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The Restatement (Third) and the Place of Duty in Negligence Law

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The Restatement (Third) and the Place of Duty in Negligence Law

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I. INTRODUCTION

A prima facie case of negligence has four elements: duty, breach, causation, and injury. In plain English, a person suing for negligence alleges that the defendant owed her a duty of reasonable care and injured her by breaching that duty. Every state adheres to the four-element account,¹ with perhaps two exceptions.² That ac-

1. See *Brushwitz v. Ezell*, 757 So. 2d 423, 432 (Ala. 2000); *Lyons v. Midnight Sun Transp. Servs., Inc.*, 928 P.2d 1202, 1204 (Alaska 1996); *Taeger v. Catholic Family & Cmty.*, 995 P.2d 721, 730 (Ariz. Ct. App. 1999); *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 125 (Cal. 1999); *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 929 (Colo. 1997); *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 155 (Conn. 1994); *Bullock v. Nat'l City Mortgage Co.*, 735 A.2d 949, 952 (D.C. 1999); *Ewing v. Sellinger*, 758 So. 2d 1196, 1197 (Fla. Dist. Ct. App. 2000); *Tuggle v. Helms*, 499 S.E.2d 365, 367 (Ga. 1998); *Tseu v. Jeyte*, 962 P.2d 344, 350 (Haw. 1998); *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 311 (Idaho 1999); *Ward v. K-Mart Corp.*, 554 N.E.2d 223, 226 (Ill. 1990); *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999); *Timm v. Clement*, 574 N.W.2d 368, 371 (Iowa Ct. App. 1997); *Hesler v. Osawatomie State Hosp.*, 971 P.2d

count was prominent in the various editions of Prosser's treatise,³ and is likewise prominent in Professor Dobbs' successor treatise.⁴ Leading casebooks also feature the four-element formula.⁵

Given the widespread adoption of the four-element test, one would have expected to encounter it somewhere in the two drafts of the *Restatement (Third) of Torts: General Principles* now circulating before the ALI.⁶ Yet, it is not there. The basic negligence provision

1169, 1174 (Kan. 1999); Helton v. Montgomery, 595 S.W.2d 257, 258 (Ky. Ct. App. 1980); Roberts v. Benoit, 605 So. 2d 1032, 1041 (La. 1991); Valentine v. On Target, Inc., 727 A.2d 947, 949 (Md. 1999); Lewis v. Knowlton, 1997 ME 12, ¶ 7, 688 A.2d 912, 913; Davis v. Westwood Group, 652 N.E.2d 567, 569 (Mass. 1995); Latham v. Nat'l Car Rental Syss., Inc., 608 N.W.2d 66, 71-72 (Mich. Ct. App. 2000); Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995); Arona v. Smith, 98-CA-01360-SCT, ¶ 9 (Miss. 1999), 749 So. 2d 63, 66; Krause v. United States Truck Co., 787 S.W.2d 708, 710 (Mo. 1990); Cusenbary v. Mortensen, 987 P.2d 351, 355 (Mont. 1999); Divis v. Calrklift Inc., 590 N.W.2d 696, 701 (Neb. 1999); Manchenton v. Auto Leasing Corp., 605 A.2d 208, 213 (N.H. 1992); Weinberg v. Dinger, 524 A.2d 366, 373 (N.J. 1987); Alberts v. Schultz, 975 P.2d 1279, 1284 (N.M. 1999); Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531, 535 (N.Y. 1981); Scialabba v. Brandise Constr. Co., 921 P.2d 928, 930 (Nev. 1996); Holshouser v. Shaner Hotel Group Props., 518 S.E.2d 17, 22 (N.C. Ct. App. 1999); Hurt v. Freeland, 589 N.W.2d 551, 555 (N.D. 1999); Mussivand v. David, 544 N.E.2d 265, 270 (Ohio 1989); Comer v. Preferred Risk Mut. Ins. Co., 1999 OK 86, ¶ 10, 991 P.2d 1006, 1010 (Okla. 1999); Ellis v. Sherman, 515 A.2d 1327, 1328 (Pa. 1986); Splendorio v. Bilray Demolition Co., 682 A.2d 461, 466 (R.I. 1996); Kleckley v. Northwestern Nat'l Cas. Co., 526 S.E.2d 218, 221 (S.C. 2000); Peterson v. Spink Elec. Coop., Inc., 1998 SD 60, ¶ 12, 578 N.W.2d 589, 591; Rice v. Sabir, 979 S.W.2d 305, 308 (Tenn. 1998); Doe v. Boys Club, Inc., 907 S.W.2d 472, 477 (Tex. 1995); Gerbich v. Numed Inc., 977 P.2d 1205, 1207 (Utah 1999); Haverly v. Kaytec, Inc., 738 A.2d 86, 91 (Vt. 1999); Austin v. Consolidation Coal Co., 501 S.E.2d 161, 163 (Va. 1998); Degel v. Majestic Mobile Manor, Inc., 914 P.2d 728, 731 (Wash. 1996) (en banc); State ex rel. Frazier v. Hrko, 510 S.E.2d 486, 491 (W. Va. 1998); Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 238 (Wis. 1998); Stroup v. Oedekoven, 995 P.2d 125, 130 (Wyo. 1999).

