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PUTTING “DUTY” IN ITS PLACE: A REPLY TO PROFESSORS GOLDBERG AND ZIPURSKY

*Dilan A. Esper & Gregory C. Keating**

In an earlier article,¹ we argued that California courts have been proliferating “no duty” decisions and that these decisions distort the concept of duty, deform the substance of negligence law and disrespect the role of the jury. We began our paper with an account of the prevailing—and we think correct—understanding of the place of duty in negligence law. The role of duty doctrine, we claimed, is to fix the legal standard applicable to the defendant’s conduct.² Therefore, duty rulings normally are and normally ought to be both rare and relatively general. We went on to argue that California courts have developed a bad habit of “abusing ‘duty’”—of using the doctrine’s status as a question of law for the courts as cover for issuing highly particularized rulings which reach no farther than the preferred outcome in the case at bar.

Duty rulings should be rare because “the general rule”—both in California and throughout the United States—is that “all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.”³ Departures from this default standard

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1. Dilan A. Esper & Gregory C. Keating, *Abusing “Duty,”* 79 S. CAL. L. REV. 265 (2006) [hereinafter *Abusing “Duty”*].

2. The proposition that the role of duty is to fix the legal standard governing the defendant’s conduct is the kind of black-letter law that courts cite when they list the elements of negligence liability. See, e.g., *Talton v. Arnall Golden Gregory, LLP*, 622 S.E.2d 589, 591 (Ga. Ct. App. 2005) (“In order to maintain a cause of action for negligence, a plaintiff must be able to prove that the defendant owed a legally cognizable duty to the plaintiff to conform to a certain standard of conduct, the defendant breached this duty, and the breach damaged the plaintiff.” (citation omitted)).

3. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997); see also

of obligation ought to be infrequent. Only a relatively small number of recurring social interactions justify either stiffening or relaxing the normal obligation of reasonable care. Ski lift operators may owe their patrons duties of utmost care because they are in exclusive control of a dangerous instrumentality, whereas football players may owe each other no duties of ordinary care because the exercise of ordinary care would impair the vigorous play of the game, but these are each exceptional circumstances. Duty rulings should be relatively general because the role of duty is to fix the standard of care owed by some *class* of potential injurers (e.g., common carriers, experts, participants in a sporting competition, or sellers of prescription drugs) for some recurring risk imposition. Put differently, the role of duty rulings is to articulate *law*. Highly specific rulings do not articulate law, because they do not state general norms for the governance of conduct.

"No duty" rulings are, of course, the flip side of duty rulings. Instead of subjecting actors to obligation, "no duty" rulings exempt actors from obligation. "A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."⁴ In a sea of general duty, islands of "no duty" must, by logical necessity, be less general than the duty of care that they suspend. But even "no duty" rulings must fix the rights and responsibilities of persons with enough generality to govern a discernible domain of conduct. Whatever the merits of no duty to trespassers may be as a rule of tort law, such a rule defines an identifiable class of persons toward whom owners of real property may be as negligent as they please.⁵ The intensely particular rulings now being issued by California courts fail this test. Representative rulings hold that mass transit agencies owe a general duty of care to passengers exiting and entering trains, but "no duty" to an inebriated passenger whom it has escorted off the train once he is on the platform;⁶ that drivers owe general duties of care to other drivers but "no duty" to change lanes when traveling at

CAL. CIV. CODE § 1714(a) (West 2002) (originally enacted in 1872, prescribing that everyone owes to everyone else a duty of ordinary care); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 7, scope note (Proposed Final Draft No. 1, 2005) (stressing that, when negligent conduct causes physical harm, duty can usually be assumed to exist).

4. *Le Lievre v. Gould*, (1893) 1 Q.B. 491, 497.

5. *Id.*

6. *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 518 (Ct. App. 1997).

a legal speed in either the No. 2 lane or No. 3 lane of a four-lane freeway at night, on dry pavement, in light traffic and clear weather;⁷ that businesses owe general duties of care to protect customers on their premises from assault at the hands of third parties but "no duty" to protect a customer's life by "comply[ing] with the unlawful demand of an armed robber that property be surrendered,"⁸ and so on.

Duty doctrine demands wholesale judgments about the law controlling the case. Is that law tort, contract or property, or no law at all? Contemporary California rulings are retail judgments about appropriate conduct on the specific facts at hand. Duty is about the existence of obligation in tort—about whether people should be expected to exercise reasonable care to avoid harming others who might otherwise be endangered by their conduct. Intensely particular "no duty" decisions do not make credible claims about the existence of obligation. What sense they make, they make as claims about responsibility "all things considered"—about whether these defendants did behave reasonably in the specific circumstances at hand. *Monreal v. Tobin* is instructive.⁹

Construed as a true duty decision, *Monreal* establishes a barely discernible sliver of license in a sea of obligation.¹⁰ Drivers owe to anyone foreseeably jeopardized by their driving a general duty to

7. *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168, 176 (Ct. App. 1998).

8. *Ky. Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1262 (Cal. 1997). It can be difficult to locate the seam between the general duty of a business to exercise care to keep its customers safe from (among other things) intentional injury at the hands of third parties on the premises, and the business' exemption from any such duty when an armed robber makes an unlawful demand for the business' property. This difficulty is compounded by the fact that the court expressly reserves judgment on whether "the right of any person to defend property with reasonable force . . . is qualified by the duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons." *Id.* at 1269–70. The set of specific fact patterns that may be subject to diverse duties as a matter of law appears open ended. Duty is set to swallow breach. In *Castaneda v. Olsher*, 162 P.3d 610, 616 (Cal. 2007), duty does swallow breach:

The duty analysis we have developed requires the court in each case (whether trial or appellate) to identify the specific action or actions the plaintiff claims the defendant had a duty to undertake. "Only after the scope of the duty under consideration is defined may a court meaningfully undertake the balancing analysis of the risks and burdens present in a given case to determine whether the specific obligations should or should not be imposed . . ." *Id.* (citation omitted) This inquiry into the merits of a particular precaution is the heart of breach analysis, properly conceived. For a further discussion of the "untaken precaution," see Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139 (1989).

9. 72 Cal. Rptr. 2d 168.

10. *Id.*

exercise reasonable care in the circumstances.¹¹ But the “driver of a vehicle traveling at the posted maximum speed limit in either the No. 2 lane or No. 3 lane of a dry and straight four-lane freeway, at night, and in light traffic during clear weather”¹² owes “no duty” “to other drivers and any involved passengers . . . to move his or her vehicle to the right 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.”¹³

To say that a driver in the position of Luis Monreal may be “as negligent as he pleases towards the whole world”¹⁴ of other drivers who approach him “from behind in the same lane at a speed in excess of the posted maximum speed limit”¹⁵ while he is “traveling at the posted maximum speed limit in either the No. 2 lane or No. 3 lane of a dry and straight four-lane freeway, at night, and in light traffic during clear weather”¹⁶ does more than draw laughter. It misstates the plausible intuition at work. That intuition is that a driver in Monreal’s circumstances *is, all things considered, conducting himself reasonably* when he does not change lanes. He is not free of the obligation to be careful; he is free of fault, even the 6 percent of fault found by the trier of fact in the case.¹⁷ But this is not a judgment of “no duty,” it is a judgment of “no breach as a matter of law.” 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. Within the law of negligence, this difference, moreover, is not merely conceptual. Questions of duty are for the court. Questions of breach are for the jury—except in the rare and special case where reasonable jurors could not disagree.¹⁸

11. *Id.*

12. *Id.* at 170.

13. *Id.*

14. *Le Lievre v. Gould* (1983) 1 Q.B. 491, 497.

15. *Monreal*, 72 Cal. Rptr. 2d at 170.

16. *Id.*

17. *Id.* The court’s confusion of “no duty” and “no breach as a matter of law” is betrayed by its saying that it is deciding “whether a reasonably prudent driver” would change lanes in the circumstances at hand. *Id.* This assumes the existence of a duty to drive reasonably and inquires into what that duty demands on the precise facts of the case.

18. See *Abusing “Duty,” supra* note 1, at 269 n.12, 279–80. “No breach as a matter of law”

Excessive particularity is not, however, the only fault to be found in the California courts' burgeoning "no duty" decisions. California courts are "abusing 'duty'" in several other ways as well. Chief among these is by espousing a version of assumption of risk doctrine that conflates law articulation and law application. This conflation prompts courts to take cases from juries on the theory that both the articulation of the legal standard and its application to the facts are matters for the court.¹⁹ The resulting practice transgresses the boundaries of judicial authority and usurps the legitimate authority of the jury.

Law articulation is the proper domain of the judge and law application is the proper domain of the jury. The latter is especially true in negligence cases, governed as they are by the highly general, morally inflected legal standard of reasonable care in the circumstances. When reasonable people disagree over whether the defendant exercised reasonable care in the circumstances at hand (or over whether some risk is "inherent" in an activity) well-settled doctrine holds that the matter is for juries—not judges—to decide.²⁰ Indeed, questions of breach in negligence law go to the jury even when the facts are undisputed, as long as there is reasonable doubt about the reasonableness of the defendant's conduct.²¹

This deference to jury adjudication in the formal doctrine of American negligence law is wholly appropriate. The legal duty of "reasonable care" is an artificial, institutional elaboration of the moral duty to respect the lives and property of others, and the idea of "reasonable" care at the heart of negligence law is an extension and special application of the "intuitive moral idea" of "reasonableness."²² That intuitive idea is concerned with what we

rulings can articulate enduring rules spelling out the precise precaution that due care requires in some recurring circumstance. The key to success here is finding a recurring circumstance and matching it to an appropriate rule. The history of negligence law suggests that this is not easy to do. *See id.* at 285–86. Understood as a "no breach as a matter of law" decision, *Monreal* appears more defensible, though we doubt that the rule it states is likely to give guidance in many future cases. 72 Cal. Rptr. 2d 168. As an example of judicially fashioned rule which has stood the test of time, consider the rule that baseball stadiums need only screen certain areas of the stands and not others. *See, e.g., Costa v. Boston Red Sox Baseball Club*, 809 N.E.2d 1090, 1093 (Mass. App. Ct. 2004).

19. *Abusing "Duty," supra* note 1, at 296–300.

20. *Id.*

21. *Id.* at 269 n.12 (citing Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424–39 (1999)).

22. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 82 (Erin Kelly ed., 2001)

owe to each other as members of a particular moral and legal community. As far as negligence law is concerned, we act reasonably when we take the risks of physical harm that our actions impose on others and adjust our actions accordingly. We act reasonably when the risks we impose can be justified to those on whom they are imposed in accordance with fair principles of risk imposition, principles that take adequate account of their right to the physical integrity of their persons. Jury adjudication is a procedurally fair and substantively democratic way of deciding how this requirement that only reasonable risks be imposed bears on the facts of particular cases.²³ Put differently, jury adjudication is a reasonable procedure for settling reasonable disagreement about what we owe to each other in the way of careful conduct.

Formal doctrine, however, is one thing; present practice is another. The vitality of jury adjudication in negligence cases depends importantly on judges confining themselves to a properly modest role. Here, the California courts' ongoing abuse of duty does real damage. When duty is a live issue in every case, it is impossible to draw a principled line between the provinces of judge and jury. Judges are inevitably drawn into making their own judgments as to whether the defendant exercised reasonable care, and lose sight of the fact that their proper role is restricted to articulating the law governing the case at hand and to policing the perimeters of jury law-application.

The abuse of duty does not end with the demeaning of juries. In a parallel usurpation of the legislative role, California courts also treat their judicially fashioned "assumption of risk" doctrine as a license to disregard statutorily recognized duties, thereby running roughshod over legislatures as well as juries.²⁴ Careening on, they have resuscitated "secondary" assumption of risk—the much and rightly reviled nineteenth-century version of the assumption of risk doctrine—under the name of "primary" assumption of risk.²⁵ Last but not least, California courts have begun a *sub rosa* resuscitation of the status categories famously abandoned in *Rowland v. Christian*.²⁶

(characterizing reasonableness as a "basic intuitive moral idea").

23. See *Abusing "Duty," supra* note 1, at 279–81.

24. *Id.* at 272, 305–310.

25. *Id.* at 305–10.

26. *Id.* at 313–18 (discussing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

Viewed singly, California cases "abusing 'duty'" are highly particularized releases of obligation—tickets good for only one ride on the railroad, as Cardi and Green say in their contribution to this debate.²⁷ Viewed collectively, California cases appear in a different light—not so much because they cumulate into larger rules, but because they crop up most often in particular domains of tort law. Assumption of risk and duties owed to entrants onto land are the primary (though hardly the exclusive) domains of California's burgeoning "no duty" jurisprudence. By virtue of their location within the larger landscape of the law of torts, these highly particular rulings have a broader—if ill-formed—effect on the contours of civil obligation in California. "No duty" doctrines that waned throughout the twentieth century are now waxing.²⁸ Inchoately and incompletely, California courts are reconfiguring twenty-first-century tort law by resuscitating nineteenth-century doctrines.

The doctrines that California courts are reviving thus trace a troubling whole. They devalue the physical integrity of the person and exalt both unfettered dominion over real property and unrestrained freedom of economic activity. No rational person values her property or her wealth more than her life, and no reasonable democratic citizen publicly asserts that her property or her wealth is more valuable than the lives and wealth of her fellow equal citizens. Nonetheless, California tort law is beginning to value some people's property and wealth more than other people's lives. By granting property and contractual interests priority over physical integrity, the more important interests of some are subordinated to the less important interests of others.

The remedy for this abusive use of duty is a simple one, or so we argued. California courts must resume making duty decisions in an appropriately categorical way. Duty doctrine must be used:

(1) to fix the boundaries among contract, tort, property and

27. Jonathan Cardi & Michael Green, *Duty Wars*, 81 S. CAL. L. REV. 671 (2008) [hereinafter *Duty Wars*]. Indeed, Cardi and Green's remarks do not go quite far enough. The rulings that we criticize are for defendants only and, for the defendants lucky enough to win them, these are old-fashioned Disneyland "E tickets", good for the best ride the tort system has to offer.

28. California is not the only jurisdiction to revive no-duty doctrines. See, e.g., *Stockberger v. United States*, 332 F.3d 479, 480 (7th Cir. 2003) (stating that under Indiana law, employer had no duty to prevent employee from driving in a hypoglycemia-induced "unresponsive, agitated . . . erratic[]" state). In California, the no-duty doctrine has also notably reappeared in *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

legally unregulated conduct; and

(2) to articulate the more particular standards of care owed by certain well-defined social roles and activities (e.g., by ski lift operators, within sporting activities); or incurred by certain undertakings (e.g., by entering into various “special relationships”).

In those broad areas where the legal standard governing the defendant’s conduct is well settled—when contract and property are out of the picture and a well-articulated tort standard of care is firmly in control of the terrain—the only recurring responsibility of duty doctrine is to identify those cases where the conduct of the defendant is unregulated by law because the risk of harm is so remote.

Put differently, the role of duty in this domain is merely to identify those risks that are not “reasonably foreseeable” and to curtail further, pointless inquiry into whether such unforeseeable risks should have been guarded against. Reasonable foreseeability of harm *to someone* is, in general, sufficient to trigger a duty of care because people have a shared and urgent interest in avoiding physical harm. The prospect of physical injury generally does suffice—and generally should suffice—to activate the obligation of reasonable care.

In proposing a limited role for “reasonable foreseeability” in duty decisions, we were (and are) rejecting the position of the current draft of the *Restatement (Third) of Torts: Liability for Physical Harm* (“*Third Restatement*”),²⁹ which proposes that all questions concerning foreseeability should be handled under the breach element of a negligence claim. But our disagreement with the *Third Restatement* should not be exaggerated. We are sympathetic to the

29. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”). This provision shifts questions of foreseeability from duty to breach, where the standard applied to the review of jury decisions would be a “no reasonable jury” standard. This standard ought to be far more constraining of judicial discretion than a standard which holds that duty is a question of law for courts. We agree that in the vast majority of cases foreseeability should be reserved for the jury as part of the inquiries into breach and/or “proximate” causation. We think it cannot be wholly eliminated from duty because people cannot reasonably be asked to guard against a risk of physical injury when they cannot reasonably be expected to foresee any risk of injury at all from their conduct, and because a limited role for foreseeability is consistent with the results of some important and celebrated cases. For defense of this proposal of the *Third Restatement*, see W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739 (2005); see also W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921 (2005).

spirit of the *Third Restatement's* proposal—namely, to limit the opportunity for judges to take cases from juries by manipulating the concept of foreseeability. Moreover, we understand the impulse to shift all questions of foreseeability of harm into the element of breach. Harms are rarely so unforeseeable that no care should be taken to prevent them. Slotting issues of foreseeability into the law of breach highlights this important truth, and might well flush out judicial abuses of power masked by the doctrine that duty is a question of law for the courts.³⁰

Notwithstanding these attractions, however, the *Third Restatement's* proposal has two drawbacks. The first is that foreseeability of harm is fundamental to the expansion of duty throughout the twentieth century. Tort pushed back both property and contract throughout the twentieth century because the great cases of twentieth century tort law “put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract”³¹ and replaced it with the notion that reasonable foreseeability of harm itself suffices to trigger a duty of care. Divorcing duty from foreseeability writes great cases, such as *MacPherson v. Buick Motor Co.*³² and *Heaven v. Pender*,³³ out of the law of duty. Yet these cases are the fonts and foundation of modern doctrine, and rightly so. Making reasonable foreseeability of harm the touchstone of obligation in tort captures a powerful and sound moral intuition: that the physical integrity of the person is an interest urgent enough to bound both the free use of real property and the free play of market forces. Dominion over things and the pursuit of rational self-interest on mutually advantageous terms must both be limited by the rights of others to the physical integrity of their persons.

The second drawback of the *Third Restatement's* proposal is that negligence law asks each of us to moderate the pursuit of our own interests in light of the legitimate interests of others. We cannot *reasonably* be asked to guard against harms that we cannot

30. See *Duty Wars*, *supra* note 27, at 729 (“The malleability of foreseeability also provides a cover for courts to obscure the real reasons for their decisions.”). Cardi and Green characterize their disagreement with us as limited. See *id.* at 724–26.

31. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

32. *Id.* at 1050.

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

reasonably be expected to foresee. Reasonable foreseeability of harm is a necessary precondition of reasonable care. Imposing obligations to guard against injuries that are not reasonably foreseeable demands “that people do more than take the legitimate claims of others into account”³⁴; it holds people responsible for failing to prevent harms they could not reasonably have anticipated. To demand that people prevent the unforeseeable violates cardinal principles of legality and responsibility, yet that is what severing duty from foreseeability does.³⁵

Our arguments have not gone unchallenged. In *Shielding Duty*, their *Comment* on our Article, John Goldberg and Benjamin Zipursky (“Goldberg and Zipursky”) express skepticism about our argument in three principal ways.³⁶ First, they argue that our criticism of the excessive particularity of California courts’ duty rulings “is severely underspecified because [we] never explain the level of categorization that [we] have in mind, nor the reasons favoring one level of categorization over another.”³⁷ Second, they “see no reason to suppose that, were the California courts to aspire to

34. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 106 (1998). The *Third Restatement* is preoccupied not with “duty as obligation” but with “duty as exemption”—with, well, “no duty.” We share its disapproval of the pretense involved in many “duty as exemption” rulings, where some unstated policy preference seems to hide behind an implausible declaration of “unforeseeability.” But we think that the default rule that there generally is a duty of care cannot be properly justified without observing that risky conduct usually creates a “reasonably foreseeable” risk of harm to *someone*, and that such risk is sufficient to put the potential injurer under an obligation of reasonable care. If no harm were reasonably foreseeable, insisting on the exercise of care would be unreasonable. Why should anyone moderate the pursuit of their own ends in the name of the security of other people when their conduct poses no discernible threat to the security of anyone else?

