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Purging Foreseeability

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The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts

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I. INTRODUCTION

For those responsible for understanding tort doctrine, the concept of foreseeability is a scourge, and its role in negligence cases is a vexing, crisscrossed morass. Indeed, one torts professor teaches that foreseeability might as well be called "strawberry shortcake," having been bent, muddled, and co-opted to such a degree that it has lost any real meaning.[1]

Foreseeability's role in the element of "duty" in negligence is especially problematic. Courts have long tied the existence of a duty—that is, whether an allegedly negligent defendant owed an obligation of care under the circumstances—to foreseeability. The more foreseeable the risk, the resulting injury, the manner of injury, or the person injured, so the reasoning goes, the greater the reason to impose a duty on the defendant to have acted with care to avoid such risk or injury. This is perhaps a reasonable approach at first blush. But because duty is the sole element of negligence not left in the first instance to the jury, duty—and hence, foreseeability—has become the primary source of judicial power to weed out cases deemed by a judge to be unworthy.

Regardless of one's general view regarding the proper breadth of judges' gatekeeping power in negligence cases, foreseeability's prominence in determinations of duty is problematic for two reasons. First, judges' use of foreseeability as a means of deciding duty has a pernicious effect on the rule of law. At the very least, foreseeability's indeterminacy leads judges to treat like cases differently and different cases alike.[2] If foreseeability truly is "strawberry shortcake," then it may be little more than a surrogate for unbounded judicial discretion.

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1. Patricia K. Fitzsimmons & Bridget Genteman Hoy, *Visualizing Foreseeability*, 45 ST. LOUIS U. L.J. 907, 908, 911 (2001) (citing a torts professor's explanation that "a foreseeable act may just as well be called 'strawberry shortcake' " because the term is merely a place-holder representing "a malleable standard used by judges in their roles as gatekeepers and tweakers").

2. *See, e.g.*, Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (describing foreseeability as "so open-ended that [it] can be used to explain any decision, even decisions directly opposed to each other .... [so as to] undermine clarity and certainty in the law whenever [it is] embedded in a legal standard").

Furthermore, to the extent that reference to foreseeability masks the actual reasons for a judge's decision to impose or deny negligence liability, foreseeability obfuscates the judicial process and likely undermines its perceived legitimacy.[3]

The second problem with foreseeability's role in duty is that it operates as a vehicle by which judges decide questions traditionally reserved for the jury. Specifically, by resolving duty based on an analysis of whether the risk created by a defendant's conduct was foreseeable, judges are really deciding whether the defendant's conduct was reasonable—the essence of a jury's determination of breach. By conditioning duty on whether one could foresee injury to the particular plaintiff ("plaintiff-foreseeability") or whether the type or manner of the injury was foreseeable, judges strip from juries their task of deciding proximate cause. By folding considerations of breach and proximate cause into the ambit of duty, judges also skirt responsibility to decide such matters, if at all, according to the deferential "no reasonable jury" standard—the standard pursuant to which a court must decide as a matter of law what is typically a jury question.

In May, 2002 the American Law Institute ("ALI") preliminarily approved an installment of the proposed Restatement (Third) of Torts entitled, "Liability for Physical Harm (Basic Principles)."[4] Unlike the previous two Restatements of Torts, Section 7(a) of the proposed Restatement Third provides an affirmative standard for determining the existence of a duty in the usual negligence case, a standard that is at once prosaic and subtly revolutionary. It reads: "An actor ordinarily has a duty to exercise reasonable care when that actor's conduct creates a risk of physical harm."[5] This restatement of duty is, on its face, uncontroversial. For many years courts have recognized the general principle that one owes a duty to avoid unreasonably causing harm to others. What is transformative about Section 7(a), however, is that it is clearly intended to operate not merely as a general principle, but as a rule of law from which courts may only depart, as Section 7(b) explains, due to "extraordinary. . . special problems of principle or policy."[6]

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3. *See* Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (suggesting that "judges should not rely on, or hide behind, words like . . . foreseeable, unforeseeable, . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions").

4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 2, 2002) [hereinafter TENTATIVE DRAFT NO. 2].

5. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7(a) (Tentative Draft No. 4, 2004) [hereinafter TENTATIVE DRAFT NO. 4].

6. *Id.* § 7(b).

Should courts take Section 7 of the proposed Restatement seriously, they will find that duty has been purged of many of the problems caused by its current reliance on foreseeability—a consequence not fully acknowledged by the Restatement, its Comments, or its Reporters' Notes. Specifically, by imposing a duty of reasonable care in any case in which the defendant's conduct "created a risk," Section 7 will 1) force judges to consider foreseeability of risk under the rubric of breach, pursuant to the "no reasonable jury" standard of review, rather than under the deference-free shroud of duty;[7] 2) shift consideration of plaintiff-foreseeability or of the type or manner of the plaintiff's injury from duty to proximate cause;[8] 3) bring into the realm of the general reasonableness duty certain cases that commonly have been decided—at least in part by reference to foreseeability—in the context of affirmative duties to warn, protect, or rescue;[9] and 4) encourage judges who wish to make legislative-like policy exceptions to negligence liability to do so expressly, rather than by relying on the language of foreseeability.[10]

Should courts adopt the proposed Restatement Third, it will radically change many courts' understanding of duty and foreseeability in negligence cases. The most important practical by-product of this doctrinal change is the potential for a dramatic shift in the balance of power between judge and jury. If judges no longer have the power to dismiss cases under the auspices of duty for lack of foreseeability, then more cases may reach the jury. One might argue that it is not the place of a Restatement to effect such drastic reform in negligence law and in courts' ability to administer that law. Indeed, the general discussion in recent ALI meetings suggests that many ALI members may not be aware of the transformative power of Section 7. The proper reach of a Restatement is a valid concern, although perhaps primarily a concern for the ALI and its desire to maintain its influential role in American jurisprudence. As the final Part of this Article explains, however, the proposed Restatement will, if adopted by courts, likely affect the substantive outcome of negligence cases only at the margins. The gatekeeping work currently done by judges in the context of duty by reference to foreseeability will still be done by judges, but under a new, less diffuse light. Judges will still grant summary judgment when it is due, only pursuant to the conclusion that no reasonable jury could find negligence or proximate

7. *See infra* Part III.B.
8. *See infra* Part III.C.
9. *See infra* Part III.D.
10. *See infra* Part III.E.

cause under the circumstances or, in the unusual case, by transparent reference to public policy. Thus, as the final Part argues, the balance of power between judge and jury will not shift significantly, although equilibrium will occur based on slightly different and clearer rules.

Part II of this Article attempts to piece together foreseeability's present schizophrenic existence in the law of negligence and to explain its current role in courts' determinations of duty, breach, and proximate cause. Part III describes how the proposed Restatement Third will alter courts' understanding and application of foreseeability as a doctrinal matter. Finally, Part IV explores the practical effects of the proposed Restatement on the balance of power between judge and jury and on the outcomes of tort cases.

II. THE CURRENT ROLE OF FORESEEABILITY IN NEGLIGENCE

In a vast majority of states, the prima facie case for negligence consists of five elements: duty, breach, factual causation, proximate causation, and injury.[11] Courts use some notion of foreseeability in deciding three of these elements: duty, breach, and proximate cause.[12] *Black's Law Dictionary* defines the term "foreseeability" as "[t]he quality of being reasonably anticipatable."[13] According to *Random House*, the verb "to foresee" means "to have prescience of; to know in advance."[14] These definitions certainly track one's common understanding of the term. As used in negligence law, however, foreseeability has particular meaning that depends on its legal context. In many courts the foreseeability lens seems to expand, contract or change focus at the will of the judge. Indeed, as mentioned above, some have argued that the doctrine of foreseeability has lost any fixed meaning and instead acts as a mere surrogate for judicial discretion.[15] While this Article presupposes the existence of an

11. DAN B. DOBBS, THE LAW OF TORTS § 114, at 269 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 163-64 (5th ed. 1984). At least two courts have seemingly enunciated a test for negligence that does not include an affirmative duty-requirement. *See* Union Pac. R.R. v. Sharp, 952 S.W.2d 658, 661 (Ark. 1997) (stating that negligence requires a showing of breach, causation, proximate causation, and injury); Fazzolari v. Portland Sch. Dist., 734 P.2d 1326, 1336-37 (Or. 1987) (en banc) (holding that negligence is shown where it is determined that the defendant "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff").

12. *See* LEON GREEN, JUDGE & JURY 66 (1930) (explaining that "a case is seemingly to be subjected thrice to the ponderous process of the 'foreseeability' formula").

13. BLACK'S LAW DICTIONARY 660 (7th ed. 1999).

14. WEBSTER'S UNABRIDGED DICTIONARY 750 (2d ed. 2001).

15. *See supra* note 3 and accompanying text.

intelligible set of meanings commonly accorded foreseeability in negligence opinions, the term is surely among the most confounding in the common law.[16]

Before examining how the proposed Restatement Third will affect the role of foreseeability in negligence suits, it is necessary to gain some perspective as to how the concept is currently used. For reasons that will become clear below, it is best to examine foreseeability's role in the elements of negligence out of order. Subsections A and B discuss courts' use of foreseeability when deciding breach and proximate cause as a matter of law. Subsection C then compares such use with foreseeability's part in duty and suggests that the various inquiries into foreseeability are largely redundant.

A. Foreseeability in the Context of Breach

Perhaps foreseeability's most uncontroversial function in negligence law lies in aiding the factfinder to determine breach. The breach inquiry is the core of the negligence cause of action because it calls for a decision regarding the defendant's blameworthiness, or culpability. Where the judge has determined that the defendant owed a duty and has delineated the broad contours of that duty in a statement of the "standard of care," the jury must then decide,[17] in the context of breach, whether the defendant's conduct failed to conform to that standard.[18] It is worth emphasizing that breach exists as an element independent of the element of duty. Where a defendant owed a duty of care under the circumstances but did not breach that duty, the defendant will not be found negligent. Similarly, a defendant whose actions were unreasonable, but who owed no duty to act reasonably, also will escape liability.[19] Courts must therefore engage in separate analyses, and reach independent conclusions, as to duty and as to breach.

The near-universal standard of care in negligence cases is the duty to act as would a reasonable person under the circumstances.[20] Foreseeability makes its entrance in the application of this reasonable

16. *See* Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J.L. & PUB. POL'Y 156, 156 (2000) ("Foreseeability is undoubtedly a muddle in tbe law of negligence.").

17. DOBBS, *supra* note 11, § 115, at 270.

18. PROSSER & KEETON, *supra* note 11, § 30, at 164.

19. *Id.*; RESTATEMENT (SECOND) OF TORTS § 282 (1965) [hereinafter RESTATEMENT SECOND].

20. RESTATEMENT SECOND, *supra* note 19, § 283. The proposed Restatement Third echoes this formulation: "A person acts with negligence if the person does not exercise reasonable care under all the circumstances." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) [hereinafter TENTATIVE DRAFT NO. 1]. The ALI adopted Tentative Draft No. 1 preliminarily in May 2001.

person standard. Where judges rule on breach as a matter of law, "reasonableness" often turns on 1) the degree of foreseeable likelihood, from the point of view of a reasonable person in defendant's position, that defendant's actions might result in injury;[21] 2) the range in severity of foreseeable injuries; and (3) the benefits and burdens of available precautions or alternative manners of conduct.[22] Together, the likelihood and severity of foreseeable injury constitute the "risk" created by an actor's conduct.[23] According to many courts, the higher the risk—that is, the more probable it was that foreseeable injury might result from particular behavior and the more severe the range of foreseeable injuries—the more careful the defendant is required to have been.[24]

For example, suppose that a driver who pulled his car onto a road's shoulder in order to watch the setting sun is struck by a passing

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21. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 76-77, 86-87 (M.D. Howe ed., 1963) (1881) [hereinafter THE COMMON LAW].

22. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173-74 (2d Cir. 1947) (enshrining these factors in the mathematical formula in which liability lies where B (burden of precautions) < P (probability of loss) x L (magnitude of loss)); Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 369 (Ariz. 1985) (recognizing that foreseeability of risk and the burden of precautions are "factors which determine the reasonableness of the defendant's conduct"); PROSSER & KEETON, *supra* note 11, § 65, at 453-54 ("The unreasonableness of the risk which [reasonable person of ordinary prudence] incurs is judged by the . . . process of weighing the importance of the interest he is seeking to advance, and the burden of taking precautions, against the probability and probable gravity of the anticipated harm . . . ."); DOBBS, *supra* note 11, §§ 143-146 (explaining in detail the interplay of foreseeability and reasonableness here summarized).

23. *See e.g.*, Zettle v. Handy Mfg. Co., 998 F.2d 358, 360 (6th Cir. 1993) ("[A] showing of the magnitude of foreseeable risks . . . includ[es] the likelihood of occurrence of the type of accident . . . and the severity of injuries sustainable from such an accident."); Diocese of Winona v. Interstate Fire & Cas. Co., 858 F. Supp 1407, 1418 (D. Minn. 1994) ("Determining whether taking the risk was reasonable involves, in turn, weighing the foreseeable likelihood that the harm would occur against its foreseeable severity."); McKinney v. Louisiana Nat. Bank, 416 So.2d 948, 951 (La. Ct. App. 1982) ("Negligence is conduct which creates an unreasonable risk of foreseeable harm to others . . . [which] is unreasonable . . . if the magnitude of the risk created out-weighs the utility or social value of the conduct creating it; in this respect consideration is given, inter alia, to the probability or extent of the harm to others threatened by the risk.").

24. TENTATIVE DRAFT NO. 1, *supra* note 20, § 3, Reporters' Note to cmt. d. The Reporters' Note cites a long list of cases for the proposition that the amount of care required is proportionate to the extent of danger involved. *See, e.g.*, Lollar v. Poe, 622 So.2d 902, 905 (Ala. 1993) ("The degree of care required of an animal owner should be commensurate with the propensities of the particular animal and with the place where the animals are kept, including its proximity to high-speed highways."); Indus. Chem. & Fiberglass Corp. v. Chandler, 547 So.2d 812, 831 (Ala. 1988) ("[T]hose who deal with dangerous instrumentalities, such as explosives or chemicals, must exercise a great amount of care because the risk is great."); Blanchard v. City of Bridgeport, 463 A.2d 553, 555 (Conn. 1993) ("The degree of care to be exercised by keepers of wild animals to protect visitors from harm must, at the very least, be equal to the coiled spring danger that lurks within the cage."). *See also* PROSSER & KEETON, *supra* note 11, § 31, at 170-71 (explaining that although "[n]early all human acts, or course, carry some recognizable but remote possibility of harm to another," precaution is required "if the risk is an appreciable one, and the possible consequences are serious").

car. The success of the plaintiff sun-gazer's suit (or in a comparative negligence jurisdiction, the amount of his recovery) may turn on whether he acted unreasonably in pulling his car onto the shoulder. If the collision occurred on a straight, infrequently traveled country road, such a collision might be deemed relatively improbable and unforeseeable, and therefore the plaintiff's conduct reasonable. If the road was the Long Island Expressway, however, and if the plaintiff had pulled onto the shoulder during rush-hour, both the foreseeable likelihood of a collision and the severity of foreseeable injury (the risk of a multiple-vehicle accident) rise dramatically. Because the combination of the foreseeable likelihood of injury and the severity of foreseeable injury is higher on the Long Island Expressway than on a country road, the plaintiff's conduct would be more unreasonable in the context of the former than the latter.

The brand of foreseeability associated with breach is one of general focus. That is, it does not examine the foreseeability of the particular injury suffered by the plaintiff, but the foreseeable likelihood and severity of injuries that might have occurred.[25] This focus is tied to foreseeability's role in deciding a defendant's blameworthiness. In negligence law, blameworthiness is judged by a defendant's conduct alone and is not dependent upon the actual results of that conduct.[26] For example, suppose that two drinking companions consume an equal amount of alcohol, then pass out while driving home in their respective cars. One car drifts off the road into a private lawn, knocking down the owner's mailbox en route. The other car veers into a parked car, killing the two teenagers within. Although the two drivers will be liable for different amounts of damages (assuming the mailbox was not the work of Midas), the drivers are equally negligent, equally blameworthy. In other words, they each breached their duty of care in the same way and to the same "extent."[27] The breach analysis is the same for each driver because

25. *See* DOBBS, *supra* note 11, § 143, at 335, explaining, in the context of a discussion of breach:

> So if a speeding driver crashes into your living room, the fact that a reasonable person would not have specifically recognized a risk of harm to living room furniture will not assist the driver to avoid liability. It is one of the cluster of harms in a generally foreseeable category, and that is enough.

26. Under criminal law, one driver will be guilty of manslaughter, while the other will only be guilty of property damage. Thus, the defendants' culpability is tied not only to their acts, but also to the consequences of their acts.

27. In fact, it is not particularly accurate to use the word "extent" to speak of negligence liability. Where there is only one alleged tortfeasor, that tortfeasor is either negligent or is not. Although each driver must pay a different amount of damages according to the injury that the driver caused, injury is a separate element of the negligence cause of action. The element of breach is blind to the injuries actually caused. One might contrast this system with that of

each produced the same range of foreseeable risks under identical circumstances. Thus, it might be said that in the context of breach, foreseeability's concern is risk generally, not whether the particular result is one for which defendant should be held liable. This latter concern is addressed by proximate cause.

B. Foreseeability in the Context of Proximate Cause

Once it has been determined that a defendant owed and breached a duty and that the breach in fact caused the plaintiff's injury, the law imposes yet another prerequisite to liability. Dubbed "proximate cause,"[28] "legal cause,"[29] or as in the proposed Restatement Third, "scope of liability,"[30] this element of negligence serves to limit the consequences of an actor's conduct.[31] Through proximate cause, courts recognize that although "the consequences of an act go forward to eternity, ... any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'"[32] Proximate cause thus focuses on the nature and extent of the connection between a defendant's unreasonable conduct and the plaintiff's injury[33] and cuts off liability at the point where "the harm that resulted from the defendant's negligence is so clearly outside the risks created that it would be unjust or at least impractical to impose liability."[34]

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criminal law, in which the relative guilt of the two drivers is conditioned not only upon the defendants' conduct, but also upon the results of that conduct. Here, for example, although both drivers are guilty of driving under the influence, one driver is also guilty of the separate crime of manslaughter, the other of destruction of property.

28. *See, e.g.*, PROSSER & KEETON, *supra* note 11, § 41, at 263.

29. RESTATEMENT SECOND, *supra* note 19, § 281(c); PROSSER & KEETON, *supra* note 11, § 41, at 263.

30. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29, Special Note on Proximate Cause, at 1 (Tentative Draft No. 3, 2003) [hereinafter TENTATIVE DRAFT NO. 3].

31. PROSSER AND KEETON, *supra* note 11, § 41 at 264. According to Patrick Kelley and Joseph Bingham, the doctrine of proximate cause arose "in response to [an] under-elaborated notion of duty," Kelley, *supra* note 2, at 1061, as a means of limiting a defendant's liability to "the purposes for which the unperformed duty was imposed." Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 16, 23-37 (1909).

32. PROSSER & KEETON, *supra* note 11, § 41, at 264.

33. *Id. See also* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 13.4, at 137-47 (2d ed. 1986); Galligan, *supra* note 3, at 1513 (explaining that proximate cause is "really a way of deciding whether society ought to hold this defendant, whose negligent acts were a cause-in-fact of the plaintiff's damages, liable under these circumstances, to this plaintiff . . . [or to] sever the chain of causation").

34. DOBBS, *supra* note 11, § 180, at 443.

Defining this point, however, has been no small trick. In some jurisdictions, for example, defendants are not liable for injuries or to plaintiffs that are too "remote" in time or space[35] or outside of the "unbroken natural sequence" of events that caused the harm.[36] In others, the line is drawn where the causal path is too "indirect"[37] or where certain "intervening causes" foreclose liability.[38] Still others endorse an even less helpful formulation by which proximate cause is satisfied where a defendant's conduct was a "substantial factor" in causing the plaintiff's injury.[39] The proposed Restatement Third adopts a rather elegant (though perhaps no more directive) standard according to which "an actor is not liable for harm different from the harms whose risks made the actor's conduct tortious."[40]

Explanations and tests for proximate cause abound. A common thread among proximate cause cases, however, is that either explicitly[41] or implicitly,[42] most consider some notion of

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35. *See, e.g.*, Casey v. Corson & Gruman Co., 221 F.2d 51, 52 (D.C. Cir. 1955) (A negligently operated truck, stolen by one without defendant's authority hours before collision in question, "was too remote from the collision in time, place, and circumstances to be a proximate cause of plaintiff's injuries . . ."); Peterson v. Underwood, 264 A.2d 851, 855 (Md. 1970) ("[A]lthough an injury might not have occurred 'but for' an antecedent act of the defendant, liability may not be imposed . . . if the injury is so remote in time and space from defendant's original negligence that another's negligence intervenes."); Wallace v. Jones, 190 S.E. 82, 84-86 (Va. 1937) (holding proximate cause absent, and therefore refusing to find defendant liable for injuries plaintiff sustained in collision with third party while waiting at scene of accident caused by defendant).

36. 4 HARPER ET AL., *supra* note 33, § 20.5, at 174.

37. *See, e.g.*, *In re* Polemis, 3 K.B. 560, 571 (Eng. C.A. 1921) (finding proximate cause, because the injury was "directly caused" by a ship worker who carelessly dropped a wooden board into the ship's hold, sparking petrol vapors, the resulting fire from which destroyed the ship).

38. *See, e.g.*, McLaughlin v. Mine Safety Appliances Co., 181 N.E.2d 430, 434-35 (1962) (holding that intervening gross negligence supersedes the negligence of the plaintiff, thus failing proximate cause).

