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IN THE DUTY WARS, I’M SWITZERLAND

W. Bradley Wendel*

ABSTRACT

The “duty wars” have been raging among tort scholars for some time, sparked by the Third Restatement’s deflationary approach to the duty element of the negligence cause of action. Defenders of the traditional approach to duty insist that it is necessary to ensure that tort law stays on the right side of the boundary between public and private law insofar as the negligence tort recognizes a relational conception of rights owed among individuals. The worry is that negligence shorn of the duty element becomes an instrument of efficiency or deterrence rather than recognizing obligations. Relatedly, the approach pioneered by the California Supreme Court, starting in the 1960s, using open-ended policy factors to determine the existence of a duty, has led to an expansionary trend in tort liability. Working with Aaron Twerski in our Torts casebook, including the incorporation of several recent and important cases, has forced me to reckon with my view on the duty wars. In this Article, I acknowledge the foundational significance of the moral relationship between injurer and victim, as emphasized by private law theorists, but argue for a way of understanding the content of duties among the parties in a way that reflects societal interests as well as the interests of the parties to the dispute. In this way, I suggest a middle ground or stance of neutrality in the duty wars.

INTRODUCTION

Like so many other participants in this tribute symposium, I have benefitted tremendously from Aaron Twerski’s scholarship in the torts and products liability fields, both of which I teach. Over the years, I have found myself utterly convinced of the soundness of the basic theoretical position underlying the design-defect test in the Restatement (Third) of Torts: Products Liability. Aaron, along with his dear friend (and my mentor, colleague, and friend) Jim Henderson, carefully, methodically, and persistently defended this position. Their efforts ultimately proved successful, as one state after another joined the risk-utility camp on design defect and began to view failure to warn as a species of negligence, not strict liability in any meaningful sense.1 Recent decisions signify what Aaron

* Edwin H. Woodruff Professor of Law, Cornell Law School. Thanks to Yin Yin Wu for comments on a draft of this article. I gratefully acknowledge the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O’Neil Charitable Trust.
1. Some of the leading articles co-authored by Jim and Aaron, who also served as co-Reporters to the Third Restatement’s volume on Products Liability, include James A. Henderson, Jr. & Aaron D. Twerski, Achieving Consensus on Defective Product Design, 83 CORNELL L. REV. 867 (1998); James A. Henderson Jr. & Aaron D. Twerski, Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 CORNELL L. REV. 1512 (1992); James A. Henderson, Jr. & Aaron D. Twerski,
referred to as the “quieting of products liability law,” marking the end of
decades of sometimes heated controversy. But I share an additional connection with Aaron, as a co-author
committed to carrying forward the legacy of Aaron’s Torts casebook,
originally prepared with Jim Henderson. I tend to switch casebooks from
to try Aaron and Jim’s new book. It was truly a breath of fresh air from the
pedagogical point of view. The original authors aimed to make tort law (not
theory, at least not primarily) understandable to first-year students without
avoiding areas of genuine ambiguity or difficulty. They achieved this by
selecting relatively recently decided cases, lightly editing them, providing
clear expository text, artfully drafting hypotheticals, and incorporating author
dialogues based on real conversations Aaron and Jim had while putting
together the book. “No hiding the ball” was clearly one of the animating
principles of the collaboration, and so was employing a distinctive narrative
voice that actually sounded like Jim and Aaron, not some generic legal
scholar. My students loved the book, and I enjoyed teaching from it,
particularly in the knotty, brambly parts of the law presented through the
hypotheticals and the Jim/Aaron dialogues (which included the kind of put-
downs and zingers only friends of very longstanding would exchange).

Closing the American Products Liability Frontier: The Rejection of Liability Without Fault, 66
N.Y.U. L. REV. 1263 (1991); James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal Collapse in
2. See Aaron D. Twerski, An Essay on the Quieting of Products Liability Law, 105 CORNELL
L. REV. 1211 (2020).
3. AARON D. TWERSKI, JAMES A. HENDERSON, JR. & W. BRADLEY WENDEL, TORTS: CASES
4. A couple of my favorite examples:

Aaron: Then why do fishermen recover when fishing grounds are damaged? They don’t
own the fish ’til they catch them.

Jim: They have a “quasi-property interest” in the fish, I suppose.

Aaron: And you, my friend, are left with a “quasi-theory.” To get Judge Henderson’s
attention, all I have to do is assert a “quasi-property interest” in the uninterrupted
operation of my deli. I didn’t realize until this moment how susceptible to legal fictions
you are.

At the end of a dialogue about the pure economic loss rule. Id. at 440.

Aaron: It’s even worse than you think, Jim. Kingston says that the defendant railroad
will be liable whenever the northwest fire is of “responsible” origin. And then the court
equates “responsible” with “human.” I assume that if the northwest fire had been shown
to have been started by a couple of non-negligent, judgment-proof eight-year-olds, the
court would have said that they constituted a “responsible origin” and would have held
the defendant railroad liable even though the eight-year-olds are the functional equivalent
of natural lightning. Even tort law, itself, thinks young children are too irresponsible to
be negligent, does it not?

Jim: Holy Rosenkrantz, Aaron, you’re right. Why are you smiling?

Aaron: I love watching a nit-picker squirm.
It was an unexpected honor to be asked by Aaron and Jim to join the team for the third edition of the casebook. Since Jim’s passing, Aaron and I have divided the primary drafting assignments, each of us taking half the chapters, while consulting with the other about major changes. We have even added a few author dialogues of our own for problems we find particularly challenging, which brings me to the subject of this paper: the perplexity of the duty element and the controversy surrounding its treatment in the Third Restatement.5 Jonathan Cardi and Michael Green refer to the “duty wars,”6 sparked by John Goldberg and Ben Zipursky’s criticism of a draft of the Restatement provision on duty.7 Dilan Esper and Greg Keating have also weighed in on the place of duty in the Third Restatement,8 and Aaron contributed his own perspective9. Working on the casebook with Aaron forced me to finally reckon with my own views about the duty element and how they align with those of other scholars. I realized I am a fence-sitter of sorts, but hopefully in an interesting way. I believe the distinction between case-by-case adjudication and the announcement of categorical duty (or no-duty) rules is slipperier than courts and commentators would prefer it to be. Vagueness and imprecision in the middle ground do not mean there is no difference between the two ways of deciding cases, however, and there are solid jurisprudential reasons to favor the latter, more rule-like approach to duty issues. That approach owes something to the relational conception of duty defended by Goldberg and Zipursky in a series of articles.10 Nevertheless, “relational” always seemed to me a better description of New York courts’ duty decisions, going back to Judge Cardozo’s opinion in Palsgraf.11 Still, thinking in terms of reasons why some suitably described category of actors owes a duty to some suitably described group of potential victims, in light of some suitably described risk of harm, always felt more rule-like, and thus more lawful, than the open-ended balancing of policy

Following on Jim’s doubts about the soundness of the reasoning in Kingston, the two-fires case. Id. at 291.

5. Here, referring not to the Products Liability Restatement, for which Aaron served as co-Reporter with Jim Henderson, but to the general provisions, for which the Reporters were Michael D. Green and William C. Powers, Jr. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM (AM. L. INST. 2010). Further citations to the Restatement will be to this volume.


considerations against which I understood the Third Restatement to be reacting.

I can live with the word “relational,” but what I believe is going on in many of the most important duty cases is a rough risk-utility comparison conducted at a high level of generality. The words “rough” and “general” are important; the claim is not that the duty analysis should be guided by welfarist considerations. Rather, it is that the reciprocal, relational nature of the duty element mandates consideration of both the foreseeability of harm to the plaintiff and the burden that will fall on the defendant of taking efficacious precautions—that is, doing the sorts of things that are likely to protect potential victims without excessively impacting the social utility of the defendant’s activities. Granted, true risk/utility balancing typically occurs when the jury determines whether the defendant’s conduct fell below the standard of care. An incorrect interpretation of the duty element could indeed interfere with the jury’s role in adjudicating tort claims. As an analytically prior step in the analysis, however, the duty element should also form the basis for a court to determine, as a normative matter, whether individuals or entities engaging in a particular type of activity should be required to take precautions to safeguard against a certain type of harm to a specific class of potential victims. If this seems reminiscent of the proximate cause analysis, duty overlaps with that as well, but again, there are some situations in which courts appropriately decide the balancing question, in general terms, across a range of relevantly similar actors and risks. In any event, what should not be happening is a case-by-case balancing of vaguely defined policy factors. Instead, there should be a genuine, good-faith effort to establish legal principles that can be applied across a range of similar cases.

To my surprise, after years of criticizing the approach of the California Supreme Court as lawless, the court handed down a radical revision of the duty element that has the potential to ease tensions in the ongoing duty wars. The court’s new and improved approach to duty shares some similarities with the relational analysis that would be familiar to New York lawyers. Much of the innovation, however, is jurisprudential. The court appears keen to turn the page on an era of reliance on a multiplicity of social policy considerations subject to ad hoc balancing by the court as the guiding methodology for determining duty. The court’s solution will undoubtedly prove less than satisfactory to all the partisans in the duty wars, but it strikes me as a very sensible middle ground.

In Part I, I will set up the substantive argument with reference to a recent decision of the California Supreme Court that charts a new course for the

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15. See Regents of Univ. of Cal., 413 P.3d at 674 (beginning with the determination of whether a special relationship exists and only then going through the multi-factor Biakanja/Rowland test).
duty element in that influential state. Part II seeks to clarify what is and is not at stake in the duty wars. Finally, Part III discusses the middle-ground position of duty as relational balancing, considering both tort law and underlying private law and moral theory.

I. THE NEW TARASOFF

For the fifth edition, Aaron proposed a radical change: Is it time to take out the venerable Tarasoff case and replace it with something more recent (with the tacit premise that a different case would better represent the current state of the law)? Tarasoff, of course, is a classic, standing not only for the narrow holding that psychotherapists have a duty to warn a person specifically identified by a patient who has expressed a threat of violence but also for a general approach to recognizing affirmative duties in cases where the peril resulting in the harm to the plaintiff was not of the defendant’s creation. Replacing Tarasoff would be a big deal. What would we replace it with? Would the replacement bring enough pedagogical benefit to offset the reliance interest, or at least the annoyance, of casebook adopters who would have to undertake substantial revisions to their teaching notes?

