

A NEW LOOK AT DUTY IN TORT LAW: REHABILITATING
FORESEEABILITY AND RELATED THEMES

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This article addresses the subtle yet turbulent “duty wars” currently raging with respect to the conceptual nature of duty in tort law. The scholars have thus far divided principally into three camps, and the courts have increasingly been taking their cue from this scholarship and altering their previously settled notions of the duty element. The main dispute has been over the role of foreseeability in the duty analysis. This article critiques the principal approaches taken in the literature, demonstrating, for example, why the vision of duty articulated in the new Restatement (Third) of Torts and represented by one of the scholarly camps—“purging” foreseeability from duty—is incoherent. The article develops the framework for a different, positive conception of duty, a policy, not obligation, centered view, in which foreseeability is itself a normative policy sub-element different in nature from the sort of foreseeability that underlies the jury’s breach and proximate cause findings.

The methodological insight that engenders this conception concerns the “self-reflexive” nature of the court’s engagement with questions of law, in particular the duty question. While the community asks the first-order question what is the obligation we owe or should owe one another, the court self-reflexively addresses the higher-order questions of how it should rule on the duty issue, and what will be the impact of its ruling on the community and society. At those times, courts implicitly, and sometimes explicitly, speak of themselves and grapple with the judicial system’s institutional role, legitimacy, and limitations. Appreciating the court’s self-reflexive character enables us to show why, as an analytic matter, the inclusion of foreseeability in the court’s duty analysis does not usurp the jury’s role. This insight also grounds the new argument presented in this article for why duty arises from policy rather than obligation.

I. INTRODUCTION

After long inattention, the concept of duty in tort law is gaining currency.¹ Some scholars have been waging subtle yet turbulent “duty wars.”² Outside of the academy, tort and products liability

¹ See ALAN CALNAN, DUTY AND INTEGRITY IN TORT LAW 2, 126–27 n.9 (2009) (“By the early twentieth century, the entire venture had ground to a halt. To this day, . . . no post-Holmesian scholar has presented a metatheory of duty that transcends all of tort’s theoretical boundaries.”).

² W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 672 (2008)

litigants and their amicus supporters, sometimes motivated by the scholarship, increasingly dispute the issues of whether one actor owes another a duty and of which duty standard to apply.³ The prior and logically independent question is how to decide these matters, a question that must provoke reflection about the institutional concerns characterizing duty analysis, and decision-making processes generally. This sort of reflection has thus far been meager in the duty wars.

Aiming to correct this methodological lapse, this article proceeds critically and divides according to the three main camps in the contest over the nature of duty in tort law. The teams leading much of the duty debate line up in the following way. John C.P. Goldberg and Benjamin C. Zipursky start with the position that duty is primarily an obligation to provide care with regard to individuals specifically resembling the plaintiff and that, by virtue of this strongly relational and obligation-centered view, the duty concept is an essential and robust component in tort controversies.⁴ Dilan A. Esper and Gregory C. Keating offer a more balanced counterpoint, arguing that instrumental considerations such as deterrence play a somewhat greater role in duty determinations than Goldberg and Zipursky allow, and that duty is only weakly relational—and should not be applied in an overly particularized manner—because it runs broadly to any individuals who may foreseeably be harmed.⁵ Meanwhile, W. Jonathan Cardi and Michael D. Green follow the

[hereinafter Cardi & Green, *Duty Wars*]; Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 269–70 (2006) [hereinafter Esper & Keating, *Abusing "Duty"*]; John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 661–62 (2001) [hereinafter Goldberg & Zipursky, *Place of Duty*].

³ See Mem. of the Coal. for Litig. Justice, Inc., in Support of Defs.' Mot. to Establish an Unimpaired Docket, *In re Asbestos Litigation*, m 2004-03964 (11th Jud. Dist., Harris County Tex., May 3, 2004)(on file with author); Behrendt v. Gulf Underwriters Ins. Co., 768 N.W.2d 568, 581 n.5 (Wis. 2009) (Abrahamson, C.J., concurring) (noting that "[t]he concept of duty . . . is in 'turmoil,'" discussing, *inter alia*, Esper & Keating, *Abusing "Duty"*, *supra* note 2, at 268, and Cardi & Goldberg, *Duty Wars*, *supra* note 2, at 671); Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) (grappling with the duty standard, relying in part on W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 801(2005)) [hereinafter Cardi, *Purging Foreseeability*]; Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 821 (E.D.N.Y. 1999) (relying in part on John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1823 (1998) [hereinafter Goldberg & Zipursky, *Moral of MacPherson*], in determining the existence of duty).

⁴ See Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 662–63.

⁵ Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1241, 1251 (2008) [hereinafter Esper & Keating, *Putting "Duty" in its Place*].

lead of the Restatement (Third) of Torts in saying that duty derives from a mixture of obligation and instrumental objectives, but that foreseeability should be purged from the analysis.⁶

This article summons its new perspective about the legal decision-making process by critiquing the approaches taken by Goldberg and Zipursky, Esper and Keating, and Cardi and Green.⁷ As an explanatory prelude, Part II offers an overview of the larger discussion thus far in progress, and of several of the pivotal dualities that have coursed through the debate.⁸ Many of the issues discussed in this Part are likely to remain unresolved in the long run notwithstanding the various commentators' best efforts.

The divide will remain between those emphasizing that duty must consist in natural obligation flowing intelligibly out of the fabric of our liberal tradition,⁹ and those reducing duty, at least to some significant extent, to a discretionary policy outcome, one that is often aimed at wealth- or utility-maximization.¹⁰ Part III expresses dissatisfaction with Goldberg and Zipursky's adherence to the former approach.¹¹ That Part offers a new perspective on why legal duty, as courts announce it, is not constituted primarily by moral obligation, but is most clearly explained as an instrumental, policy-driven element in tort cases.¹² This argument finds grounding in the article's methodological thesis that courts' decision-making process is self-reflexive at some important level, and hence that in deciding duty courts say something about law's institutional role, capacities, and limitations.

Part IV critiques the views offered by the second duty team, Esper and Keating, and shows why their approach similarly under-

⁶ Cardi & Green, *Duty Wars*, *supra* note 2, at 682. Professor Calnan labels Goldberg and Zipursky, and likely also Esper and Keating, as "conceptual pragmatist[s]" on the duty issue in varying degrees, and explains why Cardi and Green and the *Third Restatement of Torts* represent the "instrumental pragmatist" perspective. CALNAN, *supra* note 1, at 2, 53, 129–30.

⁷ Because this article seeks to further the dialogue bridging theoretical ideas about duty and judicial interpretations, it shall not, except in passing, be concerned with another highly theorized point of view, that of deontologists such as Ernest Weinrib who, as Professor Calnan nicely puts it, "argue that duty is an immutable moral obligation grounded in Kantian and Hegelian notions of abstract right." CALNAN, *supra* note 1, at 2 (footnote omitted); see Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 119–26 (2001). However, as the reader will recognize, this article's critique of Goldberg and Zipursky applies, in important respects, to the deontological approach.

⁸ See *infra* Part II.

⁹ CALNAN, *supra* note 1, at 116.

¹⁰ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 9–11, 13, 15 (1960).

¹¹ See *infra* Part III.

¹² See *infra* Part III.B.

appreciates the ways in which judicial law articulation expresses the tort system's regulatory and efficiency aims.¹³ The emerging positive analysis explains that the judicial system's division of labor as between courts, which decide duty, and juries, which address breach, is best understood in terms of the self-reflexive roles assumed on each side.¹⁴ Juries as well as courts, in other words, speak of themselves and of their communities and institutions, respectively. While helping us to generally navigate the duty dilemma, this understanding provides an important analytical tool for explaining, for instance, why the sort of particularized duty rulings that so vex *Esper* and *Keating* may sometimes be appropriate.¹⁵

The team of *Cardi* and *Green* have been the most eloquent spokespersons on behalf of the duty conception announced in the Restatement (Third) of Torts.¹⁶ Their principal focus has been on the most clawing dispute in the duty wars, namely, the role of foreseeability in the duty determination.¹⁷ In support of the Third Restatement's perspective, *Cardi* and *Green* maintain that the relational view of duty—one that includes the foreseeability sub-element—is “inferior” for a number of reasons.¹⁸ Part V, centering on a critique of *Cardi* and *Green*'s work, shows that the Restatement's purging of foreseeability renders its conception of duty incoherent.¹⁹ Appreciating courts' self-reflexive character enables us to show why, as an analytic matter, the inclusion of foreseeability in the judicial duty analysis does not usurp the jury's role.

The main hope for this article is that the framework for a coherent, positive conception of duty emerges from the critique of the main duty war camps. The article concludes that the courts' grappling with duty is ultimately instrumental and policy-laden. The foreseeability factor provides the court with a central policy constituent within the larger duty determination. Exclusion of this factor would be arbitrary and loose the duty analysis in tort law

¹³ See *infra* Part IV.A.

¹⁴ See *infra* Part IV.A.

¹⁵ See *infra* Part IV.B.

¹⁶ See *Cardi* & *Green*, *Duty Wars*, *supra* note 2, at 673, 726–32; see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7 (2010).

¹⁷ See *Cardi* & *Green*, *Duty Wars*, *supra* note 2, at 722–26; see also *Holdampf v. A.C. & S., Inc.* (*In re N.Y.C. Asbestos Litig.*), 840 N.E.2d 115, 122 (N.Y. 2005) (“New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis.”).

¹⁸ *Cardi* & *Green*, *Duty Wars*, *supra* note 2, at 713–14.

¹⁹ See *infra* Part V.

from its moorings.

II. OVERVIEW OF THE DUTY DEBATE

Because duty is considered strictly a legal affair, the court rather than the fact-finder decides both how and what to decide.²⁰ This helps judges manage the legal system. But some say such large discretion also reduces duty to a “pious aphorism[]” detached from principled analysis.²¹ If judges’ threshold rulings know no bounds, then perhaps it is best to cull out inappropriate factors they may consider, and perhaps foreseeability is a prime candidate. Foreseeability, after all, appears to be inherently fact- and case-specific, and hence not conducive to development of the sort of general principles with which duty is concerned.²² The Restatement (Third) of Torts aligns with these intuitions.²³

The controversy over the role of foreseeability in tort duty goes back to *Palsgraf*,²⁴ which smeared the cat out in equal parts, sort of.²⁵ Cardozo’s majority held that lack of foreseeability meant no duty.²⁶ Judge Andrews objected that “[i]t is the act itself, not the

²⁰ See *Kirksey v. Tonghai Mar.*, 535 F.3d 388, 391 (5th Cir. 2008); *Novak v. Seiko Corp.*, No. 01-35002, 2002 U.S. App. LEXIS 9594, at *17 (9th Cir. May 16, 2002) (“[D]uty is a legal issue to be decided by the court.”).

²¹ Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025 (1928).

²² See *Rishel v. A.P. Constr., Inc.*, No. L-296-06, 2011 WL 13691, at *2 (N.J. Super. Ct. App. Div. Jan. 5, 2011). The *Rishel* court stated:

A major consideration in the determination of the existence of a duty of reasonable care under ‘general negligence principles’ is the foreseeability of the risk of injury . . . In addition, the determination of such a duty ‘involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.’ . . . The analysis leading to the imposition of a duty of reasonable care is ‘both fact-specific and principled,’ and must satisfy ‘an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.’

Id. (citations omitted).

²³ 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7, cmt. j (2010) (“Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice . . .”).

²⁴ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

²⁵ John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger’s “Cat Paradox” Paper in* 124 PROC. OF THE AM. PHIL. SOC’Y 323, 328 (1980) (“If one has left this entire system to itself for an hour, one would say that the cat still lives *if* meanwhile no atom has decayed. The ψ -function of the entire system would express this by having in it the living and dead cat (pardon the expression) mixed or smeared out in equal parts.”) (translating Erwin Schrödinger, *Die gegenwärtige Situation in der Quantenmechanik*, 23 NATURWISSENSCHAFTEN 807 (1935)).

²⁶ *Palsgraf*, 162 N.E. at 99–100 (“Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming,

intent of the actor, that is important.”²⁷ Getting scienter out of the discussion would have left open the possibility that the railroad was liable for all harm caused by its agents’ negligence.²⁸ But, especially in the contemporary tort reform climate, courts also extract foreseeability from duty in rationalizing no-duty outcomes.²⁹

Eliminating the foreseeability sub-element of the duty analysis is a facially neutral move.³⁰ The logical pull resulting from such a doctrinal shift, however, is generally toward diminished accountability. Consider first a duty standard that includes the foreseeability component; when the underlying facts indicate that a harmful outcome was generally foreseeable, the pull is in favor of the lawsuit surviving the initial judicial oversight.³¹ When, on the other hand, harm was not foreseeable, the judge will tend to conclude there is no duty.³² But even if the judge concludes the harm was foreseeable, the case may be eliminated at a later stage,

with reference to her, did not take to itself the quality of a tort . . . The risk reasonably to be perceived defines the duty to be obeyed.”); *see also* *Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.*, 952 P.2d 768, 772–73 (Colo. App. 1997).

²⁷ *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) (citing *Hover v. Barkhoof*, 44 N.Y. 113 (1870); *Mertz v. Conn. Co.*, 112 N.E. 166 (N.Y. 1916)).

²⁸ *Id.* at 103–04. Judge Andrews adopted the then-budding legal realist position on causation, explaining that the “proximate” causation determination is “arbitrarily” a function of convenience and public policy. *Id.* at 103. “This is not logic. It is practical politics.” *Id.* Affirming the lower appellate ruling in *Ms. Palsgraf’s* favor, however, necessarily also meant upholding the duty element absent foreseeability.

²⁹ *See, e.g.*, *Holdampf v. A.C. & S., Inc. (In re N.Y.C. Asbestos Litig.)*, 840 N.E.2d 115, 119 (N.Y. 2005) (“[F]oreseeability bears on the scope of a duty, not whether a duty exists in the first place”).

³⁰ *See generally* *Gipson v. Kasey*, 150 P.3d 228, 231 (Ariz. 2007) (“Foreseeability . . . is more properly applied to the factual determinations of breach and causation than to the legal determination of duty. . . . We believe that such an approach desirably recognizes the jury’s role as factfinder and requires courts to articulate clearly the reasons, other than foreseeability, that might support duty or no-duty determinations.”) (citations omitted); *Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986) (expressing the view that the fact-intensive “reasonable foreseeability” inquiry “is so vague that it has little practical value”); *see also* 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7, cmt. j (2010).

³¹ *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) (“Properly defined, duty is the legal obligation owed by defendant to plaintiff to conform to a reasonable person standard of care for the protection against unreasonable risks of harm. A risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant’s conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm.”) (citations omitted).

³² *Keebler v. Winfield Carraway Hosp.*, 531 So. 2d 841, 844 (Ala. 1988) (“[T]he existence of such a duty depends on whether Dr. Hall knew that Keebler was likely to commit suicide. We have held that . . . the question of whether a legal duty exists is essentially a question of law for the court, to be resolved by determining whether the injury was foreseeable.”) (citations omitted); *Maurer v. 8539, Inc.*, No. 01-09-00709-CV, 2010 WL 5464160, at *3 (Tex. App. Dec. 30, 2010) (noting that an employer “generally has no duty to protect an employee from the unforeseeable criminal acts of a third party” (citing *Barton v. Whataburger, Inc.*, 276 S.W.3d 456, 461 (Tex. App. 2008))).

namely, during the breach-of-duty or proximate-cause determination.³³

Next consider a duty standard that does *not* include the foreseeability component. Absent this sub-element, a large swath of cases in which an injurious result was foreseeable may nevertheless be eliminated by the court at the gateway without benefit of jury consideration. This is because the foreseeability of the harm would count for nothing in the initial judicial assessment of a dismissal motion. Where, however, harm was not foreseeable, those cases, once again, would in all events not survive the breach-of-duty or proximate-cause evaluation.³⁴ The net loss of actionable cases is evident.

This result-minded vantage point is important to understanding the practical effect of any particular theoretical approach and sometimes may reveal the agendas underlying the competing duty analyses. Weighing the benefits against the detriments of enhanced versus diminished access to compensatory relief is, however, a separate matter from the raw project of conceptualizing duty. This article takes a new look at the concept, mostly leaving legislative concerns to interested advocates.