39. *See, e.g.*, Knodle v. Waikiki Gateway Hotel, Inc., 742 P.2d 377, 386 (Haw. 1987) (stating that "substantial factor" is a phrase sufficiently intelligible to furnish an adequate guide in instruction to the jury). One might interpret the substantial factor test as an attempt to determine whether the defendant's actions were a sufficiently "substantial" cause of the plaintiff's injury (that is, in comparison with the many other factual causes) that the defendant should therefore be held liable. Such a test offers imprecise guidance on its face. It is even more confusing in light of the fact that a different "substantial factor" test is also a means for finding factual causation where "two independent forces concur to produce a result which either of them alone would have produced." Basko v. Sterling Drug, Inc., 416 F.2d 417, 429 (2d Cir. 1969). Courts frequently confuse the two.

40. TENTATIVE DRAFT NO. 3, *supra* note 30, § 29.

41. *See, e.g.*, Tetro v. Town of Stratford, 458 A.2d 5, 7-8 (Conn. 1983) ("The test for finding proximate cause 'is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's negligence.' ").

42. For example, the Restatement Third approach might be described as little more than a "foreseeability of type of harm" standard. TENTATIVE DRAFT NO. 3, *supra* note 30, § 29, cmt. j.

foreseeability.[43] As explained above, foreseeability operates in the context of breach as a form of risk contextualization—a foreseeability of general focus (that some range of injuries, of some range of severity might occur) which helps to define the blameworthiness of a defendant's conduct. Under the rubric of proximate cause, by contrast, the foreseeability inquiry is not general but specific to the particular injury suffered by the particular plaintiff at hand. Even where injury of some kind to some person was foreseeable and therefore supports a finding of breach, a plaintiff may fail to survive the proximate cause inquiry where the defendant's actions resulted in 1) an unforeseeable type of injury,[44] 2) an injury occurring in an unforeseeable manner,[45] or 3) injury to an unforeseeable plaintiff.[46] Furthermore, foreseeability in the context of proximate cause does not help to decide whether the defendant acted unreasonably, as in the context of breach, but rather aids in the decision of whether the actual consequences of defendant's conduct were so bizarre or far-removed from the risks that made the actor's conduct negligent that the defendant, though blameworthy, should not be held liable for them.

The famous 1961 case known as *The Wagon Mound*[47] is illustrative. The good ship Wagon Mound was anchored in Sydney Harbor when, due to some bungling by the ship's crew, it began to discharge furnace oil into the harbor waters. Although furnace oil created no foreseeable risk of fire when spread across water, it did pose a foreseeable risk of congealing on and interfering with the use of the harbor docks. Pointing to this risk, the court concluded that the crew's conduct was unreasonable, and that the defendant had

43. DOBBS, *supra* note 11, § 181, at 444; MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 399 (7th ed. 2001).

44. *See, e.g.*, Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 74, 82-83 (1884) (finding unforeseeable that a speeding driver would hit another car, that the collision would bruise the shin of its driver, and that the bruise would later become cancerous). *But see, e.g.*, Hines v. Morrow, 236 S.W. 183, 187-88 (Tex. Civ. App. 1921) (finding foreseeable, as a matter of law, that a pothole left by defendant in a highway would stall a car, that a good-Samaritan attempting to pull it out would get his wooden leg stuck in the mud, and that a loop in the tow rope would lasso his good leg and break it).

45. *See, e.g.*, Bunting v. Hogsett, 21 A. 31, 32-33 (Pa. 1891) (finding foreseeable, as a matter of law, the injury of a railroad passenger where a collision threw a railroad engine out of control, the engine then ran around a circular track, and the engine struck the passenger in a second collision).

46. *See, e.g.*, *In re* Guardian Cas. Co., 2 N.Y.S.2d 232 (N.Y. App. Div. 1938) (finding foreseeable, as a matter of law, where a collision that forced a taxi into a building, which in turn loosened a stone, which fell and killed plaintiff, a bystander, while the taxi was being removed twenty minutes after the initial accident).

47. Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound), [1961] App. Cas. 388 (P.C. 1961).

therefore breached its duty of care.[48] The harm the risk of which led to a finding of breach, however, was not the harm that in fact occurred. What actually happened is that a piece of cotton, which had come to rest on some debris floating just beneath the oil slick, caught fire from the spark of a welder's torch, ignited the oil floating on the harbor waters, and burned the dock owned by the plaintiff.[49] The court reasoned that although the defendant's conduct created a risk sufficiently foreseeable to sustain a finding of breach, the plaintiff's actual injury was not foreseeable and was therefore a consequence for which defendant should not be held liable despite the defendant's blameworthy conduct.[50]

Proximate cause, like breach, is decided in the first instance by the jury.[51] That said, many courts—perhaps seeing far-reaching normative implications embedded in proximate cause—do not afford juries the same latitude typically given in the context of breach. Rather, appellate courts frequently treat the proximate cause issue as if it were a question of law, to be more readily reversed.[52] This approach might be traced to the scholarly work of Leon Green, which, in conjunction with the landmark decision of the New York Court of Appeals in *Palsgraf v. Long Island Railroad*,[53] blurred the distinction between proximate cause, which is reserved for the jury, and duty, which is the province of the judge.[54] Despite overlap in the choices underlying duty and proximate cause, however, they stand as separate elements and serve different conceptual purposes. With this in mind, and after the foregoing explanation of foreseeability's role in breach and in proximate cause, foreseeability's redundant role in duty will stand in sharp relief.

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48. *Id.* at 406.

49. *Id.* at 391.

50. *Id.* at 403.

51. KEETON ET AL., *supra* note 11, § 45, at 321.

52. LEON GREEN, RATIONALE OF PROXIMATE CAUSE 76 (1927); Galligan, *supra* note 3, at 1513-14; Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 89 (1991).

53. 162 N.E. 99 (N.Y. 1928).

54. *See* James E. Viator, *When Cause-in-Fact Is More than a Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law*, 44 LA. L. REV. 1519, 1523 (1984) (explaining Green's assertion that duty and proximate cause ask essentially the same question: whether the plaintiff's interest warrants protection).

C. Foreseeability in the Context of Duty

1. The General Concept of Duty

A defendant is only blameworthy for unreasonable behavior if that defendant owed a duty of reasonable care in the first place. Similarly, the question of whether a defendant who has acted unreasonably should be held liable for the consequences is only relevant if the defendant owed some kind of duty. Duty is thus a separate, fundamental element of the negligence cause of action, supported by its own unique analysis—unfortunately, an analysis that is commonly confused with that of breach or proximate cause.

The imposition of a duty is the province of the court.[55] It is a two-step process. First, the judge must decide whether the defendant owed a duty at all. Second, the judge must define the scope of that duty in the form of a standard of care.[56] Most courts have followed these steps to arrive at a general structure for duty in negligence cases involving physical injury. The foundation of this structure is the long-recognized principle that one generally owes a duty to avoid affirmatively causing physical harm to others.[57] The flip side of this universal duty is that one generally does not owe a duty to warn, protect, or rescue a person from risks created by another source.[58] There are, however, a number of commonly-held exceptions to this "no duty to rescue" rule. These so-called "affirmative duties" include, for example, the duty to rescue persons with whom one has a judicially-recognized special relationship[59] and the duty to continue (under

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55. RESTATEMENT SECOND, *supra* note 19, § 328B; DOBBS, *supra* note 11, § 149, at 355.

56. RESTATEMENT SECOND, *supra* note 19, § 328B; DOBBS, *supra* note 11, § 149, at 355.

57. *See, e.g.*, Weirum v. RKO Gen., Inc., 539 P.2d 36, 39 (Cal. 1975) (stating that "every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct"); Heaven v. Pender, 11 Q.B.D. 503, 509 (1883):

> [W]henever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that is he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

See also, e.g., DOBBS, supra note 11, § 227, at 578; 3 HARPER ET AL., *supra* note 33, § 18; KEETON ET AL., *supra* note 11, § 53 at 356-59; TENTATIVE DRAFT NO. 4, *supra* note 5, § 37, cmt. b (Reporter's Note) (citing string of cases that recognize the general duty not to create a risk of harm).

58. RESTATEMENT SECOND, *supra* note 19, § 314; DOBBS, *supra* note 11, § 314, at 853.

59. *See, e.g.*, Methola v. County of Eddy, 629 P.2d 350, 353-54 (N.M. Ct. App. 1981) (holding that jailors owe duty to protect and rescue inmates from other abusive inmates); RESTATEMENT SECOND, *supra* note 19, § 314A (explaining that common carriers, innkeepers, land possessors,

certain limited circumstances) a rescue effort voluntarily undertaken.[60]

What judges decide in the context of duty, and how they decide it, has been the subject of centuries-long debate. Nevertheless, a general description is possible. Duty means "an obligation, to which the law will give recognition and effect, to conform to some standard of conduct toward another."[61] In this sense, the concept of duty in tort tracks the term's common meaning as "something that one is expected or required to do by moral or legal obligation."[62] Of course, such a definition raises the question as to the method by which judges impose and define legal obligations. Judges enjoy wide discretion in doing so,[63] although their analysis appears to focus on five major considerations:

(1) *Community notions of obligation.* Since as early as sixteenth-century England, the common law has drawn duties "from pre-judicial community-defined obligations, based on the accepted coordination norms of the community."[64] Whether and, if so, how courts arrive at a consistent understanding of community notions is a matter of spirited jurisprudential debate.[65] Most agree, however, that

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and those in custodial roles owe to customers, invitees, or those in their custody a duty to protect, warn of dangers, and offer first aid).

60. Generally, a voluntary rescuer must use reasonable care to continue a rescue effort if failure to do so would leave the rescuee in a worse position than he or she was found by the rescuer. *E.g.* Atkinson v. Stateline Hotel Casino & Resort, 21 P.3d 667, 672 (Utah Ct. App. 2001).

61. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12 (1953).

62. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 608 (1996).

63. *See* Kelley, *supra* note 2, at 1041 (observing that " 'duty,' . . . seems like a description of a conclusion the court reaches by a decisional process unguided by the prima facie formulation itself"); Prosser, *supra* note 61, at 15 ("There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it.").

64. Kelley, *supra* note 2, at 1059-60 (citing S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); M.J. PRICHARD, *SCOTT V. SHEPHERD* (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE (1976)).

65. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 227 (1986) (positing that, with cases of first impression for which there is no precedent, a judge must, to reach the proper resolution, ascertain the scheme of principles behind past decisions, insofar as the community still enforces those legal standards, and apply it to the instant case; judges are not to legislate from the bench based on their own conception of community morality); *id.* at 97:

> [A community's] law belongs to the community not just passively, because its members hold certain views about what is right or wrong, but as a matter of active commitment, because its officials have taken decisions that commit the community to the rights and duties that make up law. But a particular conception of law may nevertheless make the question of what rights and duties do follow from past political decisions depend in some way on popular morality as well as on the explicit content of these decisions. Or it may deny that there is any such connection. The concept of law, understood as I have suggested, is itself neutral between . . . these competing explanations of the connection between a community's reigning opinions and its legal commitments.

community consensus regarding day-to-day obligations is an important consideration in the duty analysis.[66] As one court put it, "the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists."[67]

(2) *A broad, legislative sense of social policy.* Duty is frequently described as a form of judicial legislation, based on broad social concerns, regarding the ultimate issue of liability.[68] Although this characterization might be inaccurate as a comprehensive theory,[69] social policy concerns undoubtedly play an important role in many duty decisions. A few examples suffice to illustrate: In deciding whether to impose a duty, California courts expressly consider, among other factors, "[the] policy of preventing future harm; . . . [the] 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."[70] Where a power company's grossly unreasonable behavior caused a widespread outage, the New York Court of Appeals refused to impose a duty to non-customers on the grounds that extensive liability would expose the defendant to financial ruin and endanger the public's power supply.[71]

See also Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("The law is the witness and external deposit of our moral life."); *id.* at 466 ("We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."). *See generally* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (offering a theory of the growth of norms and deriving some implications for how law can govern norms; Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903 (1996) (challenging some notions of rationality, choice, and freedom and developing conclusions about human nature).

66. *See, e.g.*, Davis v. Westwood Group, 652 N.E.2d 567, 569 (Mass. 1999) ("In determining whether the defendant had a duty to be careful, we look to existing social values and customs, as well as to appropriate social policy."); Prosser, *supra* note 61, at 15 ("In the end the court will decide whether there is a duty on the basis of the mores of the community . . . ."); John C.P. Goldberg, Note, *Community and the Common Law Judge: Restructuring Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334-35 (1990) (discussing tort law's incorporation of social norms and expectations).

67. DOBBS, *supra* note 11, § 229, at 582 (quoting Casebolt v. Cowan, 829 P.2d 352, 356 (Colo. 1992)).

68. *See* PROSSER & KEETON, *supra* note 11, § 53, at 358 (stating that duty is "only an expression of policy which leads the law to say that the plaintiff is entitled to protection"); Holmes, *supra* note 65, at 466-68 (discussing idea generally).

69. *See generally* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733 (1998) (mounting a sustained attack on Prosser's conception of duty as mere policy).

70. Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981).

71. Strauss v. Belle Realty Co., 482 N.E.2d 34, 38 (N.Y. 1985). Similarly, one common theory of courts' early use of the concept of duty is that it provided a means of limiting the liability of burgeoning industrial manufacturers. *See* Prosser, *supra* note 61, at 13 (noting that

And where the imposition of a duty on a governmental defendant would interfere with that entity's discretion in allocating scarce resources, courts commonly demure.[72] Each of the above considerations has little to do with a community's understanding of one's day-to-day obligations to others, but rather are policy concerns of a legislative nature.[73]

(3) *Concern for the rule of law.* Because duty is the only *prima facie* element in negligence decided by the court, it provides judges their primary means of ensuring that like cases are decided alike and different cases differently. Determinations of negligence are, however, overwhelmingly fact-specific. Thus, duty rules most often cast a wide net, create rough categories of obligations, and set general standards rather than particularized codes of conduct.[74]

(4) *The goal of convenience of administration.*[75] A few categories of tort cases present special evidentiary problems or questions that are particularly resistant to principled analysis. In such cases, courts have convened special duty rules in an attempt to limit liability and provide stronger-than-usual guidance to juries. The

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the concept of duty possibly emerged from the English common law courts as a means of limiting "the responsibilities of growing industry within some reasonable means").

72. *See, e.g.*, Riss v. City of New York, 240 N.E.2d 860, 861 (N.Y. 1968) (refusing to impose duty on municipality to provide police protection to a woman who had been threatened by a former paramour on the grounds that such a duty "would inevitably determine how the limited police resources of the community should be allocated and without predictable limits").

73. Some have proposed that the policy considerations that inform duty are of a specific type—those relating in some way to the relationship between plaintiff and defendant, or between the class of people of which the plaintiff is a member and the class of people of which the defendant is a member. Decisions against liability based upon other types of policy considerations—policies that do not involve such relationships—may therefore not be duty decisions at all, but merely decisions to impose immunity. *See* Jonathan Cardi, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1312-13, 1332 (1997) (concluding, despite this theoretical difference between the policies underlying duty and immunity, that the distinction is too fine to draw as a practical matter); Goldberg & Zipursky, *supra* note 69, at fns. 82 & 111 (noting that Holmes, unlike Prosser, explained no-liability-for-public-policy cases in terms of immunity rather than duty). Others conclude that the policies that inform duty are no different than those underlying immunity. DOBBS, *supra* note 11, § 226, at 575-76. Due to the broad language of Section 7(b) of the proposed Restatement, the author does not here find it necessary to pick a side in this debate.

74. *See* DOBBS, *supra* note 11, § 227, at 579 (describing duty decisions as "expressions of 'global' policy rather than evaluations of specific facts of the case" and explaining that "no-duty rules should be invoked only when all cases they cover fall substantially within the policy that frees the defendant of liability. . . . [R]ules of law having the quality of generality. . . . should not be merely masks for decisions in particular cases."); *see also infra* notes 293-305 and accompanying text.

75. *See* Prosser, *supra* note 61, at 15 ("In the decision whether or not there is a duty, many factors interplay: . . . [including] the convenience of administration of the rule . . . .").

rules governing claims for emotional distress owe their origin to such concerns.[76]

(5) *Foreseeability.* Foreseeability of some kind plays a role in many courts' analysis of duty. Often, foreseeability is cited as a reason to impose a duty where one would not otherwise exist—for example, due to the rescue rule.[77] Courts also sometimes cite lack of foreseeability as grounds for denying a duty, even where the defendant's conduct created a risk of physical harm.[78] Indeed, in some cases, foreseeability seems so closely tied to the concept of duty that a ruling on foreseeability proves determinative of the duty element.[79] In others, foreseeability is but one factor, if an important one, in the duty calculus.[80] A discussion of the various uses of foreseeability in the context of duty follows.

2. Duty and Foreseeability

a. Foreseeability of plaintiff

Considerable debate has taken place over the decades as to whether duty is, at its root, relational—that is, whether an obligation

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76. *See* Galligan, *supra* note 3, at 1511 (noting that in the context of claims for emotional distress, "a court may decide there is no duty owed . . . .[for] administrative convenience"). Claims for emotional distress pose several unique administrative challenges: scientific and legal shortcomings in the ability to determine accurately the existence and extent of emotional harm; the problem of approximating emotional harm in dollar awards; and the threat of a "floodgate of litigation" over claims of "trivial" emotional injury. *See* DOBBS, *supra* note 11, § 302, at 823-24. In response to these challenges, courts have imposed only limited duties on defendants to avoid causing purely emotional harm. *See* Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 429-36 (1997) (outlining common-law limited duties to avoid causing emotional distress and explaining the policy reasons for such limitations).

77. *See, e.g.*, Murdock v. City of Keene, 623 A.2d 755, 757 (N.H. 1993) (explaining that a jailer may be liable for injuries sustained from an inmate's suicide attempt if the attempt was foreseeable).

78. *See, e.g.*, Herrera v. Quality Pontiac, 73 P.3d 181, 187 (N.M. 2003) ("For our duty analysis, 'it must be determined that the injured party was a foreseeable plaintiff—that he [or she] was within the zone of danger created by [the defendant's] actions' . . . .") (alteration in original) (quoting Calkins v. Cox Estates, 792 P.2d 36, 38 (N.M. 1990)).

79. *See, e.g.*, Harper v. Remington Arms Co., 280 N.Y.S. 862, 868-69 (N.Y. Sup. Ct. 1935) (finding that a gun manufacturer had no duty and thus was not liable for injuries resulting from use of highly-charged ammunition, meant only for use in firearms testing and distributed only to testing parties, because injured party was an unforeseeable user who was given the shells by a third party).

80. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (holding that among several factors to be considered in analyzing duty, "[t]he most important of these considerations . . . is foreseeability"); Goldberg & Zipursky, *supra* note 69, at 1818-19 (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), for the proposition that reasonable foreseeability is a necessary, though not sufficient condition for the imposition of a duty of care).

of care is comprehensible only in relation to a class of people to whom the obligation is owed.[81] According to the non-relational view, courts impose a duty of care solely on the basis of public policy and community standards, without regard to the question of to whom such a duty runs.[82] Whether a particular plaintiff is within the scope of the risk created by a defendant's breach is, from the non-relational perspective, the stuff of proximate cause and a question of the outer limits of liability.[83] By contrast, a relational account of duty posits that an obligation simply cannot exist in a vacuum. Like the verbs "to meet" or "to injure,"[84] the concept of "obligation" or "duty" is incomplete without some connection to a person or class of persons. The relational approach therefore considers whether the class of people of which defendant is a member owes an obligation to the class of people that includes the plaintiff.[85]

The debate over the relational nature of duty was made famous by the contrasting opinions of Justice Cardozo and Justice Andrews in *Palsgraf v. Long Island Railroad*.[86] *Palsgraf* involved the claim of a railroad passenger who, while standing on a station platform, was injured by a falling set of scales. The scales had been toppled by the force of an explosion at the other end of the platform that resulted from an exploding package of fireworks knocked from the hands of a passenger as railroad employees negligently helped the passenger

81. *Compare* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100 (N.Y. 1928) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation."), *with Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) ("Due care is a duty imposed on each one of us to protect society, . . . not to protect A, B, or C alone.").

82. *See, e.g.*, KEETON ET AL., *supra* note 11, § 53, at 357 ("Certainly [in the early common law] there is little trace of any notion of a relation between the parties, or an obligation to any one individual, as essential to tbe tort. The defendant's obligation to behave properly apparently was owed to all the world . . . ."); Oliver W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 661 (1873) (describing the universal tort duty as "a duty imposed on all the world, in favor of all"); Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 38 (1972) (recognizing a "general rule . . . that the defendant owes to those wbom he might chance upon and injure a duty to exercise due care" and accounting for no-duty or limited-duty exceptions as anachronisms or limitations of liability based on economic efficiency).

83. Goldberg & Zipursky, *supra* note 69, at 1817-18.

84. The French forms of these verbs are instructive: "to meet" is "faire la connaissance de," and "to injure" is "faire mal à." The prepositions "de" and "à" at the end of these verbs indicate that the verbs cannot be used without connecting them to the person "met" or "injured."

85. *See* Goldberg & Zipursky, *supra* note 69, at 1820 (explaining that "[f]or Cardozo [in *Palsgraf*], the foreseeability of harm to a class of persons goes to the question of whether certain conduct is owed to those persons, not to whether certain liabilities are appropriately borne by defendants"); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 59-60 (1998) (distinguishing between relational and non-relational theories of tort duty).