The substitute was Regents of University of California v. Superior Court, which in teaching I refer to as the UCLA case. Like Tarasoff, it involved a defendant who was not the perpetrator of a violent act but rather an institution that might have done more to prevent it. In this case, a university that for months had been dealing with troubling behavior by one of its students, Damon Thompson. Thompson, who claimed to be hearing voices and subjected to insults and harassment by other students, had been under intensive supervision by university administrators and clinical treatment by the school’s Counseling and Psychological Services department. As the menacing nature of his conduct escalated, the university considered whether “urgent outreach” was required. Before further precautionary measures could be taken, Thompson snapped, attacking a student in his chemistry lab whom he had accused of calling him stupid; the attack inflicted life-threatening injuries. On the university’s motion for summary judgment, the trial court and Court of Appeals concluded that the university had a duty to protect the plaintiff, Katherine Rosen, from attacks by third parties, based on a special relationship between Rosen and the university.

The California Supreme Court’s opinion represents a comprehensive revision and updating of the state’s duty doctrine, going back to the early

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17. Regents of Univ. of Cal., 413 P.3d at 656.
18. Id. at 660–61.
19. Id. at 662.
20. Id. at 661–62.
21. Id. at 662–63.
cases of *Biakanja v. Irving*\(^{22}\) and *Rowland v. Christian*\(^{23}\) and as applied in landmark cases like *Tarasoff*. The court claims to leave the *Biakanja/Rowland* framework intact, but in fact, it alters it profoundly in recognition of trends that had been emerging slowly in prior California cases.\(^{24}\) One could argue that the court is “restating” the law in the way critics of the American Law Institute sometimes accuse it of doing when their objection is lack of fidelity to existing law.\(^{25}\) Reading between the lines, I would go so far as to say that the California court has taken on board the longstanding critique of *Biakanja/Rowland*, as applied in *Tarasoff* and similar cases, as lawless.

As part of the revision of the duty chapter, I drafted portions of the explanatory text, taking aim at a famous passage from one of the most influential torts treatises of recent years. Concerning duty, William Prosser wrote:

> The statement that there is or is not a duty begs the essential question—whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. . . . It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . It should be recognized that “duty” is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.\(^{26}\)

This passage had always irritated me, so I added an editorial note asking how students felt about this as a way of doing law. Along the way, I alluded to certain strands in Lon Fuller’s work that had inspired Jim Henderson:

> Did you spit out your coffee when you read that passage? Your teacher has probably been admonishing you not to rely on a “shorthand statement of a conclusion” rather than providing analysis. And is Prosser serious that duty

\(^{22}\) *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958).


\(^{24}\) I have long believed the *Ann M.* case was an inflection point in California case law. See *Ann M.* v. *Pacific Plaza Shopping Ctr.*, 863 P.2d 207 (1993). As I read that case, the Supreme Court realized it had created a monster with the open-ended, foreseeability-first *Biakanja/Rowland* framework and, after that, was on the lookout for ways to cut back on the expansion of tort liability catalyzed by that approach to duty. Since one theme of this paper is pedagogy, a bit of personal history: I taught for five years at Washington and Lee Law School, where, at the time, one of the first-year courses also had a legal research and writing component. So, my Torts students actually got six credit hours with me—four for Torts and two for Legal Writing. It is a great way to teach both subjects, allowing for serious attention to the connection between quality legal analysis and clear writing. But it can also encourage excessively ambitious assignments by rookie law professors, such as creating a problem based on an assault in a parking lot, in which the students had to reconcile *Ann M.* as well as other cases, including *Isaacs v. Huntington Mem. Hosp.*, 695 P.2d 653, 665 (1985), *Gomez v. Ticor*, 193 Cal. Rptr. 600, 633 (Ct. App. 1983), and *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 133 (1999). I am still in touch with a few students from that class, and they recall the experience as like being trapped in a hall of mirrors or a less pleasant form of torture.


does not function like a legal rule—i.e., one that is relatively general and capable of being grasped in advance of a particular set of facts and applied fairly by a judge? In some contexts, a decision-maker may be called upon to determine what is the best option, all things considered. Legal decisions, on the other hand, are generally understood as the product of *adjudication*, which is different from an all-things-considered judgment about what should be done. One of the hallmarks of adjudication is the consistent application of relatively determinate rules settled in advance of the decision to be made, and subject to principled limitation. That is not to say that judges are robots or, as Chief Justice Roberts stated in his Senate confirmation hearings, like umpires calling balls and strikes. Judging can involve creativity and discretion in the application of pre-existing rules, and sometimes involves the creation of new law. But it is surprising to see an eminent tort scholar telling judges that they should not think “duty” is a legal doctrine but instead is merely a shorthand for “in this case, the defendant owes the plaintiff protection from a risk of harm.”

I was reacting to the strand of skepticism in Prosser’s perspective on duty, highlighted by Goldberg and Zipursky’s critical and reconstructive work that insisted the duty element not be reduced to some vague, unstructured balancing of “policy” factors, whatever that means, but that it embrace the incorporation of an explicitly relational normative component into negligence law. It was also a reaction to my experiences in attempting to teach the duty element over the years to students who asked the perfectly fair question: “How do I know what policy to apply on the exam when I’m dealing with a duty question? Does it all just come down to foreseeability? Or do ‘policy’ arguments include things like not wanting to open the floodgates of litigation?” First-year students, as it turns out, are pretty good detectors of question-begging reasoning.

In response, in an Authors’ Dialogue, Aaron came to Prosser’s defense:

**Aaron:** Brad, I think you are having a fit about Prosser’s quote on duty for no good reason. He is absolutely right the label “duty or no duty” goes on after the court has decided the policy reasons as to why liability should be recognized or rejected for a class of cases.

**Brad:** No, Aaron, I am reacting to the idea that “duty” is an empty concept with little thought being given as to what factors determine whether there should be a duty or not. According to Prosser, a court slaps the “duty” label

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27. Twerski et al., * supra* note 3, at 410–11.
28. See Goldberg & Zipursky, *Moral of MacPherson,* * supra* note 10, at 1741–42; see Goldberg & Zipursky, *Place of Duty,* * supra* note 7, at 662. In “The Moral of *MacPherson,*” Goldberg and Zipursky understand Prosser’s duty-skepticism as a reflection of his attitude that moral concepts have no place in reasoned discourse, or at least that if one were to take moral considerations into account, they had better be utilitarian, with the legitimating feature of depending on observable impacts on human welfare. See Goldberg & Zipursky, *Moral of MacPherson,* * supra* note 10, at 1808–11. As they say, “in the spirit of empiricist rigor,” Prosser and others who shared his duty skepticism, such as Holmes, felt they had to rid the law of this language even though it was perfectly unobjectionable in ordinary language and philosophical usage. *Id.* at 1810.
on a case-by-case basis whenever they fancy to do so. That, my dear friend is not law, it is judicial anarchy.

Aaron: Okay, Brad. Suppose you are philosopher king, or the next best thing, a state supreme court judge, and you are charged with the task of articulating an overarching principle that in your words sets forth “consistent application of relatively determinate rules settled in advance of the decision to be made.” Take the UCLA case, wherein California decides that a university has a duty to protect student from a psychotic fellow student. The court makes some noise about a special relationship between a college and its student and then reverts to a six-factor test for duty. This six-factor test appears in almost all California duty cases. Brad, I could use that test to get any result I want. In short, if you don’t like Prosser’s formulation do you have a better idea?29

The “better idea” for an analytic approach to duty is not my invention but instead comes from the UCLA case. The California court actually quotes the Prosser passage after stating that the decision to recognize a new duty is a question of public policy.30 It also identifies the Biakanja/Rowland factors as guiding the decision of courts to depart from the general principle that every person has a duty to act with reasonable care under the circumstances.31 But it then proceeds to revise and restate the Biakanja/Rowland factors in a way that responds to the concern that the case-by-case adjudication of duty issues, based on open-ended multi-factor balancing tests, may too readily support contradictory answers reached by different judges faced with the same set of facts.

The California Supreme Court begins by observing that an actor who did not create a peril is not liable for failing to prevent the harm to another, absent a special relationship with either the victim or the third party whose acts caused the harm.32 The idea of special relationships is deeply rooted in common law, with relationships such as common carrier-passengers, innkeeper-guests, and school-students considered “special” for purposes of

29. Twerski et al., supra note 3, at 424.
30. Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 669 (Cal. 2018).
31. Id. at 670; compare id., with id. at 663 (citing Cabral v. Ralphs Grocery Co., 248 P.3d 1170 (2011) (stating general duty of reasonable care)). The court’s recitation of the factors should be familiar:

We have identified several factors that may, on balance, justify excusing or limiting a defendant’s duty of care. These include: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 670 (citing Rowland v. Christian, 443 P.2d 561 (1968) (internal quotation marks omitted)).
32. Regents of Univ. of Cal., 413 P.3d at 664, 669.
establishing affirmative duties of care. But to use the analysis made famous by H.L.A. Hart, while we can imagine a core case in which the student-teacher relationship has settled normative significance, the relationship between a university and its students falls further out in the penumbra of debatable cases, with some features in common with the core case but also apparent distinctions. The court therefore dug into the features of special relationships that support the imposition of a duty of care. It found that the most important feature is a relationship characterized by dependency on one side and control over the means of taking precautions to protect the dependent party on the other. There is very little an airline passenger can do to ensure a safe flight—that is up to the airline and its employees. Special relationships are also bounded, both in place and time. Once a guest checks out of a hotel, the hotel owner no longer has a duty to protect the former guest from perils it did not create. The duty is also limited to specific individuals, reducing the burden on the defendant.