On other fronts, a central, albeit fairly academic question has been whether the duty element in tort law flows principally from categorical moral obligations that are, or ought to be, incorporated into tort jurisprudence or whether courts for the most part resolve, or ought to resolve, the duty question based on instrumentalist concerns that privilege societal welfare.³⁵ Those in the former camp tend to argue that the law of torts is most beneficially seen as the ordering of a set of individual entitlements to various means for accomplishing one's private purposes,³⁶ while a compelling contrary

³³ *E.g.*, *Higazy v. Millennium Hotel & Resorts*, 346 F. Supp. 2d 430, 456 (S.D.N.Y. 2004) ("To the extent a hotel owes a broader duty to prevent confusion of ownership after an emergency evacuation, *Higazy* cannot establish proximate causation, which shields a defendant in a negligence suit from liability for unforeseeable injuries." (citing *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 166, 169 (N.Y. 1980)); *Pavelko v. Breg, Inc.*, No. 09-cv-1461-PAB-KMT, 2011 WL 782664, at *5 (D. Colo. Feb. 28, 2011) ("[T]he risk associated with this use was entirely unforeseeable, and defendant did not breach any duty by not warning doctors about it.").

³⁴ See cases cited *supra* note 33.

³⁵ See W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 988 (2005) [hereinafter *Cardi, Reconstructing Foreseeability*]; Jane Stapleton, *The Internal Point of View in Law and Ethics: III. Torts and the Internal Point of View in Legal Theory: Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1556 (2006).

³⁶ Arthur Ripstein, *Tort Law in a Liberal State*, J. TORT L., June 2007, at 20, 23–24, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1049&context=jtl> (citing Immanuel Kant, *The Metaphysics of Morals*, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 394

view is that tort law aims, at least implicitly, at efficient allocations of loss and general utility.³⁷ The article suggests a new argument in favor of the view that duty is primarily a matter of policy rather than obligation.

Other controversies that have arisen in debating the duty concept, perhaps more apposite to law's practice, have included the following: whether duty should be viewed in general terms, or constructed on a case-by-case basis;³⁸ whether injury to a right versus foreseeable loss constitutes the basis of negligence liability;³⁹ and whether duty is "relational"—that is, defined by the duty-to-whom consideration—or is instead act centered.⁴⁰ This article touches on these issues to the extent that they are relevant to its critical analysis and positive thesis.

III. A CRITIQUE OF GOLDBERG AND ZIPURSKY'S VERY RELATIONAL VIEW OF DUTY

A. *Goldberg and Zipursky's Obligation-Centered View of Duty*

In their defining critique published in the *Vanderbilt Law*

[6:238] (Mary Gregor ed. & trans., 1996) (1797).

³⁷ See Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99, 108–09 (David G. Owen ed. 1995) ("In Aristotle's theory of corrective justice . . . the duty to rectify a wrong is simply that—a duty— . . . [and] the theory of corrective justice quickly runs out of steam") (footnote omitted); Keith N. Hylton, *The Internal Point of View in Law and Ethics: III. Torts and the Internal Point of View in Legal Theory: Duty in Tort Law: An Economic Approach*, 75 *FORDHAM L. REV.* 1501, 1501 (2006).

³⁸ Cardi & Green, *Duty Wars*, *supra* note 2, at 671.

³⁹ Ernest J. Weinrib, *The Disintegration of Duty*, *in* *EXPLORING TORT LAW* 143, 162–63 (M. Stuart Madden ed., 2005).

⁴⁰ Compare Cardi & Green, *Duty Wars*, *supra* note 2, at 718 ("In our view, people think about their daily actions in a way that is act centered, not relational."), and Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1256 ("[P]otential injurers usually cannot treat the different people and diverse interests endangered by their conduct in different ways."), with Cardi, *Reconstructing Foreseeability*, *supra* note 35, at 965 ("[D]uty generally (or at least often) is relational . . ."), and Linda Ross Meyer, *Unruly Rights*, 22 *CARDOZO L. REV.* 1, 12 (2000) ("[R]ights' add an important dimension not articulated by duties, as they not only give voice to self-respect, but they also make duties relational—binding our duties to persons, rather than principles."), and Benjamin C. Zipursky, *Sleight of Hand*, 48 *WM. & MARY L. REV.* 1999, 2022 (2007) ("[N]egligence law in fact has rich relational duties. The form of breach that actually applies to negligence law, therefore, must be such that we can think of it as failing to use care toward plaintiff. The duty to use ordinary care can be conceived of relationally in this manner: it is a matter of taking ordinary care toward plaintiff.") (footnote omitted); *but see* CALNAN, *supra* note 1, at 48–49 ("[T]he average negligence case actually raises three different duty issues: (1) *Whether* the defendant owes any duty at all; if so, (2) *to whom* the duty extends; and (3) *what* the duty requires the defendant to do or refrain from doing.") (emphasis in original).

Review's 2001 Symposium on the then-proposed Restatement (Third) of Torts, Goldberg and Zipursky objected to the exclusion of duty as a black letter element in the definition of negligence.⁴¹ In accord with the ultimately published volume,⁴² section 3 in the Discussion Draft sparsely provided that “[a]n actor is subject to liability for negligent conduct that is a legal cause of physical harm.”⁴³ Section 6 then admitted duty through the back door, as a limiting device, allowing that:

[e]ven if the defendant’s negligent conduct is the legal cause of the plaintiff’s physical harm, the defendant 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 special problems of principle or policy that justify the withholding of liability.⁴⁴

Crediting the legal realism of Holmes⁴⁵ and Prosser⁴⁶ for inaugurating a duty skepticism,⁴⁷ Goldberg and Zipursky determine that this instrumentalist approach is off base because “concepts of right and duty are regarded as essential analytical tools among even the jurisprudentially ‘hard-headed.’”⁴⁸ As this quotation suggests, their paper is primarily concerned with the nature of restatements of the law. So Goldberg and Zipursky puzzle over whether it may be legitimate or useful for such a work to depart from “ordinary judicial usage,” which, of course, is replete with talk of duty.⁴⁹

When courts speak of duty, say Goldberg and Zipursky, they ordinarily use the term to refer to an existing obligation of care owed by the defendant to people within the particular plaintiff’s

⁴¹ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 660.

⁴² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM (2010).

⁴³ RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 (Discussion Draft 1999); *accord* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010).

⁴⁴ RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 (Discussion Draft 1999); *accord* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(b) (2010).

⁴⁵ OLIVER WENDELL HOLMES, *THE COMMON LAW* 35 (1938) (“[Judicial policy-based] legislati[on] [is] the secret root from which the law draws all the juices of life.”).

⁴⁶ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 96, 682 (5th ed. 1984) (discussing the relational duty doctrine of privity in tort law as an example of society’s viewpoint in the nineteenth century); *see also* William L. Prosser, *Palsgraf Revisited*, 52 *MICH. L. REV.* 1, 15 (1953) (“There is a duty if the court says there is a duty. Duty is only a word with which we state our conclusion that there is or is not to be liability.”).

⁴⁷ *See generally* Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 3, at 1785–86.

⁴⁸ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 662.

⁴⁹ *Id.* at 662, 668 (“Restatements are supposed to articulate rules of law that draw their authority from the courts that adhere to them.”).

class.⁵⁰ In other words, the “primary sense” in which courts use duty is its obligation sense.⁵¹ They acknowledge that sometimes, though, jurists resolve duty issues by applying the term in a different way. Goldberg and Zipursky identify three such alternative senses.⁵²

Apart from obligation, the second judicial use of the term “duty” is much like the one described in section 6 of the Discussion Draft. In these cases, courts engage in no-duty reasoning by finding an insufficient, or overly remote, “nexus” between the parties. The defendant’s conduct may have constituted a breach of a general duty, but not one running to the particular plaintiff.⁵³ The nexus requirement is featured in cases such as *Edwards v. Honeywell, Inc.*,⁵⁴ wherein Chief Judge Richard A. Posner used the duty concept to preclude liability on the part of a fire alarm system seller to the estate of a firefighter who arrived belatedly at the purchaser’s home. Honeywell, said Judge Posner, “was entitled to dismissal of the suit because it had no duty of care to firefighters engaged in fighting a fire on its customer’s premise.”⁵⁵

The third—and second alternative—sense of duty discussed by Goldberg and Zipursky arises from the courts’ occasional efforts “surreptitiously to shrink the scope of the rule stating that the breach issue ordinarily is for the jury.”⁵⁶ In other words, courts sometimes decide breach issues “under the guise” of deciding the question of duty in its primary sense.⁵⁷ This happens, for the most part, when courts dismiss cases on a lack of duty ground based on the unforeseeability of the particular sort of accident or other injurious incident.⁵⁸ According to Goldberg and Zipursky, in these cases the defendant will have owed a duty of care to individuals such as the plaintiff, but their conduct cannot be deemed to have

⁵⁰ *Id.* at 705–07.

⁵¹ *Id.* at 699 (“Duty in its primary sense raises the issue: Was the defendant obligated to the plaintiff to exercise care to avoid causing (or to prevent) the sort of harm suffered by the plaintiff?”).

⁵² *Id.* at 698–99.

⁵³ *Id.* at 709.

⁵⁴ *Edwards v. Honeywell, Inc.*, 50 F.3d 484 (7th Cir. 1995).

⁵⁵ *Id.* at 492.

⁵⁶ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 713.

⁵⁷ *Id.*

⁵⁸ *Id.* at 713–14; *e.g.*, *Albert v. Hsu*, 602 So. 2d 895, 898 (Ala. 1992) (finding “no duty” owed by defendant’s restaurant to patron struck by car driven by third party in defendant’s parking lot); *Washington v. City of Chicago*, 720 N.E.2d 1030, 1033 (Ill. 1999) (finding that the city owed “no duty” to plaintiffs for faulty design of raised street median under circumstances in which fire truck, driving into that median, had lost control and struck plaintiffs’ car).

been unreasonable because the risk of injury was small or not sufficiently apparent.⁵⁹ Goldberg and Zipursky suggest, as an heuristic device, that “[w]hen courts find themselves talking about ‘duty’ at a very high level of specificity, they may well be talking not about duty at all, but about breach.”⁶⁰

Finally, Goldberg and Zipursky acknowledge a fourth sense of “duty”—the “exemption” sense—which aligns with Posner’s policy-based understanding that, in the nineteenth and twentieth centuries, “as liability for negligence expanded, the judges felt a need to place limitations on its scope and to rein in juries, and the concept of duty was revived to name some of these limitations and to exert some control over juries.”⁶¹ For Goldberg and Zipursky, these sorts of decisions, albeit “only one part of the story,”⁶² hold that even if the defendant owed a duty to plaintiff in the primary obligation sense of the term, “there are special reasons of policy or principle not to permit the cause of action to go forward,”⁶³ such as the potentially excessive litigation and liability burden that might be imposed upon a certain type of defendant.⁶⁴

Recognizing the importance of the instrumentalist view of duty—the fourth sense of duty just noted—Goldberg and Zipursky give some good reasons why the obligation sense does not simply “collapse” into the exemption sense.⁶⁵ For one thing, courts do often indeed speak of duty as obligation, and restatements ought to take their cue from the raw data to be restated.⁶⁶ Also, courts may sometimes determine a duty exists even when their best policy sense indicates it is better not to have liability.⁶⁷ Next, structured

⁵⁹ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 714–15; *see* Peterson v. Spink Elec. Coop., 578 N.W.2d 589, 593 (S.D. 1998) (determining the defendant electrical company retained by farmer to fix motor owed “no duty” to farmer’s son who was shocked by extension cord, which had an unforeseen defect, after defendant had replaced blown fuse); Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531, 532–533 (N.Y. 1981) (determining that the scope of landowner’s duty did not extend to placing protective fence around baseball field to shield spectators from foul balls).

⁶⁰ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 717.

⁶¹ *Id.* at 721; Edwards v. Honeywell, Inc., 50 F.3d 484, 488 (7th Cir. 1995).

⁶² Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 718 (footnote omitted).

⁶³ *Id.*

⁶⁴ *E.g.*, Strauss v. Belle Realty Co., 482 N.E.2d 34, 36 (N.Y. 1985) (“Considerations of privity are not entirely irrelevant in implementing policy. Indeed, in determining the liability of utilities for consequential damages for failure to provide service—a liability which could obviously be ‘enormous,’ and has been described as ‘*sui generis*,’ rather than strictly governed by tort or contract law principles—courts have declined to extend the duty of care to noncustomers.” (emphasis in original) (citation omitted)).

⁶⁵ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 721.

⁶⁶ *Id.*

⁶⁷ *Id.* at 722.

concepts like those underlying the obligation sense of duty are “superior” to policy judgments because they tend to be more “law-like”; in this respect, obligation but not policy engenders predictability, stability, the capacity to offer guidance, and also a buffer against vulnerability to political pressure.⁶⁸

Goldberg and Zipursky do not offer much in the way of explaining what “obligation” means, or what it derives from. They cryptically state that duty as obligation links fault and liability as a matter of legal, not moral, principle because “it is only *duties recognized by courts* that generate liability.”⁶⁹ But Alan Calnan says what Goldberg and Zipursky roughly mean. Calnan largely adopts Ronald Dworkin’s view that duty requires a principled analysis, and grounds this analysis in “foundational principles—most especially, liberal-moral principles rooted in American history, law, culture, and values.”⁷⁰ And, like Goldberg and Zipursky, Calnan does not take a deontological view grounding duty in “immutable moral obligation.”⁷¹ Rather, as he puts it, in the end, the judge improvises a “substratum of normative requirements, tapping into cultural traditions, local customs, or community *morés*.”⁷² In like manner, Goldberg and Zipursky have earlier described duty as “the set of obligations that matches, roughly, what citizens believe about the care they owe one another.”⁷³

B. A New Argument in Favor of the Policy Approach to Duty

Others have criticized Goldberg and Zipursky’s approach. In another symposium piece, for instance, Robert L. Rabin explains that, rather than diminishing predictability, stability, and the capacity to guide, the policy-based exemption sense of duty engenders quite the opposite, namely, bright line rules that enhance

⁶⁸ *Id.* at 722–23.

⁶⁹ *Id.* at 731.

⁷⁰ CALNAN, *supra* note 1, at 3.

⁷¹ *Id.* at 2, 131 n.23. Cf. Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 424 (1992) (“In natural right theory, the embodiment of the abstract will in one’s body and property creates rights that other agents are under a duty to respect. The duty is owed specifically to the holder of the right, and the violation of that duty entitles the holder of the right to a legal remedy.”); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 486 (1987) (“Kant’s notion of normativity is extraordinarily elegant. Obligation refers to what *must* be *done* and raises the philosophical problem of how the elements of necessity and action are combined. If they were separate, how could action be subject to obligation except by an impermissible inference of what ought to be done from what is done?”) (footnote omitted).

⁷² CALNAN, *supra* note 1, at 15.

⁷³ Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 3, at 1744.

tort law's certainty.⁷⁴ Indeed, "predictability is in fact their *raison d'être*."⁷⁵

Patrick J. Kelley bemoans the substantive poverty of Goldberg and Zipursky's notion that duty in its primary obligation sense serves as the legal nexus between fault and liability when the courts so recognize.⁷⁶ He argues that "this argument solves the problem of form in only a trivial sense, by showing a plausible logical relationship between duty, unreasonable conduct, and liability."⁷⁷ So Goldberg and Zipursky's notion is "a purely formal solution to the rule-of-law problem with duty, as it works whatever substantive content the courts give to 'duty,' for whatever reason."⁷⁸

Other criticisms of Goldberg and Zipursky's approach by key duty wars scholars are discussed below.⁷⁹ Before reaching those, however, we suggest a new argument in response to the widely held view voiced by Goldberg and Zipursky that duty primarily maps obligation, not policy.

The simple beginning is that courts decide some issues and juries determine others. According to the well-worn idea, "the controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts."⁸⁰ This distinction arises from the different competencies of the judge and jury, the former knowing how to navigate technical or complex legal principles and the latter being immersed in its community's routines and shared experiences.⁸¹ The categories of law and fact blur at the edges, but conceptualizing them distinctly has traditionally served an important administrative function by virtue of which authority over legal outcomes is distributed in a way that helps stabilize law's legitimacy.⁸²

⁷⁴ Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 799 (2001).

⁷⁵ *Id.*

⁷⁶ Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1050 (2001).

⁷⁷ *Id.* at 1051.

⁷⁸ *Id.*

⁷⁹ See *infra* Part IV.

⁸⁰ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

⁸¹ See Joseph P. Liu, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 COLUM. L. REV. 1223, 1225–26 (1993).