86. 162 N.E. 99 (N.Y. 1928).

onto the departing train.[87] Writing for the majority, Justice Cardozo overturned a jury verdict in favor of the plaintiff on the grounds that the defendant railroad owed no duty to the plaintiff under the circumstances. According to Cardozo, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation."[88] Because it was not foreseeable that the railroad employees' actions would cause injury to the plaintiff, who stood at the other end of the platform, the employees' conduct, though unreasonable, breached no duty owed to the plaintiff.[89] According to Justice Andrews, however, who wrote in dissent, "Due care is a duty imposed on each one of us to protect society, . . . not to protect A, B, or C alone."[90] Thus, when the railroad employees unreasonably knocked the package out of the hurrying passenger's hands, they breached the universal "duty of refraining from those acts that may unreasonably threaten the safety of others,"[91] a duty limited only by the requirement of proximate causation. Justice Andrews would therefore have upheld the jury's verdict because he could not rule as a matter of law that the plaintiff's injuries were not the proximate result of the defendant's breach.[92]

Whether a court considers the defendant-plaintiff nexus in the context of proximate cause—"was this plaintiff within the scope of the risk created by the defendant's breach?"—as did Justice Andrews, or as a matter of duty—"did the defendant owe a duty to this plaintiff?"—as did Justice Cardozo, the underlying issue is the same: "[S]hould the court hold the defendant liable to this plaintiff?"[93] Plaintiff-foreseeability often plays an important part in courts' analyses of this issue.[94] The more foreseeable the plaintiff, so the reasoning goes, the greater the reason to hold the defendant liable. Although the inquiry is identical, however, the context in which it is decided is important—plaintiff-foreseeability in the context of duty is decided by the judge; it is the jury that decides plaintiff-foreseeability as a matter of proximate cause. And courts cannot seem to agree on which is the proper place.[95] Indeed, courts within the same jurisdiction, and even

87. *Id.* at 99.

88. *Id.* at 100.

89. *Id.* at 99-101.

90. *Id.* at 102 (Andrews, J., dissenting).

91. *Id.* at 103 (Andrews, J., dissenting).

92. *Id.* at 105 (Andrews, J., dissenting).

93. *See supra* note 54 and accompanying text.

94. *See* Goldberg & Zipursky, *supra* note 69, at 1818-19 (noting as much in the context of a discussion of the *Palsgraf* and *MacPherson* cases).

95. *Compare* Lynden v. Walker, 30 P.3d 609, 615-16 (Alaska 2001) (analyzing plaintiff-foreseeability in context of duty when plaintiff suffered injury unloading pipes from truck that was negligently loaded by defendant warehouse operator); Fawley v. Martin's Supermarkets,

the very same court, often come down on different sides of this question in different cases.[96] Moreover, plaintiff-foreseeability frequently makes a dual appearance, influencing both duty and proximate cause analyses.[97]

Courts not only differ on whether plaintiff-foreseeability properly informs duty or proximate cause, they also disagree as to the scope of plaintiff-foreseeability to be considered. For some courts, plaintiff-foreseeability is a matter of categorical scope, a means of delineating broad duties owed by one class of persons to another. Here, the test for plaintiff-foreseeability is whether the class of persons of which plaintiff is a member was foreseeable to the class of

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Inc., 618 N.E.2d 10, 12 (Ind. Ct. App. 1993) (same when plaintiffs sued supermarket for negligent failure to protect them from drunk driver outside defendant's business); Fiala v. Rains, 519 N.W.2d 386, 388 (Iowa 1994) (same when plaintiff sued defendant for injuries suffered from beating administered by defendant's boyfriend in defendant's apartment); Valentine v. On Target, Inc., 727 A.2d 947, 949-50 (Md. 1999) (same when plaintiff sued defendant gun dealer for murder of plaintiff's decedent, committed by third party with gun stolen from defendant's store); Mellon Mortgage Co. v. Holder, 5 S.W.3d 654, 655 (Tex. 1999) (same in suit for damages when plaintiff was pulled over by police officer, ordered to drive several blocks to defendant's parking garage, then sexually assaulted by officer in parking garage); Rikstad v. Holmberg, 456 P.2d 355, 358 (Wash. 1969) ("Foreseeability is . . . more appropriately attached to the issues of whether defendant owed plaintiff a duty, and, if so, whether the duty imposed by the risk embraces that conduct which resulted in injury to plaintiff."), *with* Wintersteen v. Nat. Cooperage & Woodenware Co., 197 N.E. 578, 582 (Ill. 1935) ("It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act. . . . [T]his duty . . . . extends to remote and unknown parties."); Alvarado v. Sersch, 662 N.W.2d 350, 353 (Wis. 2003) ("Wisconsin has long followed the minority view of duty set forth in the dissent of Palsgraf v. Long Island Railroad. . . . '[E]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.' ") (citation omitted) (quoting Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)).

96. *Compare* Bryant v. Glastetter, 38 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1995) (analyzing plaintiff-foreseeability in context of duty when decedent, a tow truck driver, was killed by a third party while impounding defendant's vehicle after his arrest for drunk driving), *with* Schrimsher v. Bryson, 130 Cal. Rptr. 125, 127-28 (Cal. Ct. App. 1976) (analyzing foreseeability in context of proximate cause in suit for damages when plaintiff, a police officer, was hit by a drunk third party while arresting defendant for drunk driving). *See generally* Bobby M. Harges, *The Rebirth of Proximate Cause in Louisiana: A Call for the Return to Duty Risk Analysis*, 39 LOY. L. REV. 769 (1994) (discussing the modest resurgence in Andrews-like proximate cause analysis in Louisiana negligence cases).

97. *See, e.g.*, Mussivand v. David, 544 N.E.2d 265, 270 (Ohio 1989) (discussed *infra* notes 103-105 and accompanying text); Griesenbeck v. Walker, 488 A.2d 1038, 1041-45 (N.J. Super Ct. App. Div. 1985) (analyzing duty to plaintiff and proximate cause in terms of foreseeability when defendant-social hosts served alcohol to visibly intoxicated daughter, who then drove home and caused a fire in her home, killing herself, her husband, and her son, and injuring her plaintiff-daughter); Matthews v. Cumberland & Allegheny Gas Co., 77 S.E.2d 180, 188-90 (W.Va. 1953) (same in context of injured plaintiff-bystander who, when watching workers fix gas line, was startled by line breaking and ran blindly into highway, where he was hit by an oncoming car).

persons of which defendant is a member.[98] In negligence claims for physical injury, this form of plaintiff-foreseeability often, although not always, appears in courts' consideration of affirmative duties. For example, in *Tarasoff v. Regents of the University of California*,[99] the California Supreme Court imposed on the defendant psychologist a duty to warn the plaintiff's decedent Tatiana Tarasoff, a nonpatient, of a risk of physical harm posed by one of the psychologist's patients.[100] The court's duty analysis did not turn on the particular facts of the *Tarasoff* case. Rather, the court imposed a duty, at least in part, due to the special ability of psychologists as a class to foresee danger posed by patients to third parties.[101] Thus, the court did not simply impose a duty on the particular defendant in *Tarasoff* to the particular plaintiff. It created a broad category of duty, to be imposed on all psychologists (or perhaps, mental health workers) to all foreseeable nonpatients at risk of imminent attack by a patient.[102]

Other courts feel free to examine plaintiff-foreseeability in a less categorical, more fact-specific light. For example, in *Mussivand v. David*,[103] the Supreme Court of Ohio considered whether an adulterer owed a duty to the spouse of his adulteress not to transmit to him a sexually transmitted disease. Although foreseeability figured prominently in the *Mussivand* court's duty analysis, the court did not

98. Goldberg & Zipursky, *supra* note 69, at 1818-20, 1828 (explaining that duty is a relational concept, an inquiry that must focus on whether the defendant class owes a duty to the plaintiff class to act in accordance with a certain standard of care).

99. 551 P.2d 334 (Cal. 1976).

100. *Id.* at 340.

101. Although the court stated that it was not necessary to "decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct," *id.* at 343, the court's analysis of the special relationship between psychologist and patient turned in part on the fact that psychologists are uniquely privy to knowledge of dangers posed by their clients. Zipursky, *supra* note 16, at 157-58.

102. Although the primary focus of this Article is the role of foreseeability in negligence cases for physical injury, it should be noted that foreseeability of classes of plaintiffs also figures significantly in the determination of duties not to cause emotional and economic injuries. *See, e.g.*, Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282, 1285-86 (Me. 1987) (explaining that "the exceptional vulnerability of the family of recent decedents makes it highly probable that emotional distress will result from [negligently sending an amputated leg to decedent's son with other of decedent's items]"); Dunphy v. Gregor, 642 A.2d 372, 377 (N.J. 1994) ("One can reasonably foresee that people who enjoy an intimate familial relationship with one another will be especially vulnerable to emotional injury resulting from a tragedy befalling one of them."); Citizens State Bank v. Timm, Schmidt & Co., 335 N.W.2d 361, 366 (Wis. 1983) (explaining that, in a suit for economic harm, "[i]t is enough [to permit liability] that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.").

103. 544 N.E.2d 265 (Ohio 1989).

speak in terms of a generalized, class-based foreseeability. Instead, the court imposed a duty of due care in light of specific foreseeability-related facts: 1) the defendant's knowledge that his paramour was married, 2) the defendant's ability to foresee that his paramour would have intercourse with her husband, 3) the paramour's lack of knowledge or reason to know that she or the defendant had been exposed to a venereal disease, and 4) the defendant's awareness, as a doctor, of the likelihood of transmission of the venereal disease.[104] The court's holding was therefore limited to imposing on that particular defendant a duty to guard that particular plaintiff against harm. In fact, the court was careful to reserve decision as to whether the defendant, "subsequent to his affair with appellee's wife, will be liable to any and all persons with whom she may have sexual contact."[105]

Whether plaintiff-foreseeability (either class-based or particular) is best determined by the judge (in the context of duty) or the jury (in the context of proximate cause) is a matter left to discussion in Part III below.[106]

b. Foreseeability of Harm

Courts also frequently consider, in the context of duty, the foreseeability of the type of harm or the manner in which harm occurred—a practice which, as illustrated by *Wagon Mound*, is redundant with parallel considerations in the context of proximate cause.[107] In *Bryant v. Glastetter*,[108] for example, the California Court of Appeal considered a claim by the surviving family of a tow truck driver who was struck and killed by a third party as he attempted to remove the defendant's car from the side of a freeway.[109] The police had impounded the car upon the defendant's arrest for drunk driving. The question before the court was whether the defendant owed a duty to the decedent.[110] According to the court, the defendant clearly had a duty not to drive drunk.[111] In declining to impose a duty in this particular case, however, the court focused both on unforeseeability of

104. *Mussivand*, 544 N.E.2d at 272.
105. *Id.* at 273.
106. *See infra* notes 293-305 and accompanying text.
107. *See supra* notes 46-54 and accompanying text.
108. 32 Cal. App. 4th 770, 774 (Cal. Ct. App. 1995).
109. *Id.* at 774.
110. *Id.* at 776.
111. *Id.* at 777.

the plaintiff[112] and on the fact that "[t]he harm suffered by decedent . . . was not a 'harm of a kind normally to be expected' as a consequence of negligent driving."[113] In other words, although the defendant's conduct clearly created some risk of harm and was therefore unreasonable, the type or manner of the harm that actually occurred (being struck by a third party while removing the defendant's impounded vehicle) was not foreseeable. For this reason, the court determined that the defendant owed no duty to avoid causing such injury.[114]

Courts also sometimes consider under the auspices of duty the foreseeable likelihood and severity of potential harm, or "foreseeable risk."[115] Where injury was not a sufficiently likely consequence of the defendant's conduct, or where the severity of foreseeable injury was not particularly great, the judge will dismiss the case on grounds that the defendant did not owe a duty of care.[116] The converse is also true,

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112. For a discussion of this aspect of the court's opinion, see *infra* notes 195-199 and accompanying text.

113. *Bryant*, 32 Cal. App. 4th at 779.

114. *Id.*; *see also, e.g.*, Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 588-89 (Cal. 1997) (asking as a question of duty—in the context of a claim by a student molested by a vice-principal who was recommended for the job by defendant, despite knowledge of prior charges of sexual misconduct—whether "defendants reasonably [could] have foreseen that the representations and omissions in their reference letters would result in physical injury to someone").

115. *See, e.g.*, Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1006 (N.H. 2003) (citations omitted):

> All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm. Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law . . . .

Brennen v. City of Eugene, 591 P.2d 719, 723 (Or. 1979) (en banc) (stating that a defendant owes a duty where the defendant "creat[ed] a foreseeable risk of harm to others."); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990) (citing El Chicho Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987)):

> In determining whether a defendant was under a duty, the court will consider several interrelated factors, including risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant . . . [and] of all these factors foreseeability of risk is the "foremost and dominant consideration."

See also Galligan, *supra* note 3, at 1511 (noting that some courts hold that "a person has a duty to protect another whenever the risk to the other was sufficiently foreseeable that a person of ordinary prudence would exercise ordinary care to avoid that risk").

116. *See, e.g.*, Albert v. Hsu, 602 So. 2d 895, 898 (Ala. 1992) (holding that defendant restaurant owner did not owe a duty to restaurant patron to protect patron from the unforeseeable event of a car backing across a parking lot, over a curb, and through the wall of the restaurant); Washington v. City of Chicago, 720 N.E.2d 1030, 1033-34 (Ill. 1999) (holding that where plaintiff was struck by a truck which, deciding to skirt traffic, drove onto the shoulder

as is illustrated by Judge Pollock's decision in *Snyder v. American Ass'n of Blood Banks*.[117] The plaintiff in *Snyder* contracted HIV from a transfusion of contaminated blood provided by a member hospital of the defendant American Association of Blood Banks ("AABB"). On appeal from a jury verdict in favor of the plaintiff, the primary issue before the Supreme Court of New Jersey was whether the AABB owed the plaintiff a duty of reasonable care. The court focused much of its duty analysis on the "foreseeability of injury to others . . . . [and] the nature of the risk posed by the defendant's conduct"—and specifically on "the severity and foreseeability of the risk that blood transfusions could spread the AIDS virus."[118] Finding the possibility that patients might contract AIDS via contaminated transfusions to be foreseeable, and finding the severity of harm caused by AIDS to be dire, the court held that the AABB owed a duty to use reasonable precautions to avoid causing such infections.[119]

This use of foreseeable risk as a basis for deciding whether to impose a duty has been roundly criticized for its usurpation of the jury's role in deciding breach.[120] Further discussion of this point appears in Parts III.B and IV.B below.

c. Public Policy under the Guise of Foreseeability

At its core, duty—the imposition upon a class of actors of an obligation of certain conduct—inescapably involves matters of policy.[121] Just as a legislature must consider the far-reaching effects on the market when deciding whether to impose criminal liability for

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and struck a median and planter box installed by defendant city, city had no duty because "the accident . . . was not a reasonably foreseeable consequence of the condition of the median").

117. 676 A.2d 1036 (N.J. 1996).

118. *Snyder*, 676 A.2d at 1048.

119. *Id.* at 1048-49.

120. *See, e.g.*, TENTATIVE DRAFT NO. 2, *supra* note 4, § 7, cmt. i (stating that in some cases, "courts improperly use no-duty determinations when they substitute their own evaluation of the competing risks and burdens in a specific case for that of the factfinder, as long as reasonable minds can differ"); DOBBS, *supra* note 11, § 227, at 580:

> Possibly some courts are really using the no-duty locution as a convenient but misleading way to decide the *breach* of duty issue . . . . deciding issues about costs, benefits, and foreseeability that are normally jury questions. Worse, they might be deciding those cases without the benefit of appropriate evidence about the costs and benefits.

See also, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 713 (2001):

> As many before us have pointed out, . . . courts, both knowingly and unwittingly, sometimes decide what are surely breach questions under the guise of deciding the question of 'duty' . . . thus surreptitiously shrink[ing] the scope of the rule stating that the breach issue ordinarily is for the jury.

121. *See supra* notes 76-80 and accompanying text.

securities fraud, a court must consider the same when deciding whether to impose a parallel civil tort duty. And just as a legislature should take into account the effect on insurance premiums of a proposed expansion of common-law malpractice liability, so might a court. A court is not a legislature, however, and concerns of institutional competence and legitimacy loom large. Many courts feel squeamish about deciding tort cases on the basis of reasoning that arguably is proper only for the legislative branch. For this reason, courts deciding negligence cases only reluctantly speak in terms of public policy and instead often cloak policy-based reasoning in doctrinal-sounding language. One favorite tool to this end is that seemingly ubiquitous and ever-malleable concept, foreseeability.[122]

Suits alleging "social host liability"—claims by a guest or third party harmed as a result of the guest's consumption of alcohol provided by a social host—serve as context for this use of foreseeability. According to some courts, a social host case presents the quintessential affirmative duty scenario. The issue for these courts is whether the social host had an affirmative obligation to prevent an inebriated guest from drinking excessively or from engaging in dangerous conduct while drunk—usually driving or assaulting another guest.[123] In other courts, social host cases do not implicate affirmative duties, but require application of the general duty not to cause others harm.[124] The duty question in these courts is whether to refrain from imposing a duty despite the fact that by serving alcohol to guests, the social host creates a risk of harm.

With regard to either conception of the duty issue raised by social host cases, the deciding factor for most courts is whether a guest's intoxication and subsequent risk-laden conduct was foreseeable to a reasonable person in the social host's position. In *Langle v. Kurkul*,[125] for example, the Supreme Court of Vermont considered whether to impose on a social host a duty of reasonable care in serving alcohol to a guest who was later injured while driving

122. *See* Kelley, *supra* note 2, at 1045 ("When judges refuse to recognize a duty in the teeth of foreseeable harm to others, they are making an exception, on public policy grounds, to the broad duty to avoid conduct threatening foreseeable harm to others.") (citing THE COMMON LAW, *supra* note 21, at 91-103).

123. *See, e.g.*, Gilger v. Hernandez, 997 P.2d 305, 310-312 (Utah 2000) (considering whether the social host-guest relationship gives rise to a special relationship that imposes on the social host an affirmative duty either to control or protect her guests).

124. *See, e.g.*, McGuiggan v. New England Tel. & Tel. Co., 496 N.E.2d 141, 142 (Mass. 1986) ("Under traditional common law tort analysis, our inquiry is whether a social host violated a duty to an injured third person by serving an alcoholic beverage to a guest . . . . whether the social host unreasonably created a risk of injury . . . .").

125. 510 A.2d 1301 (Vt. 1986).

home.[126] The court held that "a social host has a duty of care only in situations in which the host furnishes alcoholic beverages to someone visibly intoxicated and 'it is foreseeable to the host that the guest will thereafter drive an automobile . . . .' "[127] Thus, the court's imposition of a duty turned on the foreseeability of the plaintiff's drunk driving.

The imposition of any duty on social hosts is rare, however.[128] Most courts that address the issue as a matter of common law have held that social hosts owe no duty at all to an intoxicated guest or to third parties injured by such a guest, either because 1) social hosts as a class cannot foresee how much alcohol a guest will consume and cannot know when a guest has become intoxicated, 2) a host cannot foresee or control an intoxicated guest's conduct, or 3) it is the guest who is most able to avoid injuries resulting from the guest's intoxication.[129]

Courts' reliance on foreseeability when deciding a social host's duty, however, is at best misguided and perhaps even disingenuous. By deciding as a question of duty that the risks of serving alcohol are not foreseeable and that a social host is unable to reduce those risks in any event, courts in essence hold that the conduct of social hosts is reasonable as a matter of law. In other words, such courts do not really decide duty, but rather breach.[130] And to the extent that courts decline to impose a duty because it is the guest who is primarily responsible for creating the risks inherent in the excess consumption of alcohol, such courts thereby adjudge proximate cause as a matter of law, not duty.[131]

Hence, the obvious question: why do courts in social host cases decide foreseeability under the guise of duty when what they are

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126. *Langle*, 510 A.2d at 1301.

127. *Id.* at 1306.

128. *See* FRANKLIN & RABIN, *supra* note 43, at 189 ("In the very few states in which courts have found a duty on the part of a social host to a person hurt by the drinker, the legislatures have quickly reinstated either complete immunity . . . or granted the social host very strong protection . . . .").

129. *E.g.* Graff v. Beard, 858 S.W.2d 918, 921-23 (Tex. 1993).

130. *See infra* notes 175-180 and accompanying text (expounding upon this point in the context of *Graff v. Beard*).

131. *See, e.g.*, Gabelsberger v. J.H., No. WD 63222, 2004 WL 832865, at *4 (Mo. Ct. App. Apr. 20, 2004) ("Under the common law, the consumption of alcohol by Defendant J.H. and his voluntary intoxication was the proximate cause of Leslie's death, not the furnishing of the alcoholic beverages to Defendant J.H. by Mr. Peters."); Klein v. Raysinger, 470 A.2d 507, 510 (Pa. 1983) (holding that it was the guest's consumption of alcohol, not the defendant's furnishing of it, that proximately caused the relevant injury). It might also be argued that the court is in fact imposing a form of contributory negligence in such cases—that the plaintiff's own negligence precludes recovery. Still, such an argument would not account for cases in which the plaintiff is not the intoxicated guest, but an innocent third party.

really doing is deciding breach or proximate cause as a matter of law? One possibility is that courts are confusing these three elements of the negligence action. As this Article has shown, such is often the case. And yet the overwhelming consistency with which courts dismiss social host cases seems to indicate a more principled explanation.

