounds An adequate theory of tort law must encompass this pluralism if it seeks to respect real cases and actual judicial reasoning.”); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 603 (1985) (claiming that corrective justice focus “is thoroughly unrealistic today”); Wendy E. Wagner, *What’s It All About, Cardozo?*, 80 TEX. L. REV. 1577, 1586 (2002) (stating “most seem to agree that tort law is in large part about forcing actors to internalize external costs . . . in a variety of private settings”). See also RESTATEMENT (SECOND) TORTS § 901(c) (1979) (identifying that one of the purposes of tort law is to “deter wrongful conduct”); 1 ALI, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS’ STUDY 25 (1991) (“Although this corrective justice rationale continues to maintain its hold on the popular mind and to have important

reasoning plays a role in courts' duty decisions, G&Z are left either to claim that courts do not mean what they say or to concede that their critique of a pluralist view of duty is largely normative.²¹⁸

The Third Restatement's treatment of duty, obligation, and instrumentalism is consistent with the understanding we have just described. Section 7(a) expresses the common law's collective judgment that when one acts in a way that creates a risk of harming others, one owes an obligation to take care in so acting.²¹⁹ This recognizes a community-based moral sense of obligation, one elevated to legal status by many years of judicial brick-and-mortar—exactly the type of obligation-based rule that G&Z claim is central to tort law.²²⁰ In section 7(b), the Third Restatement recognizes that at times, courts decline to impose a duty, thereby

scholarly exponents, its premises have become progressively less resonant with the real world of tort litigation.”).

Moreover, the U.S. Supreme Court's federal preemption of state law jurisprudence is premised on the foundational proposition that a tort judgment “can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)).

Even nonlawyers who study tort law reach the conclusion that there is a deterrent component to it. *See, e.g., SARAH S. LOCHLANN JAIN, INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES 2, passim* (2006) (referring, inter alia, to products liability cases filed out of frustration with federal regulation to “enforce the development of safer designs through litigation”).

218. *See Stapleton, supra* note 217, at 1532 (“Had Goldberg and Zipursky placed more emphasis on the fact that the analytical arrangement of legal concepts is a matter of choice rather than inherently mandated, they may have seen that their project is a normative one: to persuade lawyers to choose the conceptual arrangements Goldberg and Zipursky prefer.”).

219. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005).

220. It is also likely that this default rule embodies instrumental considerations such as the desire to deter unreasonably risky conduct. We note that law and economists have no use for the concept of duty as imposing any limits on liability and are perfectly comfortable with a universal duty of reasonable care, at least for physical harm. *See LANDES & POSNER, supra* note 200, at 142 (observing that in *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928), “the duty concept is not helpful”). *See also CALABRESI, supra* note 200; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007) (virtually ignoring the idea of duty); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987). For a recent exception, see Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 *FORDHAM L. REV.* 1501 (2006). Hylton finds several no-duty and limited-duty rules justified on a variety of grounds, including as a complement to protecting property rights (for example, no duty to trespassers), in instances in which the actor's conduct confers disproportionate benefit to others (for example, the rescuer rule that does not impose a duty of reasonable care to self on rescuers), and when the parties are in a contractual relationship that provides a basis for allocating risks that arise within the contractual framework. At least with regard to the actor whose conduct confers disproportionate benefits on others (externalized benefits, in the vernacular), tort law does not have to rely on no duty, as the negligence calculus already takes into account both private benefits to the actor as well as, more broadly, benefits from a social perspective. *See RESTATEMENT (SECOND) OF TORTS §§ 291–92* (1965).

withdrawing liability, due to some principle or policy.²²¹

G&Z object to section 7(b) on the grounds that it allows instrumental concerns to take center stage in courts' duty analyses.²²² This critique misses the mark for reasons already mentioned in Part V.A.3 above.²²³ Section 7(b) states that it is only in "exceptional cases" that considerations of policy or principle might overcome the default obligation.²²⁴ This hardly places instrumental considerations in the driver's seat, nor does it rule out the role of obligation in duty determinations. More importantly, section 7(b) is simply an accurate summary of what actually happens in courts' analyses of duty. Concerns for crushing liability,²²⁵ the potential for incursions on the fabric of social relations,²²⁶ the danger of becoming entangled with the periphery of the First Amendment,²²⁷ the boundaries of other substantive areas of law,²²⁸ the propriety of deferring to judgments by coordinate branches of government,²²⁹ and the goal of avoiding litigation that will harm family relationships,²³⁰ for example, are all reasons of

221. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

222. Cf. Goldberg & Zipursky, *Shielding Duty*, *supra* note 4, at 333.

223. See *supra* notes 195–198 and accompanying text.

224. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

225. See, e.g., *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 36–37 (N.Y. 1985) (denying recovery to plaintiff not in privity with defendant electric utility due to concerns for "enormous" liability).

226. See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984) (recognizing that allowing recovery for parties injured as a result of social hosts serving alcohol "will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important").

227. See, e.g., *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1116–19 (11th Cir. 1992) (addressing concern about chilling speech by granting recovery to the sons of a murder victim who sued a magazine alleging the negligent publication of an advertisement that created an unreasonable risk of solicitation of violent criminal activity).

228. For example, respecting the role of contract law in allocating risk explains a considerable portion of the economic loss rule that generally denies a tort duty when the harm is merely economic. See, e.g., *Franklin Grove Corp. v. Drexel*, 936 A.2d 1272, 1275 (R.I. 2007) ("Our rationale for abiding by the economic loss doctrine centers on the notion that commercial transactions are more appropriately suited to resolution through the law of contract, than through the law of tort."). Similarly, special rules about the duties land possessors owe to entrants on the land reflect the tension between tort law and private property rights. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. h (Council Draft No. 7, 2007).

229. See, e.g., *Riss v. City of N.Y.*, 240 N.E.2d 860, 860 (N.Y. 1968) (denying recovery to a plaintiff against the city for failing to provide adequate police protection, noting that "[t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed").

230. See, e.g., *Broadbent v. Broadbent*, 907 P.2d 43, 49–50 (Ariz. 1995) (adopting a "reasonable parent" standard in suits by children against their parents due to the desire "to protect the right of

“principle or policy” in deference to which courts have decided to adopt no-duty or limited-duty rules. What section 7(b) adds to the courts’ analyses of duty is to call for a more explicit recognition of these reasons of principle or policy.

G&Z also criticize section 7 and other Third Restatement duty provisions for their failure to incorporate duty’s relationality, for explicitly jettisoning foreseeability analysis from duty considerations, and for creating a standard that does not accurately reflect the extent to which duty is at play in negligence cases—even where the defendant’s actions created a risk. We address these arguments below.

C. RELATIONALITY

Even assuming some level of agreement on the role of obligation in duty, our more significant departure from G&Z begins with their insistence that duty is necessarily relational. As explained in Part IV above,²³¹ G&Z assert that the concept of obligation is incomplete without asking the question “duty to whom?” According to this view, a defendant may owe a duty of care to one category of person, but not another—even where that defendant has created a risk of harm. G&Z’s conception of duty therefore considers whether the class of people of which the defendant is a member owes an obligation to the class of people that includes the plaintiff.²³² In addition, even when a defendant owes a duty of care to the plaintiff and has acted unreasonably in some respect, the judge must find the proper connection between the defendant’s duty and breach—only a breach of the duty owed to the plaintiff may result in liability. In G&Z’s view, this question is also properly decided by the judge within the ambit of duty.²³³ According to G&Z, the Third Restatement’s basic duty provisions fail to account for these important aspects of negligence law. By calling for the

parents to raise their children by their own methods and in accordance with their own attitudes and beliefs”).

231. See *supra* notes 90–93 and accompanying text.

232. See Goldberg & Zipursky, *Moral*, *supra* note 85, at 1820 (explaining that “[f]or Cardozo [in *Palsgraf*], the foreseeability of harm to a class of persons goes to the question of whether certain conduct is owed to those persons, not to whether certain liabilities are appropriately borne by defendants”); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 59–60 (1998) (distinguishing between relational and nonrelational theories of tort duty).