⁸² Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 380 (1999) ("The drive to limit the law-finding function was entirely a judge-led exercise, carried out . . . [first and foremost to satisfy] the growing desire for stability in the law.").

A salient notion is that law's realm, unlike fact's, involves the articulation of propositions that effect not only the immediate case "but all others that fall within its terms."⁸³ As Monaghan observes, declarations of law, in some strict sense, thereby trade in "conclusions about the existence and content of governing legal rules, standards, and principles. The important point about law is that it yields a proposition that is *general* in character."⁸⁴ Factual findings, by contrast, are case-specific statements not about the truth of the matter in some absolute sense but rather about the cogence of the evidence.⁸⁵

The jury's ultimate function is to apply the law, as stated by the judge, to the facts. Addressing whether, for example, a defendant exercised reasonable care in shipping a dangerous product without warning, the jury engages in "ad hoc norm elaboration" and a complex psychological process of mining and applying community standards.⁸⁶ Jury outcomes tend predominantly to reflect local norms of behavior, and on occasion when the law may seem at odds with those norms, the jury's allegiance may lean toward the norm rather than the rule.⁸⁷

But even all of this begs the question somewhat. The pronouncements courts make are at least somewhat self-reflexive; the courts not only are competent to interpret, and do interpret, the constitutional and legal rules at play in controversies over which they have subject-matter jurisdiction,⁸⁸ but they do so by means of saying something about themselves as an institution. The doctrine of *stare decisis* and the common law method of constructing authority do not necessarily involve self-reflexive exercises, but create a fertile ground for the courts' evolving institutional self-awareness.⁸⁹

⁸³ HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 350 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Found. Press, Inc. 1994) (1958).

⁸⁴ Monaghan, *supra* note 82, at 235.

⁸⁵ *Id.* at 235–36.

⁸⁶ *Id.* at 236; Daniel J. Steinbock et al., *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261, 274–75 (1988).

⁸⁷ Valerie P. Hans & Andrea J. Appel, *The Jury on Trial*, in A HANDBOOK OF JURY RESEARCH § 3.03(b), at 3–14 (Walter F. Abbott & John Batt eds., 1999).

⁸⁸ Cf. Davina Cooper, *Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property*, 32 LAW & SOC. INQUIRY 625, 649 (2007) ("[T]he generation of a self-reflexive sense of 'who we are' may invariably follow authoritative assertions of collective stewardship, as occurred at the High Court . . .").

⁸⁹ See *Hubbard v. United States*, 514 U.S. 695, 711 (1995) ("Adherence to precedent also serves an indispensable institutional role within the Federal Judiciary. *Stare decisis* is a 'basic self-governing principle within the Judicial Branch, which is entrusted with the

The self-reflexive impulse has also historically grounded the courts in their development of an embodied legal philosophy. At the outset of his magisterial two-volume study of American legal history, for instance, Morton J. Horwitz noted the historical tendency of judges “with some regularity to reason about the social consequences of particular legal rules.”⁹⁰ The New York court in 1805 refused to apply the common law rule allowing a downstream mill owner to recover for water flow obstructions occurring upstream, because doing so would deprive the public “of the benefit which always attends competition and rivalry.”⁹¹ The same year, in a federal case before the Circuit Court for the District of Pennsylvania, Judge Richard Peters remarked, “I believe with Professor Smith, in his ‘Wealth of Nations,’ . . . that distributing the burthen of losses, among the greater number, to prevent the ruin of a few, or of an individual, is most conformable to the principles of insurance, and most conducive to the general prosperity of commerce.”⁹² Scholars sometimes underplay this aspect of common law methodology by linking self-reflexivity somewhat exclusively with post-modernism.⁹³

A court’s talk about itself, and about the anticipated societal impacts of its decision-making, necessarily transcends the case before it. This is not to say, of course, that courts go awry in making statements about specific cases. Law school pedagogy aims at stripping the philosophical fat off of future jurists’ succulent undergraduate minds. Then, too, the court may be the trier of fact

sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an ‘arbitrary discretion.’”) (citations omitted); *Senor T’s Rest. v. Indus. Comm’n*, 641 P.2d 877, 881 (Ariz. Ct. App. 1981) (Froeb, J., concurring) (“To me, the result is a garbled judicial voice which destroys our institutional role and reduces the court to a mere case-by-case, error-correcting function based upon shifting sands of authority. On the other hand, the principle of *stare decisis* is well served where one department is disposed to follow an earlier precedent except where disagreement flows from the most cogent of reasons. The stability and credibility of the court as a court is enhanced and its precedents furnish a proper guide to the superior court.”). *Cf.* Stapleton, *supra* note 35, at 1531–32 (“[B]y neglecting the fundamentally different functions of final courts of appeal and trial courts, Goldberg and Zipursky fail to perceive the force of precedent to guide and structure the development of the law.”).

⁹⁰ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 2 (1977).

⁹¹ *Id.* at 3 (quoting *Palmer v. Mulligan*, 3 Cai. R. 307, 314 (1805) (Livingston, J.)).

⁹² *Id.* (quoting *Thurston v. Koch*, 4 Dall. 348, 352 (C.C.D. Penn. 1805) (Peters, J.)).

⁹³ See Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1075–78 (1994) (discussing differences between Justices Scalia and Rehnquist on postmodern self-reflexive reasoning in relation to the *Teague* rule).

in any case.⁹⁴ The judge is then expected to act as a lay fact-finder, drawing upon everyday experiences and community norms, even as it becomes less important to rigidly apply protective evidentiary rules.⁹⁵

As the court speaks self-reflexively in its role as guardian of the law, so to the jury (or judge as fact-finder) speaks of its community when rendering a verdict.⁹⁶ The fact-finder aims not only for a case-specific approximation of the truth of the matter, but also aims at recognizing and giving voice to various community norms.⁹⁷ There are limitations placed upon the ability of the fact-finder to resort to community values in some circumstances, particularly where any such appeal may undermine the need for case-specific findings.⁹⁸ But overall, the community's general norms are a constituent in the fact-finder's deliberation about the reasonableness of a litigant's conduct, and a conventional ingredient in the American jury system.

Now if duty in its primary sense connotes obligation—that which matches roughly, “what citizens believe about the care they owe one

⁹⁴ *E.g.*, *Africa v. City of Philadelphia (In re City of Phila. Litig.)*, 158 F.3d 723, 727 (3d Cir. 1998) (“[A] party’s participation in a bench trial without objection waives any Seventh Amendment right to a jury trial that the party may have had.”) (citing *Wilcher v. City of Wilmington*, 139 F.3d 366, 378–79 (3d Cir. 1998)).

⁹⁵ Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1369 (1987).

⁹⁶ *See, e.g.*, M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 361 (1999) (“Juries serve to inject community values into the legal process.”) (citing Stephen Landsman, *The History and Objectives of the Civil Jury System*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 22–60 (Robert E. Litan ed. 1993) (tracing the history of the jury and its evolving roles and purposes)).

⁹⁷ *See Ashcroft v. ACLU*, 535 U.S. 564, 576 (2002) (featuring both sides agreeing that jurors consider community standards when deliberating upon child internet pornography prosecutions, while disagreeing about the nature of the community considered); *Barry v. Edmunds*, 116 U.S. 550, 564–65 (1886) (“It was [the jury’s] right to look to the particular circumstances of the case, and give such damages as the facts were deemed by them to warrant, and as would, in their judgment, be adequate, not only for compensation, but also for prevention.” (internal quotation marks omitted)); *Jong Hi Bek v. United States*, No. 2:08-CV-290 RM, 2008 U.S. Dist. LEXIS 96284, at *34 (N.D. Ind. Nov. 24, 2008) (“The jury was instructed to consider the evidence to determine whether Dr. Bek was distributing controlled substances other than for a legitimate medical purpose or not within the bounds of professional medical practice and to consider testimony relating to ‘norms’ of professional practice when making this determination.”).

⁹⁸ *United States v. Koon*, 34 F.3d 1416, 1443 (9th Cir. 1994) (“A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.”) (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)).

another,” as Goldberg and Zipursky say⁹⁹—why is it necessary, or a legal desideratum, or even beneficial, for courts but not juries to control this issue? The notion that courts decide general principles while juries address only case-specific findings is neither accurate, as shown, nor integral. What prevents the jury from doing a good and legitimate job of determining, based on community norms and collective experiences, whether individuals in the defendant’s circumstance owe a duty of care to other individuals such as the plaintiff?

Let’s look at a case that Goldberg and Zipursky hold out as “present[ing] the primary duty issue in its cleanest form,” *Harper v. Herman*.¹⁰⁰ For Goldberg and Zipursky, it is relatively clear in *Harper* what the defendant’s prudent course of action would have been, and the question squarely presented is whether he had an obligation to persons such as the plaintiff to pursue that course.¹⁰¹ In that case, some guests, including twenty-year-old Harper, joined Herman on his boat.¹⁰² When the boat set anchor in waters Herman knew to be shallow, Harper suddenly dove in, severing his spinal cord.¹⁰³ The court ruled that, because Harper was a responsible adult who may reasonably be expected to appreciate the “inherent dangers of water,” Herman had no affirmative duty to warn him that the water might be shallow.¹⁰⁴

There are all sorts of people in a community. Some own boats, many own other sorts of property, most have guests on occasion, and most are themselves guests from time to time. If duty in its primary sense is a matter of obligation, raising principally questions of community norms and beliefs, then it seems the jury could have determined whether Herman owed Harper a duty to warn. The Minnesota Supreme Court considered, for instance, whether Harper may have been “particularly vulnerable,” may have “lacked the ability to protect himself,” or may have “expected any protection from Herman.”¹⁰⁵ These being constituent sub-issues within the court’s duty analysis, and qualitatively similar to issues normally addressed by the jury, there seems little pull in the direction of allocating such matters exclusively to the court.

⁹⁹ Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 3, at 1744.

¹⁰⁰ Goldberg & Zipursky, *Place of Duty*, *supra* note 2, at 701 (discussing *Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993)).

¹⁰¹ *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993).

¹⁰² *Id.* at 473.

¹⁰³ *Id.* at 474.

¹⁰⁴ *Id.* at 475.

¹⁰⁵ *Id.* at 474–75 (citing *KEETON ET AL.*, *supra* note 46, § 56, at 374).

While scholars fret over the nature of duty, everyone agrees that duty is a legal issue to be decided by the court. Why not begin the analysis, then, with a known quantity rather than with an obscure conceptual dilemma? If we stipulate that duty—unlike breach, causation, or harm—is a legal question uniquely suited for judicial determination, the most reasonable explanation should be that duty issues are indeed different from questions arising from the other negligence elements. The difference is one between duty’s policy-related nature, which implicitly or explicitly considers institutional limitations and the judiciary’s domain, and the factual nature of reasonableness of conduct, which derives from ad-hoc norm elaboration and community standards of care.

What confronted the *Harper* court was not, in the main, an abstract conception of obligation as it may have evolved historically in the American cultural tradition,¹⁰⁶ although that concept may have had some play. Rather, the more pressing and forward-looking matter was whether the court should welcome institutional responsibility for inaugurating a regime that discouraged community members from using their property (whether owned or rented, real or personal) freely for social purposes. A duty finding, and the consequent liability, would effectively impose a tax upon such activities as might engender rescue opportunities.¹⁰⁷ That the court would also weigh the Dworkinian “fit” of the case’s outcome to law’s ongoing representation of community values,¹⁰⁸ a higher-order inquiry implicating policy and institutional self-reflection, is consistent with this paper’s thesis.

Policy approaches and commitments develop over time. The elegant Dworkinian ideas of horizontal and vertical integrity, the interpretations by which, in other words, tort duty declarations “fit[] and justifi[y]” present values, doctrines, and structures, as well as historical traditions, have no necessary or exclusive connection to the obligation view of duty.¹⁰⁹ An interpretive explanation centered on horizontal and vertical coherence is not itself an argument for any particular conception of duty, but rather helps demystify *either* the obligation *or* the instrumentalist understanding. Fit and justification constraints discipline courts in their tweaking of the

¹⁰⁶ CALNAN, *supra* note 1, at 2–3, 32.

¹⁰⁷ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 143–44 (1987) (comparing liability for performing a rescue to a tax on activities that would give rise to a duty to rescue).

¹⁰⁸ CALNAN, *supra* note 1, at 5, 22–23, 120; RONALD DWORKIN, *LAW’S EMPIRE* 239 (1986).

¹⁰⁹ DWORKIN, *supra* note 108, at 231, 237, 239.

policy commitments underlying duty decisions.¹¹⁰

IV. A CRITIQUE OF ESPER AND KEATING'S SOMEWHAT RELATIONAL VIEW OF DUTY

A. *Esper and Keating's Weak Relational View of Duty*

Esper and Keating create the second major front in the duty wars. They define the divide between the court's legal duty realm and the jury's factual realm as one between law articulation and law application.¹¹¹ Courts, in other words, articulate the legal standard, whereas juries apply that standard to the facts of the case.¹¹² That, leastwise, is the scheme of things. The unfortunate reality, say Esper and Keating, is that courts have been abdicating their judicial obligation and usurping the jury's role by issuing overly particularized rulings in the name of duty to attain preferred outcomes, a trend enabled by intellectual dishonesty.¹¹³

Esper and Keating agree with Goldberg and Zipursky that law's artificial duty of reasonable care derives from "a natural moral obligation to respect—[or] not to harm—other people and their property."¹¹⁴ By issuing case-specific duty rulings, and by thereby tending to hold that *D* had no duty to do *X*, *Y*, and *Z* in circumstances in which \forall , Φ , and Ψ narrowly obtain, courts issue no-breach-as-a-matter-of-law rulings disguised as no-duty rulings.¹¹⁵ This practice devalues the physical integrity of the person by carving out an expanding no-duty realm that increasingly immunizes defendants from accountability, and, in effect, permits interests in real property and economic activity to swallow tort concerns.¹¹⁶

Esper and Keating want law to assert that *D* has a duty to act reasonably in relation to those whom *D*'s conduct may foreseeably

¹¹⁰ See generally *Miles, Inc. v. Scripps Clinic & Research Found.*, 810 F. Supp. 1091, 1097 (S.D. Cal. 1993) (referring to the patient's right to make autonomous decisions as an important policy consideration); *Matt v. Burrell, Inc.*, 892 S.W.2d 796, 797 (Mo. Ct. App. 1995) (using policy considerations to find that a duty of reasonable care exists); *Duncan v. Rzonca*, 478 N.E.2d 603, 613 (Ill. App. Ct. 1985) (using public policy consideration in assessing whether or not there is a duty).

¹¹¹ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1229.

¹¹² *Id.*

¹¹³ *Id.* at 1225, 1236, 1240.

¹¹⁴ *Id.* at 1242.

¹¹⁵ *Id.* at 1228.

¹¹⁶ *Id.* at 1231, 1235, 1237 n.46.

imperil.¹¹⁷ This provides the correct, rather *weak* relational concept of duty; in this articulation, foreseeability gives the minimal relational condition.¹¹⁸ Esper and Keating's view is weakly relational because foreseeability stretches duty broadly across classes of individuals, without much concern for their local positions and activities. In contrast, Goldberg and Zipursky believe that duty is *strongly* relational, a function of plaintiffs' particularized relations with defendants, and they concomitantly view wrongdoing as personal, "a matter of a wrong done to this particular plaintiff by this particular defendant."¹¹⁹

Esper and Keating refuse to join Goldberg and Zipursky in renouncing instrumentalism nearly wholesale in favor of obligation. Instead, they find a place for instrumental considerations in negligence law, notably when considering the extent to which liability may promote deterrent efficiency.¹²⁰ While agreeing that the tort scheme accommodates a plurality of values, however, Esper and Keating's principal view is that instrumentalism "cannot capture" the fundamental moral sentiments underlying this area of the law.¹²¹ Tort law is primarily motivated by the resentment people feel about harms wrongfully inflicted, and talk about accident prevention costs and efficient loss allocation "denies the intrinsic value of persons."¹²²

B. *Why the Obligation View Increases Particularized Duty Rulings*

Esper and Keating's perspective is enticing. A tight, elegant view unfolds; there is a moral obligation to avoid foreseeable harm. Duty is primarily a matter of moral obligation, not instrumental policy considerations. Therefore, foreseeability is naturally a constituent of duty—at least in a minimal, relational sense—and duty is an expansive element rarely in need of particularized discussion in

¹¹⁷ *Id.* at 1232.