Given the unique features of the college environment, should a university have a duty to someone like Katherine Rosen, a student in an undergraduate chemistry lab course, to protect her from the violent acts of another student? The court gives an affirmative answer, supported by several aspects of the relationship between colleges and their students: College students may legally be adults, but many are living away from home for the first time, and to some extent, all “are dependent on their college communities to provide structure, guidance, and a safe learning environment.” Colleges have a great deal of control over the environment in classroom, residential, and social settings. They have the ability to monitor and discipline students for misconduct and, if warranted, provide counseling and mental health services to troubled students like Damon Thompson. The court was well aware of the risk of mass shootings on university campuses, such as the April 16, 2007, rampage at Virginia Tech, where an emotionally disturbed student killed five professors and twenty-four students. On the other hand, many aspects of student life are beyond the effective and practical control of universities. For instance, excessive drinking at an on-campus party may be causally

33. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2010).
35. Regents of Univ. of Cal., 413 P.3d at 664–65.
36. Id. at 665 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2010)).
37. Id. at 668.
38. Id.
39. Id. at 671. I emphasize to students that, for duty and proximate cause purposes, foreseeability is not limited to empirical foreseeability in the sense of “Can you imagine that happening?” School shootings are certainly imaginable. As the term foreseeability is used by courts—and this is clear from the UCLA case—it means whether the risk is reasonably foreseeable, in the sense that it is something a reasonable person would safeguard against.
connected with an act of violence, such as a non-consensual sexual encounter.\textsuperscript{40} But beyond training and supervising student resident assistants and providing reasonable training during first-year student orientation on subjects like consent and the risks of alcohol abuse, it is hard to know what a university can do to prevent such harms to its students.

This is where it matters to get the duty analysis right. Following Prosser’s approach, the court’s objective is to determine whether Katherine Rosen’s interests are entitled to protection. Given the ever-present danger of hindsight bias,\textsuperscript{41} it can be difficult for a court employing a foreseeability-based analysis to transcend the particular facts of this case, including the horrific attack and the evidence available to university officials of Thompson’s serious psychological issues. The California Supreme Court proposed to enhance the determinacy of the duty analysis by considering the\textit{ Biakanja/Rowland} factors in two clusters:

1. Foreseeability and the related concepts of certainty and the connection between the harm to the plaintiff and the defendant’s conduct; and

2. Other policy factors involving moral blameworthiness, the policy of preventing future harm, the burden that imposing a duty on the class of actors including the defendant would have, and the availability of insurance for the type of risk involved.\textsuperscript{42}

The court emphasized in several places that, contrary to some common interpretations of California duty cases, foreseeability is not the sole factor in the analysis.\textsuperscript{43} The idea of special relationships contains a limitation on duties based on the foreseeability of the harm. Special relationships create duties to a limited community defined by clear boundaries, not the public at large.\textsuperscript{44} This limitation holds true even when the risk to a member of the public at large is foreseeable.

The court explained the meaning of several of these factors, which had always been head-scratchers. For example, “the degree of certainty that the plaintiff suffered injury” sounded like it was restating the element of factual causation, and “the closeness of the connection between the defendant’s conduct and the injury suffered” was awfully reminiscent of the element of proximate cause. The\textit{ UCLA} court essentially wrote them out of the test, stating that the “degree of certainty” factor only comes into play in cases of emotional injuries,\textsuperscript{45} and the “closeness of connection” element is really just

\textsuperscript{40} Helfman v. Northeastern Univ., 149 N.E.3d 758, 774 (Mass. 2020).
\textsuperscript{42} Regents of Univ. of Cal., 413 P.3d at 670–74.
\textsuperscript{43} Id. at 671–72.
\textsuperscript{44} Id. at 665.
\textsuperscript{45} Id. at 671.
another way of asking whether the plaintiff’s harm was foreseeable. As for the second set of factors, the court simplified two of the *Biakanja/Rowland* factors down to a consideration of the burden that would follow from recognizing a duty in these circumstances. It is familiar from the economic theory of negligence that the policy of preventing future harm is ordinarily served by shifting the costs of accidents from those who experience them to the defendant who acted and caused the harm. In some cases, however, the social benefits of this loss-shifting approach may be outweighed “by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing potential liability.” (As discussed below, this factor, understood this way, is the key to understanding no-duty cases involving firearms manufacturers.) That is what is meant by the policy of preventing future harm.

Another factor is already stated in terms of the burden on the class of actors including the defendant, however. Universities may contend that they should not be deemed the insurers of the safety of their students—that is an appeal to the burden element. Here, the court quickly dismissed this argument by reciting the facts from the record showing the sophisticated strategies and institutional responses the university had already adopted to minimize the risk of on-campus violence. The university therefore did what many defendants do in products liability cases—it conceded the plaintiff’s theory of liability by voluntarily adopting a precaution it tried to claim, in litigation, was unreasonably burdensome.

The court also underscored an important methodological point, stating that each of these factors must be evaluated at a high level of generality, not to determine “whether they support an exception to the general duty of reasonable care on the facts of the particular case before us.” This is in line with the approach of the Third Restatement, which, as we will see in the discussion to follow, is talking here about using the duty element to relieve the defendant of liability in malfeasance cases where the default rule is that the defendant has a duty to use reasonable care:

In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

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46. *Id.* at 671–72.
47. *Id.*
48. *Id.* at 672.
50. *Regents of Univ. of Cal.*, 413 P.3d at 673.
51. *Id.* at 670.
52. *See infra* notes 91–94 and accompanying text.
The UCLA court found no good countervailing principle warranting the limitation of liability in cases involving foreseeable violence in the classroom, although one justice concurred to warn that the majority’s language of “curricular activities” was vague.54

This line of reasoning formed the basis of my answer to Aaron’s question of how to improve on Prosser’s claim that all courts do is engage in social policy reasoning and then announce the result as a conclusion of law, which Aaron saw as a gesture in the right direction:

**Brad:** I think Prosser gave up too easily. Multi-factor tests can be indeterminate, but they don’t have to be. It’s usually possible to boil them down to something meaningful. . . . I think the California court in the UCLA case is reducing the six factors from *Rowland, Tarasoff,* and a zillion other cases into this test: An affirmative duty will be imposed on an actor to take steps to protect someone in the plaintiff’s position from the type of harm that befell the plaintiff if, and only if, there is something the actor could have done that would not be too burdensome, and would make a real difference in preventing the type of harm that occurred in the case. It also has to be practical to administer the standard of care that will follow in the wake of the duty. Other actors in the position of the defendant have to be clear on what is expected of them. It’s not enough to say, “protect students from violent acts committed by other students or third parties.” A court has to articulate a test that is clear and administrable. That interpretation goes back to *Tarasoff,* where the court keyed the therapist’s duty to warn of a clear threat of violence against an identified individual.

**Aaron:** This is a clear improvement over the open-ended, six-factor test. But what you have suggested is a risk-utility test that has real teeth and not the mushy test used for negligence. It is interesting that Louisiana in dealing with the duty for shopping centers to protect against crime reviewed various duty formulations and then said it was using a risk-utility balancing test as the standard for duty. See *Poseccai v. Wal-Mart Stores Inc.***, 752 So. 2d 762 (La. 1999). In a discussion, Professor Mike Green said that this was regular negligence. I disagreed. In my opinion, Louisiana, California and Tennessee have made it clear that they will demand a high standard of proof to get past a directed verdict for the defendant. Using the lingo of duty allows the court to deny liability because duty is an issue for the court. Having said my piece, I very much like your formulation. Kudos.55

I believe Aaron is also right to see the proposed test as more than “regular negligence.” The *Poseccai* case he cited is also one that has given my students a hard time over the years because it appears to run the elements of duty and breach together.56 The court appears to say that the plaintiff must make a heightened showing of foreseeability if her theory of the case is that the

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54. *Regents of Univ. of Cal.*, 413 P.3d at 675.
defendant shopping center owner should have taken an expensive precaution, like hiring security guards, as opposed to doing something less burdensome but less effective, like increasing the lighting in the parking lot or installing security cameras.\textsuperscript{57} One year, my students coined the term “DUTY BREACH” to refer to this blurring of the two elements. Although, analytically, the plaintiff must first address the duty element, in doing so, the plaintiff will necessarily try to satisfy the court that if it does recognize a duty, there will be some precaution the defendant could take that would be required by the reasonable-care standard and not too burdensome. If the only practical way to protect the plaintiff would be to take some extraordinarily burdensome precaution, like hiring security guards to patrol the parking lot, the court will decline to go down that road altogether and decide the case on the duty element. The test from \textit{Posecat} and similar cases is not really “regular negligence” because the plaintiff must first make the showing I described, satisfying the court that, in general, in these circumstances, there exists some approach to mitigating the risk of a type of harm to a defined class of persons that will not be unduly burdensome or will not fundamentally change the nature of the activity in question—for example, by turning residence life administrators at universities into an omnipresent police force on campus.

I do not see this approach as disrespecting the role of the jury,\textsuperscript{58} at least not in true affirmative duty cases—that is, where the peril that resulted in the harm to the plaintiff was not created by the defendant but is a background risk or something exogenous to the defendant’s activities, like criminal activity in the neighborhood of a retail store. Some of the confusion with respect to duty, as I will argue in the next section, arises from the use of the element as either a precondition to proceed any further with the analysis, through consideration of the defendant’s compliance with the standard of care, or as a way to let the defendant off the hook, even though it has been established that their conduct falls below the standard of care. It does not help that the \textit{Biakanja/Rowland} factors in California are stated in terms of whether to depart from the general principle that everyone has a duty of reasonable care to the whole world when, in many cases, the factors are employed to determine whether there should be an exception to the “no duty to rescue” rule.\textsuperscript{59} The Third Restatement rule,\textsuperscript{60} at least as I read it, is intended to limit the invasion of the province of the jury by trial courts that want to absolve the defendant through case-by-case no-duty determinations.

The revised version of the \textit{Biakanja/Rowland} factors, as set out in the \textit{UCLA} case, returns the duty element to its natural role of making an initial

\textsuperscript{57} Id. at 769.
\textsuperscript{58} Cf. Esper & Keating, \textit{supra} note 8, at 268.
\textsuperscript{59} See, e.g., Tarashoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976).
\textsuperscript{60} \textit{RESTATMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM} § 7(b) (AM. L. INST. 2010).
determination, as a matter of law, of whether to recognize a duty where otherwise there would be none—that is, in nonfeasance or affirmative duty cases. In making this determination, the court’s focus should be on whether it would be “worth it,” not in strict cost-benefit terms, but in the sense that tort law could help make the world a safer place by requiring that actors in the defendant’s position take precautions against a risk they are in a good position to prevent, without driving up the cost of the goods or activity such that they are no longer affordable or fundamentally altering the nature of the activity. This may not be “regular negligence” or formal cost-benefit analysis, but it is a normative approach to duty that proceeds from the awareness that the duty of reasonable care, which is downstream from the recognition of a duty, can only require the defendant to do so much, and, therefore, courts should not impose a duty if it is unlikely to lead actors to take precautions that will increase safety at a reasonable cost.