2. See *Union Pac. R.R. v. Sharp*, 952 S.W.2d 658 (Ark. 1997) (negligence requires damage, breach of standard of care, and proximate cause); *Fazzolari v. Portland Sch. Dist.*, 734 P.2d 1326, 1336 (Or. 1987) (en banc) (criticizing standard formulation as applied to a broad category of accident cases, and stating as an alternative that negligence is made out when a defendant's conduct is determined to have "unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff").

3. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 30, at 164-65 (5th ed. 1984); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30, at 175 (1941).

4. DAN B. DOBBS, *THE LAW OF TORTS* §114, at 269 (2000).

5. See, e.g., RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 154 (7th ed. 2000); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS ON TORTS* 130 (10th ed. 2000).

6. We say "two drafts" because, as Professors Perlman acknowledges, he and Professor Schwartz have separately drafted provisions that overlap considerably in coverage yet "depart[]" from one another in terminology and substance. See Memorandum from Harvey Perlman, to Advisers and Members Consultative Group, in *RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES* (Preliminary Draft No. 2, May 10, 2000) [hereinafter Preliminary Draft No. 2]. Professor Perlman's provisions are Sections 2A, 9A, and 101-05 of Preliminary Draft No. 2. *Id.* §§ 2A, 9A, 101-05. Professor Schwartz's provisions are Sections 18-23 of Preliminary Draft No. 2, *id.* §§ 18-23, and Sections 1-17 of the Discussion Draft. *RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES* §§ 1-17 (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft]. "[I]t is assumed," according to Professor Perlman, "that the ALI will eventually integrate the two

drafted by Professor Schwartz is Section 3. It offers a three-element account of the tort:

§ 3. Negligence Liability

An actor is subject to liability for negligent conduct that is a legal cause of physical harm.

Section 3 is later qualified by Section 6, which carries the nominal title "duty." It reads:

§ 6. Duty

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.

Clearly, as described in Section 6, "duty" does not refer to an element of the prima facie negligence case. Rather, it 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.⁷

Likewise, although he intends them as alternatives to Sections 3 and 6, Professor Perlman's Sections 101 and 105 offer a three-element account of negligence.⁸ Thus, according to Section 101, a plaintiff complaining of injury need only show that the defendant failed "to act reasonably to avoid causing legally cognizable harm to another."⁹ Section 105, like Section 6, then notes as a descriptive matter that in unusual circumstances courts will, for policy reasons, limit the liability that attaches to conduct determined to be negligent under Section 101.

What has happened? Clearly, the Reporters have self-consciously set out to produce an account of negligence that evades the concept of the duty. Hence:

drafts, although that task may prove impossible to execute without introducing considerable confusion into the Third Restatement." Memorandum from Harvey Perlman, *supra*.

7. See *infra* text accompanying notes 36-40 (analyzing Section 6).

8. Preliminary Draft No. 2, *supra* note 6, § 101 ("An actor has a legal obligation, in the conduct of the actor's own affairs, to act reasonably to avoid causing legally cognizable harm to another.").