¹¹⁸ *Id.* at 1241.

¹¹⁹ *Id.* at 1251 (footnote omitted); see 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, 340 (2006) ("[C]omprehending . . . duty in its primary sense calls for a relational inquiry that asks whether the alleged tortfeasor owed it to persons such as the victim to take reasonable care to avoid causing harm of the type suffered by the victim."); Goldberg & Zipursky, *Moral of MacPherson*, *supra* note 3, at 1832–39 (explaining how duty in the common law of negligence is dependent on the relationship between the plaintiff and the defendant).

¹²⁰ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1246–47.

¹²¹ *Id.* at 1245, 1249 n.72.

¹²² *Id.* at 1244.

cases.

The problem is that this view is not adequately descriptive of the structure of American tort law. For instance, Esper and Keating agree with Goldberg and Zipursky “that legal obligation tracks moral obligation,”¹²³ but acknowledge that legal obligation “can also be articulated in ways that conflict with and undermine our moral obligations.”¹²⁴ Most notorious is the rescue construct. As Esper and Keating say, that duty tracks moral obligation is importantly qualified by, *inter alia*, “the absence of a duty to attempt an easy rescue of a helpless stranger.”¹²⁵

Otherwise, the rescue paradigm falls squarely within Esper and Keating’s view of duty. Esper and Keating do not adequately grapple with this departure from their understanding of duty, and their saving some room in negligence law for instrumental considerations does not explain why moral principle is subordinate to policy in this area. Generally, they take as a given that the overlap of moral legal duty and moral principle in many other scenarios must reflect the priority of individual right and the inviolability of persons over instrumental policy and societal benefit.¹²⁶

It is significant that the traditional rescue paradigm—involving the “easy rescue of a helpless stranger”¹²⁷—barely sets the minimal no-duty armature in today’s tort reform climate. Advocates of extravagant constriction of tort plaintiffs’ compensatory rights seek an ever-expanding rescue construct.¹²⁸ To the extent that these sorts of initiatives succeed, then even by Esper and Keating’s own terms, in this circumscribed area of tort jurisprudence, policy-based duty determinations swallow the whole.

For law’s purposes, the rescue concept is a theoretical construct, and therefore only those potential rescuers falling within the theoretical parameters qualify for the no-duty defense.¹²⁹ However,

¹²³ *Id.* at 1246.

¹²⁴ *Id.*

¹²⁵ *Id.* at 1246 n.66 (quoting Stapleton, *supra* note 35, at 1556).

¹²⁶ See Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1247–48.

¹²⁷ Stapleton, *supra* note 35, at 1556.

¹²⁸ *E.g.*, James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 SW. U. L. REV. 595, 595 (2008); *but cf.* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 251, 268–92 (1980) (endorsing a general duty to rescue within law’s ethical traditions).

¹²⁹ See Christophe Jamin, *Saleilles’ and Lambert’s Old Dream Revisited*, 50 AM. J. COMP. L. 701, 705 (2002) (quoting Raymond Saleilles, *Droit civil et droit comparé*, 61 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 24 (1911) (Fr.)) (“A juridical construct is the enunciation as a positive formula of rational ideas, drawn from social perspective, and

this doctrine gives the courts empirical control over Esper and Keating's philosophical argument, which concedes policy's priority over principle in rescue determinations. And to the extent that courts increasingly address expansive rescue claims in a variety of tort settings, the explicit focus is equivalently on policy argument.¹³⁰

In other respects, Esper and Keating revisit Keating's prior argument that risks of death and devastating harm are not suitably offset by "taking only efficient or cost-justified risk precautions against such risks,"¹³¹ that "[w]hen everything is given a price, everything is fungible with everything else at some ratio of exchange,"¹³² and that reliance upon "the morality of the market . . . denies that some goods—like life—are more valuable than others—like convenience or fine wine."¹³³ In these respects, Esper and Keating's dissatisfaction with the policy-based approach to duty is marred not so much by its failure to appreciate instrumentalism's capability to make the injured plaintiff whole, as by a sort of naïveté about the capability of non-instrumental law to accomplish this. Although it seems counterintuitive that an individual who has suffered devastating harm would not be worse off once compensated, the notion of being made whole by virtue of compensatory payments is the language of both law and economics.¹³⁴ Yet, damages may be inadequate in either event, even discounting for the risk of harm less than one. And incommensurabilities may prevent any charting of indifference, at least *ex ante*, to loss of well-being versus legal compensatory relief.

This, however, is not an argument for or against the instrumental view of duty. In fact, in this portion of their paper, Esper and Keating locate the divide within negligence law *in toto*, and not specifically within the duty debate.¹³⁵ It seems that by Esper and

reduced to specifics which eliminate, as far as is possible, any form of [the] arbitrary."); Cees P. Middendorp, *On the Conceptualization of Theoretical Constructs*, 25 QUALITY & QUANTITY: INT'L J. METHODOLOGY 235, 235 (1991).

¹³⁰ See *Young v. Conroy*, No. 01-354 ADM/RLE, 2002 U.S. Dist. LEXIS 1423, at *7-9, *12 (D. Minn., Jan. 25, 2002); *Deal v. Kearney*, 851 P.2d 1353, 1358 (AK 1993).

¹³¹ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1248 (discussing Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159 (2005)).

¹³² C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159, 167 (2005); Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1248.

¹³³ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1248.

¹³⁴ See *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) ("[T]he reason that we compensate people (that is, transfer money from defendants to plaintiffs) is because rights that are grounded in considerations of humanity have been violated. We believe that it is humane to monetize welfare losses associated with grief, pain and suffering, humiliation, mental anguish, and other intangible injuries so that we can make plaintiffs whole.").

¹³⁵ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1246.

Keating's reckoning, whether a defendant has taken sufficient precaution, however this is quantified, is a question of breach and not duty.¹³⁶ After all, it is they who protest particularized duty determinations.

But also overlooked by Esper and Keating, it is simplistic to assume that imposing a duty to take inefficient precautions would merely result in enhanced protections for the potential victim's well-being. Rather, included within the condition defining that individual's well-being must be the opportunity to partake of the defendant's presence, activity, or product, inclusive of cost-justified risk precautions. The actors have choices, and the duty on the part of one of them to subsidize the other without a calculable probability of benefit—and indeed with a likelihood of loss—would mostly motivate her to do otherwise. This would not obviously benefit the potential victim, would not reflect the choice she would make, and would most likely diminish the welfare of the class of similarly situated individuals.

Nor does it appear that Esper and Keating view the privileging of moral over policy principles as relevant to the undue particularization of duty rulings. They note that the heart of this concern about case-specific duty determinations “lies elsewhere,” namely, with Goldberg and Zipursky's strongly relational view of duty, by which obligations “run from this named defendant to this named plaintiff.”¹³⁷ But an open question, not addressed by Esper and Keating, is whether the moral obligation perspective may actually increase the odds of particularized duty rulings. To a degree, policy is inherently generalized, and to a degree, as well, moral considerations focus on the validity of norms in concrete cases.¹³⁸

The tendency toward particularity of decision-making is conspicuous in contexts that expressly claim privilege for moral or natural obligation. The communal pledge binding individuals to their specific society, and the moral particularism that this signifies, has been important in the history of morality.¹³⁹ For the

¹³⁶ *Id.* at 1228.

¹³⁷ *Id.* at 1249–51.

¹³⁸ See generally Brad R. Roth, *Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice*, 6 J. INT'L CRIM. JUST. 215, 226 (2008), available at <http://jicj.oxfordjournals.org/content/early/2008/04/08/jicj.mqn012>; Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 986 (1995) (“[In] contests involv[ing] moral and political issues . . . the meaning of the rule is determined by moral and political judgments at the point of application.”).

¹³⁹ See HYAM MACCOBY, *THE PHILOSOPHY OF THE TALMUD* 47 (2002).

moral particularist, the moral relevance of any feature depends on the context of the one case, features thereby have variable relevance, and “a feature that is a reason in one case may be no reason at all, or an opposite reason, in another.”¹⁴⁰ By this view, moral considerations are decided “on a case by case basis.”¹⁴¹ Biblically, it is a moral duty to fight against *that* regime (Hittites, Amorites, Canaanites, Perizzites, Hivites, Jebusites, *et al.*).¹⁴² And in the rabbinic concept of morality, “[d]uties are relative to circumstances, to persons, [and] to times.”¹⁴³

Interestingly, Esper and Keating believe Richard Posner’s cost-benefit analysis in *Davis v. Consolidated Rail Corp.*,¹⁴⁴ based on the Hand Formula, convincing on the point that “the question to be asked is not whether injury to the *plaintiff himself* might reasonably have been foreseen,” but rather injury to *someone generally*.¹⁴⁵ Although Esper and Keating say that Posner’s “economic conception of negligence . . . is properly criticized as not relational”—in that it “rejects the idea of duty as obligation to other people”—they acknowledge that this approach does not “impair Posner’s account of the ‘calculus of risk’ . . . [because he] is capable of fine lawyering.”¹⁴⁶ But perhaps it is his perspicacious handling of this issue that makes Posner capable of fine lawyering. *Davis* counters not only a particularized idea of duty but also the view that “instrumentalism cannot capture” the fundamental “moral sentiments” underlying tort law.¹⁴⁷

¹⁴⁰ JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 7 (2004).

¹⁴¹ Brad Hooker, *Rule-Consequentialism*, in *ETHICAL THEORY: AN ANTHOLOGY* 482, 490 (Russ Shafer-Landau ed., 2007).

¹⁴² MACCOBY, *supra* note 139, at 65 (citing *Deuteronomy* 20:17–18).

¹⁴³ *Id.* at 125. Alan Cooper gives a textual analysis of the relationship between the mandate at *Exodus* 23:5 (paraphrased by Cooper as “if you see your enemy’s loaded ass recumbent, although you might be tempted to interfere with it in one way or another, you must leave it alone”) and at *Deuteronomy* 22:4 (“If you see your fellow’s ass or ox fallen on the road, do not ignore it; you must help him raise it”). Alan Cooper, *The Plain Sense of Exodus 23:5*, 59 *HEBREW UNION COLLEGE ANNUAL* 1, 1–3 (1988). Either way, the duty runs to particulars. Of course, God may be policy-making, but then where are we? See JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* 16 (1764) (“There can be no prescription old enough to supersede the law of nature, and the grant of God Almighty . . .”). The author thanks Beth Berkowitz for suggesting and sharing Cooper’s fine article.

¹⁴⁴ *Davis v. Consol. Rail Corp.*, 788 F.2d 1260 (7th Cir. 1986).

¹⁴⁵ Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1258–59; see *Davis*, 788 F.2d at 1264 (“Although the crew had no reason to think that Davis was under a car, someone—whether an employee of Conrail or some other business invitee to the yard (such as Davis)—might have been standing in or on a car or between cars . . .”).

¹⁴⁶ Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1259 n.98.

¹⁴⁷ *Id.* at 1245, 1249 n.72.

C. Efficient, Particularized Duty Analysis is Not All Bad

Important aspects of Esper and Keating's analysis tend to homogenize duty's constituent factors. Rhetorically, this approach is coherent, but it may ultimately result in a confusion of categories and concepts. Duty is typically seen as "a bifurcated element [in tort actions], consisting of what we shall term duty *A* (duty to whom),"¹⁴⁸ the relational term,¹⁴⁹ "and duty *B* (duty to do what),"¹⁵⁰ the act centered term.¹⁵¹

Bifurcation of the duty concept promotes analytic clarity and efficient outcomes.¹⁵² Foreseeability has typically been deemed a sub-element within each prong. Foreseeability is by its nature neither exclusively relational nor act centered. Nor is foreseeability by its nature more aptly associated with moral principles than with policy considerations. Either way, the level of foreseeability selected as a constituent of the duty analysis is designed, in part, to salve the community's resentment about the harm inflicted.

Foreseeability is relational precisely in the way that Esper and Keating say. "Generally, [in most jurisdictions, an actor] owes a duty of care to all persons who are foreseeably endangered by [the actor's] conduct with respect to all risks [that] make the conduct

¹⁴⁸ Alani Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673, 684 (2010).

¹⁴⁹ *E.g.*, *Pryor v. Resort Condos. Int'l, Inc.*, No. IP98-1370-C-T/G, 2000 U.S. Dist. LEXIS 10199, at *7 (S.D. Ind. July 19, 2000) ("The Pryors . . . alleg[ed] that the [defendant] knew, or should have known, of the inherent danger [of criminal conduct] surrounding the Villas Jazmin and had a duty to warn individuals similarly situated to the Pryors, but failed to do so."); *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745 (7th Cir. 2007) (applying "strict liability to 'all persons in the distributive chain of a defective product.'" (quoting *Prompt Air, Inc., v. Firewall Forward, Inc.*, 707 N.E.2d 235, 238 (Ill. App. Ct. 1999)); *Murphy v. Mactaw, Inc.*, No. S0653-06 Cncv, 2006 Vt. Super. LEXIS 37, at *4 (Vt. Super. Ct., Chittenden Cnty. Dec. 20, 2006) ("[The plaintiff's] complaint suggests . . . the employer's duty of care towards Pete's employees as a group and also a duty of care owed personally to the decedent . . . to take appropriate measures to avoid exposing them to such risk.").

¹⁵⁰ Golanski, *Paradigm Shifts in Products Liability and Negligence*, *supra* note 148, at 684.

¹⁵¹ *E.g.*, *Kelley v. Howard S. Wright Constr. Co.*, 582 P.2d 500, 505 (Wash. 1978) ("Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas."); *Esparza v. Skyreach Equip., Inc.*, 15 P.3d 188, 198 (Wash. Ct. App. 2000) ("[A] post-sale duty to warn arises after a manufacturer has sufficient notice about a specific danger associated with the product.") (citation omitted).

¹⁵² See generally Golanski, *Paradigm Shifts in Products Liability and Negligence*, *supra* note 148, at 673, 684–86, 698–708 (discussing how Henderson's conflation of duties in *James A. Henderson, MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in *TORTS STORIES* 41, 53 (Robert L. Rabin & Stephen D. Sugarman eds. 2003) leads to logically inconsistent outcomes).

unreasonably dangerous.”¹⁵³ Foreseeability also, however, plays an additional substantive role, and helps courts determine what care is due. A manufacturer, for example, ordinarily owes end users a duty to test its products for dangers that may be deemed foreseeable to an expert in that manufacturer’s field, and is presumed to possess all of the available medical or scientific studies available to that expert community.¹⁵⁴ And “some types of issues, such as those relating to the obviousness of product-related [or other] risks, present a hybrid tending to meld duty *A* (whether to warn the group to which the risk may be obvious) and duty *B* (whether to provide a more specific warning) concerns.”¹⁵⁵

Nor is foreseeability, in either its relational or act centered guise, a one-tiered concept. In standard negligence law, for example, a tortfeasor will ordinarily be deemed to have had actual or constructive notice of a defect or danger if similarly injurious incidents or accidents previously occurred.¹⁵⁶ Products liability law, as just suggested, has often relaxed this standard by presuming that the seller knew what was discoverable at the time of sale, and thereafter.¹⁵⁷

Considerations of fairness and efficiency motivate the layered foreseeability standards. If life-threatening risks are scientifically

¹⁵³ See *Beugler v. Burlington N. & Santa Fe Ry. Co.*, 490 F.3d 1224, 1228 (10th Cir. 2007) (quoting *Iglehart v. Bd. of Cnty. Comm’rs of Rogers Cnty.*, 60 P.3d 497, 502 (Okla. 2002)).

¹⁵⁴ See *Rosa v. City of Seaside*, No. C 05-03577 JF, 2006 U.S. Dist. LEXIS 12530, at *8 (N.D. Cal. Mar. 7, 2006); *George v. Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089–90 (5th Cir. 1973) (“[T]he manufacturer is held to the knowledge and skill of an expert. . . . The manufacturer’s status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved.”) (footnotes omitted).

¹⁵⁵ Golanski, *Paradigm Shifts in Products Liability and Negligence*, *supra* note 148, at 685 (citing *City of Jackson v. Ball*, 562 So. 2d 1267, 1270 (Miss. 1990) (“[T]he dangerous product user need give no further warning after the contractor . . . has actual knowledge of the danger.”) (citation omitted); *Graham v. Ryerson & Sons*, 292 N.W.2d 704, 707 (Mich. Ct. App. 1980) (“[T]here is no duty to warn of dangers obvious to all users . . . or of specific dangers fully known to the complainant at the time the injury occurred.”)).