Another possibility is that courts feel strongly that social host liability cases ought to be dismissed upon motion for summary judgment, but find it difficult to do so pursuant to the "no reasonable jury" standard. It seems unlikely, for example, that a court could bring itself to rule as a matter of law that a host acted reasonably in serving alcohol to an obviously intoxicated guest whom the host knew would drive home from the party.[132] Folding breach and proximate cause questions into the duty inquiry is indeed a convenient way to avoid such deference. Again, however, the virtual singularity of voice with which courts denied social host liability leads one to question why courts are so reluctant to let such cases reach a jury.

The answer lies in considerations more fundamental than foreseeability and more categorical than risk or proximate cause—considerations of broad public policy.[133] The Supreme Court of New Jersey's decision in *Kelly v. Gwinnell*[134] is instructive. The issue in *Kelly* was whether to impose a duty of reasonable care on a social host who served alcohol to a guest despite knowledge that the guest was intoxicated and that the guest planned to drive home.[135] In breaking ranks with nearly every jurisdiction to consider the issue to date, the court imposed such a duty and in doing so recognized that determination of the question necessitated a choice between competing social values:

> We impose this duty on the host to the third party because we believe that the policy considerations served by its imposition far outweigh those asserted in opposition. While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of

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132. *But see* Clendening v. Shipton, 196 Cal. Rptr. 654, 658 (Cal. App. 1983):

> Although foreseeability is most often a question of fact for the jury, when there is no room for a reasonable difference of opinion, it may be decided as a question of law. . . . The question thus presented as to tbe general negligence cause of action is relatively simple: Is there room for a reasonable difference of opinion as to whether the risk a person served alcoholic beverages by a social host who attains some degree of intoxication may assault and injure a third party?

133. *See* Linda E. Fisher, *Alcohol, Tobacco, and Firearms: Autonomy, the Common Good, and the Courts*, 18 YALE L. & POL'Y REV. 351, 370-73 (2000) (discussing opposing policy interests in social host cases).

134. 476 A.2d 1219 (N.J. 1984).

135. *Kelly*, 476 A.2d at 1221-22.

> just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values.[136]

Many more courts, however, are hesitant to admit to making what some might argue is a choice more appropriate for the legislative branch. Indeed, some courts faced with allegations of social host liability expressly defer to the legislature.[137] More often, however, and as illustrated above, courts simply fall back on discussion of that staple ticket to judicial free-reign, foreseeability.

Courts' use of foreseeability in this way is not limited to cases involving social host liability. In cases involving sports-related injuries, for example, courts often dismiss a plaintiff's negligence claim by reference to foreseeability, whereas courts likely disfavor such claims because they "might well stifle the rewards of athletic competition."[138] Similarly, courts rely on foreseeability as a convenient proxy for difficult policy decisions in the context of claims for emotional distress[139] and allegations that a commercial landowner failed to protect its patrons from third-party crime.[140]

It is less important to discern courts' reasons for skirting the policy decisions inherent in certain types of negligence cases than merely to recognize that they do, and perhaps to consider why foreseeability serves as such an attractive alternative. Foreseeability provides ready shelter in such cases for several reasons. Because of foreseeability's alignment with duty, it may be utilized without deference to the jury. Furthermore, foreseeability provides some

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136. *Id.* at 1224.

137. *E.g.*, Dowell v. Gracewood Fruit Co., 559 So.2d 217, 218 (Fla. 1990); Boutwell v. Sullivan, 469 So. 2d 526, 529 (Miss. 1985); Manning v. Andy, 310 A.2d 75, 76 (Pa. 1973).

138. Thompson v. McNeill, 559 N.E.2d 705, 707 (Ohio 1990) (involving claim by a golfer who had been struck in the head by an errant ball); *see also* Zurla v. Hydel, 681 N.E.2d 148, 149-52 (Ill. 1997) (discussing similar policy reasons in the context of hockey injury case). For cases in which courts resolve similar cases by reference to foreseeability, see Hathaway v. Tascosa Country Club, Inc., 846 S.W.2d 614, 617 (Tex. App. 1993) (holding that because risk of getting hit with a golf ball is foreseeable, plaintiff may only recover pursuant to proof that defendant acted recklessly or intentionally). The brand of foreseeability cited in such cases is, perhaps, yet another distinct incarnation of the doctrine—foreseeability of injury from the plaintiff's perspective, rather than that of the defendant. Some jurisdictions treat such questions as not involving duty at all, but as requiring application of the arguably parallel doctrine of "assumption of the risk." *See* FRANKLIN & RABIN, *supra* note 43, at 469 (citing Murphy v. Steeplechase Amusement Co., 166 N.E. 173 (N.Y. 1929)).

139. *See, e.g.*, Gammon v. Osteopathic Hosp. of Me., 534 A.2d 1282, 1284-85 (Me. 1987) (using foreseeability as a proxy for a line drawn between the plaintiff's interest in recovering for emotional injury, on the one hand, and the concern for administrative difficulties in proving and measuring emotional injuries and the fear of a potential flood of litigation based on trivial claims, on the other).

140. *See, e.g.*, Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 766-68 (La. 1999) (citing several approaches to such cases—all involving some form of foreseeability—as a convenient way to balance landowners' rights and the interests of their patrons).

measure of doctrinal legitimacy while remaining extraordinarily flexible in the hands of a capable judge. Finally, foreseeability involves the relationship between the plaintiff and defendant, and between those parties and the circumstances underlying the plaintiff's claim—considerations squarely within a court's traditional power to decide the case or controversy before it. Thus, foreseeability feels safer than naked, legislative-like policy decisions.

Still, no matter how attractive foreseeability may be, to the extent that it masks—or at the very least, distracts from—courts' resolution of important policy concerns, it in fact endangers courts' legitimacy, rather than protects it—a matter addressed more fully in Part IV.A below.

III. EFFECTS OF THE PROPOSED RESTATEMENT ON NEGLIGENCE DOCTRINE

A. The Proposed Section 7 General Duty Standard

As explained above, courts have for some time recognized the general principle that one owes a duty to avoid unreasonably creating a risk of physical harm to others.[141] Indeed, in many cases involving conduct that caused physical injury, courts find little reason even to discuss duty—a duty of reasonable care is presumed.[142] This general principle of duty is not, however, accurately described as a rule of law. Rather, it exists as a kind of default inclination from which courts freely depart in light of any impetus not to hold a particular defendant liable under the circumstances.[143] Perhaps for this reason, the Restatement (Second) of Torts declined to include a black letter statement of this general duty.[144] Instead, the Restatement Second defined the duty inquiry in much narrower terms, as whether the defendant invaded a "protected interest" of the plaintiff.[145]

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141. *See supra* note 57.

142. *E.g.*, Hamilton v. Accu-Tek, 62 F. Supp. 2d 802, 818 (E.D.N.Y. 1999) ("In the usual run of cases, a general duty to avoid negligence is assumed, and there is no need for the court to undertake detailed analysis of precedent and policy."); TENTATIVE DRAFT NO. 2, *supra* note 4, § 6, cmt. f ("[I]n cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty.").

143. See *infra* Parts II.B, C, D, and E for examples.

144. The Restatement Second's Comments and Reporter's Notes did, however, recognize the principle of the general duty of care. *See* RESTATEMENT SECOND, *supra* note 19, § 4, cmt. b ("[T]he actor, if he acts at all, must exercise reasonable care to make his acts safe for others."); *id.* topic 4 (Scope Note) ("[N]ormally, when there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act.").

145. *Id.* § 281.

The initial drafts of the proposed Restatement Third also did not include an affirmative statement of the duty not to cause physical harm to another, but for a very different reason. The initial drafts proposed an account of negligence absent the element of duty altogether.[146] Discussion Draft No. 2, for example, described the *prima facie* case as follows: "An actor is subject to liability for negligent conduct that is a legal cause of physical harm."[147] Indeed, the section of that initial draft labeled "Duty" read only in the negative:

> Even if the defendant's negligent conduct is the legal cause of the plaintiff's physical harm, the [defendant] is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff. Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.[148]

As some critics have noted, duty stated as such merely "refers to the failure of a defendant who is already presumed or found to have committed the tort of negligence to obtain a judicial exemption from the liability that a negligent actor ordinarily incurs."[149]

The proposed effect of the early drafts was clear. Negligence cases involving physical injury were not to be decided by judges, except in the face of "special problems of principle or policy" or where no reasonable jury could find otherwise. Notwithstanding the potential merits of such a proposal, the initial drafts' abrogation of duty sparked strong criticism and was ultimately abandoned (or at least repackaged), likely because it offered a flawed positive account of negligence law.[150] Contrary to what the drafts proposed, virtually all courts do give content to duty as a *prima facie* element of negligence, and most courts reserve a substantial role for the judge in deciding negligence cases.[151]

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146. The initial drafting process of the proposed Restatement Tbird was taken up by Harvey Perlman and Gary Schwartz, each of whom drafted substantially overlapping provisions. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES §§ 2A, 9A, 3, 6, 18-23, and 101-05 (Discussion Draft No. 2, 2000) [hereinafter DISCUSSION DRAFT NO. 2] (drafted by Schwartz); RESTATEMENT THIRD OF TORTS: GENERAL PRINCIPLES (Preliminary Draft No. 2, 2000) (drafted by Perlman).

147. DISCUSSION DRAFT NO. 2, *supra* note 146, § 3; *see also id.* § 101 ("An actor has a legal obligation, in the conduct of tbe actor's own affairs, to act reasonably to avoid causing legally cognizable harm to another.").

148. *Id.* § 6.

149. Goldberg & Zipursky,, *supra* note 120, at 658.

150. *See generally id.* (criticizing tbe early drafts for their failure to describe accurately negligence law and for their abandon of the necessary and useful concept of duty).

151. *See id.* at 736 ("The *Restatement (Third) of Torts: General Principles* has studiously avoided the concept of duty and the language expressing it. In doing so, it has disempowered itself from *restating* our actual law . . . .").

Section 7(a) of the current draft of the Restatement Third departs from both the initial drafts and from the Restatement Second by stating explicitly that "[a]n actor ordinarily has a duty to exercise reasonable care when that actor's conduct creates a risk of physical harm."[152] The inclusion of this affirmative account of duty apparently assuaged the concerns of many who dissented from the previous drafts, and a version of this language was approved preliminarily by vote of the ALI in May, 2002, thereby becoming official ALI policy.

On its face, the Section 7(a) standard is limited in two respects. First, Section 7(a) is limited to a consideration of "conduct," defined as "some affirmative act,"[153] as opposed to a failure to rescue, protect, or warn against danger created by another source.[154] The potential existence of a duty under the latter circumstances is covered by subsequent sections of the proposed Restatement.[155] Second, Section 7(a) is limited to cases involving physical harm to person or property. Negligence cases involving economic or psychic harm are to be governed by another set of Restatement provisions yet to be drafted.[156]

The crux of the Section 7(a) duty lies in the meaning of conduct that "creates a risk." Perhaps most telling is what is absent from this phrase. Section 7(a) does not state that a duty is owed where an actor's conduct creates a risk of harm "to the plaintiff." Nor does Section 7(a) impose a duty only where an actor creates a "foreseeable" risk. Indeed, Section 7(a) is not in any way conditioned on foreseeability.

Until a recent amendment, not yet approved by the full body of the ALI, the black letter "creates a risk" standard remained largely unelaborated (which perhaps explains why Section 7(a) gained the preliminary approval of the Institute). The most current draft Comment *a* to Section 7(a), however, now explains that "[w]hen the actor's conduct is a factual cause of physical harm, the actor's conduct necessarily 'created a risk' of harm."[157] Thus, taking Section 7(a) and

152. TENTATIVE DRAFT NO. 4, *supra* note 5, § 7(a).

153. *Id.* § 6, cmt. f.

154. Perhaps Justice Cardozo enunciated the distinction best as "whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898-99 (N.Y. 1928).

155. TENTATIVE DRAFT NO. 4, *supra* note 5, §§ 37-45.

156. TENTATIVE DRAFT NO. 2, *supra* note 4, introductory note. Although cases involving physical injury stemming from landowner liability and medical malpractice are also to be considered by separate, yet-unwritten portions of the Restatement Third, the issues discussed in this Article play out very similarly in such cases. Indeed, significant parallels may be made to emotional and economic injury cases as well.

157. TENTATIVE DRAFT NO. 4, *supra* note 5, § 7, cmt. a.

Comment *a* together, where a defendant's conduct caused the plaintiff physical harm, the defendant owed a duty to have acted reasonably in so doing.

At first blush, this standard for duty appears unobjectionable, perhaps even prosaic. As explained above, courts have long recognized the general principle that one must avoid causing physical injury to others. What is revolutionary (if subtly so) about Section 7(a) is that it restates this general principle as black letter law. The ALI thereby urges courts to embrace the Section 7(a) duty standard not merely as a default inclination, but as a substantive rule from which courts should depart only in exceptional circumstances. Indeed, Section 7(b) explicitly states as much:

> A court may determine that an actor has no duty or has a duty other than the ordinary duty of reasonable care. Determinations of no duty and modifications of the duty of reasonable care are exceptional. They are based on special problems of principle or policy that warrant denying liability, or modifying the ordinary duty of care, in a particular class of cases.[158]

The comments to Section 7 make abundantly clear that no-duty cases are narrow categorical exceptions to the general duty rule and that the Section 7(a) standard is to determine duty in the usual case.[159] This presumption is so strong, in fact, that Comment *b* to Section 7 places the burden on the defendant, rather than the plaintiff, to raise the possibility that an exception to the general duty is applicable in a particular case.[160]

The comments to Section 7 list the various circumstances in which a court might decide not to impose a duty notwithstanding the fact that the defendant's conduct caused the plaintiff's injury. The comments reflect many of the circumstances in which courts currently do so: for example, where imposing a duty would conflict with an established social norm,[161] or where the general duty would conflict

158. *Id.* § 7(b).

159. See *id.* § 6, cmt. a ("Except in unusual categories of cases in which courts have developed no-duty rules, an actor's duty to exercise reasonable care does not require attention from the court."); *id.* § 7, cmt. a ("In most cases, courts can rely directly on § 7 and need not refer to duty on a case-by-case basis. Nevertheless, in some categories of cases, reasons of principle or policy dictate that liability should not be imposed."). In the Reporters' Notes to Comment *a*, the Reporters cite *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 469 (2d Cir. 1995) (Calabresi, J.) (applying New York law), for the proposition that "judicial power to modify" the general duty rule "is reserved for very limited situations."

160. See TENTATIVE DRAFT NO. 2, *supra* note 4, § 7, cmt. b; *see also id.*, § 7 cmt. b (Reporter's Note) (citing Federal Rule of Civil Procedure Form 9 as evidence that federal courts do not require a plaintiff to plead duty where the plaintiff pleads that defendant's negligence caused physical harm).

161. *Id.* § 7, cmt. c.

with another body of law.[162] Notably absent from these comments is an exception to the Section 7(a) duty for lack of foreseeability.

Should courts take Section 7 seriously and impose a duty whenever a defendant "created a risk" of physical injury, courts will have adopted what is indeed an inclusive standard. This is especially true in light of Comment *a*'s instruction that a duty necessarily arises where the defendant was a cause in fact of the plaintiff's injury. Consider, for instance, application of Section 7(a) to the following hypothetical: A, an independent and responsible adult, receives a new car as a gift from his parents—a gift that he would not have been able to afford on his own. A later broadsides B's car at an intersection. B sues not only A, but also A's parents, who were out of the country at the time of the accident. Most courts today would dismiss B's suit against A's parents at the first opportunity, likely on the grounds that A's parents owed no applicable duty. A's parents were in no way responsible for their grown son's behavior. They had no reason to believe that A might drive dangerously and had nothing to do with the accident itself.

A court applying Section 7(a) of the proposed Restatement, however, would likely not dismiss B's suit for lack of duty. Absent some exceptional conflicting "problem of principle or policy," A's parents owed a duty pursuant to Section 7(a) because their conduct—giving the car to A—created a risk that A would crash into B's car. Similarly, in the language of Comment *a* to Section 7, A's parents owed a duty because their conduct was a factual cause of B's injury—but for A's parents' having given the car to A, B would not have been injured. A's parents therefore owed a duty of reasonable care.

B's suit against A's parents would, of course, be thrown out nevertheless, even by a court applying the proposed Restatement Third—not for lack of duty, however. The court would be forced to rule either 1) that A's parents owed no duty due to some "special problem of policy or principle" pursuant to Section 7(b); 2) that as a matter of law A's parents' conduct was not unreasonable, and therefore that they did not breach their duty; or 3) that as a matter of law the conduct of A's parents was not a proximate cause of B's injuries.

In light of this hypothetical, it might be argued that the "creates a risk" standard renders duty a nullity in most negligence cases. If duty is satisfied by mere factual causation, then duty is redundant as an element of negligence and the current draft of the proposed Restatement is no better than the initial drafts, which

162. *Id.* § 7, cmt. d.

contained no duty element at all. Such an argument misses the mark, however. Section 7(a) does not represent an abrogation of duty, but rather reflects a strong form of a duty that has been collectively derived by courts from the stuff of which duty is comprised—considerations of public policy and community norms of obligation. That is, courts have come to a collective decision that one owes a duty not to unreasonably cause physical harm to another. Thus, although adoption of Section 7(a) may mean that judges do less fundamental duty analysis in a particular case, it is not because Section 7(a) renders such analysis irrelevant. It is because the work has already been done. Judicial consideration of duty over the decades, and perhaps centuries, has culminated in the rule recognized by Section 7(a).

Still, as this Article seeks to demonstrate, the shift of the Section 7(a) duty from default inclination to presumptive rule will work a significant change in many courts' understanding and treatment of negligence doctrine. Section 7(a) is thus potentially subject to another of the criticisms of the Restatement's initial drafts—that it exceeds the ALI's mandate to simply restate the law. Three responses to such criticism seem apt. First, the shift in doctrine effected by Section 7(a) is not as jarring as that proposed by the initial drafts. Defining negligence without duty would have rendered incomprehensible significant bodies of settled negligence law, such as affirmative duties.[163] The ALI's current proposal, by contrast, only crystallizes into a black letter rule courts' existing understanding of the general structure of duty. Second, although Section 7(a) represents a significant shift in doctrinal emphasis, the change will have only a subtle effect on the substantive outcome of negligence cases—a point explored in Part IV below. Third, and most importantly, it is neither possible nor desirable for a Restatement merely to describe tort law. Negligence especially is a jumbled Diaspora, with courts endorsing a variety of approaches to almost every issue from proximate cause to apportionment of liability. The Restatement must make judgments not only about what courts do, but also about what works best.[164] Indeed, the very purpose of a

163. *See* Goldberg & Zipursky, *supra* note 120, at 678 (asserting that "there are two particular categories of these cases—'duty to warn' and 'duty not to increase the risk of plaintiff suffering harm by a third party tortfeasor'—that cannot be captured without using the concept of duty in its obligation sense").

164. *See,e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § B19, cmt. c (Reporter's Note) (explaining the Reporters' choice, among approaches taken by various jurisdictions, to allow a percentage of responsibility to be assigned to identified nonparties in several liability states); RESTATEMENT SECOND, *supra* note 19, introductory cmt., at ix (explaining that one of the purposes of a Restatement is to push courts toward a more effective

Restatement since its Langdellian-formalist origins[165] is to bring clarity to the law, not simply to reflect it, and to strengthen the rule of law by nudging courts toward greater consistency and uniformity.[166]

If ever there were need for greater clarity and consistency, it is in the context of duty, and particularly duty's relationship with foreseeability. The Comments and Reporters' Notes to Sections 6 and 7 of the proposed Restatement, however, say little about foreseeability, with two significant exceptions to be discussed in Parts III.C and D below. And yet the most significant doctrinal impact of Section 7 is its implicit effect on duty and foreseeability. Should courts apply Section 7 at its face value, duty will largely be purged of the morass that is foreseeability. Section 7 accomplishes this task in four ways: 1) it forces judges to consider foreseeability of harm

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system of law); Kelley, *supra* note 2, at 1055 (arguing that "a methodology that accepts as equally valid and equally relevant all judicial decisions on the topic. . . precludes a single, clear statement of the law . . . [and] provides no basis for determining that some cases are right, or better-reasoned than other cases"); Victor E. Schwartz, *Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 745 (1998) [hereinafter Schwartz, *Products Liability*] (explaining that the Restatement (Second) of Torts "was shaped more by the Reporters' and advisory committee's evaluation of the wisdom of competing case law than a presumption to follow 'clear majority' rules"). See also Reporter Gary Schwartz's words on this topic:

> The entire project of undertaking a Restatement is based on the perception that there is some significant amount of confusion out there in the cases . . . . it is only because of the recognition of confusion that the sense emerges that a new *Restatement* might be helpful to the legal community. Given all of this, it is the job of Restatement reporters essentially to immerse themselves in the case law and then come up with some sort of structure that makes sense. . . . In this regard, the ground rules that the American Law Institute provides could not be clearer. Under those ground rules, it is entirely within the province of reporters, having identified what may be only a minority rule, to endorse that rule as the Restatement position—if they in fact conclude that it is the better rule.

Gary Schwartz, *Part II. Traditional Restatement or Harbinger of Policy Changes?: The Nature of the New* Restatement, 8 KAN. J.L. & PUB. POL'Y 43, 43-44 (1998).

165. *See* Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 14-15 (1999) (explaining that the ALI's Restatement projects emerged from the turn-of-the-century legal formalism associated with Dean Langdell of Harvard Law School).