9. *Id.*

- Duty is the element missing in Section 3's account of negligence.
- Section 4 carefully disassociates "fault" from "breach" because use of "breach" would imply the existence of a duty that has been breached.¹⁰
- Section 6 characterizes the idea of being under a duty as "being unable to obtain an exemption from liability."¹¹
- Sections 16 and 17 go to great lengths to describe classic duty cases—those raising the issues of duties to warn and duties to prevent harms caused by third parties—entirely in terms of fault rather than duty.¹²
- Sections 101-104 restate cases that nearly every court treats as "affirmative duty" cases without mentioning the term "duty" in their black-letter provisions.¹³
- Section 105, like Section 6, treats "no duty" exclusively to mean "no liability."¹⁴

It might seem surprising that two distinguished, fair-minded Reporters would conclude that the concept of duty is so problematic that it ought to be excised even at the monumental cost of excluding the standard judicial account of the tort of negligence from the Third Restatement.¹⁵ In fact, it was quite predictable. From Holmes to Green to Prosser and now to Perlman and Schwartz, one finds a steady current of skepticism about the duty element within torts scholarship, and a persistent effort among many academics to downplay, recast, or eliminate its role in negligence. Moreover, this

10. Discussion Draft, *supra* note 6, § 4.

11. *Id.* § 6; see *infra* text accompanying notes 36-40 (analyzing Section 6).

12. Discussion Draft, *supra* note 6, §§ 16-17; see, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (holding that a psychiatrist whose patient threatened to kill the plaintiff owed the plaintiff a duty to warn of the threat).

13. Preliminary Draft No. 2, *supra* note 6, §§ 101-04.

14. *Id.* § 105. In comments given for publication during a June 1999 conference on the Third Restatement held at the University of Kansas, both reporters confirmed that they are eager to provide an account of negligence that minimizes or eliminates duty from the restatement of negligence law's general principles. So did Professor Hans Linde, an Adviser to the Third Restatement Project, who asserted that he helped launch the "General Principles" project in the hope of ridding negligence law of concepts such as duty and proximate cause. Then-Judge Linde, of course, was the author of the lone opinion that Professor Schwartz cites in support of his approach to negligence. See *Fazzolari v. Portland Sch. Dist.*, 734 P.2d 1326 (Or. 1987) (en banc) (criticizing use of "duty" and "proximate cause" in negligence cases).

15. For those inclined to think "astonishing" is an overstatement, consider that Professor Schwartz's first and only citation in support of his decision to omit duty from the Third Restatement's basic negligence provision is to the *Fazzolari* opinion from Oregon. See Discussion Draft, *supra* note 6, § 6 Reporter's Note cmt. a. As indicated, Oregon is one of perhaps two minority jurisdictions that reject the four-part formula embraced by the other forty-eight states. See *supra* notes 1-2.

effort has at times made headway among certain courts, including the Supreme Court in Professor Schwartz's home state of California.¹⁶

It is not our concern here to explain the origins of the academic aspiration to eliminate duty from negligence. We have recounted that particular piece of intellectual history at length in an earlier article, *The Moral of MacPherson*.¹⁷ There, we explained that duty skepticism in torts scholarship was born of two parents: Holmesian philosophical skepticism about the intelligibility of concepts of duty and right, coupled with a Prosserian fear that these concepts were incorrigibly servants of laissez-faire. Holmesian and Prosserian skepticism were understandable in their day, we argued, but ultimately proved superficial. Today, concepts of right and duty are regarded as essential analytical tools among even the jurisprudentially "hard-headed." Likewise, talk of rights and duties happily has been detached from the stark, laissez-faire version of liberalism. Modern academic duty skepticism, we concluded, is thus a testament to the fact that ideas and analytic frameworks linger on as articles of faith long after their foundations have eroded.¹⁸

That duty skepticism has hung on as a gut instinct among many torts scholars provides an explanation for the Reporters' otherwise puzzling refusal to employ the four-element test for negligence. Obviously, however, it provides no justification for their decision to characterize the law in a manner that departs from standard judicial usage. Nor is it sufficient that a handful of judges from a certain period of California judicial history were enchanted with the Holmes-Prosser view and flirted with the idea of transforming negligence doctrine to meet it. Absent some explanation as to why ordinary judicial usage is irremediably defective, it is surely a threshold of acceptability for a restatement of the law that it accurately represent what the overwhelming majority of courts, including California courts, say about it.