¹⁵⁶ See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 116 (1992) (“[A] prior incident had given the city notice of the risks of entering the sewer lines.”) (footnote omitted); *Mobile & Ohio R.R. Co. v. Vallowe*, 73 N.E. 416, 418 (Ill. 1905) (“Where the question of notice of a dangerous defect is involved, evidence of prior similar accidents has been deemed competent on that question.”) (citation omitted).

¹⁵⁷ See, e.g., *Cover v. Cohen*, 461 N.E.2d 864, 871 (N.Y. 1984) (“Although a product be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn.”) (citations omitted).

knowable at the time the sophisticated manufacturer sells its product, the seller is capable of learning this and the presumption fairly creates an incentive for it to invest in safety research. And because the manufacturer has greater expertise than the consumer and is generally better able to calculate the costs and benefits of safety steps, and to exercise preventative care, the presumption's allocation of costs to the seller fosters efficiency.¹⁵⁸ As one scholar says, "[t]he tort duty is predicated on information costs, and so the substantive content of any duty to facilitate consumer decisionmaking should also account for those costs."¹⁵⁹

D. Accounting for the Courts' Self-Reflexiveness

To say, as Esper and Keating do, that the court's legal duty realm is one of law articulation, in contrast to the jury's factual law-application assignment,¹⁶⁰ is not necessarily to fire a conceptual arrow into the heart of particularized duty rulings. Courts know they articulate law, and believe this is their way of doing so. One appellate court stated, "[t]he existence of a duty is a question of law to be determined by the court. . . . Appellee had no duty to anticipate that appellant would stuff multiple hot rolls in his mouth."¹⁶¹ We may argue that this is application, not articulation, but as courts have the jurisdiction to decide their own jurisdiction,¹⁶² they have authority to cleave "law" and "fact."¹⁶³

Nor does the law-articulation/law-application analysis follow an easy demarcation. If, in their particularized duty determinations, courts disguise "no breach as a matter of law" rulings as "no duty" rulings, as Esper and Keating say,¹⁶⁴ it may also be argued on the

¹⁵⁸ See generally Guido Calabresi & Kenneth C. Bass, III, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 76–89 (1971) (discussing how determining liability can lead to a more efficient and optimal allocation of costs).

¹⁵⁹ Mark A. Geistfield, *Products Liability*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS: TORT LAW AND ECONOMICS 287, 314 (2d ed. 2009).

¹⁶⁰ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1229.

¹⁶¹ *Gauci v. Ryan's Family Steak Houses, Inc.*, Nos. L-03-1248, L-03-1322, 2004 WL 1595132, at *2 (Ohio Ct. App. July 16, 2004) (citation omitted).

¹⁶² *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947).

¹⁶³ *E.g.*, *Nascimento v. Preferred Mut. Ins. Co.*, 513 F.3d 273, 276 (1st Cir. 2008) (citing *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 530 (Mass. 2003); *Specialty Nat'l Ins. Co. v. OneBeacon Ins. Co.*, 486 F.3d 727, 732 (1st Cir. 2007)) ("[T]he interpretation of an insurance policy and the application of policy language to known facts pose questions of law for the court to decide."); *cf.* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

¹⁶⁴ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1228.

other side that duty holdings rooted in the general obligation to avoid foreseeable harm cloak proximate cause decisions.¹⁶⁵ Indeed, Jonathan Cardi writes, “[b]y conditioning duty on whether one could foresee injury to the particular plaintiff (‘plaintiff-foreseeability’) or whether the type or manner of the injury was foreseeable, judges strip from juries their task of deciding proximate cause.”¹⁶⁶

Self-reflexiveness provides a more favorable, albeit analytically challenging, route to tightening the duty concept. Consider by analogy the traditional definition of a contract: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹⁶⁷ We make promises. Courts define the set of promises that are contracts, and contract law supplies regions—the overlap of “competent parties, lawful subject matter, legal consideration, mutual assent and mutual obligation”—in which to assign correspondence sets.¹⁶⁸

By a similar token, we swim in a sea of moral and non-moral, general and particular, obligations. As Quine said, “[i]t is hard to pick out a single distinguishing feature of moral values”¹⁶⁹ We owe an obligation when we should perceive that we do, and this is the case when our breach gives rise to some level of collective resentment because it violates a governing norm society may reasonably be expected to infer.¹⁷⁰ So we try to meet those expectations as best we can. When we fail to do so, the community ascribes fault.

Sometimes the court provides a remedy to those harmed by our perceived wrongdoing. Somewhat similar to the contract definition, we can say that duty in tort is an obligation or set of obligations to

¹⁶⁵ *United States v. Baxter*, 394 F. App’x 377, 379 (9th Cir. 2010) (“The United States met its burden of establishing proximate cause by showing how Vicky’s harm was generally foreseeable to casual users of child pornography like Baxter.”).

¹⁶⁶ Cardi, *Purging Foreseeability*, *supra* note 3, at 741.

¹⁶⁷ RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

¹⁶⁸ *See Henke v. U.S. Dep’t of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996) (citing 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 1990)); *cf. Hailin Jin et al., Stereoscopic Shading: Integrating Multi-frame Shape Cues in a Variational Framework*, 1 PROC.: IEEE CONF. ON COMPUTER VISION & PATTERN RECOGNITION; HILTON HEAD ISLAND, SOUTH CAROLINA, JUNE 13–15, 2000, at 169, 172 (2000).

¹⁶⁹ W.V. Quine, *On the Nature of Moral Values*, 5 CRITICAL INQUIRY 471, 473 (1979).

¹⁷⁰ *See generally* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS (1990), *reprinted in* MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 179, 197 (Stephen Darwall et al. eds., 1997) (setting forth a theory for how normative systems governing and dictating individual behavior are developed via inference and “sense-experience”).

adhere to a particular standard of care, which the law recognizes as binding across the community, and for the injurious breach of which the law allows a private remedy.¹⁷¹ Obligations are multiform. Whether the mechanism should be deemed to rest on corrective, distributive, efficiency, or other core goals, the tort case survives at the threshold when the court deems the injury claim cognizable and remediation possible, and when it determines that the sort of obligation at issue falls within the legitimate sphere of its regulatory role.¹⁷² Policy circumscribes the set of obligations that constitute duties and assigns the legal gravity of any such obligation. As to most of our perceived obligations—*e.g.*, to place a book back on the shelf in proper order, the breach of which may harm the next seeker—we cannot meaningfully ask whether these constitute a legal duty.¹⁷³ Nor, as seen from the discussion of the no-duty-to-rescue doctrine, is bodily integrity the defining factor.¹⁷⁴

That a tort duty is an obligation for the breach of which the law allows a remedy also counts, in another way, in favor of the policy view of duty. A moment's carelessness, a small distraction, can result in massive loss.¹⁷⁵ The moral lapse may be small, the violation of one's obligation momentary, but the actor was at fault and liable to make her victim whole.¹⁷⁶ There will be less

¹⁷¹ *Cf.* *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) ("Duty is defined as an 'obligation, recognized by law, which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm.'" (quoting *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 366 (Ariz. 1985))); *A.W. v. Lancaster Cnty. Sch. Dist.* 0001, 784 N.W.2d 907, 914 (Neb. 2010) ("[W]e have defined a 'duty' as an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another." (citing *Schmidt v. Omaha Pub. Power Dist.* 515 N.W.2d 756 (Neb. 1994))).

¹⁷² *See* *Bangert v. Shaffner*, 848 S.W.2d 353, 355–56 (Tex. Ct. App. 1993). The court joined the group of courts that have decided to provide a remedy to athletes harmed by other players' reckless or intentional misconduct, continuing the grant of immunity only within the reasonable confines of the players' consent to physical contact. *Id.*

¹⁷³ *But cf.* H.L.A. HART, *THE CONCEPT OF LAW* 87 (2d ed. 1994) ("[T]he insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations."). We take a weaker view of "obligation" rooted in the perception of obligation rather than in a conceptual analysis of actual obligation, although Hart, too, may be speaking of perceptions. There is little social pressure underlying the rule that we fill the parking meter before our time expires, yet we perceive an obligation to do so. *See* *Rector v. City & County of Denver*, 122 P.3d 1010, 1016 (Colo. App. 2005) ("[L]ate fees assessed for parking meter violations arise out of a consumer obligation . . ."). Also, one may think of shelving books and paying meters as "conventions," but to the extent that neglect engenders some harm we may aptly perceive an obligation to conform to those conventions. *See* Heidi M. Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945, 1022 (1990).

¹⁷⁴ *See supra* notes 125–35 and accompanying text.

¹⁷⁵ Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387, 388 (David G. Owen ed., 1995).

¹⁷⁶ *Id.* at 388, 389.

justification for, and legitimacy to, a full-fledged compensatory remedy—as the law requires—when the announced legal duty is deemed a direct expression of moral obligation.¹⁷⁷ There are compelling policy reasons, however, for allocating the loss, even to its full extent, to the person at fault.¹⁷⁸ Courts do not partake of the higher order reflection that characterizes some of Ronald Dworkin's¹⁷⁹ or Joseph Raz's¹⁸⁰ work, but courts develop an embodied legal philosophy—thereby structuring a self-reflective analysis of law's parameters—by virtue of their legal rulings, and principally in duty determinations.

Esper and Keating's own writing betrays a confusion in their law articulation/law application approach. They say, for instance, that “jury adjudication is a reasonable procedure for settling reasonable disagreement about what we owe to each other in the way of careful conduct.”¹⁸¹ Esper and Keating are here intuitively referencing community norms, a setting in which jurors are speaking about themselves and about their community's belief structures. But this rich view of duty differs from the flat, generalized approach Esper and Keating otherwise take.¹⁸² In contrast, by our terms, duty consists in the court's self-reflexive policy determination. Settling on the obligations that we owe one another, *if framed by the community's lights*, could shift to the jury. The question is not what we call it, but what statement is really being made, which norms are at issue, and at what level the norms are being addressed.

The court's duty language—“[t]he risk reasonably to be perceived within the range of apprehension”¹⁸³—does not sound exactly like

¹⁷⁷ *Id.* at 390 (“The idea that how things go for a person should bear some sort of relation to how well he has acted informs our assessment of the world on all sorts of fronts.”).

¹⁷⁸ See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 275 n.2 (1979) (Blackmun, J., dissenting) (“The common-law rule [of joint and several liability] serves largely to protect plaintiffs from defendants who are unable to pay judgments entered against them.”); cf. Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 223 (2000) (“Those unlucky few who inflict injury cannot, on balance, claim that they are unjustly held accountable for the harm that their wrongdoing has caused, but they might justly complain that a system under which they *alone* bear the costs of the injuries they inflict is less fair than one which pools those losses among all those who create similar negligent risks.”) (footnote omitted).

¹⁷⁹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 109 (1977) (“Hercules constructs his political theory as an argument about what the legislature has, on this occasion, done.”).

¹⁸⁰ JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 133–34 (1975) (“Cannot John determine whether he owes £100 to Alan or whether Paul owes money to Jack?”).

¹⁸¹ Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1230.

¹⁸² *Id.* at 1225 (“The role of duty doctrine . . . is to fix the legal standard . . . [and] [t]herefore, duty rulings normally are and normally ought to be both rare and relatively general.”).

¹⁸³ *Brown v. Crown Equip. Corp.*, 554 F.3d 34, 36 n.3 (1st Cir. 2009).

the community's, but the foreseeability factor does resemble the community's norm. The concern is different, however. When the community considers whether a risk was foreseeable to the actor, it contemplates its members' well-being and their inclination toward resentment.¹⁸⁴ By contrast, the court's duty exercise undertakes a second order evaluation of the relevant community's relationship to the underlying conduct, and of how a duty ruling may impact that community, a policy matter.¹⁸⁵ The distinction is subtle, but somewhat akin to the competing notions of "use and mention" in linguistic philosophy.¹⁸⁶ The court speaks of law and, at critical times, "mentions" duty when it determines whether, as a matter of policy, to provide a remedy for the breach of a perceived obligation; the community and its jurors "use" duty when they reflect upon their sense of wrongdoing and level of resentment. The community asks what is the obligation we owe or should owe one another. The court asks how it should rule on the duty issue, and what will be the impact of its ruling on the community and society.

How, finally, might the self-reflexive view of duty impact the issue of particularized duty rulings? Although we agree that highly fact-specific duty rulings will tend, by a wide margin, to privilege the defendant's liberty interest over the injured plaintiff's security interest, this is not always, or necessarily, the case. A standard by which "[t]he risk reasonably to be perceived within the range of apprehension delineates the duty to be performed and the scope thereof"¹⁸⁷ invites a good deal of specificity, yet the outcome often favors the existence of a legal duty.¹⁸⁸ And, because the case later

¹⁸⁴ Cf. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). Liability for intentional infliction of emotional distress is found where "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.*

¹⁸⁵ *Jutzi-Johnson v. United States*, 263 F.3d 753, 756 (7th Cir. 2001) ("The duty is a recognition that the unforeseeable has become foreseeable to the relevant community."); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001) ("In drawing lines defining actionable duty, courts must therefore always be mindful of the consequential, and precedential, effects of their decisions."); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (adopting a duty analysis based upon the balancing of several considerations, including "consequences to the community of imposing a duty to exercise care with resulting liability for breach" (citation omitted)); see *supra* notes 96–98 and accompanying text.

¹⁸⁶ W.V. QUINE, THE ROOTS OF REFERENCE 68 (Eugene Freeman ed., 1974).

¹⁸⁷ *Brown*, 554 F.3d at 36 n.3 (quoting *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1232 (Me. 2005)).

¹⁸⁸ *Id.* at 36 (noting that plaintiff accurately "thought that a jury would be sympathetic to finding a duty to warn on the present facts"); see also, *Sowers v. Tri-Cnty. Tel. Co.*, 512 N.E.2d 208, 209 (Ind. Ct. App. 1987) ("[W]e hold that Tri-County owed a duty to inspect to any business invitees it invited to trim trees."); *Bowman v. Stouman*, 141 A. 41, 43 (Pa. 1928)

goes to the jury, this assessment does not predetermine the breach deliberation.

It therefore seems inadvisable to reactively deem particularized no-duty rulings to be “no breach as a matter of law” rulings in disguise, as Esper and Keating say.¹⁸⁹ Even particularized determinations may be appropriate if the court’s language is reasonably analyzed as a refinement of its institutional standing or of its regulatory role vis-à-vis the sort of activity at issue. Short of this, the court usurps the jury’s function, as Esper and Keating argue, when it picks and chooses among competing community norms.¹⁹⁰

Two cases help make the point. Esper and Keating’s prime target is *Monreal v. Tobin*.¹⁹¹ As Esper and Keating see it, the California court abused duty in this case by ruling not that the defendant driver owed a general duty of care to those who might reasonably be endangered by his driving, but rather that the “driver of a vehicle traveling at the posted maximum speed limit . . . owes ‘no duty’ [to switch over] . . . into the next slower lane when another driver approaches from behind in the same lane at a speed in excess of the posted maximum speed limit.”¹⁹² As Esper and Keating say, the court’s no-duty statement was highly particularized.¹⁹³

Monreal, however, raised the second-order issue of how the court should treat conflicting legal norms.¹⁹⁴ The *Monreal* court undertook the legitimate task of examining “the scope of the general common law duty to use ordinary care.”¹⁹⁵ Scope of duty issues typically lead courts to discuss standards for determining duty issues, that is, to speak of how courts decide things.¹⁹⁶

(“The question now develops, [w]hat was the duty of a driver who saw a boy enter a place of danger and continue therein?”).

¹⁸⁹ Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1228.

¹⁹⁰ *Id.* at 1240; *cf.* Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 244 (2003) (reviewing CASE R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002) (“[B]ecause juries may legitimately bring to the justice system values that judges may not adequately express, and because those different values may sometimes lead juries to decide cases differently than judges would, it would be odd to rely too heavily on the judicial norm (or the legal norm as construed by judges) to evaluate juries’ decisions.”).

¹⁹¹ Esper & Keating, *Putting “Duty” in its Place*, *supra* note 5, at 1227–28 (analyzing the California court’s decision in *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168 (Cal. Ct. App. 1998)).

¹⁹² *Id.* at 1228 (quoting *Monreal*, 72 Cal. Rptr. 2d at 170).

¹⁹³ *Id.* at 1225.

¹⁹⁴ *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168, 170 (Cal. Ct. App. 1998).