35. This is not a critique of strict liability. Strict liability puts actors on notice that they will be held accountable for harms properly charged to their activities, even if they should not have prevented those harms. Strict liability for *unforeseeable* harms presents parallel problems to negligence liability for unforeseeable harm. In the one case, the problem is being asked to *prevent* harm one could not anticipate; in the other, the problem is being asked to *bear financial responsibility for* harm one could not anticipate—but strict liability itself is not objectionable because it holds actors responsible for harms that they should not have prevented. It may be worth noting that negligence liability for unforeseeable harms is not likely to result in greater precaution, as the risks are, in fact, unforeseeable. Thus, to the extent that negligence law is intended to induce actors to take precautions to prevent harm to others, liability for unforeseeable risks is not an appealing strategy.

36. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006) [hereinafter *Shielding Duty*].

37. *Id.* at 335–36.

the issuance of relatively broad categorical rulings, the law would move in the direction that [we] believe it should go."³⁸ Third, they argue that our "call for tighter boundary patrols"³⁹ to keep contract and property from swallowing tort is not "in the end actually responsive to the doctrinal developments [we] decry."⁴⁰ Formal tidiness among doctrinal domains is compatible, they point out, with different substantive priorities. California courts might well construct clearer boundaries by curbing tort and expanding contract—by making explicit and coherent what is now merely implicit and inchoate.

Goldberg and Zipursky are right to observe both that more general rulings might well move the law in a direction that we would not like, and that "tighter patrolling" of the boundaries between tort, contract and property is perfectly consistent with a reconfiguration of

38. *Id.* at 336.

39. *Id.* at 337.

40. *Id.* They also argue that our advice "is not likely to be heeded." *Id.* They may well be right about this, but—although we would be happy to be heeded by the current California courts—we did not write our paper by first figuring out what advice the courts were most likely to heed, and then producing that advice. We wrote our paper to explain what California courts are doing wrong, and how their wrongful practice can be righted.

We do believe, however, that it would be politically feasible for our advice to be heeded. We disagree, for example, with Goldberg and Zipursky's argument that when *Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993), came before the court in 1993, abolishing the status categories was no longer a politically "tolerable state of affairs" so that landowner duties had to be reconfigured. See *Shielding Duty*, *supra* note 36, at 353. In fact, the status categories were abolished in Nevada in 1994. See *Moody v. Manny's Auto Repair*, 871 P.2d 935, 943 (Nev. 1994) ("A man's life or limb does not become less worthy of . . . compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters" (citing and quoting *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1960), *superseded by statute*, NEV. REV. STAT. § 41.139 (1994))). As we point out in *Abusing "Duty,"* the political opposition to abolishing status categories centers on the issue of permitting criminal trespassers to recover for injuries suffered during the commission of crimes; maintaining this narrow category of landowner immunity (based on the principle that criminals should not profit from their wrongs) but otherwise recognizing a general duty owed to all seems both politically feasible and consistent with our doctrinal approach. See *Abusing "Duty," supra* note 1, at 278 n.34.

Cardi and Green make a similar point in *Duty Wars* when they note that they "do not share [our] optimism that keeping duty in its proper place will change the contours of tort liability. The forces at work in the last generation of tort retrenchment are far too powerful to be tamed by coherent doctrine." See *Duty Wars*, *supra* note 27, at 733. We agree. But, like Cardi and Green themselves, we believe that insisting on "more coherence and less confusion in torts cases" will contribute "to more transparency and less obfuscation in courts' analyses of the moral and policy-based underpinnings of their decisions, and to the maintenance of the long-standing separation of the roles of judge and jury." *Id.* Over time, moreover, criticizing a legal trend can contribute to reversing that trend.

the boundaries among these fields in ways that we would find distasteful. A clearer, more categorical body of civil law might be constructed so as to give contract and property more priority over tort than they have at present, and we would probably not be delighted by such a development. We would, however, applaud its intellectual integrity.

Transparency, honesty and rigor are virtues in judicial decision making. The developments that we criticize are made worse by their intellectual dishonesty. At their simplest and worst, these developments involve nothing more than using the doctrine of duty to reach preferred outcomes in particular cases and disguising that enterprise as the legitimate articulation of law. We would disagree with a rigorous and coherent turn to the right, but its honesty and rigor would at least be worthy of respect. If nothing else, a rigorous and coherent turn to the right would be more likely to result in the consistent application of legal principles—and in the clarification of the issues at stake.

That said, we were not, of course, arguing for a more rigorous and transparent turn to the right.⁴¹ But then our point about the relative spheres of tort, property and contract was not essentially formal either. In our view, the laws of torts, contract and property embody fundamental commitments of value and substance. In its accident law branch, the law of torts is preoccupied with the physical integrity of the person, whereas the law of property is concerned with dominion over and use of external objects, and the law of contract with choosing the terms of our more formal interactions.⁴² Modern contract law, in point of fact, is preoccupied with one particular form of free interaction, namely, the pursuit of mutual advantage in the marketplace. To give tort priority over both property—as the revolution inaugurated by *Rowland v. Christian*⁴³ does—and contract—as the revolution inaugurated by *MacPherson v. Buick*

41. See *Abusing "Duty," supra* note 1, at 270–71.

42. There is also, we think, another difference between our view of the role of duty doctrine and Goldberg and Zipursky's view. We believe that duty delineates the domain of negligence law, carving out a particular space in relation to the domains of property, contract, and legally unregulated conduct. *Abusing "Duty," supra* note 1, at 273–79. In our view, this role is extremely important, if often underappreciated precisely because duty is usually taken for granted. Goldberg and Zipursky say nothing about this role.

43. 443 P.2d 561 (Cal. 1960).

*Motor Co.*⁴⁴ does—is to express the liberal ideal that the liberty and integrity of the person is a more urgent interest than these competing interests in unfettered dominion over external objects or unfettered freedom of economic exchange.⁴⁵ In contrast, to grant property and contract priority over tort is to express the competing quasi-libertarian ideal that the free use of external objects and freedom of economic exchange trump the liberty and physical integrity of other persons who might be harmed by the unchecked exercise of property and contract rights.⁴⁶ The libertarian tinge that Goldberg and Zipursky see as a contingent feature of *Kentucky Fried Chicken of California, Inc. v. Superior Court* ("KFC") strikes us as a defining feature of the larger transformation toward which California's

44. 111 N.E. 1050 (N.Y. 1916).

45. Abstractly, the domain of contract is the domain of voluntary agreement, not the domain of economic liberty (or laissez-faire capitalism). The contractual ideas at work in the secondary assumption of risk decisions that we criticize, however, express a laissez-faire ideal of economic liberty. Indeed, a number of the California decisions in this area involve situations where it was quite questionable whether there was voluntary consent to run the risk at issue, and where the guiding idea was not that the plaintiff chose to run the risk but that the market took care of "compensation." This is a resuscitation of assumption of the risk as it existed prior to the passage of the workers' compensation acts.

46. To be sure, this is not rigorous libertarianism. Philosophically rigorous libertarianism, as we understand it, gives pride of place to property and contract rights at the expense of rights of personal liberty, among other things. See generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105 (2002) (explaining how libertarians' concept of liberty as a kind of property leads to their rejection of basic liberal institutions). Libertarian theorists of tort usually prescribe strict liability for stranger accidents, and for contract to control the terms of the legal relations among potential injurers and victims who are not strangers. One of the things that contract then protects is the property entitlements that the parties bring to the bargaining table. See generally RICHARD EPSTEIN, A THEORY OF STRICT LIABILITY (1980) (advancing a libertarian theory of strict liability for accidents among strangers); RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 91–111 (1995); ROBERT NOZICK, *Prohibition, Compensation and Risk*, in ANARCHY, STATE AND UTOPIA 54 (1974). Our argument is that a conservative philosophy infused with some aspects of libertarianism is at work—one which inchoately attempts to reverse the priorities between tort and contract, and tort and property in several important domains. To be sure, the highly particular character of the rulings we criticize can serve to reduce the courts' ability to fully implement this quasi-libertarian philosophy because particularistic rulings tend not to construct general rules. To the extent that the two tendencies do hang together, they do so both because the rulings are concentrated in certain legal domains, and because they cut back on duties of care. To the extent that the decisions we criticize are published California Supreme Court and Court of Appeal decisions, they set a tone and encourage trial courts to grant summary judgment motions for defendants on the ground that they owed "no duty." Because the existence and extent of a duty is an issue for the court to be decided *before* a case goes to the jury, expanding the domain of duty decisions *by its nature* moves the law in a pro-defendant direction. A plaintiff who—prior to the expansion of duty's domain—needed only to convince the jury of his or her claim now has to complete two separate tasks using the same evidence: establishing the existence of a duty to a judge, and establishing a breach of the duty to a jury. Defendants get two bites at the same apple.

ongoing abuse of duty incoherently gestures.⁴⁷ The substance of political morality—not the form of legal reasoning—is the deep issue at stake in these decisions.

We suspect that Goldberg and Zipursky's mistaking of moral substance for legal form has its roots in the way that they frame the jurisprudential issues at stake. *Shielding Duty* lays the lion's share of the blame for the ills that afflict California tort law on the triumph of an instrumentalist style of legal reasoning, a triumph that preceded the developments we criticize by at least several decades.⁴⁸ *Shielding Duty*'s prescription for restoring California tort law to good health places a correspondingly great emphasis on restoring traditional doctrine—the doctrine that existed before the California court of the postwar years supposedly dissolved various “quaint” doctrines in an acid bath of instrumentalism.⁴⁹ In framing the jurisprudential issues

47. *Ky. Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260 (Cal. 1997). See *Shielding Duty*, *supra* note 36, at 354–56. The libertarianism to which we object is also implicit in *Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993), a case that Goldberg and Zipursky defend. *Shielding Duty*, *supra* note 36, at 353.

48. The importance that Goldberg and Zipursky assign to instrumentalism in their explanation of what ails California law is evidenced by the fact that *Shielding Duty* begins by explaining how California courts were infected by the disease during the heyday of California progressivism in the middle of the twentieth century. See *Shielding Duty*, *supra* note 36, at 329–33. We agree that there is something to this story. See *Abusing “Duty,” supra* note 1, at 325. We also believe that what we call “pure” instrumentalism is at odds with the very idea of “duty as genuine moral obligation.” See *infra* pp. 119–121.

We do not believe, however, that the “instrumentalist” style of legal reasoning allegedly practiced by the Traynor court explains as much as Goldberg and Zipursky appear to think it does. For one thing, the Traynor court's instrumentalism was restrained. Instead of deciding individual cases on instrumental grounds the Traynor court reconstructed the law of torts at a very general level. For instance, rather than deciding the specific duties owed relating to lane changes on freeways, the Traynor court announced a principle of strict liability applicable to all defects in the manufacture of products for the market. *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 169–72 (1964). See BERNARD SCHWARTZ, *Pragmatic Instrumentalism*, in MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 530 (1993); Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169 (1997).

In the same vein, *Rowland v. Christian*—the font of contemporary California duty analysis—itself asserts that duty can usually be inferred from injury, except in very rare circumstances. 443 P.2d at 564. This is a broad and categorical conception of duty. Furthermore, the Traynor court—like most and perhaps all courts—invoked both instrumental “policies” and non-instrumental “principles” in its decisions. Its strict products liability jurisprudence, for example, characteristically invokes two policies (“loss-prevention” or deterrence, and “loss-spreading” or insurance) and one principle (the principle of commutative justice: that those who benefit from a risk ought to bear its burdens as well). See Alan Calnan, *A Consumer-Use Approach to Products Liability*, 33 U. MEM. L. REV. 755, 760–66 (2003) (discussing Traynor's justifications). To our eyes, the Traynor court looks no more instrumentalist than many American courts.

49. See *Shielding Duty*, *supra* note 36, at 350–61.

in this way, Goldberg and Zipursky set up a choice between instrumentalism and formalism. Implicitly or explicitly, scholarship of the sort we engaged in expresses a jurisprudence, and if—in betrayal of our home state—we are not instrumentalists, we must necessarily be formalists. Our emphasis on the contrasts between and priorities among tort, property and contract must therefore involve nothing more than an attachment to formal architectural tidiness.

We agree that the use of duty by contemporary California courts exhibits faults that are identified with unprincipled, result-oriented judicial decision making. At its simplest and worst, the California courts' abuse of duty involves little more than opportunistic invocation of the doctrine's status as a matter of law as cover for reaching liability-restrictive outcomes preferred by the courts. But there are other tendencies at work, and what troubles us with these tendencies does not have much to do with instrumentalism, desirable or undesirable. In our view, legal rules have reasons behind them, and those reasons are reasons of political morality. More generally, common law legal fields tend—in a fragmentary and inchoate way—to give institutional expression to principles and conceptions of political morality. The task of courts, we suppose, is to put the best face on the law that they articulate and apply, by making that law as formally coherent and as morally compelling as they can. The developments that we criticize in *Abusing "Duty"* express an inchoate quasi-libertarianism and mark a retreat from a more humane and just liberalism.⁵⁰ The broad duty of care recognized by twentieth-century tort law got something important right: the physical integrity of the person *is* a more urgent interest than unfettered dominion over real property and unrestricted freedom of economic exchange. People do have rights and we ought to take them seriously.⁵¹

To summarize, when Goldberg and Zipursky "see no reason to suppose that, were the California courts to aspire to the issuance of relatively broad categorical rulings, the law would move in the direction that [we] believe it should go"⁵² and argue that our "call for

50. *Abusing "Duty,"* *supra* note 1, at 289–323 (describing and critiquing contemporary developments in tort law).

51. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard Univ. Press 1978).

52. *Shielding Duty,* *supra* note 36, at 336.

tighter boundary patrols [to keep contract and property from swallowing tort] is not . . . in the end actually responsive to the doctrinal developments [we] decry,”⁵³ they are mistakenly treating our arguments as essentially formal. Those arguments, however, are substantive as well as formal. We fault excessive particularity because this particularity embodies an illegitimate abuse of judicial authority—and in two directions. On the one hand, excessively particular decisions abdicate the judiciary’s obligation to articulate law; on the other hand, excessively particular decisions usurp the jury’s authority to apply the law to the facts and bring its shared sense of reasonableness to bear on deciding whether the defendant’s conduct was faulty. Courts compound this usurpation of democratic authority when they issue rulings of “no duty” in the teeth of statutory schemes that plainly contemplate the presence of duties. In these cases, their rulings usurp the legitimate authority of the legislature. Finally, we fault the subordination of tort to property and contract because this subordination grants lesser interests in the use of things and the pursuit of mutual economic advantage priority over our more fundamental interests in the liberty and integrity of our persons.

Because we do not believe that our criticisms of California courts are merely formal, we do believe that Goldberg and Zipursky’s first criticism of our objection to the excessive particularity of California courts’ duty rulings is the most important criticism of our paper. We shall devote considerable attention to this criticism, which claims that our objection “is severely underspecified because [we] never explain the level of categorization that [we] have in mind, nor the reasons favoring one level of categorization over another.”⁵⁴

We also think, however, that a deeper disagreement concerning the character of duty divides us from Professors Goldberg and Zipursky, and shapes our respective views of just how general duty decisions should be. That issue has to do with the “relationality” of duty. “Relationality,” in turn, is linked to the idea that duty is a matter of genuine moral obligation.

Part I of this Article will therefore take up the general topic of

53. *Id.* at 337.

54. *Id.* at 335–36.

duty as obligation and relation. We shall concur with Professors Goldberg and Zipursky that duty is a matter of genuine moral obligation, and a relational norm, and dissent by asserting that duty is only weakly relational. Part II engages our fundamental disagreement with Goldberg and Zipursky, challenging the strongly relational conception of duty that they endorse. This strongly relational conception mischaracterizes negligent wrongdoing by personalizing duty and breach—presenting negligence as an affront done this plaintiff by this defendant. Negligence is not personal in the way that a slap in the face or a boot on the neck is. Negligence is a more abstract wrong—a failure to show sufficient regard for an indefinite plurality of unknown persons who might come to grief from one's carelessness.

By personalizing duty and breach, a strongly relational conception of duty distorts the distinct elements of a negligence claim. It commingles existence of obligation with discharge of obligation and extent of liability. By cutting duty loose from its conventional moorings, a strongly relational conception of duty tends to make duty the master concept of negligence law and a live issue in every case. A richly relational conception of duty is therefore more likely to foster than to curb the abuse of duty. Even more troubling, personalizing duty frames the issues at stake in duty decisions in a way that obscures the general role of the doctrine and the importance of the great duty decisions of the twentieth century. Those decisions rightly established the precedence of the physical integrity of the person over the free use of real property and the unfettered pursuit of mutual advantage in the marketplace. This important—but general—truth vanishes from sight as our gaze is focused on richly describing the relations between particular plaintiffs and particular defendants.

Parts III and IV of this Article return from tort theory to tort law, and respond to the principal criticisms that *Shielding Duty* urges against *Abusing "Duty,"* tackling primary assumption of risk and the generality of duty doctrine. By revisiting two leading cases, Parts V and VI illustrate how California courts are usurping the role of the jury and determining duty without articulating law.

I. DUTY AS OBLIGATION AND RELATION

In an important earlier piece, Goldberg and Zipursky describe duty as "the set of obligations that matches, roughly, what citizens

believe about the care they owe one another.”⁵⁵ The care that people owe each other depends, in turn, on the relations between or among them. We agree with Goldberg and Zipursky that the artificial legal duty of reasonable care is an extension and specification of a natural moral obligation to respect—or not to harm—other people and their property. Indeed, it is this very linkage of morality and law that makes jury adjudication such an integral and appropriate part of negligence law. We do not think, though, that either the natural moral obligation or the artificial legal one is relational in a strong sense of that term. That is, we do not think that the existence of the obligation to exercise reasonable care depends on the details of the relationship between plaintiff and defendant.

In our view, the shared deep basis of both the moral and the legal duty of reasonable care is our common vulnerability to physical harm at one another’s hands. That standing peril is alone sufficient to insist that, so far as risks of serious physical injury are concerned, “all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct.”⁵⁶ We are reciprocally responsible for exercising reasonable care to avoid inflicting physical injury on one another because we are all equally and intrinsically valuable and each of us has an urgent interest in the physical integrity of our persons. Duty, in other words, is only *minimally* relational. It is relational in the sense that it is owed by people and to other people—by each of us to everyone else. But within the sphere of duties that are owed to other people, duty in negligence law is only minimally relational. In general, the only “relation” needed to make our negative duty of reasonable care operative is the minimal relation between persons established when one person’s actions put another person at reasonably foreseeable risk of physical injury.

Put otherwise, our disagreement with Goldberg and Zipursky is this: We agree that duty in negligence law—unlike duty to God or country—is relational in the sense that it is owed to others and not to some impersonal value. But we disagree with the implication that the relational character of duty invites, requires or entails inquiry into the details of the relations between plaintiff and defendant. Duty in

55. John C.P. Goldberg & Benjamin Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1744 (1998) [hereinafter *The Moral of MacPherson*], cited in *Duty Wars*, *supra* note 27, at 686 n.87.

56. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997).

negligence law is relational, but it is also *general* in both its formulation and its operation. It is general in its formulation because everyone owes everyone else the obligation to exercise reasonable care not to endanger one another. It is general in its operation because it protects persons by class and not by name; the duty of reasonable care protects the class of those that reasonable foresight shows to be put at risk by a potential injurer's careless conduct. A driver, for instance, does not owe one duty of care to the hybrid driver on his left and a different duty of care to the SUV driver on his right.