II. AGREEMENT ON THE PROBLEM?

One of the challenges in teaching duty is that the word can carry a multitude of meanings, which understandably drives students bonkers. For example, it is a common (and innocuous, if you’re ready for it) way of speaking for a court to say something like, “It was the company’s duty to have a bargee on board, unless he had some excuse for his absence, during the working hours of daylight.” This, of course, is a conclusion about what is required to comply with the standard of care, which simply takes for granted the existence of a duty on the barge owner in these circumstances to exercise reasonable care.

Conversely, lawyers are familiar with the locution that a defendant had “no duty” to take some precaution that would not be required by reasonable care. Consider, for example, a scenario where a tenant was injured after falling in an unlighted staircase, and the evidence shows that the landlord changed the light bulb an hour before the accident, but a neighboring teenager had thrown a rock at the light bulb and broke it. Under those circumstances, no reasonable trier of fact could find that the landlord should have done more, such as patrolling every ten minutes to ensure all the stairway lights were working properly. I have always believed courts use the “no duty” language because they view duty as an issue of law for the judge, and the judge can take certain factual issues away from the jury as a matter of law if the evidence would not warrant a reasonable factfinder in concluding for the

61. Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 673 (Cal. 2018).
62. This is, of course, the conclusion of United States v. Carroll Towing Co., 159 F.2d 169, 174 (2d Cir. 1947). Judge Hand’s explicit invocation of the idea of duty precedes the famous Hand formula. He writes: “[T]he owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) [T]he probability that [a vessel] will break away; (2) the gravity of the resulting injury, if she does; and (3) the burden of adequate precautions.” Id. at 173.
63. TWERSKI ET AL., supra note 3, at 154.
party with the burden of proof. That is a sloppy, if understandable, conflation of the standard for a judgment as a matter of law with a genuine

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64. Robert Rabin uses the familiar example of spectators at a baseball game being hit by a foul ball, which is sometimes, misleadingly, referred to as assumption of risk in its implied primary sense:

In the baseball situation, courts do not engage in a case-by-case analysis of what the cost of netting or Plexiglas screening of the entire spectator area would be as compared to the injury cost imposed on fans. Indeed, for the sake of argument, it may be that the annual injury cost in monetary terms exceeds the annualized cost of some form of screening. But the trump card—the critical variable in this situation—is an intangible social good: the open-air nature of the game and the pleasure traditionally derived by fans from this ambience, including a sense of connectedness with the players on the field. These are precisely the kinds of considerations, drawing on customary expectations and values, that go into a categorical determination of policy signaled by treating the issue as one of duty.

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Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 791–92 (2001). The passage suggests two things about the aptness of duty terminology. First, the determination must be categorical—applying to all baseball parks. And second, the decision requires reference to policy considerations, drawing on customary expectations and values. It is true that a court could announce a general no-duty rule, stating that a ballpark owner never has to install screens or nets along, say, the first and third base lines. This would be similar to the notorious rule announced by Justice Holmes in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), that, as a matter of law, the driver of a car “must stop and get out of his vehicle” before crossing a railroad track, which was overruled only a few years later by Justice Cardozo’s decision in *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934). A different way to decide the case would be to look at all the facts and determine that a reasonable factfinder could not conclude that the defendant breached its duty of care. In the baseball case, for example, a court might consider the location of the spectators and the extent of protection already involved and, on that basis, decide that it would be unreasonable for a jury to find that the defendant’s conduct violated the reasonable care standard. It can sometimes be difficult to determine which of these readings is correct. One theme to be developed in this Article is that the difference between a case-by-case and a categorical determination of duty is not always as clear as suggested by the contrast between *Goodman* and *Pokora*. See also Esper & Keating, supra note 8, at 283, 283 n.49, 285–86, 285 n.53 (noting that it can be a close question whether a decision letting the defendant off the hook for an accident should be read as a categorical ruling or a no-breach-as-a-matter-of-law decision). I agree and have told students that one of the initial no-duty cases in our casebook, *Lubitz v. Wells*, 113 A.2d 147 (Conn. Super. Ct. 1955), presents this ambiguity. See Twerski et al., supra note 3, at 154. That case involved a father who left a golf club lying around the backyard, where his eleven-year-old son picked it up and swung it, striking a playmate. The court said:

It would hardly be good sense to hold that this golf club is so obviously and intrinsically dangerous that it is negligence to leave it lying on the ground in the yard. The father cannot be held liable on the allegations of this complaint.

*Lubitz*, 113 A.2d at 147. Is this a categorical decision that no one can be held liable for leaving ordinary items that are not intrinsically dangerous lying around the house, or is it a decision that in this case, on these facts (including his son’s age, knowledge of the danger of golf clubs, and history of playing safely), no reasonable trier of fact could conclude that the father was negligent? We leave it to instructors to explore this ambiguity. Esper and Keating see one of the baseball cases, *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981), as being an example of the prediction Justice Holmes made in *Pokora*—that courts would eventually routinize or standardize breach determinations in cases with recurring fact patterns. See Esper & Keating, supra note 8, at 286 (“Whatever one thinks of that failed aspiration, the handful of cases where it has come to fruition is properly classified under breach doctrine. They settle the precise precautions required in a small number of recurring circumstances—not the standard by which conduct will be judged.”).
legal issue concerning the existence of a duty. This way of talking is harmless enough for lawyers and judges who understand the underlying principles, but it engenders considerable confusion for first-year students for whom civil procedure is still a bit hazy.65

Then there is a set of “real” duty issues, however, where the duty element has some bite doctrinally. We are not yet talking about the best theoretical explanation for the duty element but the work it is doing in the overall structure of negligence law. These are the flashpoints of the duty wars. One of the factors contributing to the intractability of the duty wars is the different jurisprudential considerations that apply in each of these contexts. For example, when a court limits liability in an area in which traditional principles of duty would hold that the defendant has an obligation to use reasonable care, there is a genuine concern about judges invading the traditional province of juries. This concern is lessened in areas where the background rule is the “no duty to rescue” rule or the longstanding judicial reluctance to recognize affirmative duties. In these situations, the concern is with the expansion of tort liability and the often-expressed fear of opening a Pandora’s box or the floodgates of litigation.

When critics complain that the Third Restatement, or negligence law more generally, has lost sight of the essential function of the duty element, that argument might be cashed out very differently depending on the context. From my perspective, many battles in the duty wars are over the Palsgrafian intersection of the duty and proximate cause elements.66 For example, a homeowner negligently leaves a backyard trampoline unsecured when a thunderstorm is forecast; the wind carries the trampoline onto a nearby road, where a driver swerves to avoid it and goes off into a ditch. Should the homeowners be liable to the driver?67 Or, in one of the cases Aaron discusses in his article on the duty element,68 a firearms manufacturer was negligent in the distribution of its products, with the result that purchasers in states with loose restrictions on the purchase and ownership of guns could re-distribute the guns, in violation of the stricter gun laws in states like New York.69 Start with the principle, frequently cited to cases like Heaven v. Pender,70 that everyone who acts owes a duty to care to all those who foreseeably may be

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65. A case in our casebook is actually a design-defect products liability case, but we edited it to look like a negligence case (which, of course, on the Third Restatement approach, it is). The case is Timpte Industries, Inc. v. Gish, 286 S.W.3d 306 (Tex. 2009), reproduced in Twerski et al., supra note 3, at 209, and the court concludes that, as a matter of law, no reasonable trier of fact could find that reasonable care would have required the defendant to adopt the design changes suggested by the plaintiff. Again, it is perfectly familiar to experienced lawyers, but it tends to be hard at first for students to wrap their minds around the idea that this is a decision warranted by procedural law that permits judges to take from juries issues of fact over which there is no genuine dispute.


68. Twerski, supra note 9, at 7–10.


70. Heaven v. Pender, 11 Q.B.D. 503, 509 (1883).
harmed by the actor’s conduct.\textsuperscript{71} Now, if a court believes that the defendant should not be liable because the risk was not foreseeable, should the analysis be a question of duty for the trial judge or a question of proximate cause for the jury?

There are still difficult questions where I will admit a certain ambivalence regarding whether or not to invoke the duty element. I will talk about one of those cases below in subsection C. But, before getting there, it is important to clarify the different ways in which courts have used duty in the analysis of negligence cases. One of the major arguments over the best way to understand the duty element pivots on the allocation of decision-making authority between judge and jury.\textsuperscript{72} If judges cite the duty element to relieve defendants of liability in malfeasance cases, where the background rule is that the defendant had a duty of reasonable care, this may indeed be a risk. But in nonfeasance cases, the background rule is the contrary, and the plaintiff’s case does not progress until there is a judicial determination that the defendant had a duty in the circumstances.

A. DUTY AS THE BRAKES ON LIABILITY

Goldberg and Zipursky suggest that much of the confusion about the duty element—at least that confusion traceable to Prosser—arises out of the cases in which a defendant violated the standard of reasonable care, but the court nevertheless determined that the defendant need not compensate the plaintiff.\textsuperscript{73} It certainly does not help that one of the most famous cases in the tort canon, \textit{Palsgraf v. Long Island Railroad Co.},\textsuperscript{74} is framed in this way. The best way to understand that case is that the railroad had a duty of reasonable care to all its passengers, including Helen Palsgraf and the two individuals with the bomb.\textsuperscript{75} The question was whether this particular event was so

\textsuperscript{71} This is what Goldberg and Zipursky object to strongly and to which their relational approach to duty is opposed. See Goldberg & Zipursky, \textit{Moral of MacPherson}, supra note 10, at 1814.

\textsuperscript{72} Esper & Keating, supra note 8, at 279–82.

\textsuperscript{73} Goldberg & Zipursky, \textit{Moral of MacPherson}, supra note 10, at 1762–64.