¹⁹⁵ *Id.* at 176 (emphasis omitted).

¹⁹⁶ *Id.* at 175; Holdampf v. A.C. & S., Inc. (*In re N.Y.C. Asbestos Litig.*), 840 N.E.2d 115, 119 (N.Y. 2005); Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1184 (2008) (“[A] consequentialist might instead specify the scope of the legal duty not to be negligent by reference not merely to

But more specifically, *Monreal* arises from a conflict between duty *A* (duty to whom) and duty *B* (duty to do what) rules. Esper and Keating focus on the duty *A* consideration, namely, the driver's general duty of care to others on the road.¹⁹⁷ As discussed, however,¹⁹⁸ duty is a bifurcated element of negligence, and the court had to attend to the duty *B* factor, as well, namely, the driver's duty to obey the posted speed limit.¹⁹⁹ Balancing competing duty rules is a legal matter for the court, and is likely to require a particularized analysis.

Esper and Keating explain about *Monreal* that the "intuition at work" is that the driver's conduct in not changing lanes was, all things considered, reasonable, and that "[h]e is not free of the obligation to be careful; he is free of fault."²⁰⁰ Esper and Keating continue:

There is a world of difference between saying that someone is not subject to any obligation of due care at all and saying that it is plainly evident that someone has discharged his obligation of due care—so evident that no reasonable person could think him even a little bit careless.²⁰¹

The problem in *Monreal*, however, was just the opposite. Although the posted maximum speed limit was fifty-five miles per hour, traffic generally traveled at speeds in excess of sixty-five miles per hour.²⁰² This means, not surprisingly, that driving at speeds higher than the fifty-five-mile-per-hour posted limit was the community's normal practice. The injured party filed the lawsuit because it seemed non-frivolous to allege that the driver *was* at fault for lingering in the higher-speed lane, and because he had been in a position to foresee an injurious outcome.²⁰³ The point of view motivating a fault analysis is that of the community, and here its members were the ones driving "normally" at sixty-five miles per hour.²⁰⁴ Atypically, the community's perceived security interest

the risks that it would be justified or unjustified for an individual to take, but also to the other, second-order costs and benefits of employing the individual-focused legal rule.").

¹⁹⁷ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1227–28.

¹⁹⁸ See *supra* notes 147–51 and accompanying text.

¹⁹⁹ *Monreal*, 72 Cal. Rptr. 2d at 176.

²⁰⁰ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1228.

²⁰¹ *Id.*

²⁰² *Monreal*, 72 Cal. Rptr. 2d at 171.

²⁰³ See *id.* at 170.

²⁰⁴ Cf. RICHARD A. WASSERSTROM, *The Obligation to Obey the Law*, in *THE DUTY TO OBEY THE LAW: SELECTED PHILOSOPHICAL READINGS* 17, 40 (William A. Edmunson ed., 1999) ("It may be true that on some particular occasions the consequences of disobeying a law will in fact be less deleterious on the whole than those of obeying it—even in a democracy.").

aligned with its liberty interest, yet conflicted with the norm requiring obedience to the law; this was a circumstance ideally suited for the court's development of its embodied legal philosophy.

Another case that Esper and Keating deem representative of the courts' abuse of duty is *McGettigan v. Bay Area Rapid Transit District*.²⁰⁵ They point to "[t]he intensely particular ruling[]" in *McGettigan* that a mass transit agency owes no duty "to an inebriated passenger whom it has escorted off the train once he is on the platform."²⁰⁶ Esper and Keating say:

We think that the duty owed in this situation does not depend on such things as whether the victim was done exiting a train or had not yet begun to board one, but extends to all reasonably foreseeable victims of the careless conduct on the railroad's part, simply because harm to them is reasonably foreseeable.²⁰⁷

For Esper and Keating, the jury should have decided whether the carrier violated its duty of due care when its agents failed to continue safeguarding the inebriated passenger once he had reached the platform.²⁰⁸ One needs, however, to decide first what sort of duty is at issue.²⁰⁹ Had the case gone to trial, the jury would have been justified in sending a note to the court seeking a definition or guidance on the extent of the carrier's legal obligation to have followed through with its supervision of the plaintiff's progress.²¹⁰ *McGettigan* answers, as a matter of policy, that the carrier's heightened degree of care is owed only while "passengers are *in transitu*, and until they have safely departed the carrier's vehicle."²¹¹ One may disagree substantively, but the sort of duty analysis *McGettigan* undertakes does not appear to usurp the jury's function.

²⁰⁵ *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516 (Ct. App. 1997).

²⁰⁶ Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1226 (citing *McGettigan*, 67 Cal. Rptr. 2d at 518).

²⁰⁷ *Id.* at 1270 n.124.

²⁰⁸ *See id.* at 1228.

²⁰⁹ *See Aquino v. Higgins*, 938 N.E.2d 1006, 1006 (N.Y. 2010) ("Since the basis of any liability on defendants' part, assuming proximate cause, rests on the duty to supervise, rather than their duty as landowners, it is not dispositive that the injury occurred off premises. As a result, summary judgment should not have been granted in defendants' favor and the cause of action for negligent supervision should be reinstated." (citation omitted)).

²¹⁰ *Cf. Council v. Connell*, No. 08 Civ. 11357(LTS)(KNF), 2010 WL 1140879, at *3 (S.D.N.Y. Mar. 25, 2010) ("[T]he jury submitted notes to the trial judge, among them a request for '[d]efinitions of what is required for conspiracy printed on paper.'").

²¹¹ *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 520 (Ct. App. 1997) (quoting *Marshall v. United Airlines*, 110 Cal. Rptr. 416, 418 (Ct. App. 1973)).

V. A CRITIQUE OF CARDI AND GREEN'S NON-RELATIONAL VIEW OF DUTY

A. *Cardi and Green's Alignment with the Restatement (Third) of Torts*

The third and final (for our purposes) major view of duty is that of W. Jonathan Cardi and Michael D. Green, as expressed in their definitive 2008 piece *Duty Wars*.²¹² Cardi and Green defend the non-relational default approach adopted by the Restatement (Third) of Torts, wherein a duty is presumed, under section 7(a), if “the actor’s conduct create[d] a risk of physical harm.”²¹³ Notably absent is any reference to foreseeability.²¹⁴ The Third Restatement, at section 7(b), permits the court to issue no-duty rulings on instrumentalist grounds, in “exceptional cases,” if there is an “articulated countervailing principle or policy [that] warrants denying or limiting liability.”²¹⁵

Cardi and Green criticize the trend they perceive among “many courts” to depart from default duty rules and to engage instead in “a loose multifactorial analysis that features foreseeability.”²¹⁶ Tort law has not and should not be this way and, indeed, the restatements have fairly uniformly rested on the default principle.²¹⁷ So too have the reporters always acknowledged a universal duty not to invade another’s bodily integrity.²¹⁸ Moreover, the two major contemporary tort treatises harmonize with the Third Restatement’s view that a default duty of reasonable care exists.²¹⁹

²¹² Cardi & Green, *Duty Wars*, *supra* note 2.

²¹³ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010).

²¹⁴ *See id.*

²¹⁵ *Id.* § 7(b).

²¹⁶ Cardi & Green, *Duty Wars*, *supra* note 2, at 678; *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (“The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the 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.” (citations omitted)).

²¹⁷ Cardi & Green, *Duty Wars*, *supra* note 2, at 692–94.

²¹⁸ *Id.* at 692; RESTATEMENT OF TORTS § 1 cmt. d (1934); RESTATEMENT (SECOND) OF TORTS § 1 cmt. d (1965).

²¹⁹ Cardi & Green, *Duty Wars*, *supra* note 2, at 697; DAN B. DOBBS, *THE LAW OF TORTS* § 227, at 578 (2001); 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 18.6, at 712 (2d ed.

The existence of a general, default duty of care was traditionally taken for granted, say Cardi and Green, and courts began to foster litigation of the duty issue during the industrial revolution primarily to limit negligence liability and promote industrial growth.²²⁰

Cardi and Green call Goldberg and Zipursky's obligation-centric view of duty under-inclusive, and note that many case decisions take an explicitly instrumentalist approach.²²¹ So Cardi and Green, like Esper and Keating in this respect, have the more balanced understanding, saying that duty is about both obligation and instrumentalist concerns such as deterrence and the spreading of loss.²²² As the Court said in *Riegel v. Medtronic, Inc.*,²²³ a tort award is designed to be "a potent method of governing conduct and controlling policy."²²⁴

According to Cardi and Green, section 7 divides the meta-tasks of treating duty from an obligation versus policy point of view.²²⁵ They regard section 7(a) of the Third Restatement as embodying "a community-based moral sense of obligation,"²²⁶ and wonder why Goldberg and Zipursky may not be satisfied that this represents "exactly the type of obligation-based rule that [they] claim is central to tort law."²²⁷ Cardi and Green allow that section 7(a)'s default rule—that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm"²²⁸—also likely expresses instrumental concerns such as the need to deter "unreasonably risky" activity.²²⁹ For the most part, however, they reserve to section 7(b) the task of describing law's instrumental, policy approach, which is implemented in the form of

1986).

²²⁰ Cardi & Green, *Duty Wars*, *supra* note 2, at 698–99; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 57 (1992).

²²¹ Cardi & Green, *Duty Wars*, *supra* note 2, at 706–07; *see also* Stapleton, *supra* note 35, at 1531 ("[T]here are areas of tort law that can only be accounted for in instrumental terms, for example torts that are explicitly based on the violation of some public policy such as the tort of retaliation by an employer against an employee." (footnote omitted)).

²²² Cardi & Green, *Duty Wars*, *supra* note 2, at 706–07; *see also* Esper & Keating, *Putting "Duty" in its Place*, *supra* note 5, at 1241, 1251.

²²³ *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

²²⁴ *Id.* at 324 (quoting *Cippollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992)) (quoted in Cardi & Green, *Duty Wars*, *supra* note 2, at 708 n.217).

²²⁵ Cardi & Green, *Duty Wars*, *supra* note 2, at 708–09.

²²⁶ *Id.* at 709.

²²⁷ *Id.*

²²⁸ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010).

²²⁹ Cardi & Green, *Duty Wars*, *supra* note 2, at 709 n.220.

no-duty determinations.²³⁰

Although we will address the substance of section 7's default principle shortly, it may be useful to say something here about what Cardi and Green's thesis implies about the community's moral sense. Were section 7(a) an embodiment of the community's morality, this would mean that the community's dominant moral sensibility is behaviorist.²³¹ There is little warrant for this view, however. Consider the well-intended falsehood. Visiting from Oymyakon, Russia, and not familiar with hot weather road conditions, *A* alerts *B* to water on the pavement and, anxious about her bald tires, *B* swerves and crashes. But *A* is wrong, and this mirage is a natural result of the refractive indices of the layers of air.²³² *A* has not lied, and the community is not likely to condemn him. Nevertheless, *A*'s conduct created a risk of physical harm. So by the logic of Cardi and Green's thesis, the community *will* condemn *A* as having acted immorally, based solely on stimulus-response types of evidence intuitively irrelevant to the moral assessment.²³³

Another consequence of Cardi and Green's duty concept purged of its foreseeability sub-element,²³⁴ and following the contours of the Third Restatement definition, is the absence of a relational component—what we have labeled duty *A* (duty to whom).²³⁵ It is Cardi and Green's view that, "although negligence liability is necessarily relational, the element of duty is not."²³⁶ Descriptively, they maintain that courts' frequent reference to relational duty may only "sometimes be taken at face value," because on the whole courts are "simply" using the duty *A* concept "as a tool to effect

²³⁰ *Id.* at 709–10.

²³¹ *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) ("It is the act itself, not the intent of the actor, that is important." (citations omitted)).

²³² William Gareth Rees et al., *Inversion of Atmospheric Refraction Data*, 8 J. OPTICAL SOC'Y AM. A 330, 330 (1991).

²³³ See JAMES R. REST, DEVELOPMENT IN JUDGING MORAL ISSUES 3, 7 (1979) (discussing Lawrence Kohlberg's view that morality is not a function of conformity with prevailing group norms, and cannot be assessed without knowing the actor's point of view and intentions); cf. Noam Chomsky, *A Review of B.F. Skinner's Verbal Behavior*, in READINGS IN LANGUAGE AND MIND 413, 416 (Heimer Geirsson & Michael Losonsky eds., 1996) (discussing broad and narrow interpretations of behavior in stimulus-response experimental results).

²³⁴ See Cardi, *Purging Foreseeability*, *supra* note 3, at 780.

²³⁵ See *supra* note 147–51 and accompanying text. Cardi and Green distinguish between "circumstantial" relationality, concerning the parties' general proximity to one another, and "substantive" relationality, concerning the parties' substantive relationship or dealing giving rise to certain affirmative duties. Cardi & Green, *Duty Wars*, *supra* note 2, at 715–16. Their objection is to the more ubiquitous circumstantial type of duty, *id.* at 716, and this article, too, focuses on that super-category.

²³⁶ Cardi & Green, *Duty Wars*, *supra* note 2, at 713.

policy driven limitations on liability.”²³⁷

This effort at developing a coherent line, however, is somewhat out of sync with section 7(b), which Cardi and Green seek to legitimize. That subsection states that “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has *no duty or that the ordinary duty of reasonable care requires modification*.”²³⁸ It is strained to assume that courts’ policy-driven duty analyses verge on subterfuge. Cardi and Green elsewhere acknowledge that section 7(b)’s policy statement expressly concerns the duty analysis;²³⁹ courts thereby reflect upon the parameters of the judiciary’s institutional competence and reach.

Products liability and toxic tort contexts often highlight the relational, duty *A* issue, sometimes raising, for example, privity and chain of product distribution concerns.²⁴⁰ Relaxation of the privity requirement in products cases enforces the accountability not only of retailers, but also of manufacturers, wholesalers, and distributors: those engaged, in short, “in the business of selling products.”²⁴¹ The “occasional seller” is thereby excluded.²⁴² It is not logical to conclude that merely one’s status as an “occasional” seller immunizes one from accountability for product-related injuries on proximate cause grounds. Certainly, the nexus of the direct (even if “occasional”) seller to the end product user is more causally proximate than that of the manufacturer or distributor. One’s day-to-day status unrelated to the transaction at issue, either by way of conduct or proximity, is not causally relevant to the effects of that transaction. Rather, courts decline to impose a relational duty on such sellers.²⁴³

²³⁷ *Id.*

²³⁸ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(b) (2010) (emphasis added).

²³⁹ Cardi & Green, *Duty Wars*, *supra* note 2, at 709 (“In section 7(b), the Third Restatement recognizes that at times, courts decline to impose a duty, thereby withdrawing liability, due to some principle or policy.” (footnote omitted)).

²⁴⁰ *E.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916); *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745 (7th Cir. 2007) (“Although a literal reading of § 402A would limit strict liability only to sellers of a product, Illinois applies strict liability to ‘all persons in the distributive chain of a defective product.’” (quoting *Prompt Air, Inc., v. Firewall Forward, Inc.*, 707 N.E.2d 235, 238 (Ill. App. Ct. 1999))).

²⁴¹ RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965).

²⁴² *Id.*

²⁴³ *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985); *Adeyinka v. Yankee Fiber Control, Inc.*, 564 F. Supp. 2d 265, 275 (S.D.N.Y. 2008).

Normatively, Card and Green deem the relational view of duty “inferior” for the following three reasons: (1) relational duty fails to accurately describe the way we think of duty in our day-to-day obligations; (2) a relational approach conflates the duty and liability elements of a negligence claim; and (3) relationality “erodes the rule of law” and distorts the separate decision-making roles of judge and jury.²⁴⁴ Card and Green “think that obligations to act reasonably are most accurately described as act centered and non-relational.”²⁴⁵ Because foreseeability is the primary constituent of the relational approach to duty, (1), (2), and (3) may be reframed as equivalent critiques of foreseeability.²⁴⁶

B. Rehabilitating Foreseeability—Why the Third Restatement’s Vision of Duty is Incoherent

Card and Green’s view that foreseeability should be excluded from the duty analysis flows from Card’s prior 2005 work, *Purging Foreseeability*.²⁴⁷ Card there argues that foreseeability’s “prominence” in duty determinations is problematic because this “has a pernicious effect on the rule of law,” providing a vehicle for “unbounded judicial discretion,” and because the court’s license to weigh in on foreseeability usurps the jury’s traditional role.²⁴⁸

The cure, for Card, resides in section 7(a), which reads, “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”²⁴⁹ Card approves of that section’s rationale, at comment *j*, which says:

Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional

²⁴⁴ Card & Green, *Duty Wars*, *supra* note 2, at 713–14. See HART, CONCEPT OF LAW, *supra* note 173, at 84, regarding the significance of the “internal point of view,” of how citizens conceive of their duties.