A. Relational and Non-Relational Obligations

As a matter of dictionary definition, the word "duty" has several different meanings. At its most abstract, it identifies an action or constraint that is "required by moral obligation, demanded by custom, or enjoined by feelings of rightness or fitness."⁵⁷ Duty in this sense is about obligation—as opposed, say, to self-interest. But not all obligations are alike. Obligations are sometimes "abstract in the highest sense (e.g., obedience to the dictates of conscience)"⁵⁸ and sometimes "based on local and personal relations"⁵⁹ in the way that the mutual duties of parents and children are. "Duties" in this second sense are not "owed" to abstract principles of morality, but to other people. They are due to some and owed by others. Duties that are due to some and owed by others are "relational."

There are two distinct ideas involved in this dictionary definition of duty. One is the idea of obligation; the other is the distinction between relational and non-relational duties. Goldberg and Zipursky emphasize both of these aspects of duty.⁶⁰ Their animus against instrumentalism, for instance, appears in its best light when the issue on the table is the obligatory character of "duty."⁶¹ Pure instrumentalism fails to take rights seriously and so is at odds with the idea of duty as obligation. Pure instrumentalism takes tort law to

57. WEBSTER'S NEW INTERNATIONAL DICTIONARY 705 (3d ed. 1968).

58. Duty, Classic Encyclopedia Based on the 11th Edition of the Encyclopedia Britannica, <http://1911encyclopedia.org/Duty> (last modified Sept. 3, 2006).

59. *Id.*

60. *The Moral of MacPherson*, *supra* note 55, at 1749.

61. *Id.* at 1826. Cf. JULES COLEMAN, THE PRACTICE OF PRINCIPLE 34–36, n. 19 (arguing that the category of duty "does not work in the law and economics account of tort law").

be a tool for the promotion of an independently desirable end—welfare cashed out as wealth in the most familiar version of such instrumentalism⁶²—and conceives of all tort doctrines simply as tools for promoting this end. On such a view, duty doctrine is just another device for balancing the costs and benefits of accidents in a way that minimizes the (social) costs and maximizes the (social) benefits of accidents and their prevention. Duty is not a matter of what we owe to other people; it is, instead, a device for putting scarce resources to their highest use.⁶³

We agree with Goldberg and Zipursky both that duty is a matter of genuine moral obligation and that a *purely* instrumental conception of tort law denies the obligatory character of “duty.” People have an urgent interest in the physical integrity of their person, and that interest is sufficient to justify a right to physical integrity. That right, in turn, places limits on the way that people can treat one another and so grounds the duty of reasonable care. A purely instrumental view—one which, say, seeks to maximize wealth as a surrogate for maximizing welfare—denies the intrinsic value of persons. This view denies that human beings have rights to the physical integrity of their persons and hence are *owed* duties of reasonable care. It sees persons simply as so many sites where welfare might be located. “Welfare” is the touchstone of value and

62. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). For Goldberg and Zipursky, Prosser and his duty-skepticism is the principal target. See *The Moral of MacPherson*, *supra* note 55, at 1756–66, discussed in *Abusing “Duty,” supra* note 1, at 325 n.244 and the sources cited therein.

63. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972). Posner states:

[B]ecause we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. Conversely, there is no moral indignation in the case in which the cost of prevention would have exceeded the cost of the accident. Where the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

Id. For specific application of the economic conception of negligence law to duty doctrine, see Keith N. Hylton, *Duty in Tort Law: An Economic Approach*, 75 *FORDHAM L. REV.* 1501 (2006). Hylton argues that duty rules serve several functions, but that an important one is “encourag[ing] or subsidiz[ing] activities that carry substantial external benefits.” *Id.* at 1502. Duty is thus a device for optimizing social welfare for optimizing social costs and social benefits. “No duty” rulings are appropriate when an activity’s positive externalities “are considerably in excess of” its negative externalities. *Id.* at 1505. “Duty” is thus not a matter of obligation to other people; instead, it is a matter of our obligation to promote the general good, conceived in economic terms. Before Hylton, duty seems to have been overlooked by legal economists writing on tort. See *Duty Wars*, *supra* note 27, at 43 n.150.

duty is an instrument for maximizing overall welfare. In our view pure instrumentalism is deeply mistaken and quite incapable of explaining "duty." For the law of negligence, persons are the principal object of moral concern. Duty is grounded in respect for their intrinsic value and the urgency of their interest in physical integrity.

We also agree with a larger point, which we take to inform Goldberg and Zipursky's animus against instrumentalism. Tort law is a practice of holding persons—natural and artificial—responsible for harm done, and the attitudes and conceptions that animate tort express a stance towards responsibility that a direct and exclusive instrumentalism cannot capture. The facts that future accidents would be minimized and past losses dispersed in a desirable way if the defendant were held liable in a particular case do not speak to whether or not the injury at hand was wrongly inflicted. This is true no matter how worthy accident minimization and loss-dispersion may be as ends.⁶⁴ Tort has its roots in moral sentiments that direct instrumentalism can neither explain nor justify, namely, the resentment people feel at mistreatment by others, and the demand for reparation to which that resentment gives rise.⁶⁵ There is, here, a latent distinction between crime and tort. Everyone may be in a position to criticize seriously wrongful conduct as something that warrants disapproval and punishment. Criminal law responds to and expresses this truth. But only some people can resent wrongful conduct and demand its redress. These are the people who are wronged by that conduct; they alone have standing to claim that the wrong done them be made right by those who have done them wrong. Tort law is concerned with this class of persons and, indeed, is *about* this aspect of wrongdoing. Goldberg and Zipursky are right

64. Our point here is about the direct application of instrumental arguments to specific cases. Instrumental concerns with minimizing the combined costs of accidents and their prevention might, in rule utilitarian fashion, serve to justify recognizing various duties of care. Once such duties were recognized, failure to comply with them might provide a reason of the right kind, justifying the imposition of liability. Indirect instrumentalism is not necessarily vulnerable to the objection we urge against direct instrumentalism. This distinction bears on our appraisal of California law. We find the instrumentalism of *Rowland v. Christian* and the Traynor court more generally to be essentially indirect.

65. The classic statement of the importance of such "reactive attitudes" as resentment and of instrumentalism's inability to account for these attitudes is P.F. STRAWSON, *Freedom and Resentment*, in *STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION* 71 (1968). The same deep fact is marked by Rousseau's oft-quoted observation: "The nature of things does not madden us, only ill will does." 4 JEAN-JACQUES ROUSSEAU, *ÉMILE* 320 (Bernard Gagnebin trans., 1969).

to insist on this truth. Where they go wrong (in our view) is in taking this truth about tort to require a thickly relational conception of “duty.” It would be better to say that the elements of a negligence claim taken as a unified whole ought to cohere with the overarching truth about the role of tort law.

Our agreement with Goldberg and Zipursky that legal obligation tracks moral obligation and that thoroughgoing instrumentalism is incompatible with the genuinely obligatory character of duty is, however, subject to important qualifications. The legal obligation of reasonable care is an artificial articulation of a preexisting natural duty, but it can also be articulated in ways that conflict with and undermine our moral obligations. Affirmative duty doctrine in tort, for example, does not match our moral intuitions. Indeed, affirmative duty doctrine *affronts* our moral sensibilities by refusing to recognize legal obligations in circumstances where we are generally thought to have moral obligations.⁶⁶ Perhaps more importantly, we think that instrumental considerations *do* figure in negligence law and properly so in many circumstances. Instrumental policies should be framed and limited by principles of justice and right, but they should not be banished from the law. Instrumental “policy” is as much a part of tort law as non-instrumental “principle.”

B. Putting Policy in its Place

The proper place of instrumental reasons in negligence law is a complex topic, and we can only touch on it here. For now it may suffice to observe that any conception of negligence law has to be concerned with the efficacy of its own obligations, which brings considerations of deterrence into play. Fixing the *extent of liability* for harm wrongly inflicted may properly involve taking into account the deterrent effect of recognizing or refusing to recognize liability

66. Courts themselves have been known to make this point. *See, e.g.,* Union Pac. Ry. Co. v. Cappier, 72 P. 281, 282–83 (Kan. 1903). Following Professor Stapleton, Cardi and Green also note that affirmative duty doctrine does not track our ordinary sense of moral obligation. *See* Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1556 (2006) (“But tort law’s finely articulated incidence of obligations does not simply track moral duty, a point illustrated by the absence of a duty to attempt an easy rescue of a helpless stranger.”); *see also* *Duty Wars*, *supra* note 27, at 42 n.148. There may, of course, be good reasons why negligence law should depart from our ordinary sense of moral obligation, and those reasons may themselves be moral. It may be, for instance, that some moral obligations may not justly be enforced by law. Our point is simply that the law and ordinary morality do diverge.

for some class of injuries. This concern that tort obligations be honored in fact—and that tort law itself provide incentives for compliance with its commands—is indeed, central to liability for negligent infliction of emotional distress as we understand it.⁶⁷ More generally, instrumental arguments are salient in the domain of proximate cause, and rightly so.⁶⁸ At the margin, it is perfectly sensible to fix the scope of liability for harm wrongly done, in part, by asking about how different delineations of the domain of liability will affect the incidence of wrongful (and rightful) conduct. The right to the physical integrity of one's person does not by itself determine the scope of liability for breach of the duty of due care. The outer perimeters of liability ought to be determined in part by asking instrumental questions because any system of rights *ought* to be concerned with its own efficacy. Negligence law therefore has good reason both to ask how much liability is necessary to induce potential injurers to exercise reasonable care and to reverse that question and ask at what point liability becomes so burdensome that it impairs the right to impose reasonable risks. Other kinds of reasons may also figure in judgments about the proper scope of liability. We may, for example, reasonably believe that liability should bear some relationship to culpability.⁶⁹ That consideration sounds neither in principled respect for individual right nor in instrumental concern with deterrent efficacy. It sounds in retributive justice. Just as we may want "the punishment to fit the crime" so, too, when we are fixing the boundaries of liability in tort, we may believe that the scope of responsibility should not be disproportionate to the wrong done.

If we were, rashly, to venture a general thesis about the respective roles of non-instrumental principle and instrumental policy in negligence law we would *not* say that tort law is all principle and no policy, but that policy is subordinate to principle. The rights that people have and the obligations that those rights entail constrain the domain of permissible policy argument. This priority of moral principle and individual right over instrumental policy and the general good expresses the inviolability of persons,

67. See *infra* note 122 and accompanying text.

68. See, e.g., *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985) (explaining that courts must "define an orbit of duty that places controllable limits on liability").

69. See *infra* notes 104–106 and 115–120 and accompanying text.

preventing the sacrifice of their fundamental interests in the pursuit of the general welfare. For example,⁷⁰ when risks of death and devastating harm are at stake, those at risk may reasonably object to taking only efficient or cost-justified risk precautions against such risks. Cost-justified precaution expresses the morality of the market and trades goods off against each other in a way that denies that some goods—like life—are more valuable than others—like convenience or fine wine. When everything is given a price, everything is fungible with everything else at some ratio of exchange. Yet life is especially valuable and its protection especially urgent. Morally acceptable principles for trading life off against other goods must take into account the special value of life and the special urgency of protecting against death and devastating injury.

Taking the inviolability of persons seriously requires that some be put at significant risk of death or devastation only when others stand to lose something of comparable value if that risk is reduced to insignificance. Not everything is morally comparable to death and devastating injury, in part because what counts morally is not the total sum of burden and benefit but the actual distribution of burdens and benefits among affected persons. When significant risks of physical injury ripen into death and incurable disease, the benefits of going beyond the cost-justified level of precaution are measured in terms of lives saved and incurable diseases avoided. To those who reap them, these are invaluable benefits. The distributed costs of going beyond the cost-justified point of precaution, by contrast, may well be small—perhaps very small—losses to large numbers of people. Sacrificing an urgent interest—the interest in avoiding premature death or devastating injury—for the sake of trivial gains to others cannot be justified to those whose urgent interests are sacrificed. They may fairly complain that their fundamental interests are being sacrificed to the general good, in the guise of wealth and welfare maximization. It is only fair to ask some people to bear a significant risk of devastating injury when the burden of eliminating that risk is comparable to the burden of bearing it.

Cost-benefit analysis ignores this precept of fairness. It treats all costs and all benefits as interests that are fungible at some ratio of

70. The following two and a half paragraphs summarize the argument of Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159 (2005).

exchange and aggregates costs and benefits across persons. Cost-benefit analysis supposes that loss of life or health by some can always be offset by increase in wealth to others, no matter how trivial the effect of that increased wealth may be in the lives of those who benefit from it. Taking the inviolability of persons seriously may therefore require pressing precaution beyond the point of cost-justification and either eliminating "significant" risks of devastating injury or reducing them to the extent that such reduction is "feasible." Matters are quite different when serious physical injury is tortiously risked but, fortuitously, only emotional distress or pure economic loss is inflicted. Here, the question is not whether the urgent interests of some should be sacrificed to the trivial interests of others. Here, the question is what should be done when physical injury is tortiously risked and nonphysical injury is instead inflicted. Here we may quite properly ask if the imposition of liability for pure emotional or economic loss is advisable in part as an incentive to induce other potential injurers to exercise appropriate care. That, of course, is an instrumental question.

Subject to this constraint, we regard the invocation of instrumental policies as generally unobjectionable.⁷¹ Tort theory ought to begin within and return to the practice of tort law, and instrumental reasoning figures prominently in the practice and rhetoric of tort law.⁷² This large topic, however, is also a subject for another day and a different paper. We shall only return to it briefly later in this Article when we are discussing duty in contradistinction to proximate cause.

II. IS DUTY PERSONAL?

Because we agree that negative duty in negligence law is fundamentally and importantly a matter of genuine moral obligation,

71. For some general discussion, see Gregory C. Keating, *Personal Inviolability and "Private Law,"* 1 J. TORT L., June 2007, <http://www.bepress.com/jtl/vol1/iss2/art4>. For a case taking this view, see *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171–72 (2d Cir. 1968).

72. Speaking generally, we agree with Cardi and Green and the scholars they cite who emphasize the plurality of values relevant to tort. *Compare Duty Wars*, *supra* note 27, at 42 n.148 (citing to and quoting writings by Calabresi, Gary Schwartz, and Jane Stapleton, among others), with Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698, 700, 737–38 (1996) (arguing against Ernest Weinrib's concept of formal coherence as the master key to private law and in favor of a conception of tort law which "emphasizes the rights-based nature of private law, [but] permits pluralistic grounds or justifications for the scope of rights").

our principal quarrel with Goldberg and Zipursky lies elsewhere. As we have said, they believe that duty is strongly relational, whereas we think that duty is only weakly relational. We believe, moreover, that treating duty as strongly relational tends to corrode the generality of duty doctrine. When duty judgments are made more particular, the line between judgments of duty and judgments of liability “all things considered” erodes.⁷³ By expanding the domain of “law” and blurring the line between law articulation and law application, this particularizing of duty also erodes the line between judge and jury. A strongly relational conception of duty makes it a live issue long after an obligation of reasonable care is conceded. Once duty is turned loose in this way it is an invitation for judges to inquire into the details of plaintiffs’ relations with defendants, and a license for judges to take cases away from juries whenever the judges’ own conviction is that the defendant is not—all things considered—responsible for the plaintiff’s injury.

Let us begin by recalling our common ground with Goldberg and Zipursky. Relational duties are duties that are owed to other people; they prescribe or prohibit various ways of treating other people. Relational negative duties—and the general duty of care is largely negative⁷⁴—prohibit mistreating or wronging others. A duty not to litter on public streets is not essentially relational, whereas a duty of reasonable care is. Littering may despoil our landscape and inflict injury on our environment, but littering is not primarily a wrong done to other people.⁷⁵ Negligent conduct mistreats other people and so expresses insufficient concern for their safety and security. The general duty of reasonable care is thus a relational, negative duty.

Professors Goldberg and Zipursky move, however, from the instructive insight that duties of care are owed by some people to other people to the unpersuasive conclusion that because the concept of duty is relational in this abstract sense, wrongdoing in negligence

73. We are thus in agreement with Cardi and Green when they write “a relational approach necessarily collapses the duty analysis into a liability analysis, distorting the established territory of the separate elements of a negligence claim.” *Duty Wars*, *supra* note 27, at 713–14..

74. See *The Moral of MacPherson*, *supra* note 55, at 1810. But the general duty of care is not entirely negative. There is more than a whiff of the affirmative to the injunction that we must stand vigilantly on guard not to carelessly trample others.

75. See Benjamin Zipursky & Arthur Ripstein, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 214, 218 (Gerald J. Postema ed., 2001).

must be conceived of as *personal*—as a matter of a wrong done to this particular plaintiff by this particular defendant.⁷⁶ Duty and breach are not just relational in the general sense that they involve obligations that some people owe to other people; they are relational in the far more specific sense of involving obligations that run from this named defendant to this named plaintiff.⁷⁷ “[N]egligence is a relation between particular individuals.”⁷⁸ The negligent conduct of the Long Island Railroad’s servants—pulling out of the station while one guard on the train held its moving doors open and yanked two would-be passengers aboard the train as another guard on the platform shoved those passengers on⁷⁹—may be a wrong, Cardozo asserts, only in relation to the passenger holding the unmarked package of explosives, or even only in relation to the package itself.⁸⁰ But a wrong *to other people or other interests* will not sustain the negligence claim of a plaintiff who simply happens to be injured by that wrongdoing.⁸¹ Rather, the plaintiff “must show [] ‘a wrong’ to

76. See *Shielding Duty*, *supra* note 36, at 340; *The Moral of MacPherson*, *supra* note 55, at 1832–39 (describing the “relational duty in the common law of negligence”).

77. See *The Moral of MacPherson*, *supra* note 55, at 1832. Goldberg and Zipursky write: “Most famously in *Palsgraf*, but consistently throughout his negligence jurisprudence, Cardozo insisted that the duty to act reasonably is not a duty owed to the world at large, but a duty owed to the plaintiff in particular.” *Id.* at 1814 (emphasis added). They further explain that “[t]he duty question in a negligence case is whether the defendant owed a duty to the plaintiff to use a particular level of care to avoid the sort of injury the plaintiff suffered.” *Id.* at 1828. Moreover, the authors write “[i]n a broad range of negligence cases, courts focus specifically on whether a defendant who was concededly negligent in some respect breached a duty of care to the plaintiff.” *Id.* at 1832 (emphasis added).

78. Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 YALE L.J. 449, 452 (1930) (summarizing Cardozo’s *Palsgraf* opinion) (emphasis added). This personalized view of negligent wrongdoing is not peculiar to Professors Goldberg and Zipursky. Ernest Weinrib’s corrective justice theory, which holds that the plaintiff may recover from the defendant only if the plaintiff suffers the very wrong that the defendant inflicts, also embraces a personal conception of negligent wrongdoing. For Weinrib, too, Cardozo’s *Palsgraf* opinion is the world in a grain of sand. ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW*, 147, 160 (1995) [hereinafter, WEINRIB, *PRIVATE LAW*]. Indeed, Weinrib sometimes writes as if his entire conception of tort law stands or falls with Cardozo’s *Palsgraf* opinion. See Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 (2001).

79. *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928). The negligence is not easy to divine from Cardozo’s statement of the facts but was clearly stated in the intermediate appellate court opinion. See the editing of the case in ROBERT E. KEETON, ET AL., *TORT AND ACCIDENT LAW* 617 (4th ed. 2004) (discussing the characterization of the negligence in the Appellate Division). The fact that Cardozo continually casts doubt on the existence of any negligence towards anyone has contributed to the confusion surrounding his opinion. See *Petition of Kinsman Transit Co.*, 338 F.2d 708, 721–22 (2d Cir. 1964).