233. At times, G&Z offer mixed messages as to the proper doctrinal home for this nexus analysis. Their most common assertion is that it is a matter for duty, Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 709–12, although, at other times, they seem to assert that it is a question of breach, *id.* at 686 (discussing the “relationality of breach”), or even a sixth and altogether separate element, similar to a standing requirement, Zipursky, *supra* note 232, at 10. Perhaps the most salient point that G&Z are clear on is that the duty-breach nexus issue is a matter for the court, and not the jury, to decide.

imposition of a duty based solely on risk creation, G&Z urge that section 7 implicitly dismisses duty's relationality.²³⁴ With regard to the duty-breach nexus, G&Z correctly point out that the Third Restatement explicitly adopts one aspect of Judge Andrews's dissenting position in *Palsgraf*, asserting that nexus is properly addressed as part of proximate cause rather than duty.²³⁵

We agree with several aspects of G&Z's relationality conception. First, we embrace the basic premise that liability for negligence (as opposed to duty, in particular) is relational. As Cardozo stated in *Palsgraf*, "negligence in the air" will not suffice²³⁶—the defendant's negligence must be tied to the plaintiff's injury in a way that justice demands a shifting of the loss from the former to the latter. For example, shooting a gun with one's eyes closed in suburban Seattle is certainly negligent, but it will not result in liability to a man shot in New Jersey. Similarly, the chef who negligently prepares a meal that causes a restaurant patron to become ill will not likely be held liable for the death of the patron's elderly live-in mother who, as a result of the patron's illness, is not given her daily aspirin and consequently dies of a stroke. Although the defendant in each of these cases committed a wrong, it cannot be said that the defendant wronged the plaintiff such that liability should ensue.

We also agree that the existence of a duty sometimes turns, and properly so, on the particular relationship between plaintiff and defendant. Affirmative duties, for example, often stem from relationships of care between parties.²³⁷ Duties regarding economic harm are often

234. The Third Restatement recognizes that some modern duties arise out of relationships, such as the duty a physician owes to a patient, and that certain relationships may also be employed as a basis for limiting duties, such as the relationship between land possessors and trespassers. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmts. a & e (Proposed Final Draft No. 1, 2005). The Third Restatement contains no reference to relationality in the black letter section providing for a default duty of reasonable care. *Id.* § 7(a).

235. The reporters' notes to section 29 (the section that defines "scope of liability," or proximate cause) state that under the Restatement, "[plaintiff-foreseeability] is dealt with as a matter of scope of liability rather than duty . . ." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29 reporters' note to cmt. n (Proposed Final Draft No. 1, 2005). *See also* *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (contending that the issue of an unforeseeable plaintiff should be dealt with as a matter of proximate cause, not duty); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 reporters' note cmt. f (Proposed Final Draft No. 1, 2005) ("Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate cause, as does this Restatement in Chapter 6.").

236. *Palsgraf*, 162 N.E. at 99. Of course, although Cardozo was referring to duty with his use of this phrase, we accept this idea as applied to negligence liability rather than duty in particular.

237. *See, e.g.,* *Farwell v. Keaton*, 240 N.W.2d 217, 221–22 (Mich. 1976); *Cuffy v. City of N.Y.*, 505 N.E.2d 937, 940 (N.Y. 1987).

relational²³⁸—for instance, auditors’ liability to third parties sometimes rests on the existence of prior communication between the parties.²³⁹ Landowner duties also, in some cases, depend on the relationship of the plaintiff and defendant with respect to the plaintiff’s visit to the defendant’s property.²⁴⁰

Finally, we agree with G&Z that, in some cases, courts’ relational analyses are nonreductive and traceable in part to parallel sociological phenomena and/or moral reasoning. Specifically, we find G&Z’s prioritization argument convincing as applied to affirmative duties.²⁴¹ One certainly prioritizes one’s everyday sense of affirmative obligations in part according to one’s relationship to the person in need. For instance, one might feel an obligation to feed one’s children, but not a similar obligation toward a hungry stranger. Similarly, one might feel an obligation to offer first aid to a client of one’s white-water rafting enterprise, but not to an injured nonclient resting on the shore. Such discernments do not involve a calculation of what conduct might be reasonable under the circumstances, but of whether one needs to engage in a reasonableness calculation at all. The factors considered by many courts in deciding whether to impose a duty based on the special relationship rubric reflect such an analysis—for example, whether “the plaintiff is . . . in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff’s welfare,” and whether the plaintiff has an “expectation of protection, which itself may be based upon the defendant’s expectation of financial gain.”²⁴²

Beyond these limited points, we part ways with G&Z. In summary, our view is that although negligence liability is necessarily relational, the element of duty is not. Courts properly decide most duty questions—particularly where the defendant created a risk of harm—from a

238. *E.g.*, *Jacques v. First Nat’l Bank of Md.*, 515 A.2d 756, 759 (Md. 1986) (“Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability.”).

239. *See Nycal Corp. v. KPMG Peat Marwick LLP*, 688 N.E.2d 1368, 1370–71 (Mass. 1998) (noting that in some jurisdictions, “an accountant may be held liable to noncontractual third parties who rely to their detriment on an inaccurate financial report if the accountant was aware that the report was to be used for a particular purpose, in the furtherance of which a known party (or parties) was intended to rely, and if there was some conduct on the part of the accountant creating a link to that party, which evinces the accountant’s understanding of the party’s reliance”).

240. *E.g.*, *Carter v. Kinney*, 896 S.W.2d 926, 928–30 (Mo. 1995) (en banc) (tailoring defendant landowner’s duty depending on whether the plaintiff was an invitee, licensee, or trespasser).

241. *See supra* notes 97–98 and accompanying text.

242. *Harper v. Herman*, 499 N.W.2d 472, 474 n.2 (Minn. 1993) (citing *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 56, at 374 (5th ed. 1984)).

nonrelational perspective, leaving questions of relationality for the jury to contend with in the context of cause in fact and proximate cause. In the following paragraphs, we offer what we believe to be a more accurate understanding of courts' use of relationality in negligence cases. We first note that although courts' talk of relationality may sometimes be taken at face value, relationality is often used simply as a tool to effect policy driven limitations on liability. We then distinguish courts' use of relationality in affirmative duty cases from cases in which the defendant's conduct created a risk. Finally, with regard to the latter, we urge that a relational understanding of duty is normatively inferior to a nonrelational one for the following reasons: (1) relational duty is based on an inaccurate description of how each of us thinks about our day-to-day obligations; (2) a relational approach necessarily collapses the duty analysis into a liability analysis, distorting the established territory of the separate elements of a negligence claim; and (3) relationality's inclusion within the rubric of duty erodes the rule of law and improperly shifts the traditional allocation of decision making authority between judge and jury.

G&Z's descriptive account of duty's relationality falls short in several respects. In some cases in which duty ostensibly turns on relationality, the concept is used merely as a practical means of limiting liability due to some predominating policy consideration. For example, where a public utility's gross negligence caused a widespread power outage, the New York Court of Appeals in *Strauss v. Belle Realty Co.* refused to impose a duty on the utility to noncustomers on the grounds that extensive liability would expose the defendant to financial ruin and endanger the public's power supply.²⁴³ Although one might fit this holding into G&Z's duty-breach nexus framework,²⁴⁴ the lack of sufficient relationality was not the source of the court's holding. Rather, the court expressly tied its decision to a concern for the continuing viability of the public utility and used contractual privity as the instrument to limit the defendant's duty and accomplish this end.²⁴⁵

243. *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985).

244. The case arguably fits G&Z's duty-breach nexus theory because, although the power company was in contractual privity with the plaintiff apartment owner, the plaintiff's injury occurred in an apartment common area, in which the power was governed by the defendant's contract with the landlord. Thus, it was arguably not foreseeable that the defendant's breach of duty would injure the plaintiff. This seems to be a fairly weak argument, however. The purpose of the defendant's contract with the landlord was to provide electricity for use by apartment residents such as the plaintiff. Moreover, the defendant also breached its contract with the plaintiff, and it was arguably the defendant's breach of this duty that led to the plaintiff's need to go to the common area for water. Thus, it seems that this case is more easily described by some other reasoning. *See id.* at 36–38.