²⁴⁵ Card & Green, *Duty Wars*, *supra* note 2, at 720.

²⁴⁶ *Id.* at 722.

²⁴⁷ Card, *Purging Foreseeability*, *supra* note 3, at 740; see Card & Green, *Duty Wars*, *supra* note 2, at 721 n.272, 722.

²⁴⁸ Card, *Purging Foreseeability*, *supra* note 3, at 740–41. Card and Green acknowledge 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.” Card & Green, *Duty Wars*, *supra* note 2, at 729 (footnote omitted).

²⁴⁹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010).

function of the jury as factfinder.²⁵⁰

This article agrees with comment *j*, and with Cardi and Green, that safeguarding the jury's expansive factfinding role is beneficial. Cardi and Green apparently believe further that eliding foreseeability will indeed result in allowing more cases to pass to the jury.²⁵¹ This is unlikely. Absence of the foreseeability factor may, as Cardi and Green say, "make more palatable the policy decisions that foreseeability so ably obscures,"²⁵² but it will not negate the policy rationales underlying no-duty decisions. If clearer articulation of true motivating reasons is the goal, then this is an issue that may be addressed separately from the foreseeability question; courts can simply resolve to say what they mean.

But the commentators' quantitative suggestion is inaccurate. Inclusion of a foreseeability factor is far more likely to count in favor of the submission of a case to the jury.²⁵³ As Cardi and Green concede, "most conduct in fact creates some foreseeable risk."²⁵⁴ Purging foreseeability removes it as a *reason* for the case to pass the duty test.²⁵⁵ Nor can we suppose that a policy-laden no-duty analysis will be the more lucid for lack of a foreseeability consideration. Jurists engaging in "unbounded judicial discretion" by treating foreseeability as no more meaningful than "strawberry shortcake,"²⁵⁶ are not necessarily bound to become bounded on the

²⁵⁰ *Id.* at cmt. *j*.

²⁵¹ Cardi & Green, *Duty Wars*, *supra* note 2, at 724–25 ("[T]he Third Restatement would impose a duty even where the risk created by a defendant's conduct was not foreseeable, [and] . . . E&K's foreseeability proposal would remove few cases at the duty stage that the Third Restatement would allow to pass.").

²⁵² *Id.* at 725.

²⁵³ *See id.* at 724–25.

²⁵⁴ *Id.* at 724.

²⁵⁵ *See, e.g.,* *Lenox, Inc. v. Triangle Auto Alarm*, 738 F. Supp. 262, 268 (N.D. Ill. 1990) ("[F]oreseeability of a particular kind of hazard is a consideration in determining . . . the scope of duty . . ."); *S. Md. Elec. Coop., Inc. v. Booth & Assocs., Inc.*, CIV. A. No. HAR-88-547, 1989 WL 85060, at *3 (D. Md. July 25, 1989) ("[T]he Court of Appeals has imposed an independent tort duty in favor of persons who are foreseeably subjected to the risk of serious personal injury."); *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 493 N.E.2d 1022, 1027 (Ill. 1986) (confirming that the lower court's finding of foreseeability of damages and consideration relevant policy factors was proper in finding duty); *Bolieu v. Sisters of Providence in Wash.*, 953 P.2d 1233, 1240 (AK 1998) (advocating imposition of a duty on the part of medical providers with respect to communicable disease "in favor of those persons, such as spouses, who are foreseeably most at risk"); *J.C. Penney Co. v. Simon Prop. Grp., Inc.*, 928 N.E.2d 579, 584 (Ind. Ct. App. 2010) ("[T]he risk of being thrown from a horse and injured was foreseeable and the public policy 'favors imposing a duty on the YMCA here because the YMCA attracted participants to [its camp] by offering horseback riding as part of the weekend and by its direct involvement with the organization of the trail ride.'" (citing *Thornhill v. Deka-Di Riding Stables*, 643 N.E.2d 983, 987 (Ind. Ct. App. 1994))).

²⁵⁶ Cardi, *Purging Foreseeability*, *supra* note 3, at 740.

basis of altered terminological tools.

Moreover, as far as decision-making transparency goes,²⁵⁷ it is probable that things work just the opposite way from that envisioned by Cardi and Green. In other words, where there may be a yes-duty determination that does not articulate a foreseeability ground, or that rejects foreseeability on principle as analytically alloyed, it is quite possible that foreseeability undergirds the intuitive insight, spurring the outcome. It is likely, in any event, that a yes-duty ruling comes equipped with both a duty *A* (duty to whom) and a duty *B* (duty to do what) rationale, even if foreseeability is not visible in the analysis.²⁵⁸

One case to which Cardi and Green cite for its adoption of the Third Restatement's rejection of foreseeability is the Arizona Supreme Court decision in *Gipson v. Kasey*.²⁵⁹ There, the defendant attended a holiday party knowing whiskey and beer would be served, yet handed out several doses of a narcotic prescription drug to his friend Sandy.²⁶⁰ The *Gipson* court made sure to note that the defendant knew that Sandy's boyfriend Nathan was interested in taking narcotic drugs for recreational purposes.²⁶¹ Nathan combined the drugs with alcohol and died.²⁶²

In the appeal, the defendant argued that foreseeability of harm should not be a factor in duty analysis, and that the intermediate appellate court had therefore erred in ruling that defendant had a duty because, in part, harm to Nathan was foreseeable.²⁶³ The court cited the Third Restatement as well as Cardi's *Purging Foreseeability* for the view that foreseeability is not a factor to be considered in the duty analysis.²⁶⁴ Inconsistent with section 7, however, the *Gipson* court both asked whether public policy warranted "imposing a duty" under the circumstances of the case, and recited its own duty principle as holding that "every person is

²⁵⁷ See *id.* at 787 ("[C]ourts sometimes ostensibly decide the issue of duty on grounds of foreseeability, when in fact their decisions rest on considerations of public policy." (citation omitted)).

²⁵⁸ *E.g.*, *A.W. v. Lancaster Cnty. Sch. Dist.* 0001, 784 N.W.2d 907, 917 (Neb. 2010) ("The duty of instructors to supervise and protect students is well established under the Restatement (Second) of Torts, the Restatement (Third) of Torts, and our current case law." (citations omitted)).

²⁵⁹ *Gipson v. Kasey*, 150 P.3d 228 (Ariz. 2007); Cardi & Green, *Duty Wars*, *supra* note 2, at 726 n.286.

²⁶⁰ *Gipson*, 150 P.3d at 229.

²⁶¹ *Id.* at 230.

²⁶² *Id.*

²⁶³ *Id.* at 231; *Gipson v. Kasey*, 129 P.3d 957, 960–62 (Ariz. Ct. App. 2006).

²⁶⁴ See *Gipson*, 150 P.3d at 231.

under a duty to avoid creating situations which pose an *unreasonable risk* of harm to others.”²⁶⁵

If a general duty of care to all is the default rule, as section 7(a) says, then the only policy issue is whether to negate that duty, as section 7(b) allows.²⁶⁶ If a determination of “unreasonable risk” is requisite to a yes-duty holding, however, then it is difficult to see why some level of scienter may not be implicated. Risk/utility balancing typically informs the issue of unreasonable risk. The Restatement (Third) of Torts: Products Liability, for instance, describes this test in the design defect context as whether a feasible “alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product,”²⁶⁷ and teaches that “the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution.”²⁶⁸

Therefore, the *Gipson* analysis was murky. It did not appear that the court recited the true ground underlying its ruling, namely, that this defendant should have known that dispensing narcotics to folks prone to misusing them in combination with alcohol could be harmful, and therefore had a duty to refrain from this conduct.²⁶⁹ By *purging* foreseeability, in other words, the decision suffered from some of the very difficulties that Cardi and Green blame on the *inclusion* of foreseeability as a factor in the duty determination.²⁷⁰ At the very least, *Gipson* is not a case in which there was a lack of foreseeability counseling a no-duty determination but for the section 7 principle.²⁷¹

Cardi and Green’s approach, patterning that of the Third Restatement, is superficially appealing. Some courts have come to

²⁶⁵ *Id.* at 232–33 & n.4 (emphasis added) (citations omitted).

²⁶⁶ *See id.* at 234 (Hurwitz, J., concurring).

²⁶⁷ *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1313 (11th Cir. 2005).

²⁶⁸ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) cmt. a (1998).

²⁶⁹ *Gipson*, 150 P.3d at 230.

²⁷⁰ *See supra* section 5 A.

²⁷¹ *See also* A.W. v. Lancaster Cnty. Sch. Dist. 0001, 784 N.W.2d 907, 916, 918–19 (Neb. 2010) (“It is evident that the university had a landowner-invitee duty to protect against *foreseeable* acts even had the attack in that case *not* been foreseeable . . . [and] our disposition of this appeal would have been the same regardless [of the section seven question, because the defendant school’s employees] should have foreseen the danger.”). Cardi and Green do not, of course, pin the integrity of their analysis on a clear-headed application by the courts, and readily acknowledge that courts may often be unclear or inconsistent under any regime. Cardi & Green, *Duty Wars*, *supra* note 2, at 716–18.

believe that it promises to clean up the duty analysis.²⁷² But the approach is incoherent. Going one step further, the concept of duty itself is incoherent—even if not meaningless or a “nullity”²⁷³—if stripped of a foreseeability component.

Again, section 7(a) says: “An actor ordinarily has a duty to exercise reasonable care when that actor’s conduct creates a risk of physical harm.”²⁷⁴ But what constitutes “reasonable care?” Under this section, the actor has a duty to exercise care that is reasonable, and inversely does not have a duty to exercise care that is not reasonable. Therefore, even if the actor’s conduct creates a risk of physical harm, he or she has no duty to take precautions that would not be deemed reasonable, under the circumstances. Reasonable care is “[care that a] reasonable person would exercise,”²⁷⁵ or so the jurists say, and the definition seems reasonable.

If reasonable care is the level of care a reasonable person would exercise, then the question becomes whether a reasonable person would exercise care to avoid unforeseeable risks. This displays the incoherence, because a reasonable person would have *no reason* to avoid unforeseeable dangers. This snag would be more apparent were section 7(a) to read: “An actor ordinarily has a duty to exercise reasonable care . . . ‘to avoid creating . . . an unreasonable risk of harm,’” as suggested in *Gipson*.²⁷⁶ Under either the actual or *Gipson*-modified version of section 7(a), however, reasonableness of conduct is a constituent of legal duty. Joseph Raz has helpfully explained that “[t]he logical equivalence between ‘ought’ statements and their corresponding ‘there is a reason’ statements is sufficiently close that if a person believes in either he necessarily believes in the other.”²⁷⁷

Cardi and Green acknowledge the “awkwardness of duty talk . . . that omits foreseeability.”²⁷⁸ They discount this awkwardness as a “by product” of the difference between law and morality.²⁷⁹ One

²⁷² See *Lancaster*, 784 N.W.2d at 918.

²⁷³ See Cardi, *Purging Foreseeability*, *supra* note 3, at 771.

²⁷⁴ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010).

²⁷⁵ *United States v. Lord*, 404 F. App’x. 773, 778 (4th Cir. 2010) *cert. denied*, 131 S. Ct. 2940 (2011) (brackets in original); see also *Desir v. Vertus*, 13 A.3d 428, 434 (N.J. Super. Ct. App. Div. 2011) (“We briefly consider the scope of the duty of reasonable care owed here. In general, the scope of the duty is defined by what a reasonably prudent person would do under the same or similar circumstances.” (citation omitted)).

²⁷⁶ *Gipson v. Kasey*, 150 P.3d 228, 233 n.4 (Ariz. 2007) (citations omitted); see *supra* note 264 and accompanying text.

²⁷⁷ RAZ, *supra* note 180, at 32.

²⁷⁸ Cardi & Green, *Duty Wars*, *supra* note 2, at 726.

²⁷⁹ *Id.*

may have no moral obligation to take precautions without having a reason to know that one's conduct may pose a danger of harm to others. But, apparently, one may nevertheless then have a legal duty to take such precautions.²⁸⁰ Raz emphasizes more cogently, however, that laws are deemed norms, and "[t]his entails that they are reasons for action."²⁸¹ And Cardi and Green may slip when they write that, "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*."²⁸²

Section 7(a) is less lucid than the traditional approach, which imposes an *ongoing* duty to exercise due care toward those who might foreseeably be harmed by one's conduct, in another respect.²⁸³ The Restatement version imposes "a duty to exercise reasonable care *when* [that] actor's conduct creates a risk of physical harm."²⁸⁴ This articulation supplies a rather opaque nexus between the risk created and the care due. The foreseeability element places the actor on the lookout for unreasonable risks, whereas the section 7(a) view is more akin, in this temporal respect, to the sort of duty that arises in particularized contexts, such as warnings²⁸⁵ or Good Samaritan²⁸⁶ cases. But fixing duty's inception to the moment the

²⁸⁰ *Id.*

²⁸¹ RAZ, *supra* note 180, at 154. "Judges, acting as judges, act on the belief that laws are valid reasons for action." *Id.* at 171.

²⁸² Cardi & Green, *Duty Wars*, *supra* note 2, at 726 (emphasis added). Cardi and Green also slip, perhaps, when they emphasize that "both of the two major contemporary torts treatises are in accord with the Third Restatement . . . [in] observing that a default duty of reasonable care exists." *Id.* at 697 (footnote omitted). However, as Cardi and Green quote it, one of the two treatises explains: that "[b]y 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." HARPER ET AL., *supra* note 219, § 18.6, at 712 (emphasis added) (quoted in Cardi & Green, *Duty Wars*, *supra* note 2, at 697 n.157.).

²⁸³ See Paulsen v. CNF Inc., 559 F.3d 1061, 1081 (9th Cir. 2009); Bradshaw v. Daniel, 854 S.W.2d 865, 870 (Tenn. 1993) ("[A]ll persons have a duty to use reasonable care to refrain from conduct that will foreseeably cause injury to others." (citation omitted)).

²⁸⁴ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 7(a) (2010) (emphasis added).

²⁸⁵ *E.g.*, De Voto v. St. Louis Pub. Serv. Co., 251 S.W.2d 355, 358–59 (Mo. Ct. App. 1952) ("The duty to maintain a careful lookout was a continuous one, while the duty to warn could only arise when the driver of the bus, in the exercise of due care, became aware, either actually or constructively, that a collision would likely occur unless a warning was given.").

²⁸⁶ Huggins v. Aetna Cas. & Sur. Co., 264 S.E.2d 191, 192 (Ga. 1980); Glanzer v. Shepard, 135 N.E. 275, 276–77 (N.Y. 1922); RESTATEMENT (SECOND) OF TORTS § 324A (1965) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm . . .").

risk arises works in these contexts, and is coherent, only by virtue of the very foreseeability factor that is absent from section 7(a).

Cardi and Green's and the Third Restatement's effort at assigning foreseeability issues exclusively to the trier of fact is not unmotivated. To be sure, in the world of legal practice, the question is posed to the jury whether a defendant exercised reasonable care under the circumstances, the breach issue.²⁸⁷ At the same time, however, when the case is explained to the jury, the court typically suggests that, as a conceptual matter, duty—the breach of which the jury is to decide—has been conditioned upon foreseeability.²⁸⁸ This avoids the conceptual incoherence inhering in the Third Restatement's and Cardi and Green's notion of duty.

As indicated above,²⁸⁹ Cardi anticipates the objection that the “creates a risk’ standard renders duty a nullity,”²⁹⁰ but responds that this objection misses the mark, because section 7(a) reflects “a

²⁸⁷ *Washington & Georgetown R.R. Co. v. McDade*, 135 U.S. 554, 574 (1890) (“In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used at shaft No. 1.” (citation omitted)); *Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185, 193 (Mich. 1995) (“Whether this risk of harm was unreasonable and whether the defendant breached a duty to exercise reasonable care by failing to remedy the danger are issues for the jury to consider.”).