80. See *Palsgraf*, 162 N.E. at 99–100.

81. *Id.* at 99.

herself; i.e., a violation of her own right, and not merely a wrong to some one else.”⁸² Mrs. Palsgraf must be able to claim that the Long Island Railroad’s breach was a personal affront to her, a careless disregard of her safety.⁸³

For Professors Goldberg and Zipursky, *Palsgraf* is relational duty incarnate. Their reading of it will therefore pay back the trouble of a bit more unpacking. That reading begins by conceding that the Long Island Railroad owed every one of its passengers—including Mrs. Palsgraf—a duty of care.⁸⁴ This concession, however, does not dispose of duty as an issue in the case. Duty lingers on, so that the analysis of breach returns us to the seemingly settled question of duty. There must be a nexus between duty and breach, and that nexus is absent in *Palsgraf*. The conduct of the Railroad’s employees in shoving and yanking the nameless passengers onto the moving train was negligent toward those passengers and their property but *not* toward Mrs. Palsgraf.⁸⁵ She was standing too far away from the scene of the carelessness for that carelessness to count

82. *Id.* at 100.

83. *Id.* at 99.

84. See *The Moral of MacPherson*, *supra* note 55, at 1819–20. We agree that duty in its ordinary sense is unproblematically present in *Palsgraf*.

85. See John C.P. Goldberg, *Duty and the Structure of Negligence*, 10 KAN. J.L. & PUB. POL’Y 149, 151 (2000). Goldberg writes:

[D]uty refers at times to what might be called a nexus or ‘proper plaintiff’ requirement. When a plaintiff stands up in court, the plaintiff has to show that some duty owed to the plaintiff or persons like the plaintiff has been breached. It is not enough for a plaintiff to say there has been a breach of a duty owed to somebody out there and I have been injured by that breach. That was Mrs. Palsgraf’s claim. You, the railroad, breached a duty to that guy over there when you pushed him, and by the way, I got injured. As Cardozo explained, however, that is not a breach of a duty owed to Mrs. Palsgraf. . . . Pushing someone over there carrying a nondescript package is not a breach of a duty owed to someone standing over here. It is not negligent as to that someone.

Id. (internal citations omitted); see also ERNEST WEINRIB, *The Disintegration of Duty*, in EXPLORING TORT LAW 143, 155 (M. Stuart Madden ed., 2005) (“In *Palsgraf* the defendant arguably created an unreasonable risk to the third-party’s package but was being sued for wrongful infringement of the plaintiff’s right to bodily integrity.”); WEINRIB, *PRIVATE LAW*, *supra* note 78, at 147, 158–60 (“The duty issue focuses on the link between the defendant’s negligence and the person injured By endangering the property of the pushed passenger, the act of the defendant’s employee fell below the standard of care The defendant’s negligence was to the package’s owner, the harm done to [Mrs. Palsgraf] was the result of a wrong to someone else.”); cf. RIPSTEIN, *supra* note 34, at 66 (“The court held that the railway was, at most, negligent in its treatment of the unidentified passenger. By pushing him, they failed to show appropriate care for his parcel.”). But see *infra* note 94, (citing authority for the proposition that foreseeability of plaintiff is a proximate cause issue).

as breach of a duty of care owed to her.⁸⁶

On this account, duty is no longer simply the first element of plaintiff's case and a nonissue almost all of the time; it is now a diffuse and protean concept that pervades the law of negligence. It bleeds into breach and, indeed, into the question of liability all things considered. Proximate cause disappears as a distinct issue in *Palsgraf*, swallowed up by the intersection of duty and a duty inflected inquiry into breach. An idiosyncratic detail of the case—the distance that Mrs. Palsgraf just happened to be standing from the scene of the shoving—supports a judicial determination of “no duty.”⁸⁷ When circumstances this particular suffice to support a ruling of “no duty,” duty doctrine has been transformed into a plenary power to dispose of any individual case. Duty doctrine so conceived places in the hands of judges the standing power to assert that this defendant did not breach a duty owed to *this* plaintiff on *these* facts.⁸⁸ Once summoned, this genie will not go gently back into its bottle.

A. Duty and Proximate Cause in *Palsgraf*

Contrary to Goldberg and Zipursky, we regard Cardozo's

86. See *The Moral of MacPherson*, *supra* note 55, at 1819–20. This claim that, as a matter of law, no duty of care owed Mrs. Palsgraf was breached depends in part on the idea of a “duty-breach” nexus, but it also depends on the factual claim that harm to Mrs. Palsgraf from the railroad's negligence was not foreseeable. This is far from clear. Harm to passengers on the platform is clearly foreseeable. In *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), Judge Friendly writes:

Certainly there is no general principle that a railroad owes no duty to persons on station platforms not in immediate proximity to the tracks, as would have been quickly demonstrated if Mrs. Palsgraf had been injured by the fall of improperly loaded objects from a passing train . . . Neither is there any principle that railroad guards who jostle a package-carrying passenger owe a duty only to him; if the package had contained bottles, the Long Island would surely have been liable for injury caused to close bystanders by flying glass or spurting liquid.

Id. at 721. The foreseeability of harm to Mrs. Palsgraf thus depends on just where she was standing and just how she was injured (whether by the explosion itself or by the ensuing panic). But neither of these facts has ever been settled. See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 34–35, 39 (1990); see also WILLIAM H. MANZ, *THE PALSGRAF CASE* 1–4 (2005). Without knowing where Mrs. Palsgraf was standing or how she came to be injured it seems to us that neither Cardozo nor any of the rest of us are in a position to say that it was impossible to foresee *any* harm to Mrs. Palsgraf.

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

88. But see *Duty Wars*, *supra* note 27, at 721, 715–18 (distinguishing between “circumstantial” and “substantive” relationality and noting the importance of “circumstantial” relationality to Goldberg and Zipursky's understanding of duty analysis).

celebrated duty rhetoric in *Palsgraf* as a mistake, precisely because it personalizes “duty.” Plaintiffs bringing negligence claims sue neither on the basis of wrongs to others nor on the basis of wrongs personal to themselves. They sue on the basis of the unique injuries negligently inflicted upon them, and usually they must establish all of the elements of completed wrong to recover, but they are treated negligently as members of the *class* of persons foreseeably endangered by defendant’s negligence. Negligent risk imposition is not an affront to a particular person in the way that a punch in the nose or a knife in the back is.⁸⁹

Duty, moreover, is not the master concept of modern negligence law. Duty addresses the existence of obligation in tort and—when risk of physical harm is at issue—duty ordinarily exists. When it does exist, it is a highly general legal obligation. The modern negligence duty of reasonable care that took shape with the birth of modern tort law late in the nineteenth century⁹⁰ is general in both its operation and its basis.⁹¹ It is unfettered from special statuses and

89. It helps here to distinguish between primary and secondary rights and duties and between “rights in personam” and “rights in rem.” In negligence law, primary rights and duties have to do with conduct. The duty to exercise reasonable care is primary, as is the correlative right to have such care exercised. Secondary rights and duties have to do with redress. They arise out of the infliction of injury through breach of the primary obligation to exercise reasonable care. These secondary rights to redress *are* in personam rights. They are held by and against determinate persons—by one person against another for the unique injuries that the former has suffered at the hands of the latter. Primary rights to reasonable care, by contrast, are “in rem” rights, in Hohfeld’s sense. They apply to an indefinite number of legal relations. Primary rights to reasonable care are held by everyone and primary duties of reasonable care are owed to everyone. See WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*, 81-86 (1978). A right to redress for negligently inflicted harm is thus personal, whereas the right to have reasonable care exercised for one’s protection is not.

90. See Tom Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1256-57, 1266-68 (2001) (explaining how negligence emerged during the late nineteenth century as an independent tort organized around a general duty of reasonable care). Oliver Wendell Holmes’ proclamation that tort law imposes a duty “of all the world to all the world” is at the intellectual center of this emergence of negligence as an independent tort. See *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873) (unsigned article universally attributed to Oliver Holmes).

91. Duty is the master concept of late nineteenth century negligence law because the recognition of a general duty of care constitutes negligence as an independent, freestanding cause of action. See Percy Winfield, *Duty in Tortious Negligence*, 43 COLUM. L. REV. 41, 49-50 (1934). Before negligence is recognized as a freestanding tort focused on defendant’s conduct, it is merely a mode in which a number of torts might be committed. *Id.* Negligence as “mode” has to do with “inadvertence” as a mental state, in contrast to intention (e.g., with “negligent” misrepresentation as opposed to “intentional” misrepresentation). Once negligence is established as a freestanding tort, duty recedes into the background. *Id.* at 49-50. The freestanding tort takes accidental physical injury to be its principal domain, and when risk of accidental physical injury is at issue, duty can usually be taken for granted as the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § (Proposed Final Draft No. 1, 2005) says and as scholars have long noted.

predicated on our common status as human beings. It is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a "reasonably foreseeable" risk of harm to *anyone* at all. Breach, in turn, is an inquiry into whether a defendant exercised reasonable care in light of *all* of the foreseeable risks at hand. When the harm that materializes is unexpected—when it is not the harm that we had in mind when we imposed the duty—the question is one of proximate cause, not duty. When the harm that materializes is unexpected, the question posed is about the *extent of liability, not the existence of obligation*. Great as it is, Cardozo's *Palsgraf* opinion leads us astray by splintering duty into an indefinite and ill-defined set of "duties." Once duty is shredded and set loose in this way, the lines dividing duty, breach and proximate cause become blurred and the division of labor in negligence law becomes fouled.

1. Disaggregating Duty

Perhaps the most salient feature of Cardozo's duty analysis in *Palsgraf* is his suggestion that we must distinguish among the persons jeopardized by a careless act and disaggregate the diverse interests that are jeopardized. He writes:

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. . . . [I]f there was a wrong to [the passenger carrying the package] at all, which may very well be doubted[,] it was a wrong to a property interest only, the safety of his package. . . . There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as,

See id.

Characteristically, perhaps, Holmes' position with respect to the "relationality" of duty is ambiguous. On the one hand, his famous remark is naturally read as a statement of minimally relational duty a claim that everyone owes to everyone else a duty of reasonable care. On the other hand, Holmes' general view of tort law is naturally read as loosely utilitarian and so is usually thought to deny that tort is a matter of genuine moral obligation *to other people*. For a discussion of the way in which modern economic analysis denies that tort is a matter of genuine moral obligation, see *supra* note 63 and accompanying text.

e.g., one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now.⁹²

The first passage disaggregates the duties owed to different people; the second contemplates disaggregating the duties owed to diverse kinds of interests. Both moves are unattractive and, taken literally, unworkable. Writing in 1930, Arthur Goodhart shuddered at “the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries.”⁹³

More importantly, potential injurers usually cannot treat the different people and diverse interests endangered by their conduct in different ways. *Palsgraf* itself illustrates the point. The Long Island Railroad and its agents could act in only one of a small number of mutually exclusive ways—they could assist, restrain or ignore the passengers running for the train, and the train could pull out of the station with its doors open or with its doors closed. The guards could not treat the passengers in one way (assist their efforts to board the train), their package in a different way (keep it safe on the platform), and third parties (each and every person whose security and property might be jeopardized if the boarding of a moving train came to a bad end) in an indefinite number of still different ways. The guards could not catalog the interests of each and every person in the vicinity and determine what duty might be owed to each person—much less each of their interests—and then proceed with courses of conduct appropriate to each distinct person or interest. Nor, for that matter, could they continuously calibrate their conduct to Mrs. Palsgraf’s particular situation—ignoring her at some moments, attending to her at others—as she moved about the platform. The problem is not simply that time is scarce and calibration is time consuming. The problem is that the railroad’s servants had to make a judgment about the overall risks of several competing courses of action and choose one.

92. *Palsgraf*, 162 N.E. at 99–101.

93. Goodhart, *supra* note 78, at 467. To be sure, Goodhart’s foreboding has not come to pass. One would be hard pressed even to *find* negligence cases that distinguish among diverse interests and correlative duties in the manner prescribed by *Palsgraf*. If Goodhart has failed as a prophet, however, the failure of the practice that *Palsgraf* prefigures to take hold is at least some evidence that the practice is, as Goodhart thought, unworkable.

Because the Long Island Railroad and its agents could not calibrate their care to the particular circumstances of distinct persons and diverse interests, so too they could not mistreat these persons and interests in different ways. If the railroad's actions were faulty—and the jury found that they were—they were faulty with respect to all those put at reasonably foreseeable risk of physical harm. If it was negligent to start the train with its doors still open and to shove and yank the anonymous passengers onto the moving train, it was negligent with respect to the passengers, their package, and bystanders on the platform alike. The negligent *wrongdoing* was the same in all of these cases. If no harm to Mrs. Palsgraf was foreseeable, the reason to deny her recovery sounds in proximate cause—the point is that she was outside the scope of the risk that made the railroad's conduct negligent. Its liability does not extend to her injury. If the railroad cannot calibrate its care to Mrs. Palsgraf's precise position, Mrs. Palsgraf can position herself outside the zone of risk created by the railroad's careless actions.⁹⁴

Cardozo's soaring rhetoric in *Palsgraf* thus errs by disaggregating duty. Duty doctrine articulates standards of care and standards of care "bind . . . prospectively on members of two *general* classes of legal subjects."⁹⁵ They obligate potential injurers to respect the safety of all those endangered by their conduct. In determining whether a duty of care exists we do not disassemble the interests of those who might be affected by the conduct at issue and

94. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 6, reporters' notes (Proposed Final Draft No. 1, 2005) ("Modern scholars tend to classify the issue of foreseeable plaintiff under the general heading of proximate cause, as does this Restatement in Chapter 6."). See generally *Duty Wars*, *supra* note 27, at 51 n.181 (citing the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005) and other authority in support of this proposition). If Mrs. Palsgraf was standing outside the zone of risk created by the Railroad's negligence, on a "zone of the risk" conception of proximate cause it is correct to say that Mrs. Palsgraf's right to reasonable care was not violated. She can show duty, breach, cause-in-fact, and injury—but not proximate cause. We are not, ourselves, partial to this position because there is enduring uncertainty as to just where on the platform Mrs. Palsgraf was standing. See *supra* note 86.

Alternatively, one might take the view that the Railroad's negligence was not the proximate cause of Mrs. Palsgraf's injury on the ground that the risk of explosion was unforeseeable. On this view, when we ask why the Railroad's actions were negligent, we do not cite, in our answer, the chance of the package exploding. As we explain in the text accompanying note 91, we are partial to this view of the case. Note on this view, too, there is no completed wrong to Mrs. Palsgraf.

95. Hanoch Sheinman, *Tort Law and Corrective Justice*, 22 L. & PHIL., 21, 50 (2002) (emphasis added).

examine each interest separately to determine if the risk of harm to that interest justifies imposition of an obligation of care. Indeed, we do the exact opposite—we consider all the endangered persons and interests. It is similarly mistaken to collapse the inquiries into duty and breach and to blur the distinction between these and proximate cause. Duty, breach and proximate cause are distinct elements of a negligence claim. Duty asks about the *existence of obligation*; it looks to the universe of reasonably foreseeable risks of injury and asks if they justify the exercise of care. Breach asks whether the defendant in fact *exercised reasonable care* or took reasonable precaution, in light of *all* of the foreseeable risks of its conduct. Proximate cause inquires into the *extent of liability*. It is here in proximate cause that questions pertaining to the foreseeability of a particular type of harm or the foreseeability of harm to a particular class of persons are properly addressed. We have a duty: Mrs. Palsgraf was a ticket-purchasing passenger standing on the platform, at risk from carelessly operated trains. We have a breach: the jury found that the train should not have pulled out of the station with its doors opened and that the railroad's servants should not have pulled and shoved the boarding passengers onto the moving train. But the risk realized—harm to Mrs. Palsgraf by exploding fireworks—is not the risk that we had in mind when we were contemplating duty and breach.

2. Reconstituting Duty

Richard Posner's explication of how the Hand Formula applies to the claim of an inspector of railroad cars—whose legs were partially severed when a train that he was inspecting moved without warning—is an instructive counterpoint to Cardozo's *Palsgraf* opinion. *Davis v. Consolidated Rail Corp.*⁹⁶ reminds us that the question to be asked is not whether injury to the *plaintiff himself* might reasonably have been foreseen if the train were to start without warning.⁹⁷ The question to be asked is whether injury *to someone* might reasonably be foreseen:

Although the crew had no reason to think that Davis was under a car, someone—whether an employee of Conrail or

96. 788 F.2d 1260 (7th Cir. 1986).

97. *Id.* at 1266 ("the standard of care is set with reference to the average person").

some other business invitee to the yard (such as Davis)—might have been standing in or on a car or between cars, for purposes of making repairs or conducting an inspection; and any such person could be severely, even fatally, injured if the train pulled away without any warning or even just moved a few feet.⁹⁸

Just as duty protects a class of persons—those who might foreseeably be endangered by carelessness on some actor's part—so too it applies to a category of harm—to the risk of physical injury. There is no general duty not to carelessly inflict economic loss or emotional distress on other people.

This analysis of whether harm is foreseeable does not disaggregate different persons and their interests; it looks to *all* reasonably foreseeable risks of physical injury imposed when a train starts without warning and asks if that universe of reasonably foreseeable risk is sufficient to require the exercise of care. It does not treat the interests of "an inspector who had crawled under the car (low P) . . . an inspector leaning on a car, a railroad employee doing repairs on the top of a car, a brakeman straddling two cars, and anyone else who might have business in or on (as well as under) a car"⁹⁹ as separate and distinct. It does not isolate each of these separate persons, separate out any property interests they might have, and examine each one in isolation from all the others. It treats this imagined list of potentially endangered persons as the set of interests that must be considered in determining whether any care at all must be exercised.

The case for a duty of care in *Palsgraf* is really no different. Here, too, the judgment that a duty of care is owed rests on the

98. *Id.* at 1264. Posner continues with this theme in explaining why the precaution of blowing the train's horn was justified:

Blowing the horn would have saved not only an inspector who had crawled under the car (low P[robability]), but also an inspector leaning on a car, a railroad employee doing repairs on the top of a car, a brakeman straddling two cars, and anyone else who might have business in or on (as well as under) a car.

Id. Posner famously endorses an economic conception of negligence that is properly criticized as not relational. His economic conception takes negligence law to be directed at the maximization of wealth and that as a way of maximizing the overall welfare of a population. This view rejects the idea of duty as obligation to other people. See *supra* note 63 and accompanying text. This non-relational approach to duty does not, however, impair Posner's account of the "calculus of risk." Judge Posner is capable of fine lawyering.

99. *Davis*, 788 F.2d at 1264.

combined importance of *all* the reasonably foreseeable risks of injury involved. It is evident in general that the operation of a railroad is the sort of thing that is likely to inflict injury unless care is exercised, and it is evident in particular that caution is required when trains are pulling in and out of stations. There are risks to passengers on the train, to passengers boarding and exiting the train, and to passengers waiting on the platform. This universe of foreseeable risk is more than sufficient to justify the imposition of a duty of care, and that duty governs the conduct before the court.¹⁰⁰

The process of taking into account *all* endangered interests, moreover, continues when we move from duty (the question of whether an actor is under an obligation to exercise due care) to the question of breach (the question of *just what* care is due). The benefits of care are measured by *all* the reasonably foreseeable harm that care averts. In *Palsgraf*, we take account of all those who were endangered by the railroad's careless actions: the anonymous passengers themselves and their packages to be sure, but also the passengers aboard the train and on the platform. The passengers on the train might be injured if the passengers trying to board lost their balance and fell onto the tracks, forcing the train to slam on its brakes. The passengers waiting on the platform might be injured if these would-be boarders were cast back onto the platform and knocked other people down. Just how far the havoc might go—can we reasonably foresee passengers waiting on the platform toppling like dominoes or not?—is an open question, but the reasonably foreseeable harm from the railroad's foolish actions is not confined to the anonymous passengers alone, much less to their unmarked package of fireworks.