245. *Id.* at 38 (“While limiting recovery to customers in this instance can hardly be said to confer immunity from negligence on Con Edison, permitting recovery to those in plaintiff's circumstances

This use of relationality is not limited to the rather unique set of circumstances presented in *Strauss*. Courts have used relationality in this manner in a variety of circumstances²⁴⁶—for example, in cases involving economic harm,²⁴⁷ emotional harm,²⁴⁸ social host liability,²⁴⁹ landowner liability,²⁵⁰ liability of psychotherapists for crimes committed by their patients,²⁵¹ and governmental duties.²⁵²

To the extent that courts' relationality analyses may be taken at face value, a further distinction must be drawn regarding the type of relationality considered. Tort cases make an implicit distinction between what we will refer to as "substantive" and "circumstantial" relationality. Substantive relationality consists of some form of ex ante relationship or dealings between the parties—for example, where the plaintiff and defendant were companions in a social venture, where they were parties who engaged in a transaction, where one party had promised to aid the other, or where one was a guest in the other's home. Substantive

would, in our view, violate the court's responsibility to define an orbit of duty that places controllable limits on liability.") (internal citation omitted).

246. Of course, it is also possible that some of these courts also utilize genuine relational or obligation based reasoning in reaching their decisions. Our point is that in many of these cases, courts rather transparently use relationality merely as a tool for instrumental ends. In still other cases, debate over the true motivation of the court's use of relationality is pointless—courts' reasoning is sometimes conclusory and might stem from either jurisprudential approach.

247. See, e.g., *Nycal Corp. v. KPMG Peat Marwick LLP*, 688 N.E.2d 1368, 1372–74 (Mass. 1998) (limiting auditor liability to those with whom the auditor had a sufficient relationship in order to ensure the continuing availability of public audits); *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (expressing concern that accountants might be exposed to liability "in an indeterminate amount for an indeterminate time to an indeterminate class").

248. See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (limiting liability for bystander emotional harm to family members of the physical harm victim).

249. See *Kelly v. Gwinnell*, 476 A.2d 1219, 1221, 1224 (N.J. 1984) (recognizing that although courts sometimes impose a duty on social hosts in cases brought by guests, courts often limit a social host's liability to third parties harmed by a guest due to concerns that such liability would "interfere with accepted standards of social behavior").

250. See, e.g., *Carter v. Kinney*, 896 S.W.2d 926, 930 (Mo. 1995) (en banc) ("The contours of the legal relationship that results from the possessor's invitation reflect a careful and patient effort by courts over time to balance the interests of persons injured by conditions of land against the interests of possessors of land to enjoy and employ their land for the purposes they wish.").

251. In *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 347–48 (Cal. 1976), the court imposed a duty on the defendant psychotherapist to warn a third party of threats issued by a patient, ostensibly due to the psychotherapist's special relationship with his patient. In light of courts' frequent refusal to impose a similar duty on medical doctors, we think that the more likely basis for the *Tarasoff* decision is the California courts expressed desire to prevent harm caused by the mentally ill. See *id.*

252. See, e.g., *Cuffy v. City of N.Y.*, 505 N.E.2d 937, 939–41 (N.Y. 1987) (limiting police liability for failing to protect an individual threatened by another to instances in which there exists a sufficient special relationship based on concerns, inter alia, about interfering with discretionary determinations of another branch of government).

relationality informs virtually every court's reasoning about certain affirmative duties. Where the defendant's conduct did not create a risk of harm, the bonds of a substantive relationship between the parties might serve as a basis for deciding to impose an affirmative duty to protect or rescue the plaintiff.²⁵³ Circumstantial relationality, by contrast, consists merely of the temporal or physical proximity of the parties. Courts sometimes consider circumstantial relationality in deciding whether to impose a duty, both where the plaintiff has alleged an affirmative duty, and in the ordinary case in which the defendant's act created a risk. Although most courts do not explicitly distinguish substantive from circumstantial relationality, the distinction is helpful in understanding our claim that relationality is essential to some duty decisions, but not to others. In sum, our view is that substantive relationality properly informs affirmative duties, but circumstantial relationality should not be considered in the context of duty at all.

G&Z are correct that section 7 of the Third Restatement endorses a nonrelational duty rule governing cases in which the defendant's acts created a risk of physical harm.²⁵⁴ Section 7 reflects black letter law repeated by an overwhelming majority of courts: that a defendant owes a duty of care not to act in a way that creates a risk of harm to others.²⁵⁵ Such a statement implies that these courts view circumstantial relationality to be relevant not as an aspect of duty, but only as part of factual causation and proximate cause. Indeed, most legal scholars and casebook authors have

253. See, e.g., *Farwell v. Keaton*, 240 N.W.2d 217, 221–22 (Mich. 1976) (imposing an affirmative duty to rescue because the parties were “companions on a social venture”). Substantive relationality might also, in particular cases, be relevant to proximate cause analysis. For example, where a father negligently conducts a science experiment in his basement, the foreseeability that his adult son might visit may lead a jury to impose liability on the father for injuries sustained by the son.

254. We have doubts, however, that G&Z are correct that the Second Restatement supports their relational account of duty. See Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 685. Section 281(b) of the Second Restatement does require negligence “with respect to the other,” as G&Z point out. RESTATEMENT (SECOND) OF TORTS § 281(b) (1965). But comment c, which discusses this requirement, and includes the *Palsgraf* facts as an illustration, nowhere states that relationality is an aspect of duty. *Id.* § 281 cmt. c. Moreover, nowhere in the elaboration of negligence contained in sections 282–84 is there anything about relationality other than that implicit in determining the foreseeable risk. This suggests to us that the Second Restatement implicitly leaves *Palsgraf*-type relationality for resolution in the context of proximate cause. If these portions of the Second Restatement make duty relational, they have done so most obscurely.

255. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 reporters' note to cmt. a (Proposed Final Draft No. 1, 2005) (citing cases expressing the view that a duty of care exists by everyone in their conduct to all who might be harmed). See also Stapleton, *supra* note 217, at 1550 (stating “throughout the common law world the orthodox conceptual arrangement in traditional cases recognizes a duty to the whole world”).

reached the same conclusion.²⁵⁶ This, however, is not universally the case. Some courts expressly cite relationality (along with policy considerations and, often, foreseeability) as comprising part of the duty calculus.²⁵⁷ Furthermore, some courts actually consider circumstantial relationality in the context of duty, even where the defendant's conduct created a risk and even where the court itself cites the general rule that a defendant owes a duty of care not to do so.²⁵⁸ Of course, courts are far from unanimous in this regard. Some courts disclaim the relevance of circumstantial

256. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 reporters' note to cmt. f (Proposed Final Draft No. 1, 2005) ("Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate cause, as does this Restatement in Chapter 6."); KEETON ET AL., *supra* note 242, § 53, at 357 ("Certainly [in the early common law] there is little trace of any notion of a relation between the parties, or an obligation to any one individual, as essential to the tort. The defendant's obligation to behave properly apparently was owed to all the world . . ."); DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 186–87 (2d ed. 1998) (noting modern trend toward treating plaintiff-foreseeability as a question of proximate cause, not duty); William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941, 1952 (1991) (explaining that the dominant modern method by which liability is limited is based on unforeseeability of the harm or unforeseeability of the plaintiff, and is under the heading of proximate cause); *The Theory of Torts*, *supra* note 9, at 661 (describing the universal tort duty as "a duty imposed on all the world, in favor of all"); Zipursky, *supra* note 232, at 3 n.4 (citing casebooks that discuss *Palsgraf* in the context of proximate cause).

257. See, e.g., *Jacques v. First Nat'l Bank of Md.*, 515 A.2d 756, 758 (Md. 1986) (citing KEETON ET AL., *supra* note 242, § 53, at 357, for the proposition that: "[W]hen negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability"); *Chavez v. Desert Eagle Distrib. Co. of N.M.*, 151 P.3d 77, 83 (N.M. Ct. App. 2006) ("The existence of a common law duty is determined by looking 'at the relationship of the parties, the nature of the plaintiff's interest and the defendant's conduct, and the public policy in imposing a duty on the defendant.'") (internal citations omitted); *Selwyn v. Ward*, 879 A.2d 882, 887 (R.I. 2005) ("This Court determines whether a duty exists on a 'case-by-case basis,' considering 'all relevant factors, including the relationship between the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations,' . . . and the 'foreseeability of harm to the plaintiff.'") We note, however, that these jurisdictions often indicate that relationality drops out of the analysis in cases where the defendant's act created a risk of physical harm. See, e.g., *Jacques*, 515 A.2d at 760 ("[W]here the risk created is one of personal injury, no such direct relationship [between plaintiff and defendant] need be shown . . .").