\textsuperscript{74} Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

\textsuperscript{75} Judge Cardozo refers to a package carried by a man rushing to board the train and says that the package “[i]n fact . . . contained fireworks.” \textit{Id.} Fireworks? That would be enough to knock down a heavy metal scale dozens of feet away on the platform, causing injuries to Helen Palsgraf? The \textit{New York Times} article about the incident reported it differently, with the headline “Bomb-Blast Injures 13 in Station Crowd,” \textit{N.Y. Times} (Aug. 25, 1924), and descriptions of lacerations and several burn injuries to people near the explosion. The \textit{Times} article further reported that the man with the package and two others were “said by the police to be Italians” and disappeared in the resulting confusion. \textit{Id}. The trial of Sacco and Vanzetti occurred three years previously, in 1921, and the two were executed in 1927. Thus, anti-immigrant bias and moral panics about anarchist bombings were very much in the air at the time of the \textit{Palsgraf} litigation. The most likely account of the accident is probably that the men trying to board the train were carrying explosives, and when the package detonated, it caused a rush for the exits, during which the scales were knocked down on Helen Palsgraf. For conjectures about the facts of the case, see William L. Prosser, \textit{Palsgraf Revisited}, 52 \textit{Mich. L. Rev.} 1, 2–3 (1953); see also Michael I. Krauss, \textit{Palsgraf: The Rest of the Story}, 9 \textit{Green Bag} 2d 309 (Spring 2006).
unusual that, for reasons related to responsibility and liability proportionate to the defendant’s culpability, it should not be said to be one of the harms for which the exercise of reasonable care was required. (Or, in Cardozo’s terms, granting that the railroad had a duty to Helen Palsgraf as a passenger, did it have a duty regarding this type of harm—i.e., the panicked stampede knocking over the heavy scales after the bomb went off?) In other words, Judge Andrews was right that the issue in the case was proximate cause, even if his analysis of proximate cause was an unfocused mess. The lasting problem for tort law and theory is that Cardozo’s description of the issue as one of duty has been interpreted by courts as an invitation to apply the duty element on a case-by-case basis to the facts of a particular event, often with foreseeability as the most important factual element of the analysis. California case law also tends to frame the issue in this manner, beginning with a general duty of care and then considering, based on the Biakanja/Rowland factors, whether to depart from the general rule. This is the issue in the trampoline case described above, which resulted in a lengthy—and, in my view, well-reasoned—decision of the Iowa Supreme Court.

Esper and Keating also lament this misuse of duty, seeing it as a troubling rollback of the jury’s role in civil litigation. Their objection is to “highly particular,” rather than categorical, duty determinations. Consider, for example, the hypothetical scenario discussed by Judge Andrews in his opinion in Palsgraf: A driver negligently collides with another car, which, unbeknownst to him, is filled with dynamite. The resulting explosion kills A, a nearby pedestrian; injures B and C, individuals at varying distances from the collision, with flying glass; and causes a nanny on the adjacent block to drop a baby she was carrying—let’s call the baby D. Cardozo’s majority

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76. Goldberg and Zipursky argue—to my mind, persuasively—that despite a lot of language about foreseeability (“the orbit of danger as disclosed to the eye of reasonable prudence,” etc.), Cardozo is not using foreseeability alone to determine the scope of the railroad’s duty:

To read the opinion this way is to convert what Cardozo regarded as a duty question concerning conduct and obligation into a proximate cause question concerning the extent of liability. For Cardozo, the foreseeability of harm to a class of persons goes to the question of whether certain conduct is owed to those persons, not to whether certain liabilities are appropriately borne by defendants.

Goldberg & Zipursky, Moral of MacPherson, supra note 10, at 1820. In fairness to the students who are perplexed by this case, Cardozo starts his opinion by saying that proximate cause has nothing to do with the case. Palsgraf, 162 N.E. at 101. To make things more confusing, Palsgraf is often in the proximate cause section of torts casebooks.

77. See Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 670 (Cal. 2018).

78. Thompson v. Kaczinski, 774 N.W.2d 831, 835 (Iowa 2009); see Twerski et al., supra note 3, at 363–70 (including a fairly lightly edited excerpt of the case).


80. Id. at 272.

opinion invites analysis in duty terms of the right of A, B, C, and D to recover, and, in a sense it, is not incoherent to ask whether the driver had a duty to D. It is much more natural, however, to analyze liability in terms of proximate cause, concluding that the driver’s negligence was the proximate cause of the injuries to A, B, and C, but not D. Where the issue is whether, under the facts and circumstances of this case, it would be unfair or unjust to hold the defendant liable for the injuries to the plaintiff, the better approach would be to employ the proximate cause element, as applied by the jury, to decide whether to relieve the defendant of liability.

Esper and Keating also raise an objection to multi-factor balancing tests that is distinct from the usual critique that such tests do not constrain the discretion of the adjudicator. They draw attention to the fact that something like the Biakanja Rowland test looks a lot like a list of considerations the jury would be permitted to consider when determining liability. The open-endedness and indeterminacy of the test, which causes its critics to exclaim “lawless!” when judges base decisions on it, is precisely the point when juries apply the factors. The legitimacy of jury decision-making is grounded differently than judicial decision-making. It is entirely acceptable for juries to reach inconsistent applications of multi-factor tests in similar cases—juries are expected to reach ad hoc resolutions in situations where reasonable people can disagree about the outcome. “[T]he balance among those factors might reasonably be struck in a number of different ways, even given a single set of facts.” The case-by-case employment of duty as a potential limitation on liability creates tremendous uncertainty with respect to judicial decision-making, which is supposed to be rooted in general principles that can be applied consistently in relevantly similar cases.

While I will defer to a California lawyer and a California legal scholar on the current state of California law, my reading of the UCLA case is that

82. That is the analysis that would be consistent with subsequent New York law. See In re Kinsmen Transit, 338 F.2d 700, 723–25 (2d Cir. 1964) (Friendly, J.).

83. Why not handle the driver’s liability to the baby under the duty element? Aaron says in his “Cleaver, Violin, and Scalpel” article that no-duty determinations may be based on the facts of an individual case. See Twerski, supra note 9, at 4. We will return to this question below when discussing the recent Quiroz case from the Arizona Supreme Court. However, the short answer is that if the nanny is walking on the sidewalk holding the baby, the nanny and the baby are within a general class of persons to whom drivers owe duties of care. It just so happens that, in this case, they were far enough away that it would not be reasonable to hold the driver responsible for the injury to the baby. That is quintessential proximate cause reasoning. Could duty principles be adapted to this case? Only if it is possible to state them at a sufficiently high level of generality that they apply beyond this baby, located at this place, dropped because of this frightened reaction. In other words, I think the Third Restatement has it right. I am grateful to Yin Yin Wu for pressing me to make my own commitments clearer in response to the famous hypothetical from Palsgraf.

84. Esper & Keating, supra note 8, at 268–72.

85. Id. at 279–80 (“[N]egligence cases go to the jury whenever the evaluation of the facts is subject to reasonable disagreement”).

86. Id. at 323–24.

87. Id. at 324.
the California Supreme Court has taken these criticisms into consideration. It provides an overview of the idea of special relationships that attempts to enhance the \textit{ex-ante} certainty in the application of that category. Special relationships have several characteristics: (1) reliance by one party on the other for protection; (2) control by one party over the means of mitigating risks; (3) defined boundaries; and (4) benefit to the party upon whom a duty of care is imposed.\textsuperscript{88} The concept of foreseeability, which previously was the engine of California cases such as \textit{Tarasoff}, now serves as a rhetorical foil for the court’s principled, categorical restatement of the duty element.\textsuperscript{89} And this element should not serve as the basis for a no-duty determination, except in cases where the court can articulate a principled reason for exempting entire categories of actors or actions from the background duty that everyone owes a duty of reasonable care insofar as they are acting. A concurring opinion from the Arizona Supreme Court, in a case discussed below, adopts this structure of a background duty and limited, categorical exceptions based on the duty element:

A judicial finding that a defendant owes no duty to a plaintiff means that even if the defendant’s actions were unreasonable and proximately caused harm to the plaintiff, the plaintiff has no recourse. Such a result should obtain, it seems to me, only when there is a good reason for doing so, and courts finding no duty as a matter of law should be required clearly to identify that reason.\textsuperscript{90}

Section 7 of the Third Restatement takes this approach:

(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.

(b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.\textsuperscript{91}

That is not to say that \textit{liability} follows in any case where an actor’s conduct creates a risk of physical harm. The plaintiff must still show that the defendant’s conduct fell below the standard of care and that the plaintiff’s harm was proximately caused by the defendant’s breach of duty.\textsuperscript{92} In the

\textsuperscript{88} Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 664–65 (Cal. 2018).

\textsuperscript{89} \textit{See id.} at 665 (discussing Zelig v. Cnty of L.A., 45 P.3d 1171 (2002), which held that the county was not liable for all foreseeable harms because its duties extended only to specific individuals with whom it was in a special relationship).


\textsuperscript{91} \textit{RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM} § 7 (AM. L. INST. 2010).