Judgments of breach are thus more particular than judgments of duty, but they are not tailored to the demands of particular people. They are tailored to the *class* of all people put at foreseeable risk of physical injury. When the claims of different subclasses within this group pull in conflicting directions, reasonable precaution typically requires not the taking of different precautions for the benefit of different classes—that happy solution may be infeasible—but the

100. In fact, the hazards of travel were once regarded as so great that an especially stringent duty of care applied: "It must be remembered that the plaintiff was a passenger of the defendant, and entitled to have the defendant exercise the highest degree of care required of common carriers." *Palsgraf v. Long Island R.R. Co.*, 225 N.Y.S. 412, 414 (App. Div. 1927).

striking of a balance between the competing claims of those endangered. Suppose, for example, that railroad cars are equipped with two kinds of brakes. One kind secures more safety for the train's passengers but imposes a greater risk on motorists crossing the tracks; the other kind protects motorists more effectively but imposes greater risks on passengers. If the railroad "owe[s] to its passengers the . . . duty . . . to exercise the utmost care for their safety" and to the motorists crossing its tracks only "the duty of exercising ordinary care," this case comes as close as any we know to matching *Palsgraf's* picture of distinct duties.¹⁰¹ Even in this special case, however, the determination of the correct precaution requires reconciling the competing claims of motorists and passengers. More safety for passengers comes at the cost of less safety for motorists, and vice versa. The greater stringency of one of the duties owed only influences the choice of the correct precaution. When duty is cashed out concretely in the form of a particular precaution, that precaution reflects the competing claims of *all* those to whom duty is owed. Precaution is no more personal than duty.

In *Palsgraf* itself, moreover, neither general duty nor more particular precaution are noticeably complex, much less unusually personal. The duty of utmost care owed by the Long Island Railroad was owed without differentiation to all those whom reasonable foresight would recognize as unacceptably endangered if such care was not exercised. The norm of conduct distilled by asking if the railroad breached that duty of care—do not pull trains out of stations with their doors open, restrain passengers from boarding moving trains instead of helping them to hop on—is more precise than the duty to exercise the highest care in the circumstances, but it is no more tailored to the particularities of different potential victims' situations. It protects *all* those endangered by the railroad's careless conduct.

3. Restoring Proximate Cause to Its Proper Place

Personalizing duty sows confusion in part because it distorts duty doctrine itself and collapses the line between duty and breach. However, it also sows confusion because it blurs the distinction between duty and proximate cause—between existence of obligation

101. *Lucchese v. S.F.-Sacramento R.R. Co.* 289 P. 188, 189 (Cal. 1930).

and extent of liability. To begin to restore duty to its proper place we need to recall the prosaic truths behind the standard classification of *Palsgraf* as a proximate cause case.¹⁰² Why, in the face of Cardozo's protestations to the contrary, do casebook editors and treatise writers routinely classify *Palsgraf* as a proximate cause case? Perhaps for the simple reason that duty, breach and cause in fact are all present: the Long Island Railroad owed a duty of utmost care (both to the passengers on the train and the prospective passengers waiting on the platform); it breached its duty of care when its train pulled out of the station while its employees pushed and pulled the anonymous passengers onto the moving train; and that breach was the cause in fact of the injury to Mrs. Palsgraf. The question before the court was thus a question about extent of liability: should the Long Island Railroad be liable to Mrs. Palsgraf, given the freakish way in which she was injured? On the one hand, the railroad breached a duty of care to Mrs. Palsgraf, and she was in fact seriously injured by that breach. On the other hand, the injury arose out of a risk—the risk of an exploding package knocking scales down on the other end of the platform and injuring a woman who appears to have been some distance from the site of the negligence—which was not among the risks whose foreseeability justified the duty of care that the railroad breached.

Cardozo and Andrews come to their conflicting judgments about the scope of the railroad's liability by invoking competing criteria of responsibility for harm done.¹⁰³ Read through the lens of proximate cause, Cardozo's opinion asserts that liability should not extend to Mrs. Palsgraf because the harm that befell her was not within the scope of the risk that made the Long Island Railroad's conduct

102. See DAN B. DOBBS, *THE LAW OF TORTS* 445 (2000) (referring to *Palsgraf* as “[t]he most famous American case on proximate cause”); RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 456 (8th ed. 2004) (discussing *Palsgraf* in connection with proximate cause issues); JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *Aligning the Elements: Proximate Cause and Palsgraf*, in *TORT LAW: RESPONSIBILITIES AND REDRESS* 265 (2004): see also Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 385 (1939) (describing the class of cases into which *Palsgraf* falls as cases “in which the defendant’s negligence is a *sine qua non* or necessary antecedent of the accident, but in which the question still remains whether the defendant has committed a tort to the plaintiff”). Like every other aspect of the *Palsgraf* case, this characterization can be and has been contested, and by Professors Goldberg and Zipursky themselves. See *The Moral of MacPherson*, *supra* note 55. But it remains by far the dominant characterization.

103. See *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

negligent.¹⁰⁴ The reasons that justify the imposition of a duty of care in the first place should also limit the scope of liability for its breach. Andrews appeals to the principle that unforeseeable harm ought to be borne by the party culpably responsible for inflicting it, even when that culpability arises from the breach of a duty of care imposed to guard against other risks.¹⁰⁵ Andrews asserts that when a duty is owed to the complaining plaintiff and that duty is breached, culpable risk creation suffices to justify liability for harm unforeseeably inflicted.¹⁰⁶ The choice between these competing principles is fair grist for the judicial mill.¹⁰⁷ To settle the issue of the railroad's liability by asking if it breached a duty that it owed to Mrs. Palsgraf *personally*, however, conflates the question of whether the railroad breached a duty of care with the question of whether liability for that

104. *Id.* at 99–101 (majority opinion).

105. *Id.* at 103 (Andrews, J., dissenting). Andrews states:

There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. . . . Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt."

Id. Both Seavey and Prosser take as the core of Andrews' dissent the principle that unforeseeable injury should be laid at the door of the party culpably responsible for creating the risk that resulted in that injury. See Seavey, *supra* note 102, at 386 ("An innocent person has been hurt; some one must bear the loss. The defendant's employee was negligent The fact that neither he nor his innocent employer had reason to believe that a momentary clumsiness might lead to great liability is not of itself sufficient to deny it."); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 17 (1953) ("The plaintiff has been hurt and some one must bear the loss. Essentially, the choice is between an innocent plaintiff and a defendant who is admittedly at fault."). For discussion of the place of this principle in the law, see generally HERBERT L. A. HART & TONY HONORE, CAUSATION IN THE LAW 259–75 (2d ed. 1985). A respectable case can be made that the conflict between Cardozo and Andrews is merely one instance of a recurring conflict between two contending principles of tort law—"No Liability Without Fault" and "As Between Two Innocents, Let the Person Who Caused the Damage Pay." See J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 22 (1986) (arguing that this conflict is endemic to tort law).

106. *Palsgraf*, 162 N.E. at 103.

107. Indeed, Cardozo's holding could plausibly be defended as a finding of "no proximate cause" as a matter of law. We regard this as an eminently defensible position, not so much because harm to Mrs. Palsgraf strikes us as unforeseeable but because the risk of *explosion* does not strike us as one of the risks that made the Railroad's conduct negligent. Note that on this "no proximate cause" view of the case there is no "completed wrong" to Mrs. Palsgraf. One of the elements of a negligence claim is absent. Because it articulates the intuition that Mrs. Palsgraf has been "injured but not wronged" this interpretation of *Palsgraf* captures some of the relational concerns that matter both to us and to Professors Goldberg and Zipursky. *Shielding Duty*, *supra* note 36. As with "no breach as a matter of law" rulings, "no proximate cause as a matter of law" rulings should be limited to situations where no reasonable jury could find that the cause was proximate; otherwise, such determinations impinge on the province of the jury.

breach encompasses her harm. When the two questions are conflated, it is all but impossible to answer either of them correctly.

B. Existence of Obligation and Extent of Liability

Professors Goldberg and Zipursky's reading of *Palsgraf* leads them to distort the respective domains of duty and proximate cause more generally.¹⁰⁸ The problem surfaces most clearly in their discussion of the *KFC* case, where Goldberg and Zipursky quite rightly observe that there is no general duty to avoid inflicting even severe emotional injury.¹⁰⁹ The mistake here is that this observation *does not go far enough*. It is equally erroneous (we think) to conclude that there are *special* duties of care to avoid inflicting emotional distress.¹¹⁰ The negligent infliction of emotional distress ("NIED") is not a question of duty *at all*; it is a matter of proximate cause. NIED cases involve either plaintiffs who are bystanders physically unharmed but emotionally traumatized by the negligent imposition of a risk of physical injury, or plaintiffs who have preexisting relationships with the parties whose negligence inflicts emotional injury on them.¹¹¹ In the former class of cases, duty exists because physical injury to a class of persons including the plaintiff is

108. *Shielding Duty*, *supra* note 36, at 354–358.

109. *Id.* at 356.

110. *Id.* at 357. Goldberg and Zipursky write:

Although California's expansion of duty famously includes the recognition of new duties to take care not to cause others emotional harm, even under California law there was no basis for concluding that a restaurant such as KFC owed a duty to take care to avoid causing emotional harm to a patron such as Brown in a situation such as the one it faced.

Id. California courts did, of course, expand liability for *intentional* infliction of emotional distress. But this expansion of liability does not involve duty in the relevant sense because duty is not an element of an intentional infliction of emotional distress claim (or any other intentional tort claim). *KFC* itself fits our description of NIED as a matter of proximate cause not duty. See *infra* notes 205–208 and accompanying text.

111. This is controversial. The alternative view is that in preexisting relationship cases the special nature of the relationship gives rise to a duty to protect the plaintiff from severe emotional harm. Reasons of space prohibit us from pursuing this debate here. Parallel questions arise in cases involving recovery for negligent infliction of pure economic loss. In these cases, too, there is either physical injury risked *to someone* or a preexisting relationship which gives rise to an independent duty of care (e.g., the relationship of accountant to client). See KEETON ET AL., *supra* note 79, at 657–64. Cases discussing pure economic loss in the context of product liability law show how the rule that there is no liability for pure economic loss in tort is a general rule of duty, which shunts purely economic harm out of tort law and into contract law. These are cases where the product failure does not risk physical injury *to anyone*. The flip side of this coin is that the economic expectancies involved are the proper subject of the law of contract. Compare *id.* at 968–73, with *Abusing "Duty," supra* note 1, at 273–74.

reasonably foreseeable, and that is sufficient to give rise to a duty of care. In the latter class of cases, preexisting relationships give rise to duties of care. In both kinds of cases *duty exists independent of the prospect of emotional injury being negligently inflicted*. Liability for emotional injury arises as a question of the extent of the defendant's liability for the consequences of its breach of a duty based on the foreseeability of other harm.¹¹²

In bystander cases—*Dillon v. Legg*¹¹³ is likely the most famous—the duty owed and breached is the duty not to impose an unreasonable risk of physical injury. That duty fixes the standard of conduct to which the defendant must conform his or her conduct, and it protects the class of persons that includes the plaintiff.¹¹⁴ The question before the court is whether breach of that duty should give rise to liability for severe emotional distress—whether risk of physical injury wrongfully imposed should result in liability for severe (and eminently foreseeable) emotional distress actually inflicted. Preexisting relationship cases—examples include cases involving doctors and patients, and involving morticians and the

112. This claim is controversial and we cannot defend it in detail here. For some defense, see the materials in KEETON ET AL., *supra* note 79, at 657–76 and the accompanying sections of the *Teacher's Manual*. But see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 46 (Tentative Draft No. 5, 2007) (treating negligent infliction of emotional distress as an independent category of liability).

113. 441 P.2d 912 (Cal. 1968). Erin Lee Dillon was killed by a negligent driver. *Id.* at 914. Her mother and her sister were present at the scene of the accident. Though they were physically uninjured, they brought suit alleging that they had each suffered "great emotional disturbance and shock" from witnessing Erin's death. *Id.* The trial court dismissed the mother's claim because she was not within the zone of physical danger created by the defendant's negligence; the sister's claim was permitted to go forward because she had been closer to the accident and might have "feared for her own safety." *Id.* at 915. The California Supreme Court reversed the dismissal of the mother's claim and repudiated the "zone of danger" rule (which itself recognized the principle that negligent infliction of emotional distress was actionable only where there was a breach of a preexisting duty, such as the duty to use reasonable care to protect plaintiff's physical safety). *Id.*

114. See, e.g., *Battala v. State*, 176 N.E.2d 729, 729–30 (N.Y. 1961) (permitting recovery of emotional damages by an infant plaintiff who was placed in a chair lift at a ski resort by an employee who negligently failed to latch the belt on the lift; plaintiff became hysterical during the descent and experienced consequential injuries); *Shultz v. Barberton Glass Co.*, 447 N.E.2d 109 (Ohio 1983) (permitting recovery for serious emotional distress by a plaintiff who escaped physical harm when a large sheet of glass negligently fell off of defendant's truck onto the highway and crashed into the windshield of plaintiff's vehicle); *Johnson v. W. Va. Univ. Hosps., Inc.*, 413 S.E.2d 889, 893 (W.Va. 1991) (plaintiff security guard was bitten by an HIV-positive hospital patient and brought suit seeking recovery for NIED; after reviewing the case law the court remarked: "It is evident from the above cases that before a recovery for emotional distress damages may be made due to a fear of contracting a disease, such as AIDS, there must first be exposure to the disease. If there is no exposure, then emotional distress damages will be denied.").

families of those they bury¹¹⁵—are structurally the same. Duty arises out of the preexisting relationship between the parties, not out of the freestanding possibility of emotional injury being negligently inflicted. The duty of care that physicians owe patients is not imposed because physician carelessness is likely to result in emotional distress. Physical injury is the more obvious and worrisome risk of negligent medical care. Liability for emotional distress arises once again as a matter of proximate cause, as a question of whether the breach of a duty of care imposed to guard against physical harm should expose the defendant to liability for any emotional injury actually inflicted.

Explaining just why duty exists in negligent infliction cases involving the mishandling of the dead by morgues is, no doubt, difficult. The impersonal value that requires respect for the dead, including proper disposal of dead bodies, is neither easy to articulate nor to justify. Calling the interest at stake a “quasi-property right” is crude at best. But it *is* easy to see that the duty to exercise care in tending to the disposal of the dead does not arise from the prospect of emotional distress on the part of the family in the event that a dead body is mishandled. Many businesses cause their customers foreseeable emotional distress by failing to discharge their contractual duties adequately. If the prospect of emotional distress sufficed to trigger duty in tort, liability for negligent infliction of emotional distress would be pervasive. It is not. Liability for mishandling the dead is a special case. Importantly, the family’s

115. *E.g.*, *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995) (permitting recovery for NIED in a case where defendant doctor negligently misdiagnosed plaintiff as having AIDS and asserting that outside the context of bystander cases “a plaintiff’s right to recover emotional damages caused by mere negligence should be limited to those cases where the defendant owes the plaintiff a preexisting duty”). The court also noted that “[a] growing number of jurisdictions have adopted this approach.” *Id.* In *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28, 29 (App. Div. 2001), a malpractice claim against fertility clinic which mistakenly implanted plaintiff’s embryo into the uterus of another woman was allowed to proceed, even though plaintiffs sought to recover only for emotional harm because “[d]amages for emotional harm can be recovered even in the absence of physical injury ‘when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm.’” *Id.* (quoting *Kennedy v. McKesson Co.*, 448 N.E. 2d 1332, 1334 (N.Y. 1983) (alterations in the original)). In *Guth v. Freeland*, 28 P.3d 982 (Haw. 2001), plaintiff family members were permitted to recover for emotional distress caused by defendant morgue’s mishandling of the body of plaintiff’s mother. “[T]he duty to use reasonable care in the preparation of a body for funeral, burial, or crematory services . . . runs to the decedent’s immediate family members . . .” *Id.* at 990. “Many courts have . . . recognized that the nearest relatives of the deceased have a quasi-property right in the deceased’s body that arises from their duty to bury the deceased.” *Id.* at 986 n.4.

distress arises from its sense of having failed to discharge its duty to ensure a decent burial. The mortician, in agreeing to perform services, has knowingly accepted delegation of that duty. Family and undertaker, then, are both bound by the same duty. The duty attaches to their roles, albeit for different reasons. Undertakers owe duties of care *to the families* of the dead whose bodies they handle because those families have delegated—and those undertakers have assumed—a part of the families' duties to give the dead a decent burial. The special gravity of this value justifies the law's intervention.

That negligent infliction cases are proximate cause cases is confirmed by the arguments courts use to justify the imposition of liability in such cases, and to gauge its extent. One prominent argument is an argument of relative culpability and proportionality: "Unlike an award of damages for intentionally caused emotional distress which is punitive, the award for NIED simply reflects society's belief that a negligent actor bears some responsibility for the effect of his conduct on persons other than those who suffer physical injury."¹¹⁶

Put differently, the argument is that defendant's *culpable risk imposition* is the basis for concluding that it is *only just* for the defendant to bear some responsibility for the terrible emotional harm that he has wrought by his breach of his duty of care to the plaintiff. It is only just for the extent of the defendant's liability to exceed the scope of his duty. This argument appeals to the intuition at the heart of Judge Andrews' *Palsgraf* dissent: that justice favors placing the cost of a harmful but unforeseeable outcome at the feet of the party culpably responsible for causing the harm.¹¹⁷

To be sure, this basis of liability violates precepts dear to defenders of the purity of "private law": culpable risk creation is the ground of liability and the principle of responsibility at work sounds not in corrective but in retributive justice.¹¹⁸ It is unjust for a

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

117. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

118. WEINRIB, *PRIVATE LAW*, *supra* note 78, at 158–64 expresses the corrective justice objection to making risk imposition the basis of liability in an unqualified way: Predicating liability on culpable risk creation violates the correlativity required by corrective justice. Correlativity requires that the harm suffered by the plaintiff be the same harm culpably risked by the defendant. When this is not the case, the defendant has not violated the plaintiff's right; and

severely injured victim to be saddled with the full cost of her injury while the party responsible for inflicting it escapes scotfree. The intuition on which these doctrines rest is that a finding of “no liability” would be disproportional to the wrong done to the plaintiff by the defendant, and that is a retributive intuition. But the lesson here is that our law of torts is not the pure expression of corrective justice that Ernest Weinrib, for one, takes it to be.¹¹⁹ Here, it prefers the competing claims of retributive justice.¹²⁰ To be sure, considerations of retributive justice do not justify the imposition of the duty of reasonable care in the first place, but that simply underscores the fact that different considerations are relevant to the existence of obligation and the extent of liability.

A second characteristic justification also marks negligent infliction cases as proximate cause cases. That justification comes to

all that the defendant has done is violate some other person's right to be free of unreasonable risk of physical injury. This emphasis on strict correlativity of doing and suffering—of defendant's wrong and plaintiff's right—leads Professor Weinrib to object both to the relaxation of factual causation, and to proximate cause doctrines which impose liability for injuries which do not fall within the scope of the defendant's negligence. *See id.* at 153–57 (insisting on traditional factual causation of harm and objecting to “probabilistic causation” and the imposition of liability on the basis of culpable risk creation); *id.* at 160–61 (praising Cardozo's *Palsgraf* opinion and criticizing Andrews' opinion). Professor Zipursky aligns himself with this general approach to factual cause in Arthur Ripstein and Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 75, 214 (criticizing much “market share” liability because it does not satisfy the requirement of correlativity, *inter alia*).