This brings us to the present Article. In *The Moral of MacPherson*, we argued that the concept of duty does important work in judicial decisions about tort, and in the academic enterprise of explaining and interpreting tort law. Indeed, we suggested that, with-

16. See, e.g., *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

17. John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1988).

18. *Id.* at 1799-1811 (discussing developments in philosophy and politics that have severely challenged the premises of duty-skepticism).

out the concept of duty, a cogent general description of the structure of negligence law would not be possible. As indicated above, however, we now have before us an attempt (in fact, two attempts) to do precisely what we said could not be done: to re-describe the law of negligence in terms of unreasonableness, causation, and injury, with duty serving merely as a question-begging label for the absence of a policy-based exemption. Our central critical goal in this Article, set out in Parts II and III, is to demonstrate that the self-conscious and carefully-constructed three-element views put forward in the drafts of the *Restatement (Third)* do not capture the law, and hence that a sound restatement of negligence cannot simply neglect duty.

In Part IV, we briefly consider and rebut certain arguments that may be thought to support the aversion to duty displayed by the Reporters. In the process, however, we recognize that the Reporters are right to be troubled by confusions that attend the courts' application of the duty element to particular cases. This recognition, we argue, does not support the effort at wholesale revision embodied in the current draft, but rather warrants careful analysis and a cautious restatement of the various meanings that courts attach to duty in their negligence opinions.

In Part V, we undertake just such an analysis by distinguishing four different senses in which courts invoke "duty." In doing so, we isolate the sense of duty-as-obligation that is central to the first element of the traditional four-element account of negligence. We then identify and elaborate three other senses of "duty." We also explain how these different senses of duty can be incorporated into a four-element account of negligence.

In Part VI, we survey some of the advantages that attach to our account of duty. In particular, we explain how it provides a more precise and useful account of the duty issues that courts confront, and a more coherent and comprehensive restatement of negligence as a whole. In support of these claims, we provide an Appendix containing alternative draft Restatement provisions, respectively labeled Sections N, D, and E.¹⁹

19. We offer these provisions not as substitutes for the Reporters', but to demonstrate the potential of our approach for bringing greater accuracy and clarity to the restatement of negligence.

II. *RESTATEMENT (THIRD) §§ 3-17: PROFESSOR SCHWARTZ
ON NEGLIGENCE*

Sections 3 to 17 of the *General Principles* draft, authored by Professor Schwartz, are presented in a manner that generates significant ambiguity as to whether they cover negligence generally, or some subset of negligence. On the one hand, the Reporter's Introductory Note specifies that these sections only restate a particular subset of negligence claims, namely those involving physical harm or property damage outside the context of nonfeasance, malpractice, and landowner liability.²⁰

The purpose of this Restatement project is to work through the "general" or "basic" elements of the tort action for liability for accidental personal injury or property damage Given the project's "general" interests, the project does not cover such *special* topics as professional liability and landowner liability; and given its focus on the *core* of tort law, it does not itself consider liability for emotional distress or economic loss.²¹

On the other hand, there are numerous indications that these sections offer, or at least will be taken to offer, a more ambitious general account of negligence. First, they appear as part of a document entitled "Restatement of the Law: Torts: General Principles," which is conceived by important members of the ALI and by Professor Schwartz's co-reporter as devoted to a global reconceptualization of all areas of tort, including all of negligence. Second, Section 3's statement of the elements of negligence is offered under the generic title "Negligence Liability," just as Section 4 follows with what is clearly intended to be a generally applicable account of what it means to be "negligent."²² Finally, Professor Schwartz sometimes cites in his comments negligence cases from outside the limited set of cases described in his introductory scope note.²³

The ambiguity as to the scope of Sections 3 to 17 is troubling. The *General Principles* draft bears the title that it does because it is the promise of a relatively clear, unified, and comprehensive account of negligence that undergirds the project of restating the law. But when critics assail the draft for failing to account for important areas of negligence doctrine, and hence for failing to fulfill that promise, the Reporter's Note seems to offer a built-in escape route: Such criticism can be dismissed as irrelevant, because it raises is-

20. Discussion Draft, *supra* note 6, at xxi.

21. *Id.* (emphasis added).