\textsuperscript{92} The Restatement drafters adopted the harm-within-the-risk approach to proximate cause, although, for some reason, they avoided that label, opting instead for the term “limitation of liability.” In any event, the Restatement aligns with one of the traditional ways of understanding
trampoline case from the Iowa Supreme Court, referenced above,\textsuperscript{93} it was within the jury’s discretion to consider whether it was careless for the homeowners to leave an unsecured backyard trampoline outside when thunderstorms were forecast and, if this was a breach of duty, whether one of the risks requiring the use of reasonable care was that the trampoline might blow around and become an obstruction on a nearby road. But only in exceptional cases is there any need to consider the duty element where there is (1) an action that (2) creates a risk of physical harm. In most cases, the proximate cause element does all the necessary work to limit the liability of defendants for harms falling outside the scope of the risks that could reasonably have been foreseen by the defendant. Indeed, the proximate cause element \textit{should} do the necessary work where the grounds for relieving the defendant of liability are specific to the facts and circumstances of a particular case.\textsuperscript{94}

One example of an exceptional case is nonliability for social hosts who serve alcohol to their guests for injuries caused by intoxicated driving or other conduct causally related to the provision of drinks. As a comment puts it, “imposing liability is potentially problematic because of its impact on a substantial slice of social relations.”\textsuperscript{95} Hosts worried about possible liability would have to monitor their guests’ consumption—probably not to the level of embargoing their car keys or requiring breathalyzer tests before allowing guests to drive home (which would go beyond the requirement of reasonable care), but to a sufficient extent that a friendly, convivial relationship could be transformed in a fundamental way.\textsuperscript{96} Another case, discussed by Aaron in his “Cleaver, Violin, and Scalpel” article,\textsuperscript{97} involves the liability of firearms manufacturers for negligent marketing and distribution practices that included indifference or willful blindness to the phenomenon of guns purchased in states with loose gun-control laws for criminal use in states with tighter restrictions.\textsuperscript{98} In that case, the New York Court of Appeals found that the manufacturers had no duty to victims of gun violence in New York, a state with strict controls on the possession of firearms. Significantly, the

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\textsuperscript{93} Thompson v. Kaczinski, 774 N.W.2d 829, 831, 835 (Iowa 2009).

\textsuperscript{94} See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. a (AM. L. INST. 2010) (“When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty.”).

\textsuperscript{95} Id.

\textsuperscript{96} See, e.g., Edgar v. Kajet, 375 N.Y.S.2d 548, 554 (Sup. Ct. 1975), aff’d, 389 N.Y.S.2d 631 (App. Div. 1976); see also Twerski et al., supra note 3, at 383–85 (citing cases and characterizing Edgar as the majority position).

\textsuperscript{97} Twerski, supra note 9, at 7.

court’s reasoning aligns with Section 7 of the Third Restatement.99 Based on articulated policy factors that apply to categorically described risks (criminal misuse of guns) and potential victims, the court concluded that it would not be appropriate to hold the manufacturers to a standard of reasonable care in their distribution practices to mitigate the foreseeable risk to victims of gun violence.100

I disagree slightly with Aaron’s take on the New York gun case. He writes that no general rule of nonliability can be deduced from the Court of Appeals decision; rather, “[i]t is the confluence of all the factors together that led the court to its conclusion that the handgun manufacturers were immunized from liability by a no-duty rule.”101 Back to our Authors’ Dialogue in the casebook, Aaron would presumably cite Prosser’s observation that “no duty” is just the label that gets slapped onto the conclusion reached by consideration of a bunch of policy factors. But I am not sure that is right in this case. My reading of Hamilton is that the court believed that the chain of distribution in the legal and illegal firearms markets, as well as the circumstances of criminal misuse of guns, were so complex and beyond the manufacturer’s control that imposing duties of reasonable care in the marketing and distribution of guns was unlikely to make any real difference in terms of mitigating the risks of gun violence. This is the principle from the UCLA case; the only difference is that Hamilton is a case putting the brakes on liability, whereas UCLA articulates a standard for imposing duties where otherwise there would be none. Nonetheless, I do believe a categorical rule can be stated in this case: The manufacturer of a product that has a potential for criminal misuse does not have a duty to exercise reasonable care in distributing the product, even though it is foreseeable that careless marketing may increase the likelihood of criminal misuse of the product. This categorical no-duty rule would apply to analogous cases, such as lawsuits against the manufacturers of fertilizers that have the potential for use in ammonium nitrate fuel oil bombs, even if there are available additives that could reduce the potential of the product’s misuse by terrorist bomb-makers.102

99. See Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 7 (Am. L. Inst. 2010)
100. Twerski, supra note 9, at 9–10 (discussing Hamilton, 750 N.E.2d at 1061–67).
101. Id. at 10.
B. True Affirmative Duty/Nonfeasance Cases

The UCLA case is an example of a true affirmative duty case, starting from the principle that “[a] person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.”103 (This is often referred to as the “no duty to rescue” rule, although it extends beyond what, in ordinary usage, would be considered “rescues” and includes other instances of taking precautions to prevent harm to another.) In cases like Tarasoff, UCLA, and so many others, the central question is whether to recognize an exception to that default rule. Familiarly, certain categories of relationships are deemed “special” for the purpose of recognizing a duty of reasonable care with respect to risks that arise within the scope of that relationship. The Third Restatement gives several examples of special relationships, including common carriers and passengers, innkeepers and guests, a business that holds open its premises to the public and those who are lawfully on the premises, and a school and its students.104 As always, however, the interesting questions arise at the margins. In the UCLA case, does the school-student relationship include colleges and universities? What is the scope of the duty—does it extend to ensuring safety off campus or in social settings? These are questions of law that must be taken up by the trial court.105

As mentioned previously, the California Supreme Court did not start with a blank slate when applying the Biakanja/Rowland factors, nor did it woodenly apply the concept of special relationships when generalizing from secondary schools to institutions of higher education. Instead, the court began by asking what features of special relationships justify the imposition of affirmative duties. Special relationships are generally characterized by a

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104. See Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 40 (Am. L. Inst. 2010).
105. See id. cmt. e (the existence of a special relationship is a question of law for the court). The Restatement comments also usefully illustrate the scope issue:

The duty imposed in this Section applies to dangers that arise within the confines of the relationship and does not extend to other risks. Generally, the relationships in this Section are bounded by geography and time. Thus, this Section imposes no affirmative duty on a common carrier to a person who left the vehicle and is no longer a passenger. Similarly, an innkeeper is ordinarily under no duty to a guest who is injured or endangered while off the premises. Of course, if the relationship is extended—such as by a cruise ship conducting an onshore tour—an affirmative duty pursuant to this Section might be appropriate.

Id. cmt. f. I wrote a final exam question on the onshore excursions offered by a cruise line one year, relying on Gentry v. Carnival Corp., No. 11-21580-CIV., 2011 WL 4737062 (S.D. Fla. 2011), and cases cited by the court therein, but looking for an appreciation of the methodological issues faced by a court in determining the scope of duty where there is an existing special relationship, such as that between a common carrier and passengers.
relationship involving one party’s dependence on another who possesses control over risk-related factors in a given situation. Another way to understand special relationships and their scope, or so I contend, is that it would be “worth it” in the circumstances of cases that are likely to arise to require the defendant to take precautions to protect the plaintiff against perils that do not originate with the defendant’s activities. By “worth it,” I do not simply mean economically justified but that a reasonable and feasible precaution is available to the defendant, which is likely to be causally efficacious. This explains, for example, why the court was keen to limit the liability of colleges and universities to harm connected with participation in curricular activities. University employees, including faculty, generally have greater visibility into the troubling behavior of students like Damon Thompson and more ability to take steps like excluding him from class, compared to incidents that occur in connection with the residential or social aspects of college life. There is something available to university administrators that has some likelihood of preventing harms such as the one that occurred in this case.

By contrast, had the harm here occurred in a residential or social setting, any precautions taken by the university, to be effective, would also have to be considerably more comprehensive, intrusive, and likely to alter the nature of the activity in undesirable ways. It would be similar to the social-host liability cases in this respect. How can a host more effectively prevent drunk driving? By doing things like taking keys from guests, calling taxis or Ubers for visibly intoxicated guests, keeping the booze locked up and outside the reach of guests determined to drink more, and so forth. The result would be a “party” that is a bit of a bummer—very different from the activity that all the participants presumably intended.

This is the point I will return to in the concluding section: The reason to deny affirmative duties in certain cases is that, while imposing a duty may result in a reduction in foreseeable risk for some participants in an activity, it is also likely to diminish the overall utility of that activity for all participants. Students do not want to live in a police state. (Yes, students tend to exaggerate the importance of their liberty, but there is a qualitative difference between a more laid-back residential environment and one that would more effectively prevent all foreseeable harms to students.) Students also, at some point, will be unable to sustain the tuition increases necessary to fund more comprehensive safety and mental health care programs. Affordability and access are important policy issues with respect to higher education, and the costs associated with implementing and maintaining a system to detect and respond to student mental health crises, funded through tuition increases and mandatory fees, can decrease access for low- and middle-income students. In

106. See Regents of Univ. of Cal., 413 P.3d at 664–65.
107. Id. at 673.
other words, there would be an impact on the entire community as a result of a judicial decision imposing affirmative duties of care on colleges and universities. The result could be a safer community but also one that is less conducive to a fulfilling student experience in other respects. This is not an easy balance to achieve, but it is what I believe is going on in many affirmative duty cases.

C. A HARD CASE

Quiroz v. Alcoa, Inc.,\textsuperscript{108} strikes me as a hard case, both because I am not sure what I think the result should be, but, more importantly, because I am not sure what the right way is for a court to get to the result. Ernest Quiroz died from mesothelioma, a signature illness caused by asbestos exposure. He alleged that his exposure was the result of his father, who worked for thirty-five years at a plant owned by Reynolds Metal Company, inadvertently bringing asbestos fibers home on his clothes.\textsuperscript{109} Ernest contended that Reynolds breached a duty it owed to him by failing to warn his father of the dangers of secondary exposure to asbestos fibers. In pure foreseeability terms, Reynolds surely could have foreseen that if inhalation of asbestos fibers can cause serious pulmonary diseases like mesothelioma, then failing to take steps to prevent employees from leaving the factory with asbestos fibers on their clothes might endanger family members of employees. Arizona courts previously used language familiar from the great \textit{Palsgraf} case—that the orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.\textsuperscript{110} But the Arizona Supreme Court became dissatisfied with the use of foreseeability as a factor in determining the scope of duty, believing that basing duty determinations on foreseeability permitted courts to intrude into questions of fact reserved for the jury.\textsuperscript{111} (Recall from above that this was the Esper/Keating critique of California practice prior to the \textit{UCLA} case.) Thus, the analysis of Reynolds’s liability to Ernest Quiroz would depend on either preexisting categories of special relationships or relationships “created by public policy,” where the principal source of public policy guidance is in the form of implied private rights of action based on statutory duties.\textsuperscript{112} Indeed, no general duty of care is owed to the public at large for harm occurring off the employer’s premises.\textsuperscript{113} Yet, in this case,