258. See, e.g., *Leppke v. Segura*, 632 P.2d 1057, 1059 (Colo. Ct. App. 1981) ("The duty to exercise reasonable care extends only to foreseeable damages and injuries to foreseeable plaintiffs. The Leppkes' injuries and damages resulting from the head-on collision, as a matter of law, were foreseeable injuries and they were foreseeable plaintiffs; therefore, the defendants' duty extended to them for the relief which they seek.") (internal citation omitted); *Smith v. Fla. Power & Light Co.*, 857 So. 2d 224, 233–37 (Fla. Dist. Ct. App. 2003) (declining to impose a duty on the defendant power company to protect the plaintiff against electrocution by power lines because the particular plaintiff was not foreseeable); *Moning v. Alfonso*, 254 N.W.2d 759, 765 (Mich. 1977) (imposing a duty on the defendants only after reasoning that "[plaintiff] Moning, as a playmate of a child who purchased a slingshot marketed by the defendants, was within the foreseeable scope of the risk created by their conduct in marketing slingshots directly to children. Moning was a foreseeable plaintiff"); *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. 1990) (citing *Palsgraf* in stating that "[n]o duty is owed to persons outside 'the orbit of the danger as disclosed to the eye of reasonable vigilance'").

relationality to duty, either expressly or by example.²⁵⁹ It is difficult to survey current law on the matter, both because courts themselves are often unclear—in fact are often contradictory—in their approaches²⁶⁰ and because cases are not easily pigeonholed as plaintiff/defendant nexus cases or type/manner of harm cases.²⁶¹ Some courts even admit to the view that there is no difference between duty and proximate cause analyses at all.²⁶² Although we disagree with such a dismissive account of the elements, we do believe that circumstantial relationality might, as a purely conceptual matter, fit within either element.²⁶³ Thus, with regard to cases in which courts engage in nonreductive relational reasoning to deny duty where a duty might apply pursuant to the Third Restatement, we simply argue that such decisions are unwise. The remainder of our discussion of relationality is thus normative. In other words, we address what we think is the real thrust of G&Z's assertions—that relationality *ought* to be considered in the context of duty.

259. See, e.g., *Gipson v. Kasey*, 150 P.3d 228, 231–32 (Ariz. 2007) (rejecting consideration of foreseeability and fact specific relationality in the context of duty); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) (“Wisconsin has long followed the minority view of duty set forth in the dissent of *Palsgraf v. Long Island Railroad*. . . . [E]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.”) (internal citation omitted) (quoting *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

260. Compare *Widowski v. Durkee Foods, Div. of SCM Corp.*, 562 N.E.2d 967, 968–72 (Ill. 1990) (stating that “[i]t is well settled that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act . . .” and then holding that defendant owed no duty to the particular plaintiff because she was unforeseeable), with *Wintersteen v. Nat’l Cooperage & Woodenware Co.*, 197 N.E. 578, 582 (Ill. 1935) (“It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act [This duty] extends to remote and unknown persons.”). Compare also *Valentine v. On Target, Inc.*, 727 A.2d 947, 949–51 (Md. 1999) (declining to impose a duty when plaintiff sued defendant gun dealer for murder of plaintiff’s decedent, committed by a third party with a gun stolen from defendant’s store), with *Jacques v. First Nat’l Bank of Md.*, 515 A.2d 756, 760 (Md. 1986) (stating that in contrast to economic harm cases, “where the risk created is one of personal injury, no such direct relationship [between plaintiff and defendant] need be shown”).

261. See W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 965–67 [hereinafter *Cardi, Reconstructing*] (urging that this distinction is often meaningless). *Palsgraf*, for example, might have been treated as a type or manner of injury case—asking whether the defendant should be held liable for an injury by falling scales or injury by explosion—rather than a case involving the nexus between plaintiff and defendant.

262. See, e.g., *Weigold v. Patel*, 840 A.2d 19, 25 (Conn. App. Ct. 2004) (“In negligence cases such as the present one, in which a tortfeasor’s conduct is not the direct cause of the harm, the question of legal causation is practically indistinguishable from an analysis of the extent of the tortfeasor’s duty to the plaintiff.”) (internal citations omitted); *Moning*, 254 N.W.2d at 764 (characterizing the proximate cause inquiry as “a policy question often indistinguishable from the duty question”).

263. See generally *Cardi, Reconstructing*, *supra* note 261 (arguing that as a conceptual matter, foreseeability, as a constituent of relationality, might fit either within duty or proximate cause).

G&Z's relational duty theory is based on what is either a strictly moral or empirical claim about how people actually think about their day-to-day obligations. G&Z provide no social-scientific basis for the latter claim, and we find none to the contrary. Nevertheless, we are unconvinced by their premise. In our view, people think about their daily actions in a way that is act centered, not relational. Consider this assertion in the context of *Mussivand v. David*, discussed above.²⁶⁴ In that case, the plaintiff sued his wife's adulterous lover for negligently passing a sexually transmitted disease to the wife, which she then transmitted to the plaintiff. G&Z urge that this case required a determination that of all the people who might be put at risk as a result of the defendant's infection of the plaintiff's wife (downstream lovers, plaintiff's unborn children, transfusion recipients, etc.), the plaintiff stood out as a particularly foreseeable victim and therefore one for whose well-being defendant ought to have been vigilant.²⁶⁵ In other words, in G&Z's view, it was the strong relative circumstantial relationality between plaintiff and defendant that gave rise to the defendant's sense of obligation and justified imposing a legal duty.

We disagree that such reasoning captures how people think about obligations.²⁶⁶ Were one to consider having sex with the knowledge that one has an STD, one's sense of obligation would not emerge from a careful sorting out of potential victims on a slide rule from more to less foreseeable. Rather, one's sense of obligation would spring from the nature of the act itself—namely, an act that creates some risk of harm. Correspondingly, one would feel an obligation not only to consider the act's reasonableness in light of harm that it might cause to a sexual partner, but also to all others who might be infected. Consider the question from an ex post psychological vantage. Would one not feel guilty to learn that one is the Typhoid Mary of a community wide outbreak of a particular STD? Such guilt intuitively seems to be tied to a preexisting sense of obligation.

264. See *supra* note 149.

265. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 679–80.

266. An anecdote—but a telling one in our judgment—supports this proposition. At the council meeting of the ALI on December 7, 2007, a draft of the chapter on land possessor duties was presented and discussed. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 9 (Council Draft No. 7, 2007). That chapter distinguishes between certain “flagrant trespassers,” to whom the possessor has a duty only not to intentionally, willfully or wantonly injure, *id.* § 52, and all other entrants for whom the duty is one of reasonable care, *id.* § 51. Several members of the council, unfamiliar with the nuances of tort law, were confused at how to reconcile the idea that land possessors could have a duty of reasonable care for risks on their property at the same time that they only have a duty with regard to those same risks not to intentionally, willfully or wantonly cause injury to flagrant trespassers. That confusion was borne of their thinking that duty is act based, not relationally based.

One response to our argument might be that we simply disagree with the court's normative judgment regarding the level of foreseeability necessary for a duty to exist under the particular facts of *Mussivand*. The court implied that an unknown downstream lover would lack sufficient relationality; we think that such relationality would suffice—either way, the analysis is based on relationality. Not so. We dispute G&Z's basic premise that people prioritize their caretaking efforts according to their relative circumstantial relationality to potential victims. Recall G&Z's explanation that because one cannot possibly take the same high level of care toward each person in every circumstance, each of us constructs differentiated notions of obligation in order to prioritize our caretaking efforts—with relationality being the guiding principle.²⁶⁷ Although such an explanation rings true with regard to certain affirmative obligations, we do not think that such reasoning informs people's sense of obligation not to engage in risky behavior. In most circumstances, one does not act toward others at all.²⁶⁸ If one considers doing an act—driving a motorcycle, going for a jog, shooting a gun, or even having sex—one typically considers only whether the act might create a risk generally. If so, then one feels an obligation to take care in doing the act. Of course, once one is motivated by a sense of obligation, one might then consider the number, proximity, and vulnerability of others in determining what constraints on an activity might be required. This second step in one's thinking, however, is an analysis of reasonableness—a matter for breach, not duty.²⁶⁹

Obligation-based duty reasoning seeks the internal—albeit objective—perspective of a person in the defendant's position at the time of acting. For the reasons discussed thus far, we think that obligations to act reasonably are most accurately described as act centered and nonrelational. Of course, circumstantial relationality remains relevant to negligence, but it is best considered as part of a post hoc determination as to whether the defendant should be held liable for the harm actually caused. In short, circumstantial relationality is best seen as a reason to limit liability. Returning to the facts of *Mussivand*, it would seem callous and strange to

267. See *supra* notes 96–98 and accompanying text.

268. Insofar as our common notions of obligation inform and are shaped by criminal law, it is notable that criminal duties are not typically relational. For example, we have a criminal duty not to speed without regard to the foreseeability of those potentially harmed by that act.