22. *Id.* §§ 3-4.

23. See, e.g., *id.* § 6 Reporter's Note cmt. g (discussing pharmacist-client and nurse-patient cases); *id.* § 16 Reporter's Note cmt. a (discussing physicians' obligations).

sues that go beyond the limited agenda described in the Note. Of course, one cannot have it both ways. If the Restatement is to be defended as a useful synthesis providing guidance throughout tort law, then the Reporter's Note must be ignored. However, if the accuracy of the Restatement depends on the Note's limitation of scope, then not only is the title of the document seriously misleading, it is also hard to know what exactly we are supposed to get out of a "Restatement of negligent-malfeasance-causing-physical-damage-outside-the-context-of-malpractice-and-landowner-cases." Nor is it clear how this curiously selective account of negligence can or will be integrated into a comprehensive Third Restatement.

In what follows, we demonstrate that the Restatement cannot have it both ways (generality and limitedness). We also demonstrate that the Restatement cannot have it *either* way. Whether one interprets the Restatement as aiming to articulate general principles, or along the lines of the Reporter's Note, it provides an inadequate account of the subject matter. We begin by addressing Sections 3-17 as if they provide a general account of negligence law. Having identified various shortcomings in the provisions so interpreted, we then consider whether those defects are cured by treating them as if they cover only a subset of negligence cases, concluding that they are not.

A. Sections 3 and 6 as a General Account of Negligence

Section 3 of the *General Principles* draft states that "[a]n actor is subject to liability for negligent conduct that is a legal cause of physical harm."²⁴ On this account, "negligence" in conduct, "physical damage," and a connection that satisfies the idea of "legal cause" constitute the three elements of the tort. This is a substantial departure in the expression of the structure of negligence from that of the courts. Most notably, there is no duty requirement in this provision, even though there is according to the usual formulation.²⁵ Thus, were Section 3 to have governed *Farwell v. Keaton*,²⁶

24. *Id.* § 3.

25. We recognize, of course, the familiar objection that the courts' mode of expression should not be taken at face value because the invocation of duty in this context is mere empty rhetoric. We postpone consideration of this sort of objection until Part III, in part because we wish to take the Restatement project seriously on its own terms (i.e., on the assumption that it is possible to "restate" the law), and in part because we have criticized these arguments elsewhere. See Goldberg & Zipursky, *supra* note 17, at 1799-1811 (debunking arguments purporting to show that duty in negligence is radically indeterminate, redundant with breach, or inherently conservative); see also *infra* text Part V (further debunking such arguments).

the plaintiff would have made out a prima facie case by establishing that the defendant was negligent in leaving his badly beaten friend locked in a car on the street overnight so as to contribute to his friend's death. Similarly, in *Benton v. City of Oakland*,²⁷ plaintiff need only have established that defendant failed to use reasonable care in maintaining its public swimming area, and that this failure caused plaintiff to become paralyzed. In *McGlothlin v. Anchorage*,²⁸ the defendant would have committed negligence under the terms of Section 3 by unreasonably failing to inform plaintiff that the scoreboard he was about to lift was extremely heavy, so as to cause plaintiff back injuries.

The court in each of these cases employed a different framework to analyze plaintiff's negligence claim. In addition to a showing of fault, legal cause, and injury, each required the plaintiff to establish that there was a duty on the part of the defendant to take steps to avoid the injury in question.²⁹ These cases are representative of the way almost every state court handles negligence cases, a point emphasized in any number of recent decisions:

- "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm."³⁰
- "[W]here there is no duty, there can be no negligence."³¹
- "Essential to any negligence cause of action is proof of facts which impose a duty upon defendant."³²
- "An elemental requirement to liability founded on negligence is the existence of a duty of care owed by the

26. *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976).

27. *Benton v. City of Oakland*, 721 N.E.2d 224 (Ind. 1999).