166. *See, e.g.*, RESTATEMENT CONFLICT OF LAWS viii-ix (1934) (citing the purpose of the *Restatement* as "certainty and clarity"); Patricia M. Monaghan, Case Comment, *Trends in New Mexico Law: 1994-95: Tort Law—Supreme Court Permits Design Defect Claims in Both Strict Liability and Negligence:* Brooks v. Beech Aircraft Corp., 26 N.M. L. REV. 629, 639-40 (1996) ("The primary purpose of the Restatement (Third) of Torts is to bring greater certainty, consistency, and predictability into the law . . . ."); Harvey S. Perlman, *Part IV: Other Key Provisions: Section 3's Circumstantial Evidence Rule: Can It Cure the Defects in Section 2?*, 8 KAN. J.L. & PUB. POL'Y 99, 99 n.3 (1998) ("The reporters had an understandable desire to 'set straight' and clarify a body of judicial opinions [in products liability law] that they properly regarded as chaotic. The purpose of a Restatement, after all, is to bring some consistency and coherence to the reported cases . . . ."); Schwartz, *Products Liability*, *supra* note 164, at 743 ("The American Law Institute . . . was founded in 1923 to bring coherence, reason, and consistency to state judge-made law.").

pursuant to the "no reasonable jury" standard in light of the specific facts of the case, rather than more generally in the context of duty; 2) it draws a meaningful line for judges considering whether foreseeability of the plaintiff is an issue of duty or proximate cause; 3) it brings into the realm of the general duty not to harm others certain cases that commonly are decided—at least in part by reference to foreseeability—in the context of affirmative duties to warn, protect, or rescue; and 4) it encourages courts that make certain types of legislative-like policy exceptions to negligence liability to do so expressly, rather than by reference to foreseeability. The following Sections elaborate on each of these effects in turn.

Author's Note: During the editing of this Article, the Reporters of the ALI issued a new draft of the proposed Restatement Third, entitled Council Draft No. 5.[167] This new draft expressly "rejects reliance on unforeseeability by courts as a basis for determining that no duty exists,"[168] relying in large part on the reasoning expressed in this article.[169] The ALI preliminarily approved of this change (and others) during its May, 2005 annual meeting.

B. From "No Duty" to "No Breach as a Matter of Law"

The element of breach requires a jury to decide the defendant's blameworthiness—whether the defendant's conduct conformed to the duty owed.[170] Foreseeability of the risk created by a defendant's conduct—that is, the likelihood and severity of potential harm—is central to determining the reasonableness of that conduct, and therefore to deciding breach. As demonstrated in Part III.C.2.b above, however, courts frequently conflate the breach analysis with that of duty. Indeed, many courts have even enshrined this amalgamation of duty and breach in a general duty standard. In Kentucky, for example, "[t]he rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent *foreseeable*

167. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) (Council Draft No. 5, 2004) [hereinafter COUNCIL DRAFT NO. 5].

168. *Id.* § 7 cmt. h.

169. *See id.* § 7, cmt. h & cmt. h (Reporter's Notes) (explaining the reasons for the change and stating that: "This comment was not contained in the original version of this Section in Tentative Draft No. 1. However, an article written after Tentative Draft No. 1 makes an attractive case for removing the foreseeability of the risk from duty determinations. *See* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement of Torts*, __ VAND. L. REV. __ (forthcoming 2005).").

170. *See supra* notes 17-18 and accompanying text.

injury."[171] In other words, if the risk created by one's activities was not foreseeable, then the defendant owed no duty to act reasonably in creating that risk.[172] In other states, foreseeable risk is just one of several factors in determining duty, although it is often described as the most important factor.[173]

By contrast, Section 7(a) imposes a duty of reasonableness where the defendant created any risk, no matter how unforeseeable, unlikely, or innocuous. This point is particularly clear in light of Comment *a*'s explanation that if a defendant's conduct was a factual cause of the plaintiff's harm, the defendant necessarily created a risk.[174] Thus, even if it was completely unforeseeable that a defendant's conduct would result in injury, where the defendant's conduct did so the defendant had a duty of reasonable care. In short, risk-foreseeability plays no part in the Section 7(a) duty analysis.

Application of Section 7(a) to the facts of *Snyder v. American Ass'n of Blood Banks*, discussed above,[175] is illustrative. In *Snyder*, the court imposed a duty on the defendant AABB only after finding that the possibility that patients might contract HIV via contaminated transfusions was foreseeable and that the harm caused by AIDS is

171. Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987) (emphasis added); *see also, e.g.*, Remsburg v. Docusearch, Inc., 816 A.2d 1001, 1006 (N.H. 2003) ("Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law."); Zanine v. Gallagher, 497 A.2d 1332, 1334 (Pa. Super. Ct. 1985) (noting that "the general duty imposed on all persons not to place others at risk of harm through their actions . . . . is limited to those risks that are reasonably foreseeable"); A.E. Inv. Corp. v. Link Builders, Inc., 214 N.W.2d 764, 766 (Wis. 1974) ("A defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone.").

172. This approach holds some intuitive appeal and might indeed be differentiated from the risk-foreseeability inquiry that informs breach. It might be argued, for example, that foreseeability in the context of duty is merely an I/O switch—if some injury was foreseeable, then the defendant owed a duty of reasonable care; if not, then no duty. Risk-foreseeability in the context of breach, on the other hand, might be characterized as an inquiry not into whether injury was foreseeable, but rather into how foreseeable it was—the more foreseeable the injury, the more is required of the defendant to satisfy the reasonableness standard. Such an account is flawed, however, for two reasons. First, one might equally explain a court's finding that injury was completely unforeseeable as part of a determination that defendant's actions were reasonable as a matter of law. Second, an account of duty that encompasses foreseeability typically leads the court to decide a matter best left to the jury. *See infra* Part IV.B. Of course, a court might address this latter concern by directing the foreseeability determination to the jury. Unfortunately, courts do not often take such a course. In any event, leaving risk-foreseeability to the element of breach is a much cleaner solution.

173. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (listing "foreseeability of harm" as one of several factors to be considered in determining whether to impose a duty).

174. TENTATIVE DRAFT NO. 4, *supra* note 5, § 7 cmt. a.

175. *See supra* notes 117-119 and accompanying text.

severe.[176] Had the court approached the question of duty pursuant to Section 7(a), it would have focused only on whether the AABB's conduct created the risk of contaminated blood transfusion. (Indeed, the proposed Restatement implies that this aspect of the duty inquiry would not be for the court, but a question of fact for the jury.[177]) If it were found that the AABB's conduct contributed causally to Mr. Snyder's harm, or even created a risk of such harm, then the AABB owed a duty to have acted reasonably. Only at that point might risk-foreseeability become relevant, although not to the existence of a duty, but with regard to the jury's determination of breach. The court may, of course, decide that the risk the AABB created was foreseeable, and therefore unreasonable as a matter of law. Rather than reaching such a conclusion *carte blanche*, however, the court would have to hold that reasonable jurors could not differ in their judgment of the matter.

In *Snyder*, the use of Section 7(a) likely would not have changed the outcome of the court's duty analysis, only the method by which the court reached its conclusion. Section 7(a) will have a substantive effect on some duty determinations, however, as analysis of the Supreme Court of Texas's decision in *Graff v. Beard*[178] demonstrates. In *Graff*, the victim of a drunk driver sued the social host who served the driver alcohol.[179] In considering whether to impose a duty on the social host, the court noted that "[a]mong other factors, we consider the extent of the risk involved, 'the foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.'"[180] In weighing these factors, the court concluded that a social host does not owe a duty because (1) a social host cannot know when a guest has become intoxicated, (2) the intoxicated guest is in a better position to foresee the risk he poses, and (3) the burden on the social host of preventing the guest from driving once intoxicated is too great and fraught with uncertainties.[181]

Were the *Graff* case decided pursuant to Section 7(a) of the proposed Restatement, the court almost certainly would have held

176. Snyder v. Ass'n of Am. Blood Banks, 676 A.2d 1036, 1048-49 (N.J. 1996).

177. Although the proposed Restatement does not specify whether judge or jury is to determine whether the defendant "created a risk," § 7, Comment *b* states that "[w]hen resolution of disputed adjudicative facts bears on the existence of a duty, the case should be submitted to the jury with alternative instructions." TENTATIVE DRAFT NO. 2, *supra* note 4, § 7, cmt b.

178. 858 S.W.2d 918 (Tex. 1993).

179. *Id.* at 918.

180. *Id.* at 920 (quoting Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).

181. *Id.* at 921.

that the social host owed a duty. The host's conduct—serving alcohol to a guest who drove to the party—certainly created a risk of harm. And the host's conduct was a factual cause of the plaintiff's injury—but for the host's serving alcohol to the guest, the plaintiff would likely not have been injured. The defendant social host therefore owed a duty of reasonable care without regard to risk-foreseeability.

The court might yet feel that a social host should not be held liable, however, and it would have three options to rule thus. It might find as a matter of law that because the risks were not foreseeable or the burden of prevention too great, the defendant did not breach its duty. The court might also find as a matter of law that the guest's reckless behavior in driving drunk was a superseding cause, therefore destroying proximate cause.[182] Finally, as explained more fully in Part III.E below, the court might decline to impose a duty pursuant to Section 7(b), recognizing a "special problem of policy" in the public's interest in having social gatherings at which alcohol is served without fear of liability.[183] In none of these possible scenarios, however, would the court decide risk-foreseeability without proper deference to the jury's traditional function in deciding breach and proximate cause.

The proposed Restatement recognizes the impropriety of courts' analysis of risk-foreseeability as a matter of duty. As Comment *i* to Section 7 explains:

> Sometimes . . . . courts take the question of negligence [breach] away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes express this result in terms of duty. Here, the rubric of duty inaccurately conveys the impression that the court's decision is separate from and antecedent to the issue of negligence. In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and should not be treated as cases involving exemption from or modification of the ordinary duty of reasonable care.[184]

Comment *i* may fall short, however, of endorsing a complete separation of duty and breach. Even when reasonable minds might differ as to foreseeable risk and the burden of risk prevention, Comment *i* suggests that a court may decide the case under the rubric

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182. Such a result would be unlikely in view of the proximate cause, or "scope of liability" section of the proposed Restatement Third. Pursuant to § 29 of TENTATIVE DRAFT NO. 3, "[a]n actor is not liable for harm different from the harms whose risks made the actor's conduct tortious." Because a car crash is a harm whose risk made providing driving guests with alcohol unreasonable, the plaintiff's claim would satisfy proximate cause.

183. *See infra* notes 233-239 and accompanying text.

184. TENTATIVE DRAFT NO. 2, *supra* note 4, § 7 cmt. i; *see also id.* § 7 cmt. i (Reporters' Notes) (explaining that when what is meant is the application of the negligence standard to a particular factual situation, "this is a misuse that is unfortunately common in judicial opinions. The confusion that the terminology of duty frequently brings about provides another reason for recommending that this terminology be deployed only in those particular cases where the terminology has a distinct role to play.").

of duty when those factors are amenable to analysis "from the perspective of the entire categories of plaintiffs and defendants," and where such categorical analysis implicates a greater "overall social impact . . . on a class of actors."[185] This portion of Comment *i* is both unnecessary and ill-advised. It is unnecessary because the potential for an adverse "overall social impact" falls squarely within the province of Section 7(b)'s provision that a court may decline to impose a duty due to special problems of principle or policy. More importantly, the comment is ill-advised to the extent that it encourages courts to ignore the plain text of Section 7(a) and to reconsider duty in light of risk-foreseeability. As explained more fully in Part IV below, foreseeability is an especially fact-dependent inquiry, not susceptible to categorical analysis. An injury that is not foreseeable under one set of circumstances may be foreseeable under even a slightly different scenario.[186] Thus, the proper forum for judicial consideration of risk-foreseeability is in the context of breach, pursuant to the deferential "no reasonable jury" standard.

C. Resolution of the Palsgraf *Question*

Even where a defendant's conduct was unreasonable because injury of some kind was to some degree foreseeable, the defendant may yet escape liability if the conduct resulted in injury to an unforeseeable person. Some courts, following the lead of Justice Andrews's dissent in *Palsgraf*, leave plaintiff-foreseeability to the jury in the context of proximate cause.[187] Other courts, often citing Justice Cardozo's majority opinion in *Palsgraf*, instead consider plaintiff-foreseeability to be a question of duty—the more foreseeable the plaintiff, the greater the reason to impose a duty on defendant to guard against injuring that plaintiff.[188]

The disarray in negligence cases surrounding the so-called "*Palsgraf* question" is replete. Many courts seemingly analyze plaintiff-foreseeability as a matter of duty in one case and proximate cause in the next,[189] and even in the context of both duty and

185. *Id.* § 7 cmt. i.

186. *Compare* Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 69-70 (1927) (prescribing, in a case involving a plaintiff hit by a train at an unguarded railway crossing, a duty to get out of one's car and assess the possibility of approaching trains), *with* Pokora v. Wabash Ry., 292 U.S. 98, 102 (1934) (limiting *Goodman* to its facts due to plaintiff's correct contention that, in light of the circumstances of this case, getting out of his car may have actually increased the risk of being hit by an approaching train). This case is discussed at length *infra* Part IV.

187. *See supra* note 95.

188. *See supra* notes 93-95 and accompanying text.

189. *See supra* note 96 and accompanying text.

proximate cause in the same case.[190] Although a few torts scholars propose that the modern trend is toward resolution of plaintiff-foreseeability under proximate cause rather than duty,[191] the question is certainly ripe for restatement. The proposed Restatement explicitly addresses the issue and chooses proximate cause.

The Reporters' Notes to Section 29 (the section that defines "scope of liability," or proximate cause) state that under the proposed Restatement, "[plaintiff-foreseeability] is dealt with as a matter of scope of liability rather than duty . . . ."[192] One need not rely on the Reporters' Notes, however. The black letter text of Section 7(a) requires such a conclusion. Consider, for example, how application of Section 7(a) might have affected the court's duty analysis in *Mussivand v. David*,[193] discussed in Part II.C.2.b above. The issue before the *Mussivand* court was whether the defendant adulterer owed a duty to avoid causing a sexually transmitted disease to be passed to the spouse of his adulteress. The court imposed such a duty, but only upon finding that it was foreseeable that the adulteress might transmit the disease to her spouse.[194] Had the court utilized Section 7(a), it would have arrived at its conclusion without reference to foreseeability. The adulterer's conduct created a risk of harm and indeed caused the plaintiff's harm, whether the plaintiff was foreseeable or not. The court's discussion of the defendant's knowledge of his paramour's marriage and the foreseeability that she would have intercourse with her husband may well have had a place in the court's discussion of proximate cause (and would surely play a role in the jury's determination of breach); however, in light of Section 7(a), it would be superfluous to an analysis of duty.

The effects of Section 7(a) are set in even more dramatic relief by its application to the facts of *Bryant v. Glastetter*.[195] Recall[196] that *Bryant* involved a claim brought by the surviving family of a tow truck driver, who was struck and killed by a third party as he attempted to remove the defendant drunk driver's impounded car from the side of a

190. *See supra* note 97 and accompanying text.

191. *See, e.g.*, DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORT 186 (2d ed. 1998).

192. TENTATIVE DRAFT NO. 3, *supra* note 30, § 29 cmt. m (Reporters' Notes); *see also* TENTATIVE DRAFT NO. 2, *supra* note 4, § 6 cmt. f (Reporters' Notes) ("Modern scholars tend to classify the issue of the foreseeable plaintiff under the general holding of proximate cause, as does this Restatement in Chapter 6.").

193. 544 N.E.2d 265 (Ohio 1989).

194. *Mussivand*, 544 N.E.2d at 321.

195. 38 Cal. Rptr. 2d 4th 770 (Cal. Ct. App. 1995).

196. *See supra* notes 108-114 and accompanying text.

freeway.[197] Citing the importance to duty analysis of "the foreseeability of harm to the plaintiff" (and thus adopting a Cardozoan/relational approach to duty), the court declined to impose a duty, at least in part because the defendant could not have foreseen that her consumption of alcohol would result in harm to the decedent.[198] By driving drunk, however, the defendant created a risk of harm. Indeed, the court expressly found this risk.[199] The defendant's conduct was also a cause in fact of the tow truck driver's death. Thus, had the court applied Section 7(a) to these facts, it clearly would have imposed a duty on the defendant. Of course, the court may still have dismissed the plaintiff's case, even by reference to the concept of foreseeability. Such analysis, however, likely would have rested on a judgment that the plaintiff's claim failed proximate cause as a matter of law. In this way, Section 7(a) purges duty of plaintiff-foreseeability, pushing consideration of the concept into the realm of proximate cause.

Although the proposed Restatement does offer some explanation as to why courts should not analyze reasonableness under the context of duty, such explanation is lacking when it comes to plaintiff-foreseeability. The current draft merely states its intention that it be so. One might argue that if, pursuant to Section 7(a), we all owe a duty to the world not unreasonably to create a risk of injury to others, then perhaps there is nothing left to decide in the context of proximate cause regarding the foreseeability of a particular plaintiff. Perhaps the ALI means to endorse an utterly non-relational concept of duty.[200] Or perhaps the Reporters doubt the very existence of the concept of foreseeability of plaintiff. In fact, the Reporters' Notes do suggest that cases like *Palsgraf*, which purportedly turn on the foreseeability of the plaintiff, might also be characterized as involving the foreseeability of type or manner of harm.[201] Perhaps the most convincing reason for leaving plaintiff-foreseeability to proximate cause is that the inquiry is best left, as an initial matter, to the jury rather than the judge—a point explored at length in Part IV below.

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197. *Bryant*, 32 Cal. App. 4th at 292.

198. *Id.* at 294-96.

199. *Id.* at 295.

200. This explanation seems unlikely, especially in light of the proposed Restatement's treatment of certain affirmative duties. Indeed, even a "duty to the world," as expressed in Section 7 is relational—it is simply tied to a very large class of persons. Goldberg & Zipursky, *supra* note 69, at 1809, 1822-24.

201. *See* TENTATIVE DRAFT NO. 3, *supra* note 30, § 29, cmt. m (Reporters' Note) (suggesting that *Palsgraf* and similar cases do not necessarily turn on plaintiff-foreseeability but might just as easily be characterized as foreseeability of harm cases); *see also* William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941, 1949 (1991) (same).

Bryant v. Glastetter illustrates yet another way in which Section 7(a) cleanses duty of foreseeability. The *Bryant* court's duty reasoning moves readily between discussion of plaintiff-foreseeability and foreseeability of the type and manner of the plaintiff's harm, ultimately declining to impose a duty on both grounds.[202] The court declined to impose a duty because not only was it unforeseeable that the defendant's drunk driving would injure the plaintiff tow truck driver, but also because it was unforeseeable that defendant's drunk driving would cause another injury via collision with a third party while removing the defendant's impounded vehicle. If foreseeability of the type and manner of harm is conceptually distinct from plaintiff-foreseeability—and there is some question on the matter[203]—it is clear that implementation of Section 7(a) would have a similar effect on both analyses, pushing both squarely under the proximate cause umbrella. In *Bryant*, for example, the defendant owed a duty under Section 7(a) because her conduct created a risk of harm, regardless of the manner in which harm in fact occurred. Were the court to hold that the type or manner of the decedent's harm was not foreseeable, the court might dismiss the case on the ground that no reasonable jury could find that the defendant's conduct was a proximate cause of the decedent's injuries.

D. From Affirmative Duties to the General Duty of Reasonable Care

The two previous subsections suggest that the proposed Restatement Third's general duty provision shifts courts' analyses of foreseeability of harm and foreseeability of plaintiff from the construct of duty to that of breach and proximate cause. Subsections D and E, *infra*, focus on two related doctrinal shifts—shifts that will also have an important, if somewhat less direct, impact on the role of foreseeability in negligence cases. The first of these is the effect of Section 7(a) on cases involving affirmative duties.

As a counterpart to the general duty to avoid unreasonably creating a risk, defendants generally owe no duty to protect, warn, or

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202. *See supra* notes 111-114 and accompanying text.

203. As the proposed Restatement points out, the line dividing the two concepts is slippery, if not altogether illusory. *See* TENTATIVE DRAFT NO. 3, *supra* note 30, § 29, cmt. m (Reporters' Note) (noting that "the Palsgraf case could have been readily resolved without reference to the unforeseeability of the plaintiff: the harm that occurred—injury due to the concussive force of an explosion—was quite different from the risk that made the actor negligent—some breakage of the package's contents upon hitting the ground"). For a somewhat different view, see John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L.R. 1315, 1336-42 (2003) (offering an explanation for the difference based on tort law's general requirement of a "wronging of the plaintiff").

rescue another from risks created by another source.[204] For example, should Person A drive by the scene of a car accident in which Person B has been injured, Person A generally owes no duty to aid Person B and is free to drive past without rendering assistance. Courts recognize several narrow categories of exceptions to this rule, however. For example, if Person A were the coach of a high school tennis team on its way to a match and if Person B were one of those players, a court might impose on Person A a duty to rescue Person B due to their "special relationship."[205] Or where Person A non-negligently caused Person B's accident, a court will typically impose on Person A the duty to take reasonable steps to rescue Person B.[206]

The proposed Restatement Third does not challenge the continuing vitality of such rules; indeed, Chapter 7 expressly endorses commonly-recognized affirmative duties.[207] However, by elevating to black letter status the general duty to avoid creating a risk, the proposed Restatement narrows the applicability of affirmative duties, capturing a greater number of cases under the broad mandate of Section 7(a). It does so by drawing a clear line separating cases involving misfeasance, in which the general duty applies, from those involving nonfeasance, which require the imposition of an affirmative duty.

Take, for example, the case of *Harper v. Herman*.[208] The plaintiff, Mr. Harper, was one of several guests aboard the sailboat of the defendant, Mr. Herman. After some period of time sailing, the group collectively expressed a desire to swim. At the defendant's suggestion, they sailed to a popular swimming area where the water remained shallow for a substantial distance from shore. The defendant laid anchor at a place "shallow enough for his guests to use the boat ladder to enter the water, but still deep enough so they could swim."[209] While the defendant was lowering the ladder, the plaintiff asked the defendant if he was "going in."[210] When the defendant responded in the affirmative, the plaintiff dove without warning into what turned out to be shallow water, severing his spinal cord.