\begin{footnotes}
\footnotetext[108]{Quiroz v. Alcoa, Inc., 416 P.3d 824 (Ariz. 2018); see TWERSKI ET AL., \textit{supra} note 3, at 370–76 (excerpting the case).}
\footnotetext[109]{Quiroz, 416 P.3d at 827.}
\footnotetext[110]{Id. at 828 (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99–101 (N.Y. 1928)).}
\footnotetext[111]{Id. at 828–29 (citing and discussing Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007)). Recall that this was the Esper/Keating critique of California practice prior to the \textit{UCLA} case. \textit{See supra} notes 79–80 and accompanying text.}
\footnotetext[112]{Quiroz, 416 P.3d at 829–30.}
\footnotetext[113]{Id. at 831–32.}
\end{footnotes}
there may be a duty due to the special relationship between an employer and its employee, Ernest’s father. Quiroz has the structure of a limitation-of-duty case. Reynolds, like anyone, has a duty to use reasonable care to avoid foreseeable harms to classes of persons put at risk by its conduct. The Gipson case, upon which the court in Quiroz relies throughout its opinion, is best understood as one that begins with the baseline assumption that anyone who engages in risk-creating conduct is liable to those who may be harmed by it.\footnote{Gipson v. Kasey, 150 P.3d 228 (Ariz. 2007).} The setting of Gipson was a boozey holiday party thrown by the employer of the plaintiff and defendant. The defendant also gave out some of his prescription oxycodone pills to his friends for their recreational use. The plaintiff died from a combination of alcohol and oxycodone toxicity.\footnote{Id. at 229–30.} After rejecting foreseeability as a test for duty and concluding there was no special relationship between the co-workers sufficient to ground a duty,\footnote{Id. at 231–32.} the Arizona Supreme Court found an implied civil cause of action within state criminal statutes prohibiting the distribution of prescription pharmaceuticals.\footnote{Id. at 233.} But why go through all that rigamarole? Is the answer not simply that when the defendant acted by giving the oxy pills to the plaintiff’s boyfriend, knowing the plaintiff wanted to use them, the defendant was subject to the ordinary background duty of reasonable care? Four justices joined a concurring opinion, differentiating no-duty decisions from this one. Citing Section 7(b) of the Third Restatement, the concurring justices said:

> It thus would seem to make sense for courts to view the duty of reasonable care as the norm, and depart from that norm only in those cases where public policy justifies an exception to the general rule.\footnote{Id. at 234 (Hurwitz, J., concurring).}

Since the parties had not urged its adoption by the court, the majority did not follow this approach.\footnote{Id. at 235 (Hurwitz, J., concurring).}

But it should have, and the Quiroz court should have framed the issue in terms of whether general, principled public policy considerations justified a categorical departure from the norm of a reasonable care duty. The court in Quiroz expressed frustration that the parties did not seem to get the message sent by the court in Gipson that a duty could not be founded solely on foreseeability:

> Despite Gipson’s express rejection of foreseeability as a factor in determining duty, both the Family and the dissent attempt to support their
general duty claim by citing cases and the Second Restatement sections that rely on foreseeability. 120

Had the concurrence in Gipson been accepted by the majority, a serious analytical tangle could have been avoided. The question in Quiroz would be whether there should be an exception to the background duty of reasonable care for suitably described categories of cases, such as off-premises exposure to asbestos fibers. This approach, as advocated for by the plaintiffs and consistent with that of the Third Restatement, presumes the existence of a duty of care when a defendant, through its actions, creates a risk of harm. 121

The Arizona court firmly rejected the Third Restatement’s presumption that there is a duty of care in all malfeasance cases. It saw the Third Restatement as working a drastic change in the law by creating a presumed duty of care owed to an indefinite class of others. 122 This approach fails to provide any meaningful ex-ante guidance about the rights and obligations of parties. 123 In the court’s view, what should be considered part of the analysis of the duty element is subsumed into either standard of care or proximate causation. 124 But the Arizona court is criticizing a straw position here; the Third Restatement does not support an infinite scope of liability. The trampoline case from Iowa relies on proximate cause (or scope of liability, in Third Restatement terms) to limit the extent to which precautions will be required to remote potential victims. Using proximate cause, the liability-related question facing the homeowners would be, “A strong line of thunderstorms is coming, and if we do not secure this trampoline, it is going to blow around and might cause damage to the neighbors’ houses or cars, or it might crash into a person unlucky enough to be out in the storm, or it might . . .” Is the risk that it might present an obstacle on a nearby road, causing a driver to swerve into the ditch, one of the risks requiring the use of reasonable care? Maybe the homeowners themselves would only be guessing at that answer, but if, for some reason, they had called their local tort litigator, that lawyer could probably have offered a fairly reliable ex-ante judgment about the likelihood of being liable to the driver. 125

120. Quiroz v. Alcoa, Inc., 416 P.3d at 833. The dissenting justice cited an Arizona case, like Heaven v. Pender, standing for the proposition that everyone has a duty, insofar as they act, to use reasonable care. See id. at 844 (Bales, C.J., dissenting) (citing Couse v. Wilbur-Ellis Co., 272 P.2d 352 (Ariz. 1954) (“fellow citizens have a duty to avoid causing harm to one another”). The court majority chided the dissent for relying on foreseeability after the Gipson case supposedly rejected foreseeability as a test for duty, see id. at 833, but again, there is a difference between the use of duty to create an exception to the rule that everyone has a duty of care insofar as they act in ways that create foreseeable risks of harm and the use of duty to create an exception to the no-duty-to-rescue rule.

121. See id. at 836.

122. See id. at 840.

123. See id.

124. See id. at 841.

125. The lawyer probably would have advised them to tie up the trampoline anyway, given the case of doing so and the risk to neighboring property. But if the question had been, very specifically,
If I were tasked with deciding Quiroz, I would likely find the company not liable, but I would be torn between the type of categorical no-duty determination that was made in cases like Hamilton, the New York gun distribution case, and the approach of the Iowa Supreme Court in the trampoline case, where the question of duty was left for the jury to decide as a matter of proximate cause. The problem of so-called take-home asbestos cases is general enough, and the policy considerations underlying these cases are general enough, that a categorical no-duty rule might be the appropriate path.\textsuperscript{126} Because no reasonable trier of fact could find that the plaintiff was within the scope of the risk created by the employer, it might prove a waste of time to litigate all these cases and let juries determine the proximate cause issue. But the court in Quiroz created an unnecessary muddle for itself and unnecessarily cast doubt on the Third Restatement’s approach by not recognizing the difference between cases where the default rule is no duty, and the duty analysis turns on special relationships (as in the UCLA case), and those cases where the default rule is a duty, but the result is not limitless liability but reliance on breach and causation rules to limit liability.

III. DUTY AS RELATIONAL BALANCING (AND WHAT THAT COULD MEAN)

It is unclear whether the duty wars are still as intense in circumstances where there is, or should be, a default duty of reasonable care, but a court seeks to limit liability using the duty element. Quiroz may come to be seen as an outlier, and the Third Restatement may continue to pick up adoptions by state courts. The New York Court of Appeals’ decision in Hamilton is a reasonable way to cabin what Esper and Keating perceive as an abuse of the duty element by trial courts that run roughshod over the traditional role of the jury. The principal battlefield in the duty wars will continue to be the recognition of affirmative duties, as seen in cases like UCLA, and the justification for creating exceptions to the general rule of nonliability where an actor had no causal role in creating the peril that caused harm to the plaintiff.

\textsuperscript{126} As the court points out, take-home asbestos cases risk creating limitless liability because, conceivably, anyone who comes into contact with asbestos fibers on an employee’s clothes might seek to recover from the employer. Quiroz, 416 P.3d at 841. Babysitters, for example, or employees at a laundry, might be “regularly and routinely” exposed to asbestos fibers. The court seems skeptical that a categorical no-duty rule could be justified in these circumstances based on general social norms of responsibility. Id. at 841–42. But the whole opinion speaks in broad social policy terms. The majority, for example, says, “[I]mposing a limitless tort duty on society may well deter negligent behavior, but it leaves little room for individual liberty and personal autonomy.” Id. at 842. If the court cares about restraint in declaring categorical rules, it is better to tailor the rule to a particular context, like take-home asbestos cases, than to make broad-brush declarations about the relative value of deterring negligence, liberty, and autonomy.
As mentioned above, my response to Prosser’s “it’s all just open-ended policy balancing” approach is that the California Supreme Court appears to have refined significantly its affirmative duty analysis so that trial courts are no longer doing what Prosser said they can do—namely, making an intuitive judgment that the defendant should have done something to protect the plaintiff, and then backfilling a legal justification using the Biakanja/Rowland factors.\(^\text{127}\) Esper and Keating urge using foreseeability as the sole test for duty,\(^\text{128}\) but this is in the context of limiting liability in malfeasance cases. Their position is not far off that of the Third Restatement. In the affirmative duty context, however, the issue that might continue to provoke skirmishes in the duty wars is whether the recent turn represented by the UCLA case reflects a recognition that tort law, negligence law, and the duty element are fundamentally about obligation, as Goldberg and Zipursky argue,\(^\text{129}\) or, as Cardi and Green contend, whether affirmative duties are justified on instrumental grounds, such as deterrence or efficiency.\(^\text{130}\) As Cardi and Green see it, the Third Restatement recognizes a “community-based moral sense of obligation,”\(^\text{131}\) albeit in the context of refraining from using the duty element to limit liability.

My middle-ground claim is that the UCLA case provides a community-based, morally grounded approach to understanding affirmative duty cases. The emphasis here is on “community-based,” but not in the sense that courts should engage in public opinion polling to see if a numerical majority of the community favors imposing a duty of care under these circumstances. Rather, the idea is that a court should ask whether it is good for the community if actors in the defendant’s position are legally obligated to take precautions to prevent a harm similar to the one that befell the plaintiff, even if they had no role in creating the risk in the first place. That is what I meant in the Authors’ Dialogue with Aaron when I said:

An affirmative duty will be imposed on an actor to take steps to protect someone in the plaintiff’s position from the type of harm that befell the plaintiff if, and only if, there is something the actor could have done that would not be too burdensome, and would make a real difference in preventing the type of harm that occurred in the case.\(^\text{132}\)

In making this determination, courts will rely on policy considerations, but not in the Prosser sense of social policy judgments; rather, the policies considered by courts are familiar middle-level jurisprudential policy reasons,

\(\text{127}\) Or, as Cardi and Green put it, quoting Goldberg and Zipursky, the Third Restatement “erroneously reduces duty to a freewheeling, legislative-like policy inquiry.” Cardi & Green, supra note 6, at 701.