269. In the breach context, circumstantial relationality is judged in relation to others generally, not with regard to the particular plaintiff. DOBBS, *supra* note 12, § 143, at 335 (explaining, in the context of a discussion of breach: “So if a speeding driver crashes into your living room, the fact that a reasonable person would not have specifically recognized a risk of harm to living room furniture will not assist the driver to avoid liability. It is one of the cluster of harms in a generally foreseeable category, and that is enough.”). The latter is the focus of cause in fact and proximate cause.

say that one owes an obligation to avoid infecting one's sexual partner, but no obligation to avoid spurring the infection of an entire community.²⁷⁰ As a post hoc limitation on liability, however, the law might decide that it would be unfair to hold a defendant liable for a failed obligation with respect to claims by downstream victims due to the passage of time, intervening conduct, or other particularistic concerns. In this sense, relationality is unproblematically encompassed by the element of proximate cause.

We offer one final normative argument against a generally relational approach to duty, and it is that a relational analysis of duty largely collapses into an analysis of ultimate liability. The argument is best illustrated with a hypothetical. Suppose that as one drives home from work, one begins to contemplate changing lanes without checking over one's shoulder for other cars. In contemplating this action, would one feel an obligation of care to a man in Shanghai? Put in such terms, it would seem ridiculous to say that one owes an obligation to the man in Shanghai—this is, of course, G&Z's claim. The problem with this intuition is two-fold. First, as we have already explained, the question "Do I owe an obligation to a man in Shanghai?" is not the question one typically asks when considering one's obligations. Rather, one typically asks only whether someone might be injured by the act. In this respect, the inquiry duty to whom asks too much.

At the same time, duty to whom? asks too little. Perhaps one has something in the car borrowed from the man in Shanghai. Or perhaps one is transporting a kidney to the airport that the man in Shanghai is awaiting for transplant. In either case, G&Z would argue that although one typically would not owe a duty to the man in Shanghai, facts establishing relationality might be sufficient to suggest the contrary. In our view, this reveals that asking duty to whom? is not enough. It is negligence in the air in the same way that G&Z allege a nonrelational duty inquiry to be. Were courts to condition duty on relationality, they must also ask, for example, duty to do what? and duty to avoid what type of injury? In short, the existence of a duty would be determined by asking: "Did the defendant owe a duty to this plaintiff not unreasonably to cause this type of injury in this manner by this conduct?" At that point, the duty inquiry will have lost its categorical nature and become a particularized inquiry into many of the judgments traditionally left to the elements of breach and proximate

270. Jane Stapleton makes what is essentially the same point in arguing that treating relationality as a duty question leads to distasteful differentiations between victims' claims. Stapleton, *supra* note 217, at 1549.

cause.²⁷¹

One of us has written elsewhere about the pragmatic benefits of keeping distinct the elements of the negligence action.²⁷² Generally, maintaining the distinctiveness of each element provides an ordered method of considering the substantive requirements of liability, facilitates a better understanding of the unique characteristics of each substantive requirement, results in a more correct and consistent application of the elements, and segregates issues to be decided by judge or jury.²⁷³ Understanding duty in a way that is wholly independent of breach and proximate cause has particular benefits: it reduces confusion in courts' negligence analyses; it discourages the cloaking of policy decisions by judicial manipulation of concepts such as foreseeability; it reduces the possibility for redundant—or worse, conflicting—determinations by the judge and jury; and, as elaborated in Part V.E below, it dissuades courts from making fact specific decisions more properly reserved for the jury.²⁷⁴ Moreover, understanding duty as free from circumstantial relationality does no damage to the instinct that, as a general matter, one should not be liable to the man in Shanghai. Courts might just as easily consider first the defendant's allegedly wrongful act, leaving analysis of the relational aspect of the wrong for a later element.

We now turn to a brief discussion of the proper role for foreseeability in negligence doctrine.

D. FORESEEABILITY

The Third Restatement expressly rejects reliance on unforeseeability by courts as a basis for determining that no duty exists.²⁷⁵ Because foreseeability is the primary constituent of circumstantial relationality, each of the criticisms we have made above of relational duty applies also to foreseeability. G&Z have responded that the foreseeability considered by

271. Specifically, all that would remain for jury determination would be whether the defendant's actions in the face of the risk (already determined by the court to be foreseeable) were unreasonable and whether those actions were a cause in fact of the plaintiff's injury.

272. See generally W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739 (2005) [hereinafter Cardi, *Purging*] (urging the benefits of analyzing foreseeability as part of breach and proximate cause rather than duty); Cardi, *Reconstructing*, *supra* note 261 (discussing the purpose of elements of a cause of action and arguing that foreseeability serves its conceptual purposes best in the context of breach and proximate cause).

273. Cardi, *Reconstructing*, *supra* note 261, at 932–37.

274. Cardi, *Purging*, *supra* note 272, at 790–804.

275. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005).

courts in the context of duty is categorical, whereas the foreseeability employed in proximate cause is specific to the particular plaintiff.²⁷⁶ Each of us has separately given riposte by urging that foreseeability is inherently unamenable to categorical decisionmaking, and that foreseeability is not in fact decided categorically by courts. Rather, foreseeability is a particularly fact-dependent determination, not properly given the broad effect of precedent.²⁷⁷ To put the point differently, for any category of duty that a court might consider, significant variability will exist in the extent of foreseeability based on the specific facts of the case. *Mussivand*—cited by G&Z in support of foreseeability’s proper role in duty—illustrates the point. In analyzing whether the defendant owed a duty to his lover’s husband, the court offered the following reasoning:

In this case appellant, allegedly infected with a venereal disease, engaged in sexual relations with a married woman. A reasonably prudent person would anticipate that a wife and husband will engage in sexual relations. In addition, [defendant] is a medical doctor who, more than most people, should be aware of the method of transmitting a venereal disease, its likelihood of spreading through sexual contact, and its potentially devastating effect. If one negligently exposes a married person to a sexually transmissible disease without informing that person of his exposure, it is reasonable to anticipate that the disease may be transmitted to the married person’s spouse. Hence liability to a third party for failure to disclose to the original sexual partner turns on whether, under all the circumstances, injury to the third-party spouse was foreseeable.²⁷⁸

This reasoning is not categorical, but decidedly fact-specific. It is also typical of cases that analyze circumstantial relationality in the context of duty. Were the defendant not a doctor, or the plaintiff another of the wife’s extramarital partners, or were the plaintiff’s partner merely “dating around”

276. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727–28.

277. Cardi, initially, and then the Third Restatement, have thoroughly considered the appropriate role of foreseeability in duty analysis. This section draws on and summarizes the gist of what we have said previously. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 reporters’ note to cmt. j (Proposed Final Draft No. 1, 2005); Cardi, *Reconstructing*, *supra* note 261, at 972–83 (arguing against categorical foreseeability); Cardi, *Purging*, *supra* note 272, at 799–804 (arguing in favor of leaving foreseeability decisions to the jury). See Howarth, *supra* 180, at 634 (concluding that foreseeability has no honest role in determinations of duty and that, when England had civil juries, foreseeability was employed as an element of duty to enable courts to screen cases in which breach was absent or weak).

278. *Mussivand v. David*, 544 N.E.2d 265, 272 (Ohio 1989). Exercising great self-restraint, we desist from piling on the cases that we find all the time in which courts rely on specific facts to determine that the defendant owed no duty and thus that a jury is not required to address the claim of negligence.

rather than married, the court's decision may have been different. Such fact-specific duty rulings invade the province of the jury, create the potential for inconsistent rulings by judge and jury in the same case, and threaten control over dissimilar future cases. Indeed, such fact-specific duty rulings have even drawn the ire of Cardozo.²⁷⁹ Again, because we have discussed the demerits of "categorical foreseeability" at length in our prior work, we do not elaborate further here.