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204. RESTATEMENT SECOND, *supra* note 19, § 314; DOBBS, *supra* note 11, § 314, at 853. The proposed Restatement Third also endorses this general rule. TENTATIVE DRAFT NO. 4, *supra* note 5, §§ 37. ("Subject to §§ 39-45, an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other.").

205. *See* DOBBS, *supra* note 11, § 314, at 854 (describing duty to rescue generally).

206. *See id.* (describing duty arising from non-negligent creation of a continuing risk).

207. TENTATIVE DRAFT NO. 4, *supra* note 5, §§ 39-45.

208. 499 N.W.2d 472 (Minn. 1993).

209. *Harper*, 499 N.W.2d at 473.

210. *Id.* at 474.

The court determined that these facts gave rise to a claim of nonfeasance. Thus the issue considered by the court was whether the defendant, as a social host and experienced boater, owed the plaintiff an affirmative duty to warn him that the water was too shallow for diving.[211] After considering the relative power and expectations of the parties, the court ultimately concluded that the facts did not support a "special relationship" between the parties sufficient to give rise to an affirmative duty to warn.

Consider how the court might have decided *Harper* under the proposed Restatement. Although Section 41 of the proposed Restatement recognizes the possibility that an affirmative duty may arise from a special relationship,[212] the court need not have resorted to an affirmative duty analysis. By taking the plaintiff for a sail, suggesting a place for the group to swim, positioning the boat in shallow water, and subsequently affirming his personal intention to swim, the defendant created a risk of harm. The defendant's conduct was doubtless a factual cause of the plaintiff's injury. Thus, pursuant to the Section 7(a) general duty standard—and without regard to the Section 41 affirmative duty standard—the defendant owed the plaintiff a duty of reasonable care. Under the proposed Restatement, the *Harper* case is not a nonfeasance case at all, but one of misfeasance.

The potential effect of Section 7(a) on cases like *Harper v. Herman* is not lost on the proposed Restatement. Comment *b* to Section 41, entitled "Connection to ordinary duty of reasonable care based on creating risk of harm," addresses the matter directly:

> In some cases the duty imposed by this section is a pure affirmative duty because the actor had no role in creating the risk of harm to the other .... In other cases, the actor's conduct might have played a role in creating the risk to the injured party .... In these cases, the source of the duty of reasonable care is § 7.[213]

Section 7(a)'s effect on affirmative duties does not, however, end at the particularized application of affirmative duties to facts such as those of *Harper v. Herman*. More broadly, Section 7(a) might require a conclusion that certain affirmative duties are not properly characterized as affirmative duties at all, but rather constitute re-affirmations—in light of facts to which the no-duty-to-rescue rule

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211. *Id.*

212. TENTATIVE DRAFT NO. 4, *supra* note 5, § 41.

213. *Id.* at § 41, cmt. b. In defending against the idea that Section 41 is therefore superfluous, the Reporters note that deciding such cases under Section 7 is sometimes problematic because it would call for "an inquiry into what would have happened if the actor's conduct . . . had never occurred." *Id.* Section 41 essentially acts as a back-up source of duty in such cases.

might appear applicable—of the Section 7 duty not unreasonably to create a risk. Section 40 of the proposed Restatement, for instance, recognizes the near-universal rule that where a defendant non-negligently creates a continuing risk, the defendant owes a duty reasonably to protect or warn others of the risk and to rescue them from any resulting harm.[214] To use a much-cited example—where a train non-negligently severs the limb of a person who darted onto the tracks just as the train was passing, the train's operators owe a duty to render assistance to the injured person.[215] In light of Section 7(a), such a case might not present an affirmative duty scenario at all. Because the train operators created a risk of injuring someone by barreling down the tracks, they owed a duty of reasonable care pursuant to Section 7(a)—a duty that might require calling an ambulance in the event that the train causes someone harm. In this sense, the duty to call the ambulance would not be an affirmative duty—an exception to the no-duty-to-rescue rule—but a part of the duty to act reasonably when one's conduct creates a risk.[216]

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214. *Id.* at § 40; *see also* DOBBS, *supra* note 11, § 316, at 856-57 (offering an account of this affirmative duty).

215. Maldonado v. Southern Pac. Transp. Co., 629 P.2d 1001, 1005 (Ariz. Ct. App. 1981); *see also* TENTATIVE DRAFT NO. 4, *supra* note 5, § 40, cmt. c, ill.3 (citing an analogous hypothetical in which a person non-negligently jumps off a bridge, landing on a person who, after the jumper jumped, had swum from underneath the bridge).

216. The Restatement expressly recognizes this possibility in Comment *c* to § 40. *See* TENTATIVE DRAFT NO. 4, *supra* note 5, § 40, cmt. c:

> This section imposes a duty that might be subsumed under the general duty of reasonable care in § 7. ... When an actor engages in a course of conduct that continues throughout the time the other person is at risk, the rule stated in this section might be applicable, but a court is more likely to apply the general principle in § 7.

Section 40 reads: "When an actor's prior conduct, even though not tortious, creates a continuing risk of physical harm of a type characteristic of the conduct, the actor has a duty to exercise reasonable care to prevent or minimize the harm." Section 40 might best be understood not as an affirmative duty, but as a limitation on the Section 7 general duty standard. Although, pursuant to Section 7, one owes a duty of reasonable care when one creates a risk, Section 40 limits that duty by imposing it only where the actor's earlier conduct creates a risk "of a type characteristic of the conduct." With this phrase, the proposed Restatement imposes a proximate-cause-like limitation on the application of Section 7 to "continuing risk" scenarios, as a means of distinguishing cases in which the defendant's conduct played only a very minor role in causing the plaintiff's harm. For example, where a bus driver drops a passenger in a ski resort town, then later sees the person unknowingly ski into a hazardous area of the mountain, Section 7 might suggest that the bus driver owes a duty reasonably to warn the person. The language of Section 40 provides a mechanism to limit or negate such a duty.

In this author's opinion, the premise for Section 40 is flawed. A better understanding of Section 7 is that it creates a duty of reasonable care *only with regard to the conduct that creates a risk.* Understood thus, Section 7 would only impose upon the train operators a duty to operate the train reasonably or upon the bus driver a duty to drive and drop off passengers carefully. It would not impose a duty to rescue someone harmed as a result of the train operator's or bus driver's non-negligent conduct. A subsequent duty to rescue must arise independently, as an

In either way that the proposed Restatement transforms affirmative-duty cases into cases in which the general duty standard applies, the Restatement affects the role of foreseeability. Many courts' affirmative duty analyses rely on foreseeability of harm, risk, or plaintiff in much the same way as do their conventional duty analyses.[217] By capturing in the fold of Section 7(a) cases typically requiring an analysis of affirmative duty, the proposed Restatement renders foreseeability irrelevant to the existence of a duty in such cases. The high court of Pennsylvania's decision in *R.W. v. Manzek*[218] is illustrative. In *Manzek*, parents sued their daughter's school in negligence after their child was sexually assaulted while selling candy door-to-door for a school fundraiser.[219] The primary issue before the court was whether the school owed an affirmative duty reasonably to protect its fundraising students from the risk of assault.[220] Resolution of this question, according to the court, depended on whether a "special relationship" existed between the school and the plaintiff, and on whether "the harm that befell [the plaintiff] while participating in the fundraiser, fell within a foreseeable, general, broad class of risks."[221] The court ultimately upheld the lower court's decision that sexual assault was not a foreseeable danger of selling candy door-to-door, and therefore that the defendant owed no affirmative duty to guard the plaintiff against such danger.[222]

Had the proposed Restatement Third applied, the court likely would not have deemed *Manzek* to be an affirmative-duty case at all. By initiating the fundraising activity, the school created a risk that students would be assaulted and was a factual cause of the plaintiff's injury. Thus, pursuant to Section 7(a), the school owed a duty of care without regard to any "special relationship" between the school and its students and, more importantly, without regard to the foreseeability of sexual assault. Of course, the court would be free to decide as a

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exception to the no-duty-to-rescue rule, a true affirmative duty. The author plans to make this issue the subject of a subsequent scholarly work.

217. *See, e.g.*, Beach v. Jean, 746 A.2d 228, 234 (Conn. Super. Ct. 1999) ("In any determination of whether a special relationship should give rise to a duty to exercise care to avoid harm to a third person, the key element is foreseeability."); R.W. v. Manzek, 838 A.2d 801, 806-08 (Pa. 2003) (considering, at least in part by reference to foreseeability, whether a school owed affirmative duty to protect a student from harm suffered while selling candy for a school fundraiser).

218. 838 A.2d 801 (Pa. 2003).

219. *Manzek*, 838 A.2d at 803.

220. Actually, in light of the procedural context of the case, the issue was whether the state trial court properly relied on the foreseeability reasoning of the federal district court in which the case was first tried. *Id.* at 803-04.

221. *Id.* at 806.

222. *Id.* at 807.

matter of law that the school acted reasonably under the circumstances or, if the court decides that the intervening sexual assault was unforeseeable as a matter of law, that the school's unreasonableness was not a proximate cause of the child's injury. Duty, however, would remain unencumbered by such considerations.[223]

The effect of Section 7(a) on *Manzek* reflects generally how the proposed Restatement will limit foreseeability's place in the analysis of many affirmative-duty cases. If courts take Section 7(a) seriously, no longer will foreseeability operate as a limiting factor in such cases. That is, in light of Section 7(a), courts in affirmative-duty cases will no longer cite a lack of foreseeability as a reason for refusing to impose a duty. Section 7(a) might not, however, purge foreseeability completely from the affirmative-duty landscape. Foreseeability may yet retain a foothold in two scenarios.

First, courts might decline to impose a duty for lack of foreseeability where a defendant's conduct did not create a risk of harm, but where a duty might otherwise exist pursuant to one of the traditional exceptions to the rescue rule.[224] The proposed Restatement anticipates this phenomenon and discourages it for the same reasons that foreseeability should not serve to limit duty where the defendant created a risk.[225]

Foreseeability's second possible remaining function in affirmative-duty cases is exemplified by the *Tarasoff* case, discussed above.[226] In *Tarasoff*, the court imposed on a psychologist a duty to warn third parties of a risk of physical harm posed by the psychologist's patient.[227] The court imposed this duty in part because of the special relationship between the psychologist and his patient, but also because psychologists as a profession are especially privy to the violent intentions of their patients.[228] Although the proposed Restatement discourages the use of unforeseeability (class-based or otherwise) as a reason to decline to impose a duty, it does not explicitly preclude courts' consideration of a particular ability to

223. Of course, were the *Manzek* court troubled by the policy implications of the school's potential liability, the court might refuse to impose a duty due to a Section 7(b) "special problem of policy or principle."

224. *See, e.g.*, Nivens v. 7-11 Hoagy's Corner, 943 P.2d 286, 291-93 (Wash. 1997) (recognizing special relationship between the defendant convenience store and its patron, the plaintiff, but declining to impose an affirmative duty to provide security personnel due to a lack of sufficient foreseeability of injury).

225. TENTATIVE DRAFT NO. 4, *supra* note 5, § 38, cmt. c.

226. *See supra* notes 99-102 and accompanying text.

227. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976).

228. *Id.* at 343-45.

foresee injury as a reason to impose an affirmative duty. The proposed Restatement simply does not address the question. Nonetheless, as a normative matter such use of foreseeability would seem to be inconsistent with the general push of the proposed Restatement against foreseeability's use in duty determinations. If a particular inability to foresee injury may not serve as a reason to decline to impose a duty, then a particular ability to foresee injury would seem to be similarly irrelevant in deciding to impose a duty.[229]

E. Transparency in Decisions of Public Policy

As explained above, courts sometimes ostensibly decide the issue of duty on grounds of foreseeability, when in fact their decisions rest on considerations of public policy.[230] With Section 7, the proposed Restatement Third sharply curtails this practice, pressing judges to be forthright with their public policy choices. Section 7 impels this change in two steps. First, as has been demonstrated above, Section 7(a) renders foreseeability irrelevant to courts' duty analysis in most cases. Because a duty inheres whenever a defendant's conduct creates a risk of harm, any consideration of foreseeability is expelled from the duty calculus into breach and proximate cause. By taking away the primary screen behind which courts obscure decisions of policy, Section 7(a) leaves courts with little option but to make transparent the policy choices that underlie certain duty questions. Second, Section 7(b) provides that courts may decline to impose a duty otherwise called-for under Section 7(a) due to "special problems of principle or policy that warrant denying liability."[231] Section 7(b) thus expressly encourages courts to make policy-based exceptions to duty, at least in the "exceptional" case in which a court deems such an exception necessary.[232]

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229. Still, one might argue that these two uses of foreseeability are not necessarily two sides of the same coin. Suppose that the *Tarasoff* court had held that a psychologist owes no duty because it is generally not foreseeable that a psychologist's patient may pose a risk to a third party. In such case, a psychologist would escape liability even where a jury might find that the harm was indeed foreseeable—or even, as was the case in *Tarasoff*, actually foreseen—by the defendant psychologist. Such a result would be nonsensical. The *Tarasoff* court's use of class-based foreseeability as a reason to impose an affirmative duty avoids this problem. Although the court imposed a duty based in part on psychologists' unique ability to foresee harm to third persons, the jury remained free to deny liability in the context of breach or proximate cause because the risk, the type or manner of injury, or the plaintiff was not foreseeable under the circumstances.

230. *See supra* notes 121-140 and accompanying text.

231. TENTATIVE DRAFT NO. 4, *supra* note 5, § 7(b).

232. *See id.*

The discussion of *Graff v. Beard* in Part III.B above illustrates how subsections 7(a) and (b) will work together to change courts' approach to cases in which the duty determination implicates compelling policy considerations.[233] *Graff* involved a claim by the victim of a drunk driver against the social host who had served the driver alcohol.[234] The *Graff* court declined to impose a duty at least in part because the risk of guests becoming intoxicated, driving drunk, and injuring a third person was not sufficiently foreseeable to require a duty to guard against such risk.[235] Had the court applied Section 7(a), it would have concluded that the host owed a duty of reasonable care—in serving alcohol to guests, the host created a risk of harm and in fact caused the harm to the plaintiff.

Still, consistent with Section 7(a), the court might rely upon foreseeability to hold that the host did not breach his duty as a matter of law. Such a decision seems unlikely, however, in light of the fact that the defendant served alcohol to an already-intoxicated guest whom the defendant knew would subsequently drive home. Reasonable jurors surely could find that such conduct created a foreseeable risk, and was therefore unreasonable and a breach of the host's duty.

In the alternative, the court might conclude as a matter of law that the driver's negligence in driving drunk superseded the wrongdoing of the social host, thereby precluding proximate causation. The viability of such a decision would depend primarily on the jurisdiction's rules for proximate cause. In some jurisdictions, for example, only an intervening grossly negligent, reckless, or intentional act supersedes a defendant's negligence.[236] Certainly, were the court to apply the proposed Restatement's "scope of liability" provision, the court would find it difficult to hold as a matter of law that the defendant's conduct was not the proximate cause of the plaintiff's injuries.[237]

The real problem with both of these resolutions, however—decisions denying breach or proximate cause as a matter of law—is that neither addresses the *Graff* court's evident desire to implement a

233. *See supra* notes 178-183 and accompanying text.

234. Graff v. Beard, 858 S.W.2d 918, 918 (Tex. 1993).

235. *Id.* at 920-21.

236. *See, e.g.*, McLaughlin v. Mine Safety Appliances Co., 181 N.E.2d 430, 435 (N.Y. 1962) (holding that only gross intervening negligence or worse may sever proximate causation).

237. Section 29 of TENTATIVE DRAFT NO. 3, *supra* note 30, provides that "[a]n actor is not liable for harm different from the harms whose risks made the actor's conduct tortious." Because a car crash is a harm whose risk made the host's provision of alcohol to driving guests unreasonable, the plaintiff's claim would likely satisfy proximate cause under this test.

broad ban on social host liability. This desire no doubt prompted the court to dismiss the case under the rubric of duty, which is traditionally amenable to broad, categorical rules.[238] For this same reason, were the *Graff* court to apply the proposed Restatement, the court would likely ground its dismissal of the case in Section 7(b). Like foreseeability, Section 7(b) provides a means by which the court might decline to impose a duty in a category of cases and thereby create a broad rule against social host liability. The "catch" is that the court must do so by explicit reference to the "special problem of principle or policy" that underlies its desire to create a broad rule—in the case of social host liability, the court's desire to protect the great American keg party (and, of course, other social gatherings at which alcohol is served).[239]

Courts faced with dilemmas similar to that in *Graff v. Beard* will thus be guided by the carrot of Section 7(b) and the stick of Section 7(a) to write opinions that transparently explain duty decisions in terms of public policy. One might contend, however, that Section 7 leaves a back door through which courts might re-infuse duty with foreseeability. A lack of foreseeability certainly might constitute a "special problem of principle or policy" pursuant to Section 7(b). Some courts, for instance, already consider the difficulty a social host has in foreseeing guests' conduct to be a policy reason to limit a host's liability.[240] Moreover, courts might even cite the proposed Restatement itself in support of such a proposition. Section 38 of the proposed Restatement imports the exception found in Section 7(b) into the realm of affirmative duties—pursuant to Section 38, a court may decline to impose an otherwise-applicable affirmative duty by reference to "special problems of principle or policy."[241] Comment *c* to Section 38—entitled "*The role of foreseeability in affirmative duties and the allocation of judge and jury roles*"—explains that courts "more carefully supervise [affirmative duty] cases than cases in which the actor's own conduct created a risk of harm," and that courts frequently do so through the use of foreseeability.[242] The placement of this comment as a modifier to Section 7(b)'s affirmative-duty analog arguably implies the proposed Restatement's endorsement of

238. *See supra* note 74 and accompanying text.

239. *See supra* notes 133-136 and accompanying text.

240. *See, e.g.*, Kovar v. Krampitz, 941 S.W.2d 249, 254-55 (Tex. App. 1996) (explaining that the difficulty a social host has in controlling guests and knowing the quantity of their alcohol intake counsels against imposing a common law duty upon hosts who serve alcohol).

241. TENTATIVE DRAFT NO. 4, *supra* note 5, § 38.

242. *Id.* § 38 cmt. c.

foreseeability as a "special problem of principle or policy" by which a court might decline to impose a duty.

Although a court desperately enamored with foreseeability might indeed argue as much, such is not the proposed Restatement's intent. Insofar as courts currently refer to foreseeability as a policy reason not to impose liability, this Article has shown that what courts are really doing is to decide reasonableness or proximate cause without proper deference to the jury and its role. The proposed Restatement is quite clear that if the defendant caused the plaintiff's injury or even created a risk of injury, the defendant owed a duty of reasonable care. Furthermore, Section 7(b) provides that deviations from this rule are to be "exceptional" and only due to "special" problems of principle or policy. Lack of foreseeability is not "exceptional" or "special," but rather a run-of-the-mill argument made by defendants in many negligence cases. As for Comment *c* to Section 38, it is notable that no similar comment modifies Section 7. Moreover, Comment *c* taken as a whole in fact discourages courts' use of foreseeability as a means of limiting affirmative duties.[243] For all of these reasons, it seems clear that it is not the proposed Restatement's intent that foreseeability limit duty as a "special problem of principle or policy" under Section 7(b).

IV. PRACTICAL EFFECTS OF THE PROPOSED RESTATEMENT

A. A Boon for the Rule of Law

Central to our system of jurisprudence, and indeed to American society in general, is our dedication to the "rule of law." The rule of law represents our resistance to anarchy, arbitrariness, and prejudice and our related attempts to render legitimate the exercise of judicial power.[244] It encompasses the following interrelated goals: (1) neutrality—that cases should be decided by laws, not by judicial

243. *See id.*

> Courts have other devices [than duty] to limit liability when they are persuaded that the defendants should not be liable. . . . Invoking no duty in these situations is more comfortable for courts because duty remains a question for the court. Yet determinations of no breach as a matter of law more accurately reflect that the court is pretermitting jury consideration of an element of the case traditionally left to the jury.

244. *See* Jeffrey E. Thomas, *Legal Culture and* The Practice*: A Postmodern Depiction of the Rule of Law*, 48 UCLA L. REV. 1495, 1498 (2001) ("[T]he rule of law's historic purpose: 'to protect against anarchy and establish a scheme of public order, . . . and to protect against at least some types of official arbitrariness.' ") (citation omitted).

preference;[245] (2) consistency in law's interpretation and application—that like cases should be decided alike and different cases differently;[246] (3) generality—that laws should be applied generally, without regard to the qualities of a particular person or group of persons;[247] (4) transparency—that laws and the reasoning of judges should be susceptible to public scrutiny;[248] (5) predictability—that laws should be fixed in advance and may serve as guides for public behavior;[249] and (6) procedural fairness—that all persons subject to criminal or civil action should have the opportunity fairly to be heard.[250]

Despite the attractiveness of these goals, scholars at least since the legal realist movement have taught us that a system governed

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245. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1594 (2001) ("Central to the rule of law is the notion that judicial decision making must be marked by reason, integrity, and consistency."); Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 482 (2004) ("[H]ow do we prevent courts, in the guise of enforcing their interpretation of the law, from usurping the rightful functions of the elected branches of government? That is, how do we prevent the rule of law from becoming the rule of the judges?"); Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court*, 89 CAL. L. REV. 1165, 1183 (2001) ("[R]eplicability, stability, and consistency in application are values that the ideal of the rule of law is intended to serve."); Thomas, *supra* note 244, at 1497 ("Although the rule of law does not have a precise, well-accepted definition, it is generally contrasted with the 'rule of man.' ").