28. *McGlothlin v. Anchorage*, 991 P.2d 1273 (Alaska 1999) (holding that, where plaintiff injured his back while lifting a sign owned by plaintiff's employer, the defendant arena-owner owed no duty to warn plaintiff of the risks associated with lifting the sign).

29. *Farwell* is particularly clear on this point. The first sentence of the opinion reads: "There is ample evidence to support the jury determination that [the defendant] David Siegrist failed to exercise reasonable care after voluntarily coming to the aid of Richard Farwell and that his negligence was the proximate cause of Farwell's death." *Farwell*, 240 N.W.2d at 219. The court then proceeded to analyze the duty question.

30. *Lauer v. City of New York*, 733 N.E.2d 184, 187 (N.Y. 2000) (citations omitted) (ruling that medical examiner owed no duty to criminal suspect to ensure police received exonerating evidence).

31. *Albert v. Hsu*, 602 So. 2d 895, 897 (Ala. 1992) (quoting *Rose v. Miller & Co.*, 432 So. 2d 1237, 1238 (Ala. 1983)) (concluding that restaurant owed no duty to protect patron against car backing out of parking lot, over curb, across sidewalk and through its exterior wall); see *infra* text accompanying notes 175-77 (discussing *Albert*).

32. *Duncan v. Afton, Inc.*, 991 P.2d 739, 742 (Wyo. 1999) (citations omitted) (holding that laboratory hired by company to conduct drug test of employee owed duty to employee to take reasonable care to obtain and report accurate results).

wrongdoer to the person injured or to a class of which he is a member.”³³

- “In order for the plaintiff to recover under a negligence theory, she must first demonstrate that the defendant owed her a duty of care.”³⁴

Of course one might conclude that Professor Schwartz has effected a salutary amendment of the law by relieving plaintiffs of this burden.³⁵ But that contention simply confirms our point: There is a significant difference between a three- and four-element account of negligence, and a substantial change in the law is being proposed by Section 3, although under the guise of description.

To be fair, Section 6 of Professor Schwartz’s draft, entitled “Duty,” states that “[e]ven if the defendant’s negligent conduct is the legal cause of the plaintiff’s physical harm, the [defendant] is not liable for that harm if the court determines that the defendant owes no duty to the plaintiff.”³⁶ Clearly, however, this provision fails to restate duty as an element. Instead, it offers only an observation that courts sometimes reject proven (or presumed) *prima facie* claims of negligence because there are “special problems of principle or policy that justify the withholding of liability.”³⁷ In other words, Section 6 asserts that when a judge uses the phrase “defendant owes no duty to plaintiff,” he or she is always merely expressing the conclusion that, for some reason peculiar to the case at hand, or the category of case, an exemption should be granted to the defendant from the liability that normally attaches to negligent conduct causing injury. To the extent that the section recognizes “duty,” it is only as a word that (when preceded by a “no”) happens to be used by courts inclined to concoct a defense to an otherwise well-formed negligence claim. This is the opposite of an element.

The substantive difference between the standard judicial formulation (duty/breach/cause/damage) and Professor Schwartz’s (negligence/cause/injury/no-exemption) is significant, as several

33. *Parmely v. Hildebrand*, 1999 SD 157, ¶ 17, 603 N.W.2d 713, 717 (quoting *Waggoner v. Midwestern Dev. Inc.*, 154 N.W.2d 803, 805 (1967)) (declaring that non-professional mason who constructed home for own use owed no duty of care in construction to subsequent purchaser).

34. *Millis v. Fouts*, 744 A.2d 81, 84 (N.H. 1999) (holding that landlord owed no duty of care to tenant injured while removing rotted fence from landlord’s property).

35. *But see infra* Part V.B (suggesting that in the current political climate, the three-element plus policy exemption formulation is at least as likely to be used to advance restrictive tort reform agendas).

36. Discussion Draft, *supra* note 6, § 6.

37. *Id.*

subsequent sections will explain.³⁸ For the moment, it is worth noting that Section 6 cannot be read to say that negligence liability presupposes a duty of care running from the defendant to persons such as the plaintiff, which, as we have seen, is exactly what the courts do say. If Section 6 specified that a negligence case could not succeed if there is no duty, it might conceivably be the substantive equivalent of prevailing law. But it does not say that. Rather, it says: "if the court finds there is no duty," then there will be no liability.