Professors Goldberg and Zipursky jointly object to imposing liability in cases where there is duty, breach, cause in fact and injury, but where the injury inflicted is not the injury against which the duty was directed. *See The Moral of MacPherson*, *supra* note 55, at 1828–29 (“Our negligence law does not give a plaintiff a right of action against anyone who injured him, but only against a defendant who breached a duty not to injure him.” (footnote omitted)). To sustain this thesis, they do and must construe negligent infliction cases as “limited duty” cases. *Id.* at 1832–34. This recognition of a “limited duty” not to inflict emotional distress is arbitrary. If there is indeed a duty to avoid inflicting emotional distress, that duty should be general in the way that the duty to avoid inflicting physical injury is. It should attach whenever emotional injury is to be foreseen. By contrast, if recovery for NIED is a matter of proximate cause, it can more readily be limited to only those circumstances where it is justified by considerations of proportionality and deterrent effectiveness.

119. WEINRIB, *PRIVATE LAW*, *supra* note 78, at 153–54. “Private law” is not pure in the way that Weinrib imagines, as his critics have pointed out. *See* John Gardner, *The Purity and Priority of Private Law*, 46 U. TORONTO L.J. 459, 470 (1996) (criticizing Weinrib's thesis that the “form taken by a part of private law must be the form taken by the whole of private law.”); Simons, *supra* note 72.

120. For a brief discussion, see TONY HONORE, *RESPONSIBILITY AND FAULT* 85–90 (1999). *See also* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, 387, 390–91, 406 (David. G. Owen ed., 1995) (noting both that notions of proportionality and retributive justice cannot be entirely expunged from the law of torts even though the justice of tort law is not primarily the justice of retribution).

the fore in cases where breach of duty does not issue in physical injury—either to the plaintiff bringing suit, to anyone else, or in the normal case of a breach of this sort. Mishandling a corpse is a case in point. If the decedent's immediate family members cannot recover, "there will often be no one to hold defendants accountable for their negligent handling of dead bodies. A defendant does not owe a duty of care to the decedent, who is not himself actually harmed by the defendant's actions."¹²¹ In the absence of liability for negligent infliction of emotional distress, the duty of care itself will be toothless because its breach will have no adverse consequences for the breaching party. Here the concern is less retributive and more instrumental. It matters that duties of care be honored in practice, and we therefore have reasons sounding in deterrence to see to it that those whose negligence fortuitously inflicts only severe *emotional* distress do not escape "scotfree." This concern with fixing the scope of liability at a level that will deter wrongful conduct is quintessentially a concern of proximate cause doctrine.¹²² It is also quintessentially instrumental—and properly so. The law of torts ought to care about its own efficacy. Rights are supposed to be efficacious.

We have, by now, tramped through a thicket of cases and doctrines in pursuit of what might be thought an esoteric, taxonomic debate among tort professors. Some of the time, though, taxonomy

121. *Guth v. Freeland*, 28 P.3d 982, 989 (Haw. 2001). Negligent misdiagnosis of a patient as HIV-positive (*Chizmar*) and negligent implantation of a patient's embryo in the uterus of another woman (*Perry-Rogers*) are other examples of negligence which do not physically injure victims. *Chizmar v. Mackie*, 896 P.2d. 196 (Alaska 1995); *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (App. Div. 2001). In *Barber Lines v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985), Judge Breyer explains a parallel exception to the general rule that there is no liability for negligent infliction of pure economic loss: "Awarding damages for financial harm caused by negligent misrepresentation is special in that, without such liability, tort law would not exert significant financial pressure to avoid negligence; a negligent accountant lacks physically harmed victims as potential plaintiffs."). *Id.* at 56.

122. DOBBS, *supra* note 102, at 443 ("Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability."); W. PAGE KEETON, PROSSER AND KEETON ON TORTS 273 (1984) (identifying proximate cause as being concerned with the "scope of liability").

Contract concerns also justify the availability of negligent infliction of emotional distress liability as a way around the problem that the dead person cannot sue when her corpse is mishandled. Obviously, the mortician is paid to perform a professional service, up to professional standards, and liability is necessary to ensure that the service paid for is provided. Thus NIED fills a gap where breach of contract remedies may not be adequate to ensure that contracts are performed.

matters. Personalizing duty is a mistake with potentially serious consequences. "Because of the elasticity of the concept of duty, it is always possible for a court to characterize and analyze every issue in a negligence case in terms of duty."¹²³ When duty is conceived as strongly relational, the concept escapes from its proper domain, sheds the restraints of its traditional role, and begins to pervade the whole of a tort case in a diffuse and protean way. Duty no longer functions to determine the existence of an obligation in tort—to determine whether or not the defendant was required to exercise reasonable care for the protection of a class of persons, including the plaintiff. Instead, it becomes a license to determine the exact contours and scope of the obligation owed *to any particular plaintiff*.¹²⁴ Duty begins to swallow breach and proximate cause. It is converted from the first element of plaintiff's case and a non-issue in most cases into the master concept of negligence law. This deforms tort doctrine and invites the very kind of judicial abuse that disturbs us—a degradation of the judicial role and a usurpation of the jury's role by collapsing the line between law articulation and law application. Goldberg and Zipursky may not *intend* for this to happen, but this is the path down which their personalization of duty points.

The remainder of our Reply will proceed in four steps. First, in Part III we shall address briefly *Shielding Duty's* account of the doctrine of assumption of risk. There is, it seems, a doctrinal impasse between us and Professors Goldberg and Zipursky; we believe that primary assumption of the risk is a form of assumption of the risk and they do not. Second, in Part IV we shall take up Goldberg and Zipursky's argument that our critique of the level of generality at which California courts are issuing duty rulings is grossly underspecified. Third, in Part V we will discuss *Record v.*

123. *Castaneda v. Olsher*, 162 P.3d 610, 625 (Cal. 2007) (Kennard, J., concurring and dissenting).

124. *See McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr.2d 516 (Ct. App. 1997) (deciding that a duty of care was owed to passengers exiting or entering trains, but not to passengers on the platform awaiting trains, or to passengers on the platform en route out of the station). 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. On a strongly relational conception of "duty," however, facts this detailed may speak to the "duty-breach nexus."

*Reason*¹²⁵ in the hope of clarifying why we claim that judges are taking it upon themselves to act as juries. Last, in Part V we will also revisit *KFC*¹²⁶ in order to illustrate how the "no duty" rulings now proliferating in California courts fail to fix general legal standards.

III. ASSUMPTION OF RISK REVISITED

Shielding Duty asserts that "[i]mplied assumption of risk is simply not a 'no duty' doctrine. It is instead a defense that turns on what a particular plaintiff subjectively understands and voluntarily chooses to do. . . . [A]ssumption of risk is not about the absence of a duty of reasonable care"¹²⁷ We confess to being perplexed.¹²⁸ Case law and commentary unequivocally assert that implied *secondary* assumption of risk is a defense to a breach of a duty of care, and that implied *primary* assumption of risk is a genuine "no duty" doctrine.¹²⁹ Although we are unsure just what kind of argument will persuade Goldberg and Zipursky that primary assumption of risk is a form of implied assumption of risk, we feel compelled to revisit the matter, both to make clear our disagreement with *Shielding Duty* on this point and because we suspect that Goldberg and Zipursky's difficulty understanding what we mean when we call rulings of "no duty" insufficiently categorical is

125. 86 Cal. Rptr. 2d 547 (Ct. App. 1999).

126. Ky. Fried Chicken of Cal., Inc. v. Superior Court, 927 P.2d 1260, 1262 (Cal. 1997).

127. *Shielding Duty*, *supra* note 36, at 344–45.

128. Perhaps Goldberg and Zipursky are asserting that—even though primary assumption of risk is universally *thought* by courts and commentators to be a version of assumption of risk—it is not *really* a version of assumption of risk because the only "true" version of the doctrine is "a defense that turns on what a particular plaintiff subjectively understands and voluntarily chooses to do." *Shielding Duty*, *supra* note 36, at 344. If this is what they mean, they need to say far more than they do. Among other things, this claim needs to be defended *even in the case of the classical defense*. See *Abusing "Duty," supra* note 1, at 291 (describing classical assumption of risk). The gist of the "realist" critique of the classical defense was that the defense had nothing to do with plaintiffs' choices and everything to do with defendants' wrongful actions. *Id.* at 292–93. Defendants could relieve themselves of their ostensible duty of care by making unsafe conditions "open and obvious" thereby forcing plaintiffs either to bear the risk or leave the job. *Id.* at 292. Put differently, simply by flagrantly and blatantly disregarding its duty to provide a reasonably safe workplace an employer could rid itself of that duty. *Id.* at 293. As a practical matter, therefore, the defense *eliminated* the duty of reasonable care and replaced it with a duty to make unsafe conditions "open and obvious." *Id.* at 314. This opens the classical doctrine up to the charge that it was not really a defense that allowed parties to consent to careless risk imposition but a de facto doctrine of reduced duty. See *id.* at 291 (describing and critiquing the development of the assumption of risk doctrine).

129. See, e.g., *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90, 93 (N.J. 1959).

entangled with their (mis)understanding of primary assumption of risk.¹³⁰

Classical assumption of risk—the doctrine of implied assumption of risk developed during the latter part of the nineteenth century—was an absolute defense to negligence liability.¹³¹ Over the course of the twentieth century the classical defense underwent a slow, and conceptually elaborate, decline.¹³² First, the classical doctrine was narrowed without being either overthrown or formally restructured. Exploiting the elasticity of the concepts of “knowledge” and “consent,” courts and commentators began to insist that, for assumption of risk to apply, the plaintiff must be “subjectively” aware of the risk that she was assuming and her assumption must be truly “voluntary.”¹³³ Second, courts and commentators restructured the now narrowed doctrine. Implied assumption of risk was divided into “primary” and “secondary” forms.¹³⁴ The “primary” form of the doctrine holds that in some circumstances—almost always recreational ones—no duty of ordinary care ever arises.¹³⁵ “Secondary” assumption of risk is quite a different matter, both conceptually and practically. The “secondary” form of implied assumption of risk is, like contributory negligence, a defense to a breach of an established duty of care.¹³⁶

130. *Shielding Duty*, *supra* note 36, at 343. Goldberg and Zipursky write:

On the one hand, [Esper & Keating] seem to want to endorse Knight’s treatment of primary assumption of risk as a genuine ‘no duty’ defense, which renders primary assumption of risk a question of law. On the other, they want to leave it to juries to decide in each case whether the victim of an injury incurred in the course of a recreational activity counts as the realization of a risk ‘inherent’ in that activity.

Id. What we want is for California courts to treat primary assumption of risk in the way that *every other jurisdiction* that recognizes the doctrine does: we want California courts to reserve the choice of legal standard—the question of whether the doctrine of primary assumption of risk applies to the kind of (recreational) activity before the court—to themselves and to leave the application of the standard—the question of whether the risk which materialized in this case was inherent in the activity—to the jury.

131. *Abusing “Duty,” supra* note 1, at 291.

132. *Knight v. Jewett*, 834 P.2d 696, 703–04 (Cal. 1992); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1240–41 (Cal. 1975); DOBBS, *supra* note 102, at 535; 2 FOWLER V. HARPER & FLEMING JAMES, THE LAW OF TORTS § 21.1 (1st ed. 1956); W. PAGE KEETON ET AL., *supra* note 122, at 330.

133. See, e.g., RESTATEMENT (SECOND) OF TORTS: ASSUMPTION OF RISK §§ 496(c),(e) (1965); Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 U.C.L.A. L. REV. 481, 485 (2002).

134. *Knight*, 834 P.2d at 703.

135. *Id.* at 704.

136. *Id.* at 703.

Unlike contributory negligence, however, "secondary" assumption of risk is concerned with choice or consent, not with carefulness or reasonableness. "Secondary" assumption of risk embodies the idea that plaintiffs sometimes implicitly consent to the defendant's negligent conduct.¹³⁷

The doctrine is, therefore, concerned not with the reasonableness or unreasonableness of plaintiff's encounter with defendant's breach of its duty of care, but with the voluntariness of that encounter. Knowing, voluntary encounters with negligently created risks operate to bar all recovery on the part of the person encountering the risk.¹³⁸ The claim that people implicitly agree to relinquish their right to be free of others' negligence came under sustained attack during the first half of the twentieth century.¹³⁹ In response to that attack, courts and commentators broke "secondary implied assumption of risk" down further, into "reasonable" and "unreasonable" branches. "Reasonable" implied secondary assumption of risk—such as plaintiff Lamson's decision not to quit his job and so to run the risk of being struck by a hatchet falling from an unsafe drying rack¹⁴⁰—did not bar recovery or even reduce recovery. "Unreasonable" implied secondary assumption of risk, by contrast, continued to bar all recovery.¹⁴¹ "This conceptual splitting of the doctrine effectively

137. *Abusing "Duty," supra* note 1, at 292.

138. *Id.* at 247.

139. See *Knight*, 834 P.2d at 699 (citing authorities).

140. See the discussion of *Lamson v. American Axe & Tool Co.*, 58 N.E. 585 (Mass. 1900) (Holmes, C.J.), in *Abusing "Duty," supra* note 1, at 292–93.

141. *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1992); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992); W. PAGE KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS 497 (W. Page Keeton ed., 1984). Thus, we do not agree with *Shielding Duty* that courts were wrestling with the kinds of situations described in its footnote 65 after the *Li v. Yellow Cab*, 532 P.2d 1226 (Cal. 1975) decision. See *Shielding Duty, supra* note 36, at 347 n.65. We believe that *Li* regards both of the cases that Goldberg and Zipursky describe as variants of contributory negligence and so absorbed them into comparative negligence. *Abusing "Duty," supra* note 1, at 295–95. The only form of assumption of risk which survived *Li* is the kind which reduces duty:

As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." (*Grey v. Fibreboard*

abolished implied secondary assumption of risk as a distinct defense. Because implied secondary assumption of risk now barred recovery only when the conduct it covered was unreasonable, the defense was now identical to the defense of contributory negligence."¹⁴²

The final stage in the classical doctrine's demise came with the rise of comparative negligence. The triumph of comparative negligence eliminated the last vestige of the classical defense—its operation as a complete bar to recovery. With the rise of comparative negligence, the plaintiff's failure to exercise due care for her own protection was now compared with the defendant's failure to exercise due care to protect others from the reasonably foreseeable risks of her actions, and plaintiff's recovery was reduced in proportion to her relative culpability.¹⁴³ At the end of this long process, then, the classical doctrine of implied assumption of risk was a sliver of its former self, and even that sliver was subdivided into two smaller shreds. Implied "secondary" assumption of risk operated as a bar to recovery only in the special circumstance of the "firefighter's rule" prohibiting a firefighter from recovering from a person who negligently started a fire;¹⁴⁴ every other part of the defense was absorbed into comparative negligence. Implied "primary" assumption of risk was confined to a limited domain of recreational cases.¹⁴⁵

Paper Prod. Co., 418 P.2d 153, 156 (1996)).

We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.

Li, 532 P.2d 1226, 1240. Reasonable or unreasonable, if defendant owed a duty of care the defense was absorbed into comparative negligence.

142. *Abusing "Duty," supra* note 1, at 293.

143. *Lipson v. Super. Ct. of Orange Cty.*, 644 P.2d 822, 831 n.8 (Cal. 1982); *Kendrick v. Ed's Beach Serv., Inc.*, 577 So.2d 936, 938 (Fla. 1991); *Jacobsen Constr. Co., v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306, 312 (Utah 1980).

144. *Walters v. Sloan*, 571 P.2d 609, 614 (Cal. 1977), *overruled on other grounds by* *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 351-52 (Cal. 1994); *Terhell v. Am. Commonwealth Assoc.*, 218 Cal. Rptr. 256, 258 (Ct. App. 1985); *Santangelo v. State of N.Y.*, 521 N.E.2d 770, 772 (N.Y. 1988), *superseded by statute*, N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 2001), *as recognized by* *Williams v. City of N.Y.*, 811 N.E.2d 1103 (N.Y. 2004).

145. California's revival of the doctrine began with its declaration that *primary* assumption of the risk had survived the adoption of comparative negligence. *Knight v. Jewett*, 834 P.2d 696, 707 (Cal. 1992). *Knight's* holding that primary assumption of risk applied to certain kinds of recreational activities did no more than align California with the growing number of jurisdictions that have recognized "primary" assumption of risk, and have applied it to recreational activities. *Id.* at 710-11; *Abusing "Duty," supra* note 1, at 295. The devil was in the details—not in the

The doctrine of "primary assumption of risk" that emerged from this process of legal transformation *is* a form of assumption of risk. It holds that participants in certain activities (outside California, almost exclusively recreational activities) assume the "inherent" risks of those activities and it predicates its applicability on the *choices* of those it applies to—their choice to engage in the activity at issue. And it is an *implied* form of assumption of risk: there is no express agreement among the participants. The agreement is imposed by law and its terms are spelled out by judges and juries. To be sure, primary assumption of risk is also a form of "no duty" doctrine; it holds that participants in or sponsors of activities subject to the doctrine are not under a duty of reasonable care to reduce the activities' inherent risks. That, however, is simply the (formal) difference between primary and secondary implied assumption of risk. Secondary assumption of risk holds that plaintiffs who knowingly and voluntarily encounter breaches of duty waive their right to complain of any harm they suffer. It is a defense in substance as well as in procedural form.

In the hopes of closing the gap between our understanding of primary assumption of risk and Goldberg and Zipursky's, it may help to observe that primary assumption of risk is on the objective end of the spectrum of assumption of risk doctrines. This is true in two ways. First, the judgment that justifies the recognition of the doctrine is objective. Primary assumption of the risk rests on a claim about the character of the (recreational) activities that it covers—namely, that the goods realized by those activities are fostered by refraining from imposing a duty of reasonable care, and would be frustrated by the imposition of a duty of reasonable care. Second, the *content* of the norm that it imposes is objective. Primary assumption of risk assumes that we can, by and large, agree on what the inherent risks of the activities to which it applies are.¹⁴⁶ Objective

recognition of the doctrine but in its application—in California's peculiar conflation of law articulation with law application. *Abusing "Duty," supra* note 1 at 294–96.

146. This is a plausible assumption in the case of many sports because they are cooperative endeavors governed by shared understandings; sharply divergent subjective understandings of their inherent risks are a threat to their continued existence. Although we do not believe that California *had* to recognize primary assumption of risk for recreational activities—not all jurisdictions do—we do believe that primary assumption of risk is a more attractive regime for recreational activities than the "pure" version of assumption of risk that Goldberg and Zipursky endorse. See *Shielding Duty, supra* note 36, at 342–51. Sharply diverging subjective understandings of just which risks are permissible conflict with the shared understanding on

understandings are not, however, peculiar to primary assumption of risk. The canonical statement of the classical doctrine of implied secondary assumption of risk hardly applied in *Lamson v. American Axe and Tool Co.*¹⁴⁷ defers to plaintiff's understanding that he had *objected* to the risk that he was held to have assumed.¹⁴⁸

We therefore believe that primary assumption of risk is a genuine form of implied assumption of risk. It also happens to be a "no duty" doctrine—not a true defense—and a highly objective form of assumption of risk. These features locate primary assumption on the map of assumption of risk doctrines, but they do not move it into a different doctrinal domain.

IV. HOW GENERAL SHOULD DUTY RULINGS BE?

Shielding Duty rightly observes that we do not offer a general account of the level of generality that duty rulings must take.¹⁴⁹ This complaint, however, asks the impossible. The question—"Precisely how general should rulings of duty (and 'no duty') be?"—is no more answerable than the question: "Precisely how general should the decisions of common law courts be?" Is Cardozo's ruling in *MacPherson* too general, exactly as general as it should be, or not general enough?¹⁵⁰ We lack even a scale along which we could measure duty rulings for their generality. And even if we possessed such a scale, we could not say just how general different types of legal rulings should be. We know that the rule of law is the subjection of human conduct to governance by general norms,¹⁵¹ and

which cooperative enterprises like sports depend. Wisconsin is an example of a jurisdiction which applies a negligence standard to recreational activities. See *Lestina v. W. Bend Mut. Ins. Co.*, 501 N.W.2d 28, 33 (Wis. 1993).