246. *See* Merrill, *supra* note 245, at 519 ("Sometimes the rule of law is taken to mean consistency in the interpretation of law. Sometimes it is taken to mean fidelity to the opinions of the Supreme Court."); W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate Speech Cases*, 65 LAW & CONTEMP. PROBS. 33, 55 (2002) ("Of course generality and consistency are what the rule of law is all about. Judges must treat like cases alike.").

247. *See* Wendel, *supra* note 246, at 55 (stating that the rule of law "is what prevents the state from arbitrarily granting favors to some and punishments to others on the basis of rules that do not apply generally").

248. *See* William Mock, *On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1069, 1099 (1999) ("[T]he Rule of Law is impossible without transparency and the accountability it makes possible.").

249. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 15-16 (1997) (noting the formalist ideal of the rule of law that law be consistent, clear, and determined in advance); Thomas, *supra* note 244, at 1498 (noting that one of the rule of law's purpose is "to allow people to plan their affairs with advance knowledge of the legal consequences"); *id.*:

> Rule of law generally requires rules that are fixed in advance, that are publicly known, and that are applied with a degree of neutrality to both the governor and the governed. Modern accounts of the rule of law generally identify five basic characteristics of rule of law: (1) capacity of legal rules to guide people's conduct, (2) efficacy in doing so, (3) stability of the rules, (4) supremacy of law over governmental actors, and (5) an instrumentality of impartial justice.

250. *See* Fallon, *supra* note 249, at 16-18 (noting the legal process theorist's view of the rule of law ensuring procedural fairness and that courts reach decisions by reasoned elaboration).

absolutely by the rule of law is flawed, impossible, or both, and tolerates little intrusion from the world of real facts and real people.[251] Thus, judges' relationship with the rule of law is schizophrenic. While one hemisphere of the judicial brain embraces the rule of law, the other hemisphere longs for, or at least cannot escape, the exercise of legislative-like discretion—the freedom to seek out the "right" result in a particular case without regard to the rule of law.[252]

The struggle between these two forces in judicial decisionmaking is especially pronounced in tort cases, which are particularly fact-driven and often implicate extra-evidentiary policy considerations. It is perhaps this tension that has led courts in negligence cases to rely upon foreseeability when ruling on the existence of a duty. Foreseeability sounds "doctrinal," if only because it has been part of the duty calculus for so long. Furthermore, because foreseeability is so inherently flexible, when used to determine duty it affords courts broad discretionary power. One can see why this combination of qualities might be attractive to a judge. Yet it is exactly this combination that makes foreseeability's persistent appearance in duty analyses so insidious to the rule of law.

It is perhaps foreseeability's malleability that is most harmful to the rule of law in negligence cases. As explained in Part II above, courts utilize foreseeability to decide duty in at least five different ways,[253] although commonly without recognizing the conceptual differences between them. The result is a body of law that is at best inconsistent and unreliable, and at worst downright incomprehensible. Because the use of foreseeability in duty analyses is so opaque, it opens the way for like cases to be treated differently and different cases to be treated alike. In addition, because duty rules are created by the court, they are meant to serve as broadly-applicable guidelines for public behavior. Foreseeability determinations are inherently fact-specific, however, and are thus not broadly-applicable and are incapable of serving as useful behavioral guides. As Prosser

251. *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (suggesting that in adhering to the rule of law, courts ignore entirely the reality of human affairs); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (setting forth classic basis for "rule-skepticism"); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989) (proposing that although the ideal of the rule of law is impossible, a reconceived notion is worth keeping around).

252. *See, e.g.*, KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 56-70 (2d ed. 1951) (arguing that judges decide cases based on their intuition, then subsequently create law to justify the result).

253. Foreseeability of risk, type or manner of harm, and plaintiff, and the decision of public policy by reference to foreseeability.

noted, "[f]oreseeability . . . carries only an illusion of certainty in defining the consequences for which the defendant will be liable."[254]

Foreseeability's indeterminacy creates an even deeper challenge to the rule of law, however. The more flexible, nebulous, or undefined a legal concept, the more likely it is to be used as a front, a screen for the real reasons that a court reaches its decision. To the extent that foreseeability serves as cover for judicial discretion, it enshrouds the decisionmaking process and creates an impression of arbitrariness. This lack of transparency is anathema to the rule of law, even if one has faith that judges exercise discretion in good faith. And what if foreseeability hides irrational or even prejudicial reasons for deciding tort liability? Because the power of foreseeability, when used in the context of duty, is so broad and so erratically defined, such injustices may go unnoticed and unchecked.

Foreseeability's prominence in duty decisions poses yet another threat to the rule of law. Each aspect of foreseeability's use in the context of duty overlaps with either an analysis of breach or proximate cause.[255] Such redundancy is confusing and illogical and frustrates the longstanding allocation of decisionmaking power between judge and jury.[256] Foreseeability's redundant roles also give rise to the possibility that judge and jury might reach inconsistent conclusions with regard to whether a risk, type or manner of injury, or plaintiff was foreseeable. For example, suppose that a defendant moves for summary judgment on grounds that it owed no duty because the plaintiff was not foreseeable. Suppose also that the judge rejects this argument and imposes a duty on the defendant, at least by implication holding that the plaintiff was indeed foreseeable. Should the case go to trial, the jury is yet free to find that the plaintiff's case fails proximate cause because it was unforeseeable that defendant's breach would harm the particular plaintiff.[257] In such a case, both judge and jury have considered the issue of plaintiff-foreseeability and have reached opposing conclusions. Such inconsistency undermines

254. Prosser, *supra* note 61, at 19; *see id.* at 17-19 (citing many examples of the unpredictability of foreseeability determinations by courts).

255. *See supra* notes 81-120 and accompanying text and Part III.B & C.

256. *See infra* notes 258-310 and accompanying text; *see also* Leon Green, *Jury Trial and Proximate Cause*, 35 TEX. L. REV. 357, 358 (1957) ("When [legal] doctrines lack precision and rationality they blur the functions of court and jury. In the confusion that results anything can happen, and one of the things that does happen is a taking over of more and more power by the judges themselves.").

257. A judge could of course, skirt this particular problem by instructing the jury that the plaintiff was foreseeable as a matter of law. To this author's knowledge, however, such instructions are not common. This is likely the case because such decisions are properly reserved for tbe jury in the first place!

the rule of law both in terms of procedural fairness and predictability and in terms of the goal of treating like cases alike.

Courts' widespread adoption of Section 7 of the proposed Restatement will check these erosions of the rule of law by purging duty of considerations of foreseeability. By herding considerations of foreseeability into their conceptually proper pens—breach and proximate cause—no longer will duty analysis prove redundant. By imposing a duty whenever a defendant has created a risk of harm, the standard for duty could not be more simple, clear, and predictable. By instructing judges that a refusal to impose a duty despite the defendant's creation of a risk must turn on an exceptional problem of policy or principle, Section 7 encourages judges to be transparent in their reasons for declining to impose a duty, rather than to rely on the screen of foreseeability. Finally, as discussed below, by sending fact-driven determinations of foreseeability to the jury, Section 7 realigns the age-old allocation of power between jury and judge.

B. A Shift in Power from Judge to Jury

Notwithstanding its benefits for the rule of law, the most significant effect of the proposed Restatement's conceptual restructuring is that by casting foreseeability out of duty, foreseeability as a limitation on negligence liability is no longer a presumed matter for the judge, but a presumed matter for the jury. This raises the question of whether such a shift is desirable. Debate over the allocation of power between judge and jury in negligence cases generally is as intense as it is long in the tooth.[258] Several aspects of this debate are worth mentioning here, however, as they place the Restatement's dramatic effect on foreseeability into broader context.

As detailed above, foreseeability most logically informs the inquiries of breach and proximate cause.[258] Because it is settled law that breach and proximate cause are matters to be decided by the jury,[259] one might conclude that foreseeability also is properly a jury question. Nonetheless, judges consistently rule on foreseeability in the context of duty without deference to the jury. In an attempt to make an explicit case for the Restatement's largely implicit assault on foreseeability as a judicial determination, this Article now turns to a discussion first, of the jury's historical primacy in deciding breach and proximate cause; second, of why judges may have moved away from this practice, particularly by reliance upon foreseeability; and third, of

258. *See supra* notes 17-54 and accompanying text.

259. *See supra* notes 17-51.

why as a normative matter foreseeability should be left, in the first instance, to the jury.

In seventeenth and eighteenth century English and colonial American courts, the jury was held in such esteem that it was often said to be the judge of both fact and law.[260] The jury's privileged position among American colonists likely stemmed from a common post-Enlightenment view that man is inherently reasonable and that even the most ordinary man is capable of discerning natural law and reaching the "right" resolution of a legal dispute.[261] According to this populist notion, ordinary men were not only capable but were the best possible decisionmakers for most disputes. The concentration of power in single men (i.e., judges) was suspect,[262] and the belief was widespread that judges were either corrupt[263] or biased in favor of wealthy private or government litigants.[264] Juries thus represented a powerful democratic force, providing a check on the power of the judiciary.[265] Indeed, the Framers' early faith in the jury was so powerful that the right to civil jury trial was constitutionally guaranteed, at least in federal courts, by the Seventh Amendment.[266]

In the torts arena particularly, the jury's predominance began even earlier, perhaps as early as the fifteenth century. Professor Patrick Kelley cites the work of English law historians S.F.C. Milsom and M.J. Pritchard in offering a revealing explanation of the jury's importance to the development of negligence law:[267]

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260. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 350 (1995); *see also* JAMES P. LEVINE, JURIES AND POLITICS 24 (1992) (noting that juries had "power not only to decide the facts but to interpret the law and to apply their own moral standards").

261. Dooley, *supra* note 260, at 350-51; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170, 172 (1964) [hereinafter *The Changing Role*] ("Since natural law was thought to be accessible to the ordinary man, the theory invited each juror to inquire for himself whether a particular rule of law was consonant with principles of higher law.").

262. Dooley, *supra* note 260, at 350-51.

263. *See* Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 153-54 (1991) (arguing that eighteenth-century view of juries was of an important political body and a check on potentially corrupt judges); *The Changing Role*, *supra* note 261, at 173 (same).

264. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 679-84 (1973); *see also* Scheiner, *supra* note 263, at 144 ("For the Antifederalists, the civil jury would play a dual role in the new Republic; it would protect the common people against the judges' biases in favor of the government and the private ruling class, and also establish a small preserve of direct self-government in the face of the remote Federal regime.").

265. Dooley, *supra* note 260, at 350; Scheiner, *supra* note 263, at 153-54.

266. *See* Dooley, *supra* note 260, at 351-52 (describing forces that led to passage of the Seventh Amendment).

267. *See generally* Kelley, *supra* note 2 (citing S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); M.J. PRITCHARD, *SCOTT V. SHEPHERD* (1773) AND THE

> The formal "law" of trespass and trespass on the case, the old forms of action we see as forerunners of the modern common law of torts, was really law about what had to be pleaded to get past the courts at Westminster and get out to a virtually unreviewable trial before a jury in the county. Pleadings in trespass were ritualized: the plaintiff ordinarily began with a stylized formula that touched only briefly the real facts in the case. The defendant's ordinary response was to plead the general issue, which denied generally the facts pleaded and also, according to Milsom, denied that defendant had acted wrongfully. Pleading the general issue sent the case to the jury, which determined the facts and also decided whether, on those facts, defendant had wronged the plaintiff.[268]

At some point in the eighteenth century, however, the English courts initiated procedural rules that allowed courts to review jury-found facts and to rule as a matter of law on the wrongfulness of the defendant's conduct.[269] This development put the jury's primacy at risk and threatened to "reduce the law of torts to a multitudinous set of very specific legal rules of conduct."[270] According to Kelley, Milsom, and Pritchard, it was in response to this threat that the English courts developed the general duty of care pleading and the ordinary reasonable man standard.[271] Each of these developments tied the wrongfulness determination generally to accepted customs and practices of the community and protected the jury's position as the most able body to determine them.[272]

On the heels of these developments, the modern doctrine of proximate cause emerged in the 1840s and 1850s.[273] Unlike the general duty of care pleading and the reasonable man standard, proximate cause served as a limitation on liability,[274] a reminder that

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EMERGENCE OF THE TORT OF NEGLIGENCE (1976)); Kelley, *Proximate Cause*, *supra* note 52 (same).

268. Kelley, *supra* note 52, at 57.

269. *Id.* at 62.

270. *Id.*

271. *Id.* at 62-63.

272. *Id.* at 87; Kelley, *supra* note 2, at 1057-59. According to Kelley:

> The formal legal statement of the standard as the conduct of the ordinary reasonable man was pitched at a high level of generality. . . . [This] could effectively keep the judges from reviewing jury verdicts on the facts developed at trial, for the judges did not need to decide as a matter of law whether certain conduct was negligent. All they needed to decide was whether the jury could reasonably find that the conduct was not that of the ordinary reasonable man.

Kelley, *supra* note 52, at 62; *id.* at 64: Similarly, the general duty of care pleading

> avoided the multiple categories that would have developed if customs of the realm had to be pleaded specifically under the new procedural conditions that encouraged accurate fact pleading. [Thus] . . ., the courts avoided . . . [the] risk of transferring from the jury to the courts the responsibility for determining the standard of behavior.

273. Kelley, *supra* note 52, at 89.

274. *See* Green, *supra* note 256, at 358 ("[Proximate cause] was taken over by the common-law courts from insurance law in the early 1800's and incorporated into the development of the action for negligence as a retreat from the strict liability of medieval common law.").

even in the event that a defendant acted wrongfully, not all repercussions of such wrongfulness warrant liability. Like the issue of wrongfulness, however, proximate cause also was left to the jury. Explanations for this historical phenomenon are elusive, and the strong policy undercurrents of proximate cause determinations have led some to question the wisdom of the practice.[275] Indeed, a few legal scholars have even suggested that proximate cause is only ostensibly a matter for the jury, and that courts typically decide (and have since its inception decided) proximate cause as a matter of law.[276] Such a claim is likely overstated, however,[277] and the jury has retained first-instance authority over proximate cause against a number of encroachments over the years.[278]

Despite centuries of jury primacy in tort law, beginning as early as the eighteenth century[279] and gaining momentum in the nineteenth, the jury fell into disfavor.[280] Scholars have proffered a number of theories to explain this fall. One common explanation is that the industrial revolution spurred judicial concern that tort jury verdicts might thwart corporate and industrial progress.[281] Another

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275. *See* Thomas C. Galligan, Jr., *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*, 57 LA. L. REV. 1119, 1131 (1997) (evaluating the merits of jury decision of proximate cause); Kelley, *supra* note 52, at 88-89 (arguing that proximate cause is more appropriately decided by the judge); E. Wayne Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Function Between Judge and Jury*, 1977 UTAH L. REV. 1, 26 (1977) (explaining that under the duty-risk schema, championed by Leon Green, the judge determines the policy questions posed by the proximate cause inquiry).

276. Galligan, *supra* note 1, at 1511; Kelley, *supra* note 52, at 88.

277. None of the foregoing distinguished scholars cite quantitative evidence of the phenomenon—nor is this author aware of any. Professor Kelley suggests that the fact that judges more frequently decide proximate cause as a matter of law than breach may be because "the purpose questions underlying proximate cause issues are ordinarily easy questions on which reasonable people would all agree." Kelley, *supra* note 52, at 88-89. Although this is an intriguing argument, this author remains unconvinced. Proximate cause questions seem to be just as Gordian as those of breach, oftentimes much more so.

278. *See, e.g.*, Daniel J. Steinbock et al., *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261, 267 (1988) ("Prior to abolition of the rule excluding testimony as to ultimate issues, expert opinion on the issue of proximate cause would have been excluded as a matter of course. The rule . . . excluded lay or expert opinion upon an ultimate issue on the ground that such an opinion 'invaded the province of the jury' or 'usurped the function of the jury.' "). Of course, the most successful threat to the jury has been the use of foreseeability in the context of duty.

279. *See generally* Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87 (detailing the eighteenth-century shift in power between judge and jury).

280. *See generally* David Millon, *Juries, Judges, and Democracy*, 18 LAW & SOC. INQUIRY 135 (1993) (reviewing SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1990) (describing the nineteenth-century demise of juridical authority)); *The Changing Role*, *supra* note 261 (noting the same).

281. Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 605-07 (1993) (citing MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW:

cites the fact that turn-of-the-century formalists, led by Dean Langdell of Harvard, ushered in the notion that the study of law should be approached as a science, and that law itself consists of a closed system of uniform, predictable rules.[282] According to this theory, because such rules stem from the decisions of judges, not juries, the formalist movement influenced judges to co-opt jury questions for judicial resolution.[283] Other scholars have attributed the jury's decline to the increasing sophistication and training of the judiciary and the fading need for the jury to serve as a weapon against English imperialism.[284] Still others point to the possibility that professional elitism or classism on the part of lawyers and judges[285] or the inclusion of women and minorities in the jury pool may have sparked scorn and distrust toward the jury system.[286] Whatever the reason, most seem to agree that courts continued to erode the power of the jury in negligence actions throughout the twentieth century.[287]

It is perhaps as part of this larger story of the jury's fall from grace that judges have seized upon foreseeability as an instrument by which to strip decisionmaking power from the jury. There are, however, particular, functional reasons that judges may wish to decide foreseeability. For example, the judge, unlike any jury, typically has vast experience in considering such matters and might bring this

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THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); Wes S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946)); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 45 (noting that a "risk of aberrant, emotional decisionmaking in tort actions may be to deter investment in activities that are exposed to tort liability. Economic activity of all kinds is a function of social and political stability that facilitates planning; nineteenth-century American law was much concerned with encouraging economic activity").

282. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (describing Langdell's attempts to shape the study of law into a scientific inquiry). *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) (outlining legal academia's movement through the late nineteenth century toward the view of law as science).

283. Dooley, *supra* note 260, at 354.

284. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 38-39 (1986).

285. *See* LEVINE, *supra* note 260, at 25 (explaining the movement against the jury in the late nineteenth century and noting that "[t]he jury's freedom of action was also restricted, perhaps in part as a result of the growing professionalism of the legal system and the disdain that many prominent lawyers of the late-nineteenth century had for the nation's growing masses.").

286. Dooley, *supra* note 260, at 355-56.

287. *See, e.g.*, Green, *supra* note 256, at 357 ("The taking over of the jury's functions in negligence cases by appellate courts has been steadily progressing everywhere . . . ."); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 (1997) (arguing that in "moving away from broad definitions of duty and toward particularized definitions of duty," the Texas Supreme Court shifts "more of the normative work in tort litigation away from juries and toward judges").

experience to bear in fashioning informed and consistent rulings.[288] In addition, jury determinations of foreseeability lend scarce guidance to people in conducting their daily lives. Judges might seek to create clear, specific, and ordered rules for behavior by ruling on foreseeability in the context of duty.[289] One might argue that by entrusting juries to decide the often outcome-determinative issue of foreseeability, the court is essentially abdicating its power to decide the scope of one's duty under the circumstances.[290]

As compelling as such arguments may be, however, the arguments in favor of leaving foreseeability decisions to the jury are more so. Perhaps most persuasive are the reasons that breach and (likely) proximate cause were assigned to the jury in the first place. Decisions of foreseeability of risk, harm, or plaintiff are not particularly "legal" in that they require special training, expertise, or even instruction. Nor do they call for consideration of far-reaching policy concerns. Rather, foreseeability determinations require common sense, common experience, and application of the standards and behavioral norms of the community. Who better to render such judgments than a cross-section of that very community?[291] The average juror in this age of mass-communication is at least as educated and sophisticated as were those whom the English and colonial courts held in such high esteem.

It is true that a judge, through years of trial experience, may bring cumulative knowledge of community norms to the table in

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288. *See* Kelley, *supra* note 2, at 1041-42 (explaining that the jury is "a one-shot decision-maker without prior experience in applying the [breach] standard").

289. THE COMMON LAW, *supra* note 21, at 88-103; *see* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1192, 1194, 1202-06 (2001) (detailing norm creation in the context of breach of negligence in torts); Goldberg & Zipursky, *supra* note 69, at 1830-32 (explaining that judicial determination of foreseeability has a prioritizing effect on the public's various duties of care toward others).

290. *See* Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 162-63 (1996) ("[T]he jury, when deciding the proximate or legal cause issue, is free to apply its sense of justice to the particular case before it. By entrusting the jury with the power to set the limits of the defendant's duty in the particular case as a matter of fact/law the court is essentially abdicating its decisionmaking power in the particular case.").