We turn to what is perhaps a more subtle assertion of foreseeability's relevance to duty made by E&K. E&K urge that California's multipart balancing test for duty ought to be abandoned and that "reasonable foreseeability of injury and reasonable foreseeability alone should be the touchstone of duty."²⁸⁰ Because E&K make this proposal in the concluding paragraphs of their article, they do not elaborate on the precise shape of foreseeability's role in this regard.²⁸¹ What they do say is that "[b]eyond the threshold requirement of reasonable foreseeability that arises because negligence liability only extends to accidents that could have been foreseen and so are candidates for prevention, duty must be used sparingly."²⁸² This suggests a very limited role for foreseeability—that if any injury to any potential plaintiff in any manner was at all foreseeable, then the court must conclude that the defendant owed a duty of care.

Thus understood, E&K's proposal certainly tracks many courts' statements of the basic duty standard. Tracing back to *Heaven v. Pender*, courts have held that one owes a duty not to create a *foreseeable* risk of harm to others.²⁸³ As a practical matter, such a limited use of foreseeability

279. Compare *Balt. & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927) (Justice Holmes prescribing, in a case involving a plaintiff hit by a train at an unguarded railway crossing, a duty to get out of one's car and assess the possibility of approaching trains), with *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 101–02 (1934) (Cardozo limiting *Goodman* to its facts due to plaintiff's correct contention that, in light of the circumstances of this case, getting out of his car may have actually increased the risk of being hit by an approaching train).

280. Esper & Keating, *supra* note 4, at 327.

281. Actually, we find E&K's proposal to be a bit contradictory in light of their surrounding arguments. E&K simultaneously (1) bemoan the California Supreme Court's conflation of duty and breach, *id.* at 323–28; (2) explicitly recognize that "the [*Rowland*] list of factors . . . bears a close resemblance to those that juries must bring to bear when they determine if a duty of care has been breached," *id.* at 324; (3) recognize that foreseeability is the chief factor in that test, *id.* at 318; and yet (4) endorse foreseeability as the primary consideration in duty questions, *id.* at 327.

282. *Id.* at 327.

283. *Heaven v. Pender*, (1883) 11 Q.B.D. 503, 509 (U.K.) (holding that "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger"). See also, e.g., *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1006 (N.H. 2003) ("All persons have a duty to exercise reasonable

may not be much of a departure from the Third Restatement's basic risk-creation standard. Although the Third Restatement would impose a duty even where the risk created by a defendant's conduct was not foreseeable, most conduct in fact creates some foreseeable risk. Thus, E&K's foreseeability proposal would remove few cases at the duty stage that the Third Restatement would allow to pass. Furthermore, many courts that consider foreseeability to be a part of duty nevertheless leave such determinations to the jury.²⁸⁴ Were E&K to endorse this practice, then the distance between E&K's proposal and the Third Restatement would truly be slight. Whether a jury considers foreseeability in the context of duty or breach and proximate cause, its analysis might well be the same.

Still, despite its pragmatic similarity to the Third Restatement approach, we are nevertheless hesitant to endorse even a narrow role for foreseeability in courts' duty analyses. Once foreseeability makes its way into the judicial tool shed, it is inevitably abused.²⁸⁵ Its role expands, using

care not to subject others to an unreasonable risk of harm. Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law . . .") (internal citation omitted); *Brennen v. City of Eugene*, 591 P.2d 719, 723 (Or. 1979) (en banc) (stating that a defendant owes a duty where the defendant "creat[ed] a foreseeable risk of harm to others").

284. See, e.g., *Ariz. Pub. Serv. Co. v. Brittain*, 486 P.2d 176, 178 (Ariz. 1971) (en banc); *Sewell v. Pub. Serv. Co. of Colo.*, 832 P.2d 994, 998 (Colo. Ct. App. 1991) (in reversing the trial court's grant of summary judgment for the defendant utility company on the grounds that there was no duty, the court held that "if differing factual inferences may be drawn from the evidence, the question of foreseeability remains a disputed factual issue, and the entry of summary judgment in such circumstances is improper"); *Lee v. Farmer's Rural Elec. Coop. Corp.*, 245 S.W.3d 209, 216-17 (Ky. Ct. App. 2007) (holding that in the context of deciding the existence of a duty, when varying inferences are possible with respect to foreseeability, the question must be submitted to the jury) (also citing, for the same proposition, *Smith v. Tenn. Valley Auth.*, 699 F.2d 1043 (11th Cir. 1983) (applying Tennessee law)); *Elbert v. City of Saginaw*, 109 N.W.2d 879 (Mich. 1961). In fact, even Cardozo, in G&Z's favorite case, would leave foreseeability to the jury. See *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (N.Y. 1928) ("The range of reasonable apprehension is . . . if varying inferences are possible, a question for the jury.").

285. See, e.g., *Cardi*, *Purging*, *supra* note 272, at 740-41 (describing problems with courts' use of foreseeability); Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (suggesting that "judges should not rely on, or hide behind, words like . . . foreseeable, unforeseeable . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions"); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (describing foreseeability as "so open-ended [it] can be used to explain any decision, even decisions directly opposed to each other. . . [so as to] undermine clarity and certainty in the law whenever [it is] embedded in a legal standard"); Patricia K. Fitzsimmons & Bridget Genteman Hoy, Students' Perspective, *Visualizing Foreseeability*, 45 ST. LOUIS U. L.J. 907, 908, 911 (2001) (interpreting a torts professor to mean that "a foreseeable act may just as well be called 'strawberry shortcake'" because the term is merely a placeholder representing "a malleable standard used by judges in their roles as gatekeepers and tweekers").

as flint and tinder the judicial desire to provide prospective guidance rules and the need to make more palatable the policy decisions that foreseeability so ably obscures. Indeed, this is exactly what has happened in the courts through the decades, with California playing a leading role. E&K seemingly share our view (and that of the Third Restatement) that courts should not be deciding whether some degree of foreseeability of risk, a particular type or manner of harm, or a particular plaintiff is normatively sufficient to give rise to a duty. We feel, however, that the better means to this end is not to reconceive courts' use of foreseeability in duty, but to nip it in the bud. Only time will tell as to the Third Restatement's success in encouraging this route. We note, however, that the first court to confront this issue explicitly has expressly adopted the Third Restatement approach.²⁸⁶

As a final note, we recognize the awkwardness of duty talk—at least in the obligation sense—that omits foreseeability. How can it be that one has a duty to take precautions without having reason to know that one's actions pose a threat to others? We do not disagree with this observation, at least when considering duty in moral terms.²⁸⁷ Our response is that this awkwardness is a by-product of the necessary distinction between moral and legal duties. For the pragmatic and legal-structural reasons we have outlined above, we feel that it is better to consider foreseeability in the context of breach and proximate cause.²⁸⁸ And after all, it does not seem appreciably more awkward to say that one owes a duty to take reasonable precautions not to create risks of harm to others, and if no risk was foreseeable, then no precautions were required.

E. THE BENEFITS OF THE THIRD RESTATEMENT'S TREATMENT OF DUTY

We have already adverted to a number of the advantages that the Third Restatement provides. Restatements, after all, are not purely descriptive. Indeed, given the complexity and messiness of the common law, pure description would be an unattainable goal. But Restatements, in any case, explicitly seek to synthesize, rationalize, and, on occasion,

286. *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007) (citing the Third Restatement in rejecting consideration of foreseeability in the context of duty).

287. Thus, we agree with E&K who make the same objection. See Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in its Place*, 41 LOY. L.A. L. REV. (forthcoming 2008) (manuscript at 6–7, on file with authors) [hereinafter Esper & Keating, *Putting "Duty"*].