²⁸⁸ *E.g.*, California Pattern Jury Instructions—Civil § 1004, at 609 (2011) (“There may be a duty to remedy a dangerous condition . . . if the condition is foreseeable.”); New Mexico Pattern Jury Instructions—Civil § 13:1320 (2011) (“The [owner’s] [occupant’s] duty to protect visitors arises from a foreseeable risk that a third person will injure a visitor and, as the risk of danger increases, the amount of care to be exercised by the [owner] [occupant] also increases.” (brackets in original)); Ralph King Anderson, Jr., South Carolina Requests to Charge—Civil § 11-4, at 116 (2002) (titled: “Builder Negligence - Duty on Builder to Refrain from Constructing Housing he Knows or Should Know will Pose Serious Risk of Physical Harm”); *see also* Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 118 (1963) (“The jury had been instructed that . . . [the] defendant’s duty was measured by what a reasonably prudent person would anticipate as resulting from a particular condition—‘defendant’s duties are measured by what is reasonably foreseeable under like circumstances’—by what ‘in the light of the facts then known, should or could reasonably have been anticipated.’” (footnote omitted)); *Magoffe v. JLG Indus., Inc.*, 375 F. App’x 848, 857 n.17 (10th Cir. 2010) (“The district court also addressed New Mexico’s Civil Uniform Jury Instruction 13-1402, which requires suppliers to avoid foreseeable risks of injuries to users of its products, and Civil Uniform Jury Instruction 13-1425, which requires adequate warnings to reasonably foreseeable users disclosing the nature and extent of a danger not covered by a general warning or simple directive to use or not to use the product in a certain way.”); *Rodríguez-Quiñones v. Jiménez & Ruiz, S.E.*, 402 F.3d 251, 256 (1st Cir. 2005) (“The jury in this case was instructed that an owner or lessor has no duty to protect tenants from criminal acts unless they are foreseeable”); *Hynes v. Energy West, Inc.*, 211 F.3d 1193, 1198 (10th Cir. 2000) (affirming the accuracy of jury instruction that “any increase in foreseeable danger requires increased care”); *cf. McDade*, 135 U.S. at 574 (crediting the railroad’s requested jury instruction that “[t]he machinery need not be the safest of the kind, provided it is such as a person of reasonable care and prudence would provide”).

²⁸⁹ *See supra* note 273 and accompanying text.

²⁹⁰ Cardi, *Purging Foreseeability*, *supra* note 3, at 771.

strong form of a duty” that courts have already developed on the basis of public policy and community norms.²⁹¹ Accordingly, the work of imbuing the duty concept with content “has already been done.”²⁹² The problem, however, is not that duty itself is rendered a nullity under section 7(a), but rather that its constituent “reasonable care” component is rendered incomprehensible.

Reasonable care is equivalent to reasonable conduct. For *duty to render reasonable care* to be coherent, the constituent idea of reasonable care must be meaningful and capable of rational assessment. The question becomes not whether the jury can decide breach of duty, but rather whether the actor herself—or in a larger sense, the community—has a basis for ascertaining a difference between reasonable care and unreasonable conduct. If the concept of duty is stripped of its mental element, and if it thereby encompasses risks that the actor does not and could not be aware of, under any definition of constructive knowledge, then what constitutes reasonable care?

Professor Cardi argues that the conceptual work done by foreseeability in statements of duty better fits wholly within the elements of breach and proximate cause.²⁹³ With respect to breach, Cardi explains:

Once the judge has determined that the defendant owed a duty and has delimited that duty in a standard of care, the jury must then decide, in the context of breach, whether the defendant’s conduct failed to conform to that standard. The near-universal standard of care in negligence cases is the duty to act as would have a reasonable person under the circumstances. Reasonableness often turns on (1) the degree of foreseeable likelihood that the defendant’s actions might result in injury, (2) the range in severity of foreseeable injuries, and (3) the benefits and burdens of available precautions or alternative manners of conduct. Together, the range of likelihood and severity of foreseeable injury constitutes the foreseeable “risk” created by an actor’s conduct.²⁹⁴

A breach of duty is a failure to perform the duty.²⁹⁵ Conceptually,

²⁹¹ *Id.* at 772.

²⁹² *Id.*

²⁹³ Cardi, *Reconstructing Foreseeability*, *supra* note 35, at 924.

²⁹⁴ *Id.* at 925 (footnotes omitted).

²⁹⁵ STEVEN H. GIFIS, *LAW DICTIONARY* 54 (3d ed. 1991); *Munroe v. Hartford St. Ry. Co.*, 56 A. 498, 500–01 (Conn. 1903).

if duty is defined to exclude the foreseeability component, then the minimal condition for a breach of duty must also exclude foreseeability. If foreseeability does not inhere in the idea of reasonable care, then it is not necessarily implicated in deciding the failure to exercise reasonable care. Drivers having a duty to drive on the right side of the road are in breach of that duty when they drive on the left side.²⁹⁶ But if foreseeability does inhere in the idea of reasonable care, then it also is a component within duty.

Cardi continues that the proximate cause element affords the jury or court a tool for limiting liability for blameworthy conduct to risks sufficiently connected to that conduct.²⁹⁷ But concepts of causation vary,²⁹⁸ and causation in and of itself does not logically guarantee a foreseeability sub-element. The causation element itself is tripartite, consisting of causation *A* (the legal, “proximate” connection between the breach of duty and the harm); causation *B* (the general capability of the mechanism to cause the harm); and causation *C* (the link in the particular case between the mechanism and the harm).²⁹⁹ Foreseeability is alien to the core idea, which is simply that there are two (or more) distinct events bearing some sort of cause-effect relation to one another.³⁰⁰ Regarding causation *A*, there was a time when some courts took the position that, “where in the natural and continual sequence, unbroken by any intervening cause, an injury is produced which, but for the negligent act would not have occurred, the wrongdoer will be liable. And it makes no difference whether or not that particular result was foreseeable.”³⁰¹

Consider the following hypothetical: Fozzie walks Gonzo home on a steeply sloped San Francisco street. Fozzie acts silly, spins, and

²⁹⁶ *E.g.*, IDAHO CODE ANN §§ 49-630, 49-631 (2011); *Leavitt v. Swain*, 963 P.2d 1202, 1206 (Idaho Ct. App. 1998) (“Icy road conditions do not serve to excuse a violation of these statutes.” (citations omitted)).

²⁹⁷ Cardi, *Reconstructing Foreseeability*, *supra* note 35 at 926–27.

²⁹⁸ *See generally* CAUSATION (Ernest Sosa & Michael Tooley eds., 1993) (providing a compilation of several different approaches to the analysis of causation).

²⁹⁹ *See generally* *Golden v. CH2M Hill Hanford Grp., Inc.*, 528 F.3d 681, 683 (9th Cir. 2008) (“To survive summary judgment on a toxic tort claim for physical injuries, Golden had to show that he was exposed to chemicals that could have caused the physical injuries he complains about (general causation), and that his exposure did in fact result in those injuries (specific causation).” (citing *Jaros v. E.I. DuPont (In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 133 (9th Cir. 2002)).

³⁰⁰ Wesley C. Salmon, *Causality: Production and Propagation*, in CAUSATION, *supra* note 298, at 154.

³⁰¹ *McGettigan v. Nat’l Bank of Wash.*, 320 F.2d 703, 709 n.7 (D.C. Cir. 1963) (quoting *Hitaffer v. Argonne Co.*, 183 F.2d 811, 815 (D.C. Cir. 1950)); *Albers v. County of L.A.*, 398 P.2d 129, 137 (Cal. 1965) (“[A]ny actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not.”).

negligently pushes Gonzo sideways by two feet. Gonzo is unharmed by the push, but at that moment the brake mechanism on a parked car gives out and the car slides into Gonzo. But for Fozzie's push, Gonzo would have been unharmed by the car. Under section 7(a), Fozzie owed a duty of reasonable care to Gonzo. Fozzie's conduct violated that duty, because it negligently created a risk of physical harm. The case would probably be dismissed, or a verdict directed in favor of Fozzie, on proximate causation grounds, but this is not necessarily so.³⁰² It is difficult to appreciate the inferiority of the alternative analysis, that Fozzie owed a duty to exercise reasonable care toward those who might foreseeably be harmed by his conduct (duty A),³⁰³ and in relation to foreseeable dangers (duty B), and it was *this* duty of which he was not in breach.

C. Why Foreseeability in Duty Does Not Encroach Upon the Jury's Role

Professor Cardi has acknowledged that the foreseeability inquiry may be different in different contexts.³⁰⁴ By the same token, nothing prevents the foreseeability determination in legal duty contexts from being different from the factual foreseeability inquiries in breach and proximate causation contexts.

When the jury deliberates upon the evidence and applies the law to the facts, it asks whether the defendant was in a position to foresee harm—either some harm or the particular harm³⁰⁵—or whether, given the circumstances, it should have foreseen—such that a reasonable actor would have foreseen—the harm.³⁰⁶

When the court includes a foreseeability component within the duty analysis, it has a different concern. It then makes a general policy determination whether to enforce—and thereby whether

³⁰² See *supra* note 301 and accompanying text.

³⁰³ *Bradshaw v. Daniel*, 854 S.W.2d 865, 870 (Tenn. 1993); *Henderson v. Bowden*, 737 So. 2d 532, 535–36 (Fla. 1999).

³⁰⁴ Cardi, *Purging Foreseeability*, *supra* note 3, at 749 (“[F]oreseeability operates in the context of breach as a form of risk contextualization—a foreseeability of general focus . . . which helps to define the blameworthiness of a defendant’s conduct. Under the rubric of proximate cause, by contrast, the foreseeability inquiry is not general but specific to the particular injury suffered by the particular plaintiff at hand.”).

³⁰⁵ *Lopez v. Nutrimix Feed Co.*, 27 F. Supp. 2d 292, 297 (D.P.R. 1998) (“Foreseeability does not require that the precise risk or exact harm which occurred have been foreseen or anticipated. The essential factor is that the individual should have foreseen consequences of the kind that in fact occurred.” (citation omitted)).

³⁰⁶ *Smith v. Frank*, 207 F. App’x 617, 620 (6th Cir. 2006) (“An act or omission will not be considered a proximate cause of an injury if a reasonable person could not have foreseen or anticipated the injury.” (citing *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991))).

courts should enforce—an *obligation to foresee* the sort of risk involved.³⁰⁷ As one court put it:

In determining the existence of a duty, we look 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. We look at both foreseeability *and* whether the obligation of the defendant is one to which the law will give recognition and effect. The assessment of foreseeability takes into account "community moral norms and policy views, tempered and enriched by experience, and subject to the requirements of maintaining a reliable, predictable, and consistent body of law."³⁰⁸

Although the level of self-awareness evident in the court's statement may be unusually high, the statement seems perspicuous. This view of duty and its constituent foreseeability sub-element accurately describe the approach, however implicit, in most jurisdictions. And this article has argued that, normatively, this is the lens through which courts should approach the duty determination.

Cardi and Green agree with Goldberg and Zipursky that liability for negligence, "as opposed to duty, in particular," is relational, and that "negligence in the air" will not suffice."³⁰⁹ Accordingly, say Cardi and Green, "the chef who negligently prepares a meal that causes a [diner] to become [sick] will not be held liable for the death of the [diner's] elderly mother who, as a result of the [diner's] illness, [was] not given her [medication]."³¹⁰ This hypothetical is framed entirely in causal language, and the chef's negligence was a substantial contributing factor in having caused the death. Cardi and Green are correct that, probably, if it came down to this, the jury or court would find proximate, legal cause lacking. Given the causal connection, however, resolving the case by finding a duty and a breach, albeit lack of proximate causation, seems messy. The

³⁰⁷ *Duenas v. Yama's Co.*, Nos. 91-16923, 92-15885, 92-15919, 1993 WL 280407, *3 (9th Cir. July 26, 1993) ("[T]he [state] court held that, based on public policy concerns, the government had no duty to foresee and protect against extreme carelessness even if the government was negligent in the design and maintenance of the road."); *but cf.* Cardi & Green, *Duty Wars*, *supra* note 2, at 722 ("[F]oreseeability is inherently unamenable to categorical decisionmaking . . .").

³⁰⁸ *Johnstone v. City of Albuquerque*, 145 P.3d 76, 80 (N.M. Ct. App. 2006) (citations omitted); *accord* *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1233 (D.N.M. 2008).

³⁰⁹ Cardi & Green, *Duty Wars*, *supra* note 2, at 712 (citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928)).

³¹⁰ *Id.*

cleaner, more intuitively stable outcome, would be that the chef simply owed no duty to the unseen live-in mother. The law will not impose upon the chef a duty to foresee what the diner's private living arrangement might be.

Any such duty determination on the part of the court would not encroach upon the jury's role in deciding foreseeability. While the jury's assessment will reflect its community's norms, the jury, unlike the court, will not be charged with taking into account "policy views, tempered and enriched by experience, and subject [self-reflexively] to the requirements of maintaining a reliable, predictable, and consistent body of law."³¹¹

VI. CONCLUSION

Everyone agrees that law's legitimacy wanes when legal outcomes seem to result from whim or undisciplined discretion. Any duty theory should minimize the appearance of arbitrary decision-making about whether *D* owes *P* a duty, and concomitantly maximize the probability that the case's outcome may apply generally and universally, stabilizing law's legitimacy.³¹²

Those who have led the charge in the duty wars are understandably concerned that no-duty determinations often appear inappropriately case-specific and fact-bound, and hence illustrative of the sort of decision-making legal realism has described.³¹³ Nevertheless, neither conceptualizing duty as moral obligation, as Goldberg and Zipursky and Esper and Keating propose, nor ridding the concept of its foreseeability sub-element, *pace* Cardi and Green and the Restatement (Third) of Torts, is the key to a more stable, coherent and legitimate tort mechanism. This article has shown that such moves may have the opposite effect.

³¹¹ *Johnstone*, 145 P.3d at 80.

³¹² See generally Amy L. Wax, *Against Nature—On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 307, 322 (1996) (reviewing ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* (1994)) ("According to Wright, it is no accident that cultural traditions that effectively channel and control natural desires tend to call upon moral concepts of right, obligation, and duty. These normative traditions capitalize on the biologically rooted attraction to universal precepts, which in turn tend to maintain evolutionarily stable cooperative arrangements.")

³¹³ See BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 109 (2007) (describing legal realism's "Core Claim that judges respond primarily to factual situation-types rather than legally valid norms or doctrines"); KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES*, at x (1930) ("[R]aw facts repeatedly, and in defiance of our legal 'safeguards,' break through undistorted to the court's consciousness in some cases and influence decision.")

The legal scholars have failed to appreciate the extent to which the court's instrumental duty analysis, inclusive of a foreseeability component, furthers the role judges play in self-reflexively developing, and at times articulating, an embodied philosophy of tort law's reach and limitations in structuring the efficiencies of private and commercial activity. Duty to foresee is often the most salient policy issue constituent within the larger duty determination.³¹⁴ Although Cardi and Green assess foreseeability as a standardless murk that should be purged from the duty analysis (but not from the jury's deliberations), it can, quite the contrary, be pellucid as a sub-element in a tort claim. Foreseeability in duty is a resilient hybrid factor tending to meld duty *A* (whether the protected group should be deemed closely enough situated to warrant defendant's consideration) and duty *B* (whether the defendant should be vigilant or investigate) concerns.

Duty commentators appear to agree that preserving the availability of legal remedies for those aggrieved by actors at fault is the salutary goal. Inclusion of foreseeability within duty does not predetermine the jury's assessment, but clarifies duty's parameters and helps send to the jury those cases in which enforcing an obligation to foresee is deemed normatively desirable. The unfortunate alternative is to arbitrarily purge this important policy consideration from the larger instrumental determination of duty.

³¹⁴ See *Santos v. Sunrise Medical, Inc.*, 351 F.3d 587, 593 (1st Cir. 2003) (noting issue of "the manufacturer's obligation to foresee the way the product would be used"); *Rojas v. Nogama Constr. Corp.*, Civil No. 09-1149 (JAG), 2011 U.S. Dist. LEXIS 72791, at *8 (D.P.R. July 6, 2011) ("The duty to exercise due care comprises the obligation to foresee and to prevent the occurrence of damages which may be reasonably foreseen"); *City of Tallahassee v. Hawes*, 87 So. 765, 767 (Fla. 1921) ("[T]he customary hitching of horses to posts supporting awnings over sidewalks in the city put upon the city an 'obligation to foresee and guard against' injuries to pedestrians caused by the jerking of the posts from their places by horses hitched thereto").