291. *See* THE COMMON LAW, *supra* note 21, at 119-20 (arguing that leaving breach to the jury is a way of accessing the common experience of mankind in assessing danger under particular circumstances); Kelley, *supra* note 52, at 87 ("The ordinary reasonable man standard of care applied by the jury can be seen as a way of asking a cross-section of the community whether the defendant breached the relevant social rule or practice."). *But see* Carrington, *supra* note 281, at 42:

> [A]ny contemporary assessment of the jury ought to take account of the reality that 'community' in America is a pale imitation of the social condition that gave rise to the institution of the jury. America is today far more an aggregation of individuals than a community, and the conception of a verdict as an expression of community morality is simply in most places quaint.

deciding any particular foreseeability question. Long experience, however, also breeds opinion, perspective, and the hasty compartmentalization of new cases into long-constructed categories. Experience may therefore engender pre-judgment and, potentially, narrow judgment.[292] In fact, because many state judges are elected, their experience may bring more than intellectual and professional biases; judges may hold vested political interests in reducing (or increasing) certain classes of liability. The genius of the jury is that it brings to each case multiple perspectives, both shared and diverse experiences, and (with the exception of the occasional attorney-juror) a legal *tabula rasa*.[293] To put it simply—especially when considering a question like foreseeability that is part-analysis, part-community experience, and part-gestalt—perhaps twelve heads are better than one. The Supreme Court once echoed this sentiment in defense of the jury's dominion:

> It is this class of cases [negligence] . . . that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.[294]

Furthermore, were judges to continue to decide foreseeability in the context of duty, courts' understandings of community standards may run the risk of ossification. Particularized duty standards, consisting of individual judges' divination of the customs of the age, are frozen as precedent—immune to the natural evolution of the community. Jury decisions, by contrast, are not thus limiting. Indeed, the generality of the reasonable person standard and of the

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292. KEETON ET AL., *supra* note 11, at 237; Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 668, 685-87 (1949)); Steinbock et al., *supra* note 278, at 275 (citing Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116 (1924):

> The question of what a reasonable person would have done under the circumstances is generally for the jury, because of 'the public's desire to have its conduct judged by the layman ('the man on the street') rather than by the more sophisticated and expert judgment of the trained lawyer, whose judicial experience may have given him a biased point of view.

293. Although it is true that because of their diversity, different juries might arrive at inconsistent results given any one set of facts, at least each decision is made by those whose customs likely guided (or should have guided) the defendant's behavior in the first place. In addition, the jury's independence from the legal tradition might, as one scholar suggests, "humanize the law" and operate as a "backlash against one-sided and harsh, judicially-created tort doctrines" such as contributory negligence. Landsman, *supra* note 281, at 605.

294. Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall) 657, 663-64 (1873).

various standards for proximate cause exists precisely to allow tort liability to evolve with changing cultural mores.[295] It is important that foreseeability determinations enjoy the same flexibility.

This point leads to an even more fundamental reason to leave foreseeability (and therefore breach and proximate cause) to the jury—foreseeability determinations are particularly fact-dependent and case-specific. As Professor Dobbs explains, "[r]ules declaring that no duty exists . . . are expressions of 'global' policy . . . rules of law having the quality of generality."[296] Of course, breach and proximate cause also entail policy-like judgments. The only palpable distinction is that duty determinations—because decided by the judge—are categorical, whereas breach and proximate cause constitute case-specific judgments. The importance of this distinction is perhaps best highlighted (at least in the context of breach) by the now-archetypal railroad-crossing cases, *Baltimore & Ohio Railroad Co. v. Goodman*[297] and *Pokora v. Wabash Railway Co.*[298] The plaintiffs in each of these cases were struck by oncoming trains while driving their respective vehicles across railroad grade crossings despite obstructed views of the tracks.[299] Justice Holmes, writing for the court in *Goodman*, held categorically that "if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle . . . ."[300] In so holding, Justice Holmes acted upon his longstanding view that judges should more actively prescribe specific duties in categories of cases in which judges might readily apply their cumulative wisdom.[301] The weakness of this approach was soon made apparent by the facts of *Pokora*, in which the layout of a different grade crossing was such that to exit one's car to check for oncoming trains—as was one's duty pursuant to *Goodman*—would be to increase, rather than to reduce, the risk of catastrophe.[302] Thus, Justice Cardozo (who had, by that

295. *See* Steinbock et al., *supra* note 278, at 275 ("Proximate cause is defined in relatively general terms precisely because we want the jury to apply its own experience and values to any further norm elaboration, a process that is purposely kept invisible and case specific."). *But see generally* Abraham, *supra* note 289 (arguing that the open-endedness of the reasonable person standard is the source of the "trouble with negligence").

296. DOBBS, *supra* note 11, § 227, at 579.

297. 275 U.S. 66, 70 (1927).

298. 292 U.S. 98, 104 (1934).

299. *Goodman*, 275 U.S. at 69; *Pokora*, 292 U.S. at 100.

300. *Goodman*, 275 U.S. at 70.

301. *See id.* ("It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts."); Kenneth Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1485 n.11 (1992) (noting that Justice Holmes's *Goodman* opinion was an attempt to implement the theories he had propounded in THE COMMON LAW).

302. *Pokora*, 292 U.S. at 582-83.

time, replaced Justice Holmes on the court) was forced to some fancy footwork in characterizing Justice Holmes's broad duty holding as dictum and in reassigning the negligence issue in grade-crossing cases to the jury, where it belonged.[303]

The lesson of the *Goodman* and *Pokora* cases is that categorical rules of conduct—that is, those not tied to a narrow set of facts—will often result in injustice when applied to some later, unimagined set of facts. This lesson applies similarly to no-duty rules[304] and to rules regarding proximate cause,[305] and it is doubly true with regard to decisions of foreseeability. The foreseeability component of breach and proximate cause determinations is particularly fact-dependent and case-specific. It is, as one court explains "a judgment about a course of events, a factual judgment that one often makes outside any legal context."[306] For illustration, recall the facts of *Bryant v. Glastetter*, in which the plaintiff tow-truck driver was hit by a car while removing the defendant's vehicle (impounded due to the defendant's DUI) from the side of a highway.[307] In determining the existence of a duty on the part of the defendant, the court considered whether the plaintiff and the type or manner of the plaintiff's injury were foreseeable. One can imagine many slight variations in the facts of *Bryant* that might influence one's analysis of foreseeability—whether the road on which the plaintiff was driving was typically busy or infrequently-traveled; whether the defendant had been driving drunk at night or during the day; whether the police moved the car before the tow truck arrived; or whether other pedestrians had previously been hit on that road. Unfortunately, the limits of the human imagination fall far short of prescience. Not even the most experienced judge is capable of anticipating all possible facts that might affect future foreseeability

303. *Id.* at 582.

304. *See, e.g.*, DOBBS, *supra* note 11, § 227, at 579 ("[N]o-duty rules should he invoked only when all cases they cover fall substantially within the policy that frees the defendant of liability."); GREEN, *supra* note 12, at 57-58 (suggesting that broad limits on duties cannot be determined *ex ante* due to the infinite variety of potential facts); Leon Green, *The Duty Problem in Negligence Cases,* (part 1), 28 COLUM. L. REV. 1014, 1022-23 (1928) (stating that the "passing of judgment in bulk . . . is a dangerous thing" due to the limited prescience of human thought).

305. *See, e.g.*, Jackson v. B. Lowenstein & Bros., Inc., 136 S.W.2d 495, 496 (Tenn. 1940) ("[The *Palsgraf* case], by virtue of the sharp difference of opinion of the judges, should be a warning to appellate courts not lightly to assume the primary duty of determining liability or non-liability, in actions of tort, but to leave that duty where the Constitution has placed it, with the jury, as triers of facts, and if they act capriciously and arbitrarily to supervise their action."); Galligan, *supra* note 3, at 1528 (stating that in the context of proximate cause, "where the primary issue before the court relates, essentially, to what is fair given the facts before the court, then perhaps the jury is the best decision-maker.").

306. Fazzolari v. Portland Sch. Dist. No. 1J, 734 P.2d 1326, 1327-28 (Or. 1987) (holding that foreseeability is a question for the jury).

307. *See supra* notes 108-110 and accompanying text.

determinations in analogous cases. By ruling on foreseeability in the context of duty, however, this is exactly what a court attempts to do.

Of course, one might argue that the problem highlighted by *Goodman* and *Pokora* lies not with judges deciding foreseeability under the rubric of duty, but with judges failing to limit such holdings expressly to the narrow facts of the particular case. Indeed, even under the proposed Restatement, courts may still decide foreseeability in the context of breach or proximate cause as a matter of law.[308] What is the difference between a determination of foreseeability as a matter of law and a narrowly-tailored foreseeability-based duty ruling? This is an important challenge, and three responses seem apt.

The first response has, in essence, already been discussed—even a narrowly-tailored foreseeability ruling is ill-advised if rendered by the entity less capable of doing so. For the reasons stated above juries, at least in the first instance, should be left to decide close questions of foreseeability.

Second, although judges might theoretically limit their duty decisions to the exact facts before them, such decisions simply run counter to the established function of duty. Duty decisions, by long judicial custom, are read broadly. They create rules, they carry the weight of precedent, and they are meant to govern categories of future cases. Although battles often rage in later cases over the breadth of a prior court's duty holding,[309] the common judicial understanding is that the rule might well apply beyond the facts of the case that established it. Judgments as a matter of law, however, begin with the opposite presumption. They are presumed to be limited narrowly to the facts. As questions of foreseeability are closely fact-dependent, judgment as a matter of law is the more appropriate mechanism.

Third, by forcing judges to decide foreseeability as a matter of law (if at all), the proposed Restatement effects a subtle but important shift in judicial perspective. Because duty is a question for the court, a judge is free to decide the questions underlying duty however the judge sees fit—hopefully with reason and good judgment, and with only appellate courts to check the judge's work. By contrast, judgment as a matter of law requires the court to apply the "no reasonable jury standard." It asks the judge to abandon personal reasoning and to

308. *See* TENTATIVE DRAFT NO. 1, *supra* note 20, § 8(b) ("When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.").

309. A perfect example being whether the duty, imposed on psychologists in *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 348 (Cal. 1976), to warn others of dangers posed by patients extends to social workers, school counselors, and health care workers of all stripes.

reach back in memory to analogous decisions by past juries, to imagine the potential reasoning of family and friends, of neighbors, barbers, and bank tellers, of the folks on the other side of the tracks, and of those with the wrong candidate's bumper-sticker—and it asks the judge to imagine what those people might decide were they impaneled on the jury. The judge must gore her own ox, if necessary. For the same reasons that foreseeability decisions are best left to the jury in the first instance, the mental exercise initiated by the reasonable jury standard is equally important.

The debate will, no doubt, never end regarding the proper balance of power between judge and jury in negligence cases. The foregoing arguments, however, strongly support the proposed Restatement's implicit shift from judge to jury of the primary role in deciding foreseeability. Although such a shift is not without support in the case law,[310] for most jurisdictions the Restatement Third's proposal will represent a significant doctrinal change. Nevertheless, as Part IV.C below suggests, although the shift will affect the means by which courts analyze questions of duty and foreseeability, it will change the substantive outcomes of negligence cases only at the margins.

C. The Final Analysis: Little Significant Change in the Outcome of Negligence Cases

Many in the ALI and the legal academy opposed the initial drafts of the proposed Restatement Third.[311] For some of the same reasons, many will oppose the current draft—particularly once the transformative force of Section 7 becomes apparent. In Section 7, the ALI endorses a notion of the judge's role in negligence law that contradicts much of the case law of the past century and a half. It reminds courts that their place in duty decisions is as blunt-instrument gatekeepers, and it reinforces the jury's primacy as factfinder and as enforcer of fact-specific community standards. In an age of tort-reform, skyrocketing insurance premiums, and razzle-

310. *See, e.g.*, Martinez v. Woodmar IV Condos. Homeowners Ass'n, 941 P.2d 218, 223 (Ariz. 1997) (noting that "danger [that is, foreseeable risk] neither creates nor eradicates duty; it only indicates what conduct may be reasonable to fulfill the duty" and stating that "we disapprove of attempts to equate the concepts of duty with specific details of conduct"); Donaca v. Curry County, 734 P.2d 1339, 1344 (Or. 1987) (holding that facts of each specific case bear on foreseeable risk, therefore making improper a rule of law that attempts to cover all possible fact scenarios).

311. *See supra* notes 150-151 and accompanying text.

dazzle plaintiffs' attorneys, these are not wholly welcome reminders. In the final analysis, however, how much power is really lost to judges under the proposed Restatement? How much effect will Section 7 have on the ultimate outcome of negligence cases? The answer to both questions, most likely, is not much.

Section 7(a) imposes a duty on any defendant that was a cause in fact of the plaintiff's injury—a broad sweep, to be sure. Pursuant to Section 7(b), however, courts retain the power to seize upon factors that a jury might miss (and indeed upon which a jury is not really empowered to act) and to carve out broad policy-based exceptions to the general duty of care. Thus, where a power company's unreasonable actions cause a city-wide blackout and scores of related injuries, a court may still, pursuant to Section 7(b), deny or limit the company's duty due to the public's need for the company's continuing solvency.[312] In so-called "wrongful life" claims against physicians for the failure to sterilize a plaintiff as requested, courts might still decline to impose a duty due to limitations in the ability of the trial process adequately to value the plaintiff's loss.[313] In social host liability cases, courts may yet deny the existence of a duty to protect the American tradition of beer and Monday Night Football.[314] The only catch, as was explained in Part III.E above, is that under Section 7(b) courts must muster the gumption to make such exceptions explicit, without burying their reasoning in discussions of duty and foreseeability.

Furthermore, although Section 7 forces considerations of foreseeability out of the realm of duty and out of the reach of unfettered judicial discretion, courts may still decide foreseeability—in the context of breach or proximate cause—as a matter of law. As previously discussed, courts must render such decisions pursuant to the "no reasonable jury standard." It is thus no doubt true that under the proposed Restatement some greater measure of foreseeability issues will reach a jury. To the extent that this occurs, it is properly so. If a court is faced with a case that (1) involves no policy concern strong enough to justify a categorical denial of duty under Section 7(b), and (2) requires a judgment of foreseeability of risk, type or manner of injury, or plaintiff so ambiguous that reasonable members

312. *See* Strauss v. Belle Realty Co., 482 N.E.2d 34, 38 (N.Y. 1985) (finding that the defendant utility owed no duty of care to individual tenant and that liability was limited to those in direct contractual privity).

313. *See* Galligan, *supra* note 3, at 1511 (noting that in the context of claims for wrongful life, "a court may decide there is no duty owed [for].... administrative convenience," and "because of problems with valuing life").

314. *See supra* notes 133-137 and accompanying text.

of the community might differ in their resolution of the matter, then such a case is almost tautologically the stuff of jury deliberation.

Still, courts are perennially reluctant to admit to deciding policy and some are extraordinarily hesitant to invade the jury's realm by deciding breach or proximate cause as a matter of law. One might argue that courts' intransigence in this regard may, despite the pressure brought to bear by Section 7, lead to greater numbers of cases reaching the jury.[315] This is indeed a possibility. On the other hand, one suspects that courts' desire to reach the "right" result, in the most expedient manner, will often prevail. Besides, the collective brainpower and prestige of the ALI gives them cover. It thus seems likely that any upturn in jury decisions upon courts' adoption of the proposed Restatement will appear only at the margins. Most cases currently dismissed for lack of foreseeability in the context of duty will still be dismissed as a matter of law or pursuant to Section 7(b). A brief analysis of one set of difficult and controversial cases—negligence suits against handgun manufacturers—will test this prediction.

In recent years, victims of handgun-related violence have brought a variety of negligence suits against the manufacturers of handguns. In some such actions, the plaintiffs claim that the manufacturer negligently designed its guns to make them more attractive to criminals. In other suits, plaintiffs argue that the manufacturer marketed its product to inappropriate users. Still others contend that the manufacturer negligently distributed its guns so that dangerous customers might more easily purchase them.[316] To date, such suits have not gained much traction in the courts, their primary impediment being courts' determination that the manufacturer owed no duty of care.[317] For some courts, the suits amount to claims of nonfeasance—that is, claims that the manufacturer failed affirmatively to protect the plaintiffs against the crimes of third parties. Such courts dismiss the plaintiffs' claims on grounds that the manufacturer owed no duty in the absence of a special relationship.[318] Other courts decline to impose a duty not on the basis of nonfeasance, but (at least in part) upon characterizing the plaintiff's harm as unforeseeable.[319]

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315. Or perhaps, for this reason, some courts will decline to adopt the Restatement Third's approach in the first place.

316. Richard C. Ausness, *Tort Liability for the Sale of Non-defective Products: An Analysis and Critique of the Concept of Negligent Marketing*, 53 S.C. L. REV. 907, 909 (2002).

317. *Id.* at 911.

318. *Id.* at 911, 953 (citing McCarthy v. Olin Corp., 119 F.3d 148 (2d Cir. 1997)).

319. *Id.* at 952-53 (citing Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146 (Ct. App. 1999)).

Were courts to apply Section 7(a) of the proposed Restatement, dismissal for lack of duty might not come so readily. Pursuant to Section 7(a), if the gun manufacturer's conduct was a factual cause of the victim's harm, the manufacturer owed a duty of reasonable care. Although showing factual causation might prove difficult for plaintiffs in some cases, the effort may produce more palatable fruit than the unexplained and rather arbitrary characterizations of nonfeasance and unforeseeability currently on the menu.[320] Even were gun suits to clear Section 7(a), however, courts might nonetheless dismiss the plaintiffs' claims for lack of duty. Many courts seem hesitant to impose tort liability on gun manufacturers for policy reasons, as guns are legal and perhaps even protected by the Constitution. Furthermore, guns are obviously dangerous instruments and, in most negligence cases against manufacturers, the guns worked as intended. Thus, for many courts the duty question likely boils down to a proposed referendum on the continuing market for handguns.[321] Section 7(b) of the proposed Restatement provides courts ready means for declining to impose a duty on grounds that such a volatile social issue is best left to the elected branches of government.

Even were courts to impose a duty on manufacturers pursuant to Section 7, however, they would likely still dismiss handgun claims as a matter of law for lack of breach or proximate cause. In the absence of evidence that a particular gun manufacturer intentionally set out to attract criminal customers (one would hope a rare finding), many claims of negligent product design, marketing, or distribution are supported by reasonable sales-related goals and thus potentially amenable to summary judgment on the issue of breach. Furthermore, even when it was foreseeable to a gun manufacturer that a particular design or sales practice might lead to guns falling into the hands of dangerous individuals, the costs of avoiding such a result might well lead a court to rule against breach as a matter of law.[322] In addition, many gun-related cases are subject to dismissal as a matter of law for lack of proximate cause, either because "the route that a gun takes from manufacturer to the city streets [is] 'long and tortuous,' "[323] or

320. *See id.* at 953 (explaining that most gun cases dismissed for lack of a special relationship rest on "the assumption, mostly unspoken, . . . that the defendant's conduct can best be characterized as nonfeasance").

321. *See id.* at 955-59 (describing the concern that the plaintiffs in gun manufacturing claims in effect seek to rid the market of an undesirable product).

322. For an excellent discussion of the various considerations in the context of breach in cases against gun manufacturers, see *id.* at 940-946.

323. Richard C. Ausness, Public Tort Litigation: Public Benefit or Public Nuisance? 68 (2004) (unpublished manuscript, on file with author) (citing City of Philadelphia v. Beretta U.S.A., Corp., 277 F.3d 415, 423-24 (3d Cir. 2002)).

because most such cases involve superseding gross negligence or intentional misconduct on the part of the gun owner or victim.[324]

If the handgun foil is any indication, it seems unlikely that courts' adoption of the proposed Restatement will be sweepingly outcome-determinative. Rather, the effect of Section 7 on the outcomes of cases will likely be marginal, and thus outweighed by the many benefits afforded by the simpler and more transparent duty structure that Section 7 provides. As any prediction, of course, this one will have to be tested by practice and time.

V. CONCLUSION

It seems clear from the discussion at recent ALI meetings that the potential impact of Section 7 of the proposed Restatement has not yet dawned on many ALI members. Once it does, many may raise objections similar to those aimed at the initial drafts of the project—that the ALI should not seek to change the law or impact the outcomes of cases. In one sense, such objections would be valid. If adopted by courts, Section 7 will reshape the concept of duty in negligence in subtle, but significant fashion. It will strip courts of their beloved tool, foreseeability. And it will force courts to assume what some find to be the prickly clothes of the policymaker and the jury-empath. The ALI should not shy away from the path laid out by Section 7, however—and neither, ultimately, should the courts. Section 7 renders the general test for negligence duty comprehensible, consistent, and conceptually honest, for the first time in over a century. Perhaps more importantly, the proposed Restatement realigns tort doctrine with the inherited and imminently sensible assignment of functions to the judge and jury—the function of the judge as broad-brush policymaker (whose transparent decisions are kept under close watch by the elected branches), and the jury as factfinder and as the collective instrument of community norms. Should Section 7 prove to be outcome-determinative in some cases, so be it. The improvements in the decisionmaking process are well worth a little transitory

324. *Id.* at 69 (citing People ex rel. Spitzer v. Sturm, Ruger & Co., Inc., 761 N.Y.S.2d 192, 201 (N.Y. App. Div. 2003)). Of course, were the courts to adopt the proposed Restatement Third's "scope of the risk" test for proximate cause, it seems likely that the plaintiff would prevail—the harm suffered is precisely what makes the gun manufacturer negligent.

instability. Should some judges feel reluctant to adopt an approach that at least on its face limits their control over negligence cases, they will come around—even the most consumptive among us tires eventually of strawberry shortcake!

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Taking *Miranda's* Pulse

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The period from May 2003 through June 2004 was one of the most active periods for the law of self-incrimination since Miranda *was decided in 1966. This Article focuses on three cases from that period* - Missouri v. Seibert *and* United States v. Patane *from 2004, and* Chavez v. Martinez, *decided in 2003. These cases, along with the blockbuster from 2000,* Dickerson v. United States, *demonstrate what has been happening to the Court's self-incrimination jurisprudence. It is the Article's thesis that although the Court is purporting to rest these decisions on the Self-Incrimination Clause of the Fifth Amendment, what the Court is really doing when it decides whether to extend or limit* Miranda *is employing traditional due process analysis. The Article assesses* Miranda's *health as a result of these decisions and concludes that it is the traditional due process principles that have become central to keeping* Miranda *contained that also keep the decision alive.*

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