147. 58 N.E. 585 (Mass. 1900).

148. *Id.* at 586 ("[Plaintiff] complained, and was notified that he could go if he would not face the chance. He stayed and took the risk."). Our disapproval of *Lamson* is not predicated on its objectivity. Our complaint is that the defendant was able to rid itself of its duty of care by brazenly violating that duty.

149. *Shielding Duty*, *supra* note 36, at 336.

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

151. LON L. FULLER, *THE MORALITY OF LAW* 46 (1964) ("The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality."). Cf. H. L. A. HART, *THE CONCEPT OF LAW*, 156-57, 202 (1961) (noting that because law is an attempt to control conduct by general rules, "formal justice"—the principle that "like cases must be treated alike"—is integral to law); JOHN RAWLS, *A THEORY OF JUSTICE* § 38 (Rev. ed., Belknap, Harvard 1999) ("[F]ormal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system.").

we can distinguish among types of legal norms—between more narrow legal rules and more general legal standards, for instance—but we cannot say that legal standards are sevens on some scale, legal rules are threes on that scale and rulings in particular cases are ones. What we can say is how the various elements of negligence law differ from each other and why they should. This is the kind of account we offered. It is more than imprecise if it is read as an abstract account of appropriate degrees of generality—read this way there is no account of the matter at all in our paper. Our account gathers its meaning and its point from the way that it situates duty within the larger fabric of negligence law.

Thus, when we said that legal rulings of duty and “no duty” must be general, we meant first and foremost that the law of negligence is deformed when courts issue rulings of duty and “no duty” that are no more general than jury determinations in particular cases.¹⁵² Our point has both formal and substantive elements. Formally, our point is that rulings of law must be *general enough to guide future conduct in similar situations*. Rulings that do not reach beyond the facts of the case at hand—such as *Monreal*’s rule governing when one must change lanes on the freeway¹⁵³—fail this test. Substantively, our point was that the standing of duty as a question of law for courts grants to courts the legitimate authority *to elaborate law*—to develop doctrines and rules covering recurring

Our inability to say exactly how general legal norms must be does not make it impossible for us to distinguish between the “Kadi-justice” of wise men who decide cases in ways that they perceive to be all things considered just on the facts at hand, and judges who settle disputes through the application of preexisting norms. See ANTHONY KRONMAN, *MAX WEBER* 76–80 (1983); MAX WEBER, *ECONOMY AND SOCIETY*, 845, 976–78 (Ephraim Fischhoff et al. trans., 1978).

152. See *Abusing “Duty,” supra* note 1, at 282

153. Recall *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168, 170 (Ct. App. 1998), where a “driver of a vehicle traveling at the posted maximum speed limit in either the No. 2 lane or No. 3 lane of a dry and straight four-lane freeway, at night, and in light traffic during clear weather” owes no duty “to other drivers and any involved passengers . . . to move his or her vehicle to the right 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.”

Another California Court of Appeal recently decided that a driver that gestures to another driver that it is safe to turn owes no duty to that driver and cannot be sued if the gesture was negligent and it was in fact not safe to turn. *Gilmer v. Ellington*, 70 Cal. Rptr. 3d 893, 896 (Ct. App. 2008). The “relational” or personal aspect of the *Gilmer* holding is quite notable, the court applies the factors originally announced in *Rowland v. Christian* to find that a duty does not arise out of the relationship between a driver and somebody gesturing to that driver that it is safe to proceed. *Id.* at 899–900. Focusing on the relationship between the parties promotes taking the case away from the jury and awarding summary judgment to the defendant.

categories of cases so long as those doctrines and rules involve the reasoned elaboration, extension and revision of existing legal materials.¹⁵⁴ Exemptions from obligation crafted in the name of “no duty” ought not differ in kind. They, too, should draw on rationales of some generality, and their scope should track their rationales.¹⁵⁵ Courts have, for example, the legitimate authority to decide that various kinds of recreational activities should be governed by a special exception to the general duty of reasonable care, in light of the special features of those activities—principally, the fact that risk is essential to their enjoyment. The proposition that these activities will not flourish unless they are exempted from the ordinary duty of reasonable care that would otherwise govern them is a reasonable position. A reasonable state supreme court might adopt this position as a general rule.

The flip side of this coin is that the authority granted to judges by duty doctrine runs out when the articulation of law comes to an end and the application of law begins. Because the duty of care recognized by our law is both highly general—it has proven enduringly resistant to recasting in the form of precise rules¹⁵⁶—and close to universal in its extension—it is owed by everyone to everyone else¹⁵⁷—duty is a nonissue in most cases and there are few legitimate opportunities for judges to exercise their powers of law articulation under the doctrine.¹⁵⁸ In most cases, negligence law requires judgments of “all things considered” reasonableness “based

154. See *Abusing “Duty,”* *supra* note 1, at 296–300.

155. If, for example, a court claims that the competitive character of sports requires the suspension of the duty of ordinary care the resulting rule of “no duty” should be limited to competitive sports, not extended to all recreational activities. Here, we think our position is congruent with the *Third Restatement* with its emphasis on categorical rules expressing general principles or policies. The proposed final draft of the *Third Restatement* notes:

In some categories of cases, reasons of principle or policy dictate that liability should not be imposed. In these cases, courts use the rubric of duty to apply general categorical rules withholding liability. . . . No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.

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

156. See *Abusing “Duty,”* *supra* note 1, at 286 n.58 (discussing the fate of Holmes’ prescription and prophecy that courts ought to and would over time fix precise rules of conduct through negligence adjudication); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 8 (Proposed Final Draft No. 1 2005).

157. See *Abusing “Duty,”* *supra* note 1, at 267–68.

158. *Id.* at 279–289.

on the circumstances of each individual situation."¹⁵⁹ When law application as opposed to law articulation is at issue, judges have very limited authority to remove cases from juries. They may do so only when reasonable people could not reasonably disagree over the application of law to fact. When reasonable people might reasonably disagree over the application of the law articulated by judges to the facts of particular cases, courts do not have the legitimate authority to decide the matter.¹⁶⁰

The role of the jury in negligence adjudication is part "imperfect procedural justice" and part "pure procedural justice."¹⁶¹ Juries are in part a well-chosen instrument for determining whether the defendant did in fact act reasonably and in part an intrinsically fair way of resolving reasonable disagreement about what care was due. They are a well-chosen instrument because juries represent a form of collective judgment particularly appropriate to negligence cases. Judges are likely better situated than juries to decide whether or not matters of principle and policy require a heightened duty of care for

159. The *Third Restatement* notes:

[W]hat looks at first to be a constant or recurring issue of conduct in which many parties engage may reveal on closer inspection many variables that can best be considered on a case-by-case basis. Tort law has thus accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 8 (Proposed Final Draft No. 1 2005). The phrase "ethics of particularism" is taken from Jonathan Dancy, *Ethical Particularism and Morally Relevant Properties*, 92 MIND 530 (1983). In invoking the *Third Restatement's* description of negligence adjudication here, we do not mean to be signing on to Dancy's epistemological thesis that there are no general moral principles. Our point is more modest: Negligence adjudication does not yield many legal *rules*. It applies a legal *standard* and yields particular decisions.

The *Third Restatement's* apt emphasis on the contextual character of judgments of reasonableness needs to be balanced by bearing in mind that jury adjudication can condemn as negligent a widespread practice, thereby unsettling a wide swath of social life. See, e.g., *Snyder v. Am. Ass'n of Blood Banks*, 659 A.2d 482 (N.J. Sup. Ct. 1995). *Snyder* upheld a jury verdict finding the American Association of Blood Banks negligent for failing to recommend that its 2,400 members nationwide conduct surrogate testing of blood as a precaution against transmitting the HIV virus through blood transfusions. *Id.* at 490–95.

160. *Abusing "Duty," supra* note 1, at 269 n.12.

161. For this distinction, see RAWLS, *supra* note 151, at 74–75. Imperfect procedural justice applies when there is an independent criterion identifying the correct outcome, but no procedure which always leads to the correct outcome. Pure procedural justice applies when there is no independent criterion identifying the correct outcome, but there is a fair or correct procedure for determining outcomes. In this case, the fairness or correctness of the procedure vouches for its outcomes.

experts and, of course, only judges can announce such a rule in a manner that would render it applicable to future cases. Judges are no better suited—and may in fact be less well suited—than ordinary citizens to determine whether a driver acted unreasonably in not changing lanes on the freeway to avoid an accident. The consensus of twelve citizens, many of whom drive on similar freeways and have had the common experience of driving too slow for a fast lane, as well as the experience of driving behind someone who was doing so, is a reliable index of the reasonableness of a driver's actions in those situations.

The instrumental efficacy of jury adjudication is, however, only one piece of the case for jury adjudication. Judgments of reasonableness in concrete cases may often be debatable, and no procedure, however well defined, may be able to dispel all doubt. The intrinsic fairness of jury adjudication therefore matters along with its instrumental efficacy. The law of negligence fixes an abstract standard of public right governing our relations with one another as members of a legal and moral community. It settles what we may reasonably demand from each other in the way of reciprocal regard for each other's safety. It does so by appealing to our capacity to govern ourselves by reference to a shared sense of reasonableness. Its norms implicitly claim that we would reasonably agree to them, were we to work the matter for ourselves.¹⁶² The institutions of negligence adjudication spell out the content of reasonable care. When enduring disagreement over just what this shared moral conception demands in a particular case is to be expected, it is eminently fair to ask a subset of citizens themselves to decide what we may reasonably demand of one another in the way of care. This, in any case, is the theory behind our jury system.¹⁶³

162. See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 373–79. Cf. RIPSTEIN, *supra* note 34, at 106–08.

163. A fascinating recent U.S. Supreme Court case demonstrates why even the most accomplished judges, despite their competence in determining legal issues, are not in the best position to judge questions of basic reasonableness. In *Scott v. Harris*, the issue was whether the Fourth Amendment was violated when police officers terminated a high speed chase by ramming the back of the suspect's car, causing the car to roll and catch fire and rendering the driver permanently paralyzed. 127 S.Ct. 1769, 1772 (2007). The Fourth Amendment prohibits "unreasonable" seizures, so the issue of whether the force was reasonable was in some ways similar to a negligence issue (though whether or not it should be a jury question in the Fourth Amendment context is of course beyond the scope of this Article). U.S. CONST. amend. IV. The majority, speaking through Justice Scalia, emphasized that they believed that anyone who viewed the videotape of the chase (which, in an unprecedented move, they placed on the Supreme Court's

In *Abusing "Duty,"* we criticized California courts for warping both the conceptual and the institutional dimensions of duty doctrine.¹⁶⁴ On the one hand, we argued, California courts are not articulating general legal rules; they are instead issuing cryptic, fact-specific rulings.¹⁶⁵ On the other hand, by issuing these cryptic rulings confined to particular facts, they are usurping the role of the jury, appropriating the task of law application to themselves in cases where reasonable people might reasonably disagree over the application of law to fact.¹⁶⁶

We began from the premise that the negligence norm of reasonable care in the circumstances is a classic instance—perhaps even *the* classic instance—of a legal standard. Rules and standards are different kinds of legal norms, in part because standards *are* more general than rules and in part because the application of standards calls for the exercise of evaluative moral judgment. "[A] rule may be defined as a legal direction that requires for its application nothing more than the determination of the happening or non-happening of

website) would believe that the force was reasonable. *Scott*, 127 S.Ct. at 1775–76. The Court came to this conclusion by emphasizing the high speed and potential danger to bystanders if the chase continued. *Id.*

However, Justice Stevens dissented. *Id.* at 1781 (Stevens, J., dissenting). He emphasized the police sirens, and the fact that other drivers on the road seemed to be able to pull to the side in time and nobody seemed to be in serious danger, in indicating that he did not think it was reasonable to terminate the chase in so violent a fashion. *Id.* at 1782–83. This is a powerful illustration of why these matters should be jury questions, at least in negligence law. Nine of the most learned judges in the world view a videotape, applying a standard of reasonableness, and come to divergent conclusions, emphasizing different facts. Tellingly, it requires no specialized training in the law to form a reasoned opinion about the reasonableness of the officers' actions. Equally telling, these judges are not peculiar in their disagreement. See generally Dan M. Kahan, et al., *Whose Eyes are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1081227> (summarizing study of different persons' reactions to videotape from *Scott v. Harris*). Jurors will, moreover, have more common experience to pool. Some jurors may, for instance, have experience as pedestrians and/or drivers who have been proximate to high speed chases, which they can bring into the jury room in evaluating what the level of danger really was and whether it was reasonable for the officers to act. Those jurors, of course, will be peers of the parties pulled from the local community rather than Supreme Court justices who do not know the local roads or the local customs or the local drivers.

Making duty highly relational—personalizing duty—threatens to take more and more cases out of the hands of juries and into the hands of trial and appellate judges whose opinions on the issue of reasonableness are not likely to be any more learned than those of twelve jurors (and who may lack the common sense and understanding of the community that jurors have).

164. *Abusing "Duty,"* *supra* note 1.

165. *See id.* at 282.

166. *Id.* at 289.

physical or mental events—that is, determinations of *fact*.¹⁶⁷ By contrast, a “standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of these happenings . . .”¹⁶⁸ The application of a standard to the idiosyncratic details of particular accidents presents a mixed question of law and fact; it *requires the exercise of evaluative judgment* as well as the finding of facts.¹⁶⁹

Standards thus differ from rules in two key respects. First, they differ because their application requires the exercise of evaluative judgment, an appraisal of whether or not the defendant’s conduct was reasonable. Second, standards differ from rules because their application is more fact-specific. Applying a legal standard to a case involves working out a highly circumstantial “rule” applicable to the particular facts at hand. Decisions in particular cases are thus even more specific than *rules*. The kind of law application that we criticized as an “abuse of duty” is this kind of application—application of law to facts in the form of rulings of “no duty” that reach no farther than the undeveloped facts of the case before the court. Duty is a question of law for the courts because it involves the articulation of law—of a norm governing something more than the facts of the case before the court. The application of law to the facts in negligence cases is a matter for juries whenever reasonable people might reasonably disagree over that application. The legitimate authority of juries derives from different sources than the legitimate authority of judges, and the legitimate province of jury adjudication differs from the legitimate province of judicial authority.

The application of the reasonable person standard requires bringing a number of considerations to bear,¹⁷⁰ and reasonable people

167. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (citing the “idea of the common law that no person should drive ‘at an unreasonable rate of speed’” as a canonical example of a standard). A canonical example of a legal rule is a precise statutory speed limit (e.g., 65 mph).

168. *Id.* at 140.

169. The classic statement of this proposition is Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 112 (1924). Bohlen stresses that the application of legal standards necessarily raises mixed questions of law and fact.

170. See e.g., UNIF. COMPARATIVE FAULT ACT § 2 cmt. percentages of fault (1996) (enumerating some of the factors relevant to the determination of negligent culpability: the burden of the precaution necessary to prevent the accident, the probability and gravity of the harm, the knowledge and capacity of the actor, the advertence or in advertence of the relevant

may reasonably disagree over how to evaluate the significance of these considerations even when they agree on the facts. People may reasonably disagree over the relative unreasonableness of defendant's speeding through a yellow light on the crest of a hill, and plaintiff's turning across three lanes of traffic beneath the crest of the hill to enter the driveway of a service station, without making certain that the coast is clear, for instance.¹⁷¹ Were a court to settle the relative culpabilities of this plaintiff and this defendant as a matter of *law*, its ruling would be an arbitrary assertion that *one* reasonable resolution was *the* reasonable resolution. That claim would betray the court's obligation to reach reasoned decisions even as it professed to discharge that obligation, and the ruling itself would be so fact-specific that it would fail to possess the generality required of law. Yet there is nothing unusual about the case. The rulings produced by ordinary negligence cases typically are so fact-specific that they do not apply beyond the circumstances at hand, and do not yield general "rules." There is thus no occasion to exercise the distinctively legal authority of judges.

The distinctive authority of juries in negligence cases depends on the special authority that they have to resolve reasonable disagreement. The reasonable person standard of negligence law claims a presumptively universal range of application and invokes a common moral conception. Each and every member of the community owes and is owed the obligation to impose *only* reasonable risks, and reasonableness itself is an irreducibly moral notion concerned with what we owe to each other. We act reasonably when we take the relevant rights or interests of other people who might be affected by our actions as a circumstance capable of affecting our conduct, and seek to act in ways that could be justified to them.¹⁷² When reasonable people disagree about the culpability of a particular defendant's conduct, conflicting judgments about the reasonableness of that conduct are *prima facie* plausible. The defendant is entitled to have his or her conduct appraised by the moral conception that we hold in common, yet we are divided over how that conception applies to the defendant's conduct, and

conduct).

171. See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975).

172. For elaboration of these points, see *Abusing "Duty," supra* note 1, at 279–81.

justifiably so. We must work our way from reasonable disagreement to reasonable agreement.

Judicial articulation of law and jury adjudication both have distinctive roles to play in the construction of reasonable agreement in negligence law. The judicial elaboration, extension and revision of law lays claim to being the articulation of reasonable norms that are general enough to guide conduct. Ideally, the norms of reasonable conduct that courts spell out in negligence cases are norms that people themselves would recognize as eminently reasonable if and when they consider the matter.¹⁷³ By defining the domain of the jury as the domain where reasonable people might reasonably *disagree* over the application of law to fact, jury adjudication takes over precisely when it is no longer possible for judges to articulate evidently reasonable norms. In its turn, jury application of negligence law to particular cases lays claim to being a fair way of resolving sharp disagreement over just what due care calls for in particular cases. Because negligence law's norm of reasonableness claims to apply a shared moral conception to determine what we owe to each other, it is fairer for a plurality of reasonable persons to settle reasonable disagreements over the adequacy of a defendant's care after full development of relevant facts and arguments, than it is for judges to settle such disagreement by determining matters to their own satisfaction before the facts are developed and the arguments aired.¹⁷⁴

Jury adjudication attempts to resolve reasonable disagreement in a principled and procedurally fair way by enjoining co-deliberation among a community of reasonable persons who form a microcosm of the community governed by the norm that they are applying to others. By virtue of their plurality and diversity, juries are far more likely than individual judges to embody the range of reasonable

173. The reasons for this run quite deep. For an additional discussion, see Keating, *supra* note 162, at 373–79. Cf. RIPSTEIN, *supra* note 34, at 108 (explaining that we can *presume* the foreseeability of reasonable conduct because we are entitled to expect others to behave reasonably).

174. Not all legal standards are tied to a common moral conception. The Uniform Commercial Code makes heavy use of standards in its effort to embed the actual morality of commercial communities into commercial law, for example. Consistent with this aspiration, Karl Llewellyn, the principal drafter of the Code, proposed the use of “merchant juries” to resolve commercial disputes. See *Abusing “Duty,” supra* note 1, at 280 n.43. The strong tie between negligence law and jury adjudication stems from both the properties of standards in contrast to rules and from the fact that reasonableness is a basic “intuitive moral idea.” *Id.* at 281 n.44.

disagreement over the conduct at issue in a negligence case. Unlike judicial determinations of "no duty," jury adjudication proceeds on a fully developed factual record and reaches judgment after the airing of competing viewpoints on the reasonableness of the defendant's conduct. It is thus designed not to ignore or override the diverse viewpoints and biases that lead to reasonable disagreement, but rather to engage and reshape them in order to reach reasonable agreement.¹⁷⁵ The prevailing understanding of duty and breach thus divides the labor of negligence adjudication between judge and jury in a principled way. Duty doctrine, properly deployed, assigns to judges the decidedly legal task of articulating the law—of stating *general* norms for the guidance of conduct. Breach doctrine, properly deployed, assigns to juries the task of evaluating conduct when the reasonableness of that conduct is subject to legitimate disagreement, and when the resolution of that disagreement will not lead to the making of general law.