More importantly, Section 6's formulation intimates that a "no duty" holding always boils down to a judicial determination that, all things considered, there ought not be liability. In this respect, the "no duty" defense of Section 6 is not like, for example, the "truth" defense in defamation. It is not an aspect of the case that (whoever bears the burden) will determine whether the case is legally sound or not. It is, rather, a wild card for judges to use when they believe, for whatever reason, that liability should be cut off. This is not merely a shifting of phraseology. It is a reconceptualization of duty that converts what the courts regard as an essential element of a negligence case into a grant of discretionary authority to individual judges to dismiss or allow negligence suits.

The foregoing analysis understates the inability of Section 6 to cure the shortcomings of Section 3, for the language of Section 6 is markedly different from the language of almost every other part of the draft, and markedly different from that of most of the hundreds of provisions in the first two torts Restatements. Restatements are supposed to articulate rules of law that draw their authority from the courts that adhere to them. Professor Schwartz's provisions generally follow that form, but not Section 6. It states that a plaintiff is not liable for certain harms, "if the court determines that defendant owes no duty to plaintiff." It then adds, "[f]indings of no duty are unusual . . ." The oddity of the word "findings" in the latter phrase is revealing. It suggests that courts do not make legal rulings about whether the law imposes a duty of care on the defendant. Rather, they make factual "findings" that

38. There may also be procedural differences. For example, were Section 3 accepted at face value, it would seem that a plaintiff's failure to plead or establish that the defendant was obligated to take care not to injure the plaintiff would not entitle the defendant to a ruling as a matter of law. Perhaps, too, a defendant would be required to plead "no duty" in an answer or waive it. Moreover, even if a court relying on Section 6 could raise the issue of "no duty" *sua sponte*, it would seem to have no obligation to do so, but instead complete discretion to decide whether to entertain the issue at all.

support a policy decision to impose or not impose liability. What is most peculiar, however, is to find a Restatement provision that merely describes what courts do, commenting along the way on how frequently they do it. This is not a statement of a rule of law, but rather an announcement that the law has "run out", that the only thing that can be said about this class of cases is that judges sometimes in fact choose to exempt defendants from negligence liability.

It is important to appreciate the strength of the implicit claim of Section 6. It would be one thing to begin one's account of negligence with a four-part test that includes the duty element, and then to point out that courts at times use that element not to refer to the question of whether the defendant was obligated to exercise care with regard to the plaintiff, but instead as a platform from which to issue a ruling that declines to impose liability for some reason of principle or policy. As we have noted elsewhere, and as we explain below, this is a plausible account of certain "no duty" decisions, particularly decisions rendered in the mid-twentieth century by courts such as the California Supreme Court, which were heavily influenced by Holmes-Prosser duty-skepticism.³⁹ Emphatically, however, Section 6 does *not* take the position that it is articulating a supplement to the idea of duty as obligation. Rather, it asserts the much stronger claim that "duty" simply means the absence of an exemption from liability.⁴⁰ The strength of this claim, in large part, is what disables Sections 3 and 6 from fairly restating whole areas of negligence case law.

It states the obvious to note that many negligence claims are never brought, or fail if they are brought, because courts rule (or would rule) that the defendant owed no obligation to the plaintiff to take precautions against her suffering a particular sort of injury. This includes, for example, certain cases brought against attorneys, physicians, and other professionals by non-clients, against landowners by trespassers, as well as cases brought for negligent infliction of pure emotional distress, and of pure economic harm. They also include a broad swath of nonfeasance cases, including suits for failure-to-rescue. At the same time, courts in each of these areas also issue rulings establishing limits on or exceptions to these rules.

39. Goldberg & Zipursky, *supra* note 17, at 1772 (discussing California cases); see *infra* Part V.B.3.a (discussing duty in its fourth or "policy-exemption" sense).