\(\text{128}\) Esper & Keating, supra note 8 at 327.

\(\text{129}\) See Goldberg & Zipursky, Moral of MacPherson, supra note 10.

\(\text{130}\) See Cardi & Green, supra note 6, at 706–9.

\(\text{131}\) Id. at 709.

\(\text{132}\) Twerski et al., supra note 3, at 425.
such as administrability of the standard, providing clear guidance to both actors and adjudicators (conduct rules and decision rules, in Meir Dan-Cohen’s terms), and not opening a Pandora’s box of unmanageable claims.133

Goldberg and Zipursky might criticize this approach as merely instrumental; after all, I discuss accident prevention as one of the objectives supporting the imposition of affirmative duties. Maybe this distinction is merely rhetorical, without yielding any substantive normative difference. However, my approach looks at whether a court, when looking at the relationship between the injured person and the defendant, would find it justifiable to impose duties of reasonable care on the defendant to protect people in the category of potential victims that includes the plaintiff.

The normative insight underlying this approach to the duty element owes a great deal to recent scholarship in private law theory.134 Tort doctrines, including the requirement of establishing a duty of care, should not be justified as instruments for furthering some other social policy, such as safety, economic efficiency, or distributive justice. Instead, they should be about doing justice between the parties or, as elaborated by Goldberg and Zipursky, understood as providing a right to seek redress in favor of those who have been injured by wrongful actions.135 Greg Keating articulates that the economic analysis of tort law rejects the notion that people are self-originating sources of value and, hence, of moral and legal rights and duties.136 In my own jurisprudential scholarship, I have elaborated this insight, not in the Rawlsian terms of the basic structure of society chosen by the parties in the original position (contractualism)137 but along the lines of T.M. Scanlon’s contractarian approach to morality in What We Owe to Each Other and the relational account of morality given by R. Jay Wallace in The Moral Nexus.138

Looking to the insights of moral philosophy to shed light on the role of law in establishing just relationships among members of a political

133. Cardi and Green provide a nice summary of these policy reasons, which are the sort of thing I encourage students to keep track of when they are reading cases:

Concerns for crushing liability, the potential for incursions on the fabric of social relations [the social-host liability cases discussed above], the danger of becoming entangled with the periphery of the First Amendment, the boundaries of other substantive areas of law, the propriety of deferring to judgments by coordinate branches of government, and the goal of avoiding litigation that will harm family relationships. . . .

Cardi & Green, supra note 6, at 709–10 (citations omitted).


135. Goldberg & Zipursky, Place of Duty, supra note 7, at 735.

136. Keating, supra note 134, at 50.


community seems like a promising strategy. At the risk of stating the obvious, however, law and morality are distinct normative domains that answer to different human needs.\textsuperscript{139} Small-scale interactions and thick relationships can serve as the foundation of moral duties, as understood by Scanlon and Wallace. Legal duties, on the other hand, serve the needs of individuals embedded in much larger-scale, decentralized communities consisting of people with conflicting goals and values. There are community-wide concerns that may not be present in simpler interactions between individuals. For example, I mentioned above one reading of the UCLA case, which is that the court was sensitive to the features of a college community that create risks—such as student mental health challenges—and also that make the student experience enjoyable, meaningful, and useful as a developmental stage in early adulthood. When considering whether the university ought to owe a legal duty of care to students, that sort of thing is relevant. In the moral philosophy literature, however, directed duties tend to be discussed in terms only of the interests of the person harmed or potentially harmed by the acts or omissions of another. Wallace, for example, talks about \( A \) having a moral claim on \( B \) only if \( A \) is likely to be affected in some way by something \( B \) might do or fail to do.\textsuperscript{140} Translated into legal terms, this analysis is reminiscent of the reliance on foreseeability that characterized the California Supreme Court’s analysis in cases like \textit{Tarasoff} and the former methodology of Arizona courts that received severe criticism in \textit{Quiroz}. These courts now recognize that foreseeability alone cannot be the test for affirmative duties. There must also be some recognition of the social consequences of imposing a duty and the likelihood that courts will be able to adjudicate the resulting claims in a principled manner.

In other words, the moral relationship between the injurer and their victim, which is taken as fundamental by private law theorists, must be viewed through a legal lens as also implicating the interests of actors relevantly similar to the defendant and the societal interests in the activity in which the defendant is engaged. The California Supreme Court recognized this when it observed that “a duty to prevent alcohol-related crimes would require colleges to ‘impose onerous conditions on the freedom and privacy of resident students,’ contrary to the modern view that adult students are generally responsible for their own welfare.”\textsuperscript{141} This reasoning is relational in that it pertains to what is owed by the university to the student, but it takes into account more than the student’s interest. Put differently, the student’s rights are limited to the extent that the assertion of those rights would lead to an alteration in the freedom and privacy of other members of the relevant

\textsuperscript{139} An as-yet underdeveloped concern I have with some of the positions taken by Hanoch Dagan and Avihay Dorfman in \textit{Relational Justice}. See DAGAN & DORFMAN, supra note 134.

\textsuperscript{140} WALLACE, supra note 138, at 160, 162–63.

\textsuperscript{141} Regents of Univ. of Cal. v. Superior Ct., 413 P.3d 656, 666 (Cal. 2018) (quoting Tanja H. v. Regents of Univ. of Cal., 228 Cal.App.3d 434, 438 (1991)).
community. The precise contours of the plaintiff’s right, indicating what is owed to her by the defendant, are generally determined by the standard of care or breach element, which is usually a question for the jury. But in many affirmative duty cases, like UCLA, the court determines whether there should be any duty owed at all—before getting to the specific content of the duty of care—by considering whether imposing a duty would have a deleterious impact on the social value of the services provided by the defendant. Contrary to what appears to be the position of the Third Restatement (but by now, I hope it is clear that Section 7 is only for malfeasance cases), the defendant does not owe a duty to the whole world but only toward those whose interests can be protected without excessive social disutility.142 Importantly, however, the impact on the community as a whole of the legal duty to be recognized should be a factor considered by the court in determining whether to recognize the duty.

Replicating the normative stance described within a Wallace/Scanlon-style relational morality framework can be challenging. To a significant extent, contractualism in moral philosophy is motivated by the rejection of utilitarianism.143 Rather than looking to maximize the goodness of outcomes, a contractualist holds that the permissibility of actions turns on their justifiability to those affected by them. Scanlon, for example, believes the permissibility of an action depends on whether it is justified on principles that no one, if suitably motivated, could reasonably reject.144 He does rule out pure self-interest as a reason someone might reject a proffered justification. The person affected by the action must be morally motivated, in the sense that acceptance or rejection is based on general principles that would apply to others similarly situated. Justifiability to others presupposes that the relevant “other” has a similar aim.145 The most natural way to imagine this form of justification is in a one-to-one interaction between a party who acts and another who is affected by the action. The affected party stands in a position of second-person authority with the actor and is entitled to demand a justification.146 Borrowing an example from Thomas Pogge that resonates with some well-known torts cases, suppose an exhausted and hungry hiker, A, breaks into a cabin owned by B, eats some of B’s food, and spends the night in the cabin in order to shelter from a coming blizzard.147 Has A wronged B? Not if A can justify the trespass by appealing to the necessity of his actions in light of his fatigue, hunger, and the threatening storm. To add

143. See, e.g., F.M. Kamm, Owing, Justifying, and Rejecting, in Intricate Ethics: Rights, Responsibilities, and Permissible Harm 455 (2007).
144. SCANLON, supra note 138, at 189.
145. Id. at 191.
the torts angle, A’s actions may be permissible in the sense of being justifiable to B, but only on the condition that A compensates B for the food eaten and any damage caused by breaking into the cabin.\textsuperscript{148}

In Scanlon’s terms, B could not reasonably reject the justification offered by A. But the reasoning of A and B seems limited to the question of what would happen if their roles were reversed. If B were the hiker in peril, she would want to be permitted to break into A’s cabin and eat his food. From that point of view, B can appreciate the force of A’s justification. She could not reasonably reject the principles offered by A because they are the same reasons she would give if she were the party in peril. The consequence of general performance or non-performance of an act is a consideration that bears on the reasonable rejection of the underlying principle.\textsuperscript{149} Scanlon does acknowledge that “general prohibitions and permissions have effects on the liberty, broadly construed, of both agents and those affected by their actions.”\textsuperscript{150} In contractualist moral theory, therefore, the content of the rights and duties owed between A and B could conceivably take into account the effect on others of recognizing the principle that someone in peril is entitled to take the property of others in order to preserve their life. If that is all that is meant by “relational” duties, I do not have a quarrel with that label. In affirmative-duty cases, however, it is important to consider the effect of recognizing a duty on all who participate in the relevant activity. As I read the \textit{UCLA} case, the California Supreme Court appreciates this point that a purely foreseeability-based approach to the duty element focuses too heavily on the interests of the injured party while neglecting due consideration of the social interest in maintaining an activity relatively unencumbered by tort duties.

\textbf{CONCLUSION}

This discussion has, by necessity, offered only a brief and suggestive examination of an approach to understanding the duty element in affirmative duty cases like \textit{UCLA}. I see it as a middle ground between the assertion that there is a “duty in the air” owed to everyone—which, to be clear, is \textit{not} the position of the Third Restatement in nonfeasance cases—and the insistence by private law theorists that duty be understood non-instrumentally, grounded in the normative relationship between a wrongdoer and victim. I am sympathetic to much of the New Private Law methodology as applied to tort law generally and the duty element in particular. But, at the risk of seeming to concede too much to instrumental justifications, I want to highlight the importance of the effect of recognizing duties on the community as a whole, not just the plaintiff and the defendant, in determining whether

\textsuperscript{149} \textsc{Scanlon}, supra note 138, at 203.
\textsuperscript{150} \textit{Id}.
the defendant should be legally obligated to protect a class of potential victims against a particular type of harm.