This, of course, is abstract. So let us make it more complete by revisiting two cases—*KFC*¹⁷⁶ and *Record v. Reason*¹⁷⁷—which *Abusing "Duty"* criticizes and *Shielding Duty* defends, at least in part.

V. RECORD V. REASON: JUDGES AS JURIES

Record v. Reason involved a "tubing" accident. Reason was piloting a motor boat and towing Record in an inner tube.¹⁷⁸ Record had a preexisting neck injury, and there was testimony—from both Record and a "spotter" on the back of the boat—that plaintiff had

175. See Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2393-2410 (1990). Legal opinions recognize this point. It is, writes the court in *Havas v. Victory Paper Stock Co.*, 402 N.E.2d 1136 (N.Y. 1980),

particularly appropriate to leave [a finding of negligence] to the jury, not only because of the idiosyncratic nature of most tort cases . . . , or because there was room for a difference in view as to whether [the defendant's] conduct in the particular circumstances of this case did or did not evidence a lack of due care, but, perhaps above all, because, in the determination of issues revolving about the reasonableness of conduct, the values inherent in the jury system are rightfully believed an important instrument in the adjudicative process.

In her important dissents to the California Supreme Court's "no duty" decisions that we criticize, Justice Kennard has also emphasized the role of the jury. See, e.g., *Ky. Fried Chicken of Cal., Inc. v. Superior Ct. (KFC)*, 927 P.2d 1260, 1278 (Cal. 1997).

176. See, e.g., *KFC*, 927 P.2d 1260.

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

178. *Id.* at 549.

specifically told defendant (who knew of the injury) to “go slow and take it easy.”¹⁷⁹ Record suffered a serious spinal injury when he was thrown from the tube as Reason executed a left turn.¹⁸⁰ The speed and angle at which Reason turned the boat were disputed. Defendant himself claimed “that the boat was traveling 15 to 25 miles per hour . . . and that he made a gradual left turn.”¹⁸¹ This claim was disputed by Robin Perron, one of the two “spotters” on the back of the boat.¹⁸² She reported that Reason “was making a sharp left turn,” that “the boat’s speedometer read 30 miles per hour” and that the “tow line [connecting plaintiff to the boat] was at least 70 feet long.”¹⁸³ She also testified to a conversation between Reason and Patrick Lynch, the fourth member of the boating party, “about a game the two [of them] were playing where the object was ‘to try and knock one another off the tube using [the] speed and momentum of the boat.’”¹⁸⁴ Plaintiff himself estimated that the speed of the inner tube during the turn “approached 50 to 60 miles per hour.”¹⁸⁵

Invoking the doctrine of “primary” assumption of risk, the California Court of Appeal took it upon itself “to define the nature of the activity [and] the parties’ relationship to it,”¹⁸⁶ and subsequently affirmed summary judgment for the defendant. First, the court concluded that “tubing” was the kind of activity to which “primary assumption of risk” applies. Second, under cloak of its authority to determine the “existence and scope of a defendant’s duty of care,”¹⁸⁷ the court decided that the risk out of which plaintiff’s injury arose was “inherent” in the activity of “tubing.”¹⁸⁸ Whatever one makes of

179. *Id.* at 550.

180. *Id.* at 549.

181. *Id.* at 550.

182. *Id.* at 549 (describing how the role of the “spotter” is “to watch [the tuber] and, if he fell off the tube, to notify [the pilot] and raise a red flag to inform other boaters that someone was in the water.”).

183. *Id.* at 558, 550. There was expert testimony that the tube involved in the accident came with an instruction “never [to] exceed 25 mph when towing adults” and that tow ropes should be 50 feet long. *Id.* at 549–51.

184. *Id.* at 550. Record testified that Lynch’s “exact words [after the incident] were, ‘You were going way too “F’n” fast.’ Or, ‘You were going “F’n” fast.’ He made comments that I looked like a rag doll bouncing across the water.” *Id.* (alteration in original).

185. *Id.* at 551, n.2.

186. *Id.* at 555.

187. *Id.* at 555.

188. *Id.* at 556.

it, the conclusion that "tubing," like waterskiing, is the kind of vigorous recreational activity to which the doctrine of primary assumption of risk applies¹⁸⁹ is an exercise in fixing the legal standard that governs the activity at hand. The court's affirmation of summary judgment, however, crosses the boundary between law articulation and law application, treating matters that are plainly *not* matters of law as though they are.

Record thus involved a dispute as to what sort of "tubing" took place—"tubing" tempered by a mutual understanding that defendant was to take care not to aggravate plaintiff's preexisting injury, or the kind of high-speed "tubing" that is more readily analogized to waterskiing.¹⁹⁰ This may be a question of pure "fact," as the dissent asserts.¹⁹¹ Or it may be a "mixed" question of law and fact, turning both on what the parties said and did *and* on evaluative judgment about just how the enterprise that they agreed to should be characterized. But it is not, in any standard or convincing usage, a "pure" question of "law." The court's rejection of the argument that driving too fast can constitute reckless activity (not immunized by

189. "Primary" assumption of the risk is supposed to track the shared—and hence "objective"—understanding held by participants in an activity. *Record* invites the worry that the court is imposing its understanding on the activity, instead of reconstructing the participants' shared understanding of their common enterprise. "Tubing" may be a poor candidate for primary assumption of risk because it is an informal activity which can be conducted gently as well as vigorously. There may simply not be a core enterprise common to all instances of "tubing," which would be chilled by the recognition of duties of due care. See *id.* at 554 ("[A]ppellant described the enjoyment a rider receives from tubing as ranging from, the 'simple pleasure' of being casually towed behind the boat to the 'thrill' of the boat turning rapidly to get the inner tuber to go much quicker."); see also *id.* at 560 (Vogel, J., dissenting). A point—and perhaps the point—of "tubing" in a tame way is to minimize any risks of serious injury. The court's extension of "primary assumption of risk" to "tubing" is not, however, the principal reason why the decision is problematic.

190. After noting that instances of tubing fall on a continuum from gentle to very vigorous, the court disposes of the problem that this presents by acknowledging that an express understanding between the participants could take "tubing" out of the domain of "primary" assumption of risk, but then announcing that (as a matter of law) *Record* did not offer enough evidence to make out such an understanding. *Id.* at 555 n.3 (majority opinion). Bear in mind that this conclusion about the strength of *Record*'s evidence is reached in affirming a motion for summary judgment.

191. *Id.* at 558 (Vogel, J., dissenting). Judge Vogel wrote, in his dissent:

[I]t is evident that there are disputed issues of material fact regarding the existence of an explicit understanding between appellant and respondent and, if so, whether respondent failed to abide by that understanding. That factual dispute must be decided before it can be concluded that appellant's claim is barred by primary assumption of risk as a matter of law.

Id.

*Knight v. Jewett*¹⁹²); its holding that imposing any speed limits at all would chill the activity;¹⁹³ and its willful overlooking of the testimony that the defendant had actually discussed deliberately attempting to knock the passenger out of the inner tube by speeding and turning sharply; are all egregious.

Individually and jointly, these decisions treat a question of law application for the jury—whether the risk that materialized was or was not “inherent” in the activity of “tubing”—as a question of law articulation for the court.

The court’s conclusions are not necessarily *unreasonable*. We can certainly imagine a jury deciding to credit the testimony that the boat was traveling at only 15–25 miles per hour; or concluding that traveling 30 miles per hour (thus exceeding the recommended maximum speed by 5 miles per hour) and using a tow rope 20 feet too long was not egregious enough to exceed the boundary of the risks assumed, or, if egregious enough, did not cause plaintiff’s injury. A jury could also reasonably conclude that, under the circumstances at hand, plaintiff needed to do more than simply make a general request that defendant drive the boat slowly. But a reasonable jury could also draw opposite conclusions: that plaintiff and defendant had agreed that they were going to engage in a mild form of “tubing” in which the boat’s speed would be carefully controlled; that driving even 5 miles an hour (20 percent) above the recommended speed limit was too dangerous, especially when the tow rope was too long; that in fact the defendant was driving the boat above 30 miles per hour and causing the tube to reach clearly unsafe speeds of 50–60 miles per hour; and that the defendant was deliberately and unsafely trying to knock the plaintiff out of the inner tube. These are classic jury questions. In deciding them, the court is acting as the trier of fact.

It is hard not to see a resemblance between what the *Record* court is doing and the conception of “relational duty” that Goldberg and Zipursky champion, even though Professors Goldberg and Zipursky are themselves troubled by the case.¹⁹⁴ When wrongs must

192. 834 P.2d 696, 712 (Cal. 1992).

193. *Record*, 86 Cal. Rptr. 2d at 556.

194. See *Shielding Duty*, *supra* note 36, at 342–45. Goldberg and Zipursky agree that *Record* should have gone to the jury because they believe that the court should have applied assumption of risk in its secondary and “true” form. Doing so would have required a particularized, factual

be personal to the plaintiffs who plead them, the relationship between *this* particular plaintiff and *this* particular defendant on *these* particular facts is a fit subject for judicial inquiry. A strongly relational conception of duty thus suits a court disposed to sit in judgment of the facts of a case as an additional, gate-keeping jury, determining whether the plaintiff will ever get to present his case to the real one.¹⁹⁵

VI. KFC: DETERMINING DUTY WITHOUT ARTICULATING LAW

Kentucky Fried Chicken of California, Inc. v. Superior Court ("KFC")¹⁹⁶ is extensively discussed in *Abusing "Duty."*¹⁹⁷ We will revisit it only briefly here. As framed by the California Supreme Court, the issue in *KFC* was whether a shopkeeper has "a duty to

inquiry into the parties' states of mind. That kind of inquiry falls within the jurisdiction of the jury. Tellingly, Goldberg and Zipursky also argue that we cannot coherently object to having the case taken from the jury because we believe that the "no duty" doctrine of primary assumption of the risk can be applied to the case. *Id.* at 343 ("[P]rimary assumption of risk [is] a question of law [for the court, not a question of fact for the jury]."). By assuming that duty analysis encompasses both law articulation and law application, this criticism unwittingly illustrates just how compatible Goldberg and Zipursky's conception of duty is with the California courts' ongoing abuse of duty.

195. While claiming to maintain adherence to the *Knight* primary assumption of risk doctrine, including the prong that holds that the inherent risks of the activity are determined by courts as a matter of law, the California Supreme Court has begun to "walk back" at least the signals that it sent lower courts in *Knight*, indicating that they could and should grant summary judgments for defendants in cases where there were disputed facts. See *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992); see also *Cheong v. Antablin*, 946 P.2d 817 (Cal. 1997); *Parsons v. Crown Disposal Co.*, 905 P.2d 418 (Cal. 1995). Thus, *Kahn v. East Side Union High School District*, 75 P.3d 30 (Cal. 2003), holds that a high school swimmer who was encouraged by her coach to try a dangerous dive that she was not ready for had raised a triable issue of fact that the coach's conduct was reckless and thus actionable under *Knight*. *Id.* at 44. Similarly, *Shin v. Ahn*, 165 P.3d 581 (Cal. 2007), holds that there was a triable issue of fact as to recklessness where a golfer hit another golfer with an errant shot and there was a factual dispute as to whether the golfer saw the other golfer before lining up to tee off. In *City of Santa Barbara v. Superior Court (Janeway)*, 161 P.3d 1095 (Cal. 2007), the court held that while waivers of ordinary negligence actions were enforceable, waivers of actions for gross negligence violated public policy. The court did not disturb the lower courts' findings that the plaintiff had stated a cause of action for gross negligence based on a lifeguard's split-second looking away from a developmentally disabled child in a swimming pool which resulted in the child drowning. *Id.* at 1118. Cases like *Kahn*, *Shin*, and *Janeway* appear to use recklessness and gross negligence as a proxy for negligence, and appear inconsistent with earlier court of appeal cases involving sports coaches and golfers where no triable issues of fact were found.

This demonstrates another problem with particularistic conceptions of duty. When courts take it upon themselves to issue rulings of law as detailed as the ones now being issued, the result is a hopelessly confused doctrine, in which courts and lawyers parse fact patterns in pursuit of minute and meaningless distinctions in order to reconcile conflicting cases.

196. 927 P.2d 1260 (Cal. 1997).

197. See generally *Abusing "Duty," supra* note 1.

comply with the unlawful demand of an armed robber that property be surrendered.”¹⁹⁸ The KFC employee refused to turn over the cash in the register and, as a result, the robber took the plaintiff hostage and held her at gunpoint. Goldberg and Zipursky are, of course, correct that this was essentially a claim for negligent infliction of emotional distress. However, there is no doubt that under *Dillon v. Legg*¹⁹⁹ and case law preceding it, the plaintiff’s claim arose out of a risk to her physical safety and that her claim therefore fell within an exception to the general rule prohibiting recovery for NIED.²⁰⁰

But the California Supreme Court barred recovery, as a matter of law and on a different ground.²⁰¹ It held that business owners owe “no duty” to turn over the cash in the cash register to an armed robber in order to protect the business’s patrons.²⁰² The Court’s holding would therefore extend to a situation where plaintiff *had* been shot and injured. The Court thus holds that the property rights of the restaurant—over a very small amount of money in the cash register—take *absolute* precedence over the physical safety of the patrons. The competing claims of potential victims to the safety of their persons do not even have to be considered. Once an unlawful demand to surrender business property is made, businesses may be as negligent as they please with the safety of their customers “no matter how insignificant the object and no matter how slightly it is jeopardized . . . no matter how many [customers are endangered] and no matter how gravely they are threatened.”²⁰³ In *KFC*, property rights trump “the right to life”—but only, it seems, on the facts of the case. This is a very narrowly drawn ruling: “we need not decide if th[e] right [to defend property] is qualified by the duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat of harm to third persons.”²⁰⁴

198. *KFC*, 927 P.2d at 1262 (an armed robber had demanded the cash in the register at a KFC outlet).

199. 441 P.2d 912 (Cal. 1968).

200. *Id.* at 919.

201. *KFC*, 927 P.2d at 1270.

202. *Id.*

203. *Id.* at 1270 (Mosk, J., dissenting). Recall that a business does have a general duty to protect customers who visit its premises from assault by third parties. This “duty” is an exception to that general duty.

204. *See id.* (majority opinion).

Goldberg and Zipursky contend that our real complaint is with the political conservatism of the California Supreme Court in privileging private property rights over the interests in physical security that tort law seeks to protect. We certainly do believe that *KFC* embodies a wrongheaded privileging of property over life. But we also believe that *KFC* illustrates an unworkably particular approach to "duty." To see this, it helps to bear in mind that, formally speaking, duty doctrine is performing its proper *role* in *KFC*. By giving absolute priority to the claims of property, the decision fixes a boundary between property and tort. In the circumstances covered by the case, shopkeepers can be "as negligent as they please" with the lives of their customers. But the ruling is so closely tailored to the particular facts of the case that it does not define a domain large enough to orient either future conduct or future legal decisions.

The law in place after *KFC* prescribes that there is: (1) a general duty to protect customers from assault at the hands of third parties on the premises; (2) "no duty" to comply with an unlawful demand that property be surrendered; and (3) uncertainty as to whether the "right [to defend property] is qualified by [a] duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons."²⁰⁵ "Physical resistance," we gather, is different from a mere refusal to comply with an unlawful demand that property be surrendered. And "[p]rovok[ing] a robber into carrying out a threat to harm third persons"²⁰⁶ is a step beyond provoking a robber into credibly threatening to harm third persons. Only after that threat fails and someone is harmed, will we learn if there was a duty to yield to the threat and so to have prevented that harm. This is not a categorical proclamation that the shopkeeper's privilege to defend its property preempts the customer's claim to safety. It is a judgment that the privilege trumps on these exact facts. "No breach as a matter of law" based on these particular facts is the way to express a conclusion this narrow.²⁰⁷

205. *Id.*

206. *Id.*

207. See *id.* at 1273–74 (Kennard, J., dissenting) (explaining that because the "emergency rule" might be invoked to hold the store employee to a relaxed standard of care, a ruling that there was no breach as a matter of law is at least plausible, if not necessarily persuasive).

Put otherwise, *KFC* relies on the idea that duty is a live issue in every case. This idea is, indeed, precisely what the Court must use to justify its conclusion that, as a matter of law, a business never has a duty to comply with a robber's demands for the cash in its register in order to protect the safety of its customers. If duty doctrine had been confined to its traditional roles of limiting obligation to circumstances where harm *to someone* is reasonably foreseeable—and fixing special rules of greater or lesser obligation in *classes* of cases where we have good reason to recognize heightened or lessened obligation of care—*KFC* simply could not have been decided as it was. The existence of a duty to protect the physical safety of patrons during a robbery would be presumptively settled by the broad rule of *Rowland v. Christian* that business invitees are owed reasonable care, nothing more and nothing less.²⁰⁸

Under the rule that everyone owes everyone else a duty of reasonable care, it is up to the jury—not the judge—to determine whether a defendant's interest in protecting its property justifies not handing the cash in its register over to a robber. That is simply a matter of deciding whether the benefit of protecting the receipts in the register are worth the risk to human life created by a failure to acquiesce to the robber's demand.

Under *Dillon* (and case law preceding it), the extent of liability for breach of that duty extends to emotional distress caused by conduct that risks physical harm to the plaintiff. A court that wanted to cut back on *Rowland* would have to state a rule of some generality, and that rule would have to articulate a principled boundary on defendant's duty of care, a boundary fixed and supported by plaintiff's property rights. The California Supreme

208. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968). In *Marshall v. Burger King Corp.*, 856 N.E.2d 1048 (Ill. 2006), the Supreme Court of Illinois analyzed whether a fast food restaurant owed a duty to a customer who was dining when a automobile smashed into the building, killing the customer. The Illinois Supreme Court applied a multifactor balancing test similar to *Rowland v. Christian*, but declined Burger King's invitation to fashion a rule of "no duty" tailored to the particular facts of the case. 856 N.E.2d at 1061.

[T]o the extent defendants suggest we could create a [narrow] rule of law . . . to absolve them of liability, they are actually requesting that we determine, as a matter of law, that they did not *breach* their duty of care. It is inadvisable for courts to conflate the concepts of duty and breach in this manner. Courts could, after all, state an infinite number of duties if they spoke in highly particular terms, and while particularized statements of duty may be comprehensible, they use the term duty to state conclusions about the facts of particular cases, not as a general standard.

Id. (internal quotation marks omitted).

Court would have to articulate its quasi-libertarian conviction that life may be endangered to preserve property in a general and principled way.

VII. CONCLUSION

The California courts, of course, are responsible for their own decisions. Professors Goldberg and Zipursky are not. But their strongly relational conception of duty is more likely to reinforce than to restrain the abuse of duty now afoot in California. Make duty "relational," in the robust sense that Goldberg and Zipursky advocate, and courts can deny plaintiffs recovery and take cases away from the jury whenever that strikes them as appropriate given the relationship between *this* plaintiff and *this* defendant on *these* facts. In a case like *KFC*, the question becomes whether *this* particular restaurant owed *this* particular customer a duty not to hand *this* robber the money in its register. The preliminary question of duty metamorphoses into the ultimate question of liability. Relational duty as Goldberg and Zipursky conceive it is thus as supportive of excessively particular duty rulings as any form of instrumentalism run amok. An excessively personal conception of duty is both a license to pursue preferred outcomes, and at war with the premise that everyone owes everyone else a duty of reasonable care. An excessively personal conception of duty obscures and erodes the great achievement of twentieth century tort law—its recognition that the equal right to the physical integrity of one's person trumps the free use of property and the unfettered pursuit of mutual advantage in the marketplace.