288. In that respect, eliminating foreseeability from duty is similar to denying a duty of easy rescue and limiting duty with regard to emotional harm and economic loss. See *infra* text accompanying notes 307–11.

improve on what might otherwise be nose counting among all relevant jurisdictions.²⁸⁹

What benefits might the Third Restatement's approach to duty in physical harm cases provide? We think there are several, and we think that G&Z and E&K share sympathy for many of the ends sought by the Third Restatement, even though it does not endorse their particular conceptions of tort law.²⁹⁰

First, the Third Restatement approach to duty should avoid pointless, confusing, and sometimes obfuscating efforts to find a basis for a duty when a defendant created a risk of physical harm to others.²⁹¹ Courts need not look for the basis for a duty in a statute, special relationship, or other source.²⁹² They need not, and indeed should not, invoke the *Biakanja* factors that leave duty a wide-open discretionary exercise. Prosser's widely invoked but unfortunate passage about duty being nothing more than the sum total of all considerations would be banished, at least in the vast majority of cases. Nor would plaintiffs be faced with confounding statements that confuse duty with the other elements of negligence and

289. Herbert Wechsler, while director of the ALI, provided the best account of the extent to which Restatements should go beyond description and take account of normative matters: "[W]e should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." Herbert Wechsler, *Report of the Director*, 1967 A.L.I. 5, 5. That statement hangs on the wall of the ALI conference room at its headquarters in Philadelphia.

290. It would be foolish, in our view, for a Restatement to take sides among the schools clashing over the unitary metatheory that explains tort law. The late Gary Schwartz concurred with our opinion both in his own view that tort law is pluralistic, see Schwartz, *supra* note 217, and in his acknowledgement in the Third Restatement of moral and instrumental grounds to justify negligence. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 4 cmt. j (Discussion Draft 1999).

291. Thus, in *Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975), one finds the following three statements juxtaposed almost right next to each other in the court's opinion:

[E]very case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct. However, foreseeability of the risk is a primary consideration in establishing the element of duty. . . .

While duty is a question of law, foreseeability is a question of fact [that was established by the jury's finding of negligence].

(internal citations omitted). We find the first two statements irreconcilable. We cannot understand why, if a jury's finding of negligence includes a sufficient determination of foreseeability for duty purposes, foreseeability should play a redundant role in duty. The primary answer is not a satisfying one: it gives courts room to maneuver when they want cover to deny liability without the necessity of explaining the animating reason.

292. See, e.g., *Gipson v. Kasey*, 150 P.3d 228 (Ariz. 2007). In *Gipson*, the defendant provided Oxycodone to a coworker at a party for recreational use. The coworker shared it with her boyfriend who was killed by an overdose of a combination of the drug and alcohol. *Id.* at 229–30. The court was prepared to entertain adopting a default duty of reasonable care, but the plaintiff declined to argue that issue. In its "search" for the basis of a duty, the court found a statute making it illegal to provide a prescription drug to another without a prescription. *Id.* at 233–34.

which state that duty must somehow be “proved.” Where the defendant’s conduct created a risk, the Third Restatement makes it clear that a default duty exists and that courts need not attend to duty in the ordinary physical harm case. We understand E&K to agree with this effort, even if they are at odds with us on the role of foreseeability (a matter we address below).²⁹³

A second benefit is that recognizing a default duty of reasonable care leaves to the other elements of a negligence case the fact-intensive matters that are particularly appropriate for juries to decide. The spatial and temporal connection between the plaintiff and the defendant is a historical fact—the paradigmatic question that juries are asked to resolve. And the significance of that connection with respect to the ultimate question of liability is a narrow, fact-specific judgment—one more akin to the jury’s determination of negligence than the court’s categorical and precedent-bearing determination of duty. Thus, whether put as an inquiry into whether the harm that the plaintiff suffered was foreseeable at the time of the negligent act, or whether the harm was among the risks making the defendant negligent, or even, in *Palsgraf*-ian terms, whether the plaintiff was foreseeably threatened by the negligent conduct of the defendant, is better left for the element of proximate cause.

This brings us to the appropriate level of detail for duty determinations, a matter the Third Restatement does not explicitly resolve. By invoking a default duty of reasonable care, the Third Restatement does, however, take seriously Cardozo’s triumph over Holmes in the classic pair of cases *Baltimore & Ohio Railroad v. Goodman*²⁹⁴ and *Pokora v. Wabash Railway Co.*²⁹⁵ Holmes, in *Goodman*, sought to adopt specific duty rules that reflected the accumulated wisdom of the judge.²⁹⁶ In *Pokora*, Cardozo gently overruled *Goodman*, explaining that the myriad of circumstances that might arise, even for railroad crossing accidents, makes the adoption of judicial rules of conduct unwise.²⁹⁷ This “ethics of particularism” has been generally accepted in American tort law, even if it is often undermined by

293. See Esper & Keating, *supra* note 4, at 326 (“The fundamental problem is that courts are distorting the role of duty in negligence law by proceeding as though the existence of obligation in tort is always an open question. Duty cannot be an eternally open question . . .”). Even G&Z seem troubled at least by routine inquiries into the basis for a duty, although we understand them to be troubled by the nature of the inquiry rather than by the frequency with which it occurs. Their anti-instrumentalist version of tort law would bar instrumentalist considerations, subject to their concession described *supra* notes 205–07 and accompanying text.

294. *Balt. & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927).

295. *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934).

296. *Goodman*, 275 U.S. at 69–70.

297. *Pokora*, 292 U.S. at 100–03.

Biakanja-factor duty rulings.²⁹⁸

We recognize that in a system reliant on civil juries, the eight-hundred-pound gorilla in the courtroom is jury control. As observers of tort law appreciate, the gatekeeping function of the court is a pervasive matter, and one that is intimately tied up with the generality of duty rules. Duty—or more precisely, no-duty—is often employed to remove a case from the jury, and too frequently is based on the specific facts of the case. Like *G&Z*,²⁹⁹ *E&K*,³⁰⁰ and numerous other modern commentators,³⁰¹ the Third Restatement shares concern about this practice because it usurps the jury function. Duty should not be narrowed to the point that it becomes a ticket for a single ride on the tort railroad; when it does, the court has cut the jury out of its historical and proper role in the system. The Third Restatement therefore seeks to quell this practice.³⁰²

Nevertheless, courts appropriately rule as a matter of law on factual matters, including whether the defendant acted negligently or whether there is proximate cause when no reasonable jury could find otherwise. Although the outcome is the same whether the court relies on no-duty or no-breach or proximate cause as a matter of law, there is an important difference. The latter requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury. That imposes an appropriate psychological hurdle for a judge before so ruling. By contrast, a no-duty ruling takes the easy way out, laundering the decision of any requirement of jury deference. The caution produced by ruling as a matter of law preserves the jury function and provides analytical clarity by keeping the element of duty conceptually distinct from the elements of breach and proximate cause.³⁰³

For similar reasons, the Third Restatement banishes foreseeability from the duty calculus. We recognize that the Third Restatement's position on foreseeability does not conform to the preponderance of existing practice; most jurisdictions couch their statement of the ordinary duty as contingent on there being a foreseeable risk of harm.³⁰⁴ Nevertheless, the

298. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8 cmt. c & reporters' note to cmt. c (Proposed Final Draft No. 1, 2005).

299. Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 716–17.

300. Esper & Keating, *supra* note 4, at 324.

301. See, e.g., DOBBS, *supra* note 12, § 227, at 579–80; Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 843–44 (1997).

302. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. i (Proposed Final Draft No. 1, 2005).

303. See Rabin, *Duty Concept*, *supra* note 217, at 791.

304. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. j & reporters' note to cmt. j (Proposed Final Draft No. 1, 2005).

Third Restatement's position on foreseeability is justified by strong normative arguments. Many jurisdictions use the malleability of foreseeability as a convenient cover to decide the breach or proximate cause questions without the circumspection borne of recognizing that the court has decided a matter that is reserved in the first instance for the jury.³⁰⁵ The malleability of foreseeability also provides a cover for courts to obscure the real reasons for their decisions. Thus, as the California Supreme Court has expanded tort law in the area of economic loss, emotional harm, landowner liability, and affirmative duties, the foreseeable nature of the harm has often been invoked.³⁰⁶ Yet the reason for limiting duty in these arenas has nothing to do with the unforeseeability of harm. That one of us (Jonathan) is not subject to a legal duty if he decides not to rescue the other (Mike) who is unconscious in the middle of Interstate 80 is not due to the unforeseeability of harm. Harm is virtually certain to occur to Mike, but concerns about impinging on freedom and autonomy, and the difficulty of drawing a line defining a duty of easy rescue mandate not imposing a duty. Similarly, the reason for limiting liability for emotional harm has nothing to do with its unforeseeability. To the contrary, emotional harm is all too foreseeable and prevalent and the requisite line drawing too difficult to allow general liability for emotional injury. Indeed, the California Supreme Court acknowledged this rationale when it modified the foreseeability standard adopted in *Dillon v. Legg*³⁰⁷ for bystander recovery of emotional harm, adopting instead a more limited set of rules in *Thing v. La Chusa*.³⁰⁸

By eliminating foreseeability from duty determinations and providing that exemptions from the ordinary duty of reasonable care be based on articulated principle or policy, the Third Restatement both recognizes what

305. A telling example of this phenomenon is *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762 (La. 1999), in which the plaintiff, a customer of the defendant, was mugged in the defendant's parking lot. She alleged the defendant was negligent in failing to have security outside in the parking lot. *Id.* at 765. Relying on "foreseeability" to decide if the defendant owed the plaintiff a duty, the court proceeded to a *Carroll Towing* balancing of the foreseeable probability and magnitude of harm against the burden of providing a security guard—the breach analysis in other words—before concluding that there was insufficient foreseeability for the defendant to have a duty. *Id.* at 768–69. The court might well have reached the same conclusion and contributed to analytical clarity—our students' confusion is considerably enhanced when they come to *Posecai*—if the court had said that no reasonable jury could have found the defendant negligent for failing to employ security guards to patrol the parking lot.

306. E&K find this a reason to keep foreseeability in duty. See Esper & Keating, *Putting "Duty," supra* note 287, (manuscript at 5). Because we think that invoking foreseeability was a cover for other unarticulated reasons for expanding liability—it was neither necessary nor a candid explanation—we disagree with E&K.

307. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).

308. *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989).

courts do and seeks to encourage such activity to be self-conscious and transparent. We do not mean to claim that all such no-duty determinations will be wise or prudent. Rather, making those rationales transparent affords appellate courts, parallel jurisdictions, and commentators the opportunity to engage with the real basis of the decision instead of confronting often laughable conclusions of unforeseeability.³⁰⁹

As a means of illustrating the usefulness of the Third Restatement's approach, we return to the California Supreme Court and its much discussed decision in *Kentucky Fried Chicken of California, Inc. v. Superior Court* ("KFC").³¹⁰ The plaintiff in *KFC* was held hostage by an armed robber who demanded money from the restaurant's clerk.³¹¹ When the clerk stalled, the robber became agitated and intensified his threats to the plaintiff, which resulted in her suffering harm.³¹² The court held that the restaurant had no duty to comply with the demands of a robber.³¹³ Although the unforeseeability of the robber had been argued by the defendant as the basis for a no-duty decision, the court explained its concern that to hold otherwise might encourage other potential robbers to attempt robberies.³¹⁴

G&Z criticize this decision as "jarring," "half-baked," and relying on a "fatuous bit of policy analysis."³¹⁵ We are not sure if G&Z's objection is that the court engaged in a policy analysis *at all* or that the policy that the court invoked was misguided. If it is the latter, we have two observations: First, we do not necessarily share G&Z's assessment of the court's policy. The matter of whether and how criminals would respond to a duty on retailers to take reasonable care in responding to robbery demands is at bottom an empirical one, and we are far less sure than are G&Z regarding the effect that such a legal rule would have. Second, and more importantly, it was the court's explicit identification of the grounds for its decision that enabled G&Z's criticism and our rejoinder that courts and commentators ought to be more careful in attending to the empirical evidence underlying

309. See also Stapleton, *supra* note 217, at 1559 (advocating transparency in tort law in order to "identify the concerns of the courts . . . and evaluate those concerns"); Esper & Keating, *Putting "Duty," supra* note 284 (manuscript at 5) (identifying transparency as a virtue in judicial opinions).

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

311. *Id.* at 1262.

312. *Id.* The majority states she sought to recover for emotional harm. *Id.* A dissenting account provides that she sought recovery for physical injury. *Id.* at 1272 (Kennard, J., dissenting).

313. *Id.* at 1269.

314. *Id.* at 1270.

315. Goldberg & Zipursky, *Shielding Duty, supra* note 4, at 355–56.

policy reasoning.³¹⁶ It is precisely this combination of transparency and criticism that spurs progress in the law.

If, on the other hand, G&Z are critical of *KFC* for the court's reliance on any instrumental reasoning in denying a duty, that leads us to their claim that the way in which the duty issue is framed—whether based on G&Z's theory of duty as underlying obligation or the Third Restatement's ordinary duty with specified policy-based exemptions—will make a difference in the outcome. Our view of this is simply stated: we do not think that framing duty as “obligation” will quell courts' longstanding concerns about the effect of duty rulings on criminal conduct, otherwise socially desirable enterprise, risky behavior, insurance premiums, government decision making, and a host of other policy matters. Drive them underground it might, but we doubt courts will cease to employ instrumentalism in their thinking about the appropriate outcome of a case. The Third Restatement recognizes this and attempts to channel and make transparent such reasoning. This is not to say that obligational or even relational reasoning is not appropriate in certain categories of duty cases—it may be. It is the Third Restatement's position, however, that in the typical negligence case, the defendant's obligation is captured by the default duty of care. And in those cases in which obligation or relationality properly and genuinely bears on the result, such considerations ought to be balanced transparently with competing policies and principles.

VI. CONCLUSION

The Third Restatement continues a long trend—dating back to *Heaven v. Pender* in the case law, Holmes among commentators, and the Second Restatement—in recognizing a default duty of reasonable care with regard to causing physical harm.³¹⁷ This duty reflects moral and instrumental concerns that underlie tort law. Being pluralistic, it does not provide

316. As is so often the case, available empirical evidence does not resolve the matter. We have been unable to locate any research that investigates whether changes in noncriminal law affects the rate of crime. A review of effects of making crimes more costly—by imposing the death penalty, increasing sentences for crime, or increasing apprehension of criminals—reveals at most modest effects on the incidence of criminal activity. See Steven D. Levitt & Thomas J. Males, *Empirical Study of Criminal Punishment*, in *HANDBOOK OF LAW & ECONOMICS* 457 (A. Mitchell Polinsky & Steven Shavell eds., 2007). Modifying tort law to, in effect, make the rewards of certain criminal activity greater—for example, making hostage taking during a robbery yield more rewards to the criminal—is at least one step removed from changing criminal penalties, and, one would suspect, have even less of an effect on criminal behavior.

317. We leave for another day the role of duty with regard to other types of harm, such as emotional or economic, that tort law also addresses.

comfort to academics who seek monistic explanations for tort law.

The Third Restatement counsels that duty is a question of law that courts ought to take seriously.³¹⁸ Legal rules should be categorical and broad enough to cover the applicable principle or policy that justifies the rule. No-duty rulings similarly ought to be categorical and ought not be tickets good only for a single ride.

There are elements of a tort case that appropriately and adequately attend to the specific facts of a case. Whether some risk was foreseeable to a reasonable person at the time of the defendant's act, whether those risks included the risk that manifested in the plaintiff's harm, whether harm to the particular plaintiff was foreseeable, whether the defendant might have taken additional precautions, and whether the balance between potential precautions and the foreseeable risk recommends liability are all necessary and fact-dependent inquiries, appropriately and adequately resolved by the elements of breach or proximate cause. When courts have an intuition that liability should not be imposed for these reasons, they should confront the inhibition—but not prohibition—that what they are deciding is ordinarily a matter of fact and for the jury. They should not detour around that inhibition and rely on no-duty as the basis for decision.

Nevertheless, while this account of the proper role of duty is quite consistent with E&K's views (save for the role they see for foreseeability), we do not share their optimism that keeping duty in its proper place will change the contours of tort liability. The forces at work in the last generation of tort retrenchment are far too powerful to be tamed by coherent doctrine. Rather, we think that a proper account of duty should contribute to more coherence and less confusion in torts cases, to more transparency and less obfuscation in courts' analyses of the moral and policy-based underpinnings of their decisions, and to the maintenance of the long-standing separation of the roles of judge and jury. These feats, in themselves, are an awful lot to ask of an element of tort law that did not emerge until well after tort law had grown past early childhood in the middle of the nineteenth century.

318. See generally RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005).