40. As we note below, the commentary to Section 6 hints at a notion of duty-as-obligation in remarking upon, for example, social host and pharmacist liability. See Discussion Draft, *supra* note 6, § 6 cmts. c, g. However, the commentary stops short of recognizing these as genuine instances of judicial inquiries into obligations of care, and Professor Schwartz leaves no room for such inquiries in the texts of Sections 3 and 6.

That these are "yes duty" rather than "no duty" rulings does not alter the fact that the courts are confronting the same issue: whether defendant was obligated to act with due care for the interests of the plaintiff. A few familiar examples will suffice to illustrate these points.

- *Attorney malpractice.* In most jurisdictions, a litigant who sues her adversary's counsel for malpractice typically will lose. The attorney's duty is held to run principally to the client and not generally to third parties, and there is certainly not a duty to take care to avoid inflicting financial injury on a client's adversary.⁴¹ Conversely, most courts today will permit the beneficiary of a negligently drafted will or trust to sue the attorney of the testator or the settlor of the trust, reasoning that while the principal duty runs to the client, there is sometimes a duty of care running to beneficiaries.⁴² This pair of duty rules suggests a comprehensible judgment by courts that an attorney engaged in litigation need not—indeed ought not—focus her care on an adversary, but that an attorney drafting a will ought to focus on the economic welfare of the intended beneficiaries of his or her work.
- *Landowner Liability.* In most jurisdictions, a landowner who negligently keeps a stairway in disrepair will be held liable to someone welcome on her land, be it a licensee or an invitee, who is injured. However, she will not be held liable to a burglar using those steps to commit a burglary. The classic articulation of the distinction is that one has no duty to safeguard land for the benefit of (adult, unknown) trespassers.⁴³
- *Emotional Harm.* The infliction of emotional distress is not generally actionable in negligence law, but requires (among other things) a showing that the defendant acted with a level of culpability far greater than negligence (typically somewhat overstated as "intentional"). More generally, one does not ordinarily owe a duty to avoid

41. See DOBBS, *supra* note 4, § 488, at 1397 ("The lawyer owes no duty of care to his client's adversary."). See generally Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 *FORDHAM L. REV.* 649 (1998).

42. The leading case is *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961).

43. See DOBBS, *supra* note 4, § 232, at 591-93 (summarizing these rules).

causing pure emotional distress to another.⁴⁴ By contrast, a funeral parlor owner who negligently switches the head of a corpse to the wrong body in many states would be held liable for the emotional distress inflicted upon the family.⁴⁵ Courts that make such distinctions do not do so simply because the latter sort of faulty conduct causes more emotional harm than the former. Rather, they have decided that funeral parlors owe an obligation to family members to safeguard them from severe emotional distress; whereas, employers do not have a general duty to employees to be vigilant of their employees' emotional well-being.

- *Negligent Misrepresentation.* An accounting firm that negligently performs an audit and causes its clients economic loss will be held liable to those clients in all jurisdictions. But what about the investors who rely upon auditors' analyses? Historically, courts were begrudging, declining to permit actions to any investor harmed by a negligently performed audit, while sometimes permitting an action by a third party who had arranged to do business with the client, at least where the accountant knew of the arrangement.⁴⁶ Today, the courts are split, but the focus in most cases is on the question of obligation: Was the plaintiff so situated that the accountant had a duty to be cognizant of his interests in preparing an audit?⁴⁷ Courts have generally held that there is plainly a duty to the client and those close enough to the transaction to be known beneficiaries of their work. They have come out at various places as the relationship becomes more tenuous, and have typically articulated their decisions as ones of duty.
- *Economic Loss.* All jurisdictions permit compensation for economic harm as parasitic damages on an underlying claim based on some other form of injury, typically, a

44. See *id.* § 308, at 836-38 (noting general absence of a duty to take reasonable care to avoid causing emotional distress unaccompanied by physical impact or lasting physical symptoms).

45. See *Christensen v. Superior Court*, 820 P.2d 181 (Cal. 1991); DOBBS, *supra* note 4, § 308, at 837 n.10 (describing the recovery rule as "probably" a minority rule).

46. See *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (limiting liability to those in privity or near-privity with the accountant).

47. See DOBBS, *supra* note 4, § 480, at 1372-74 (describing the range of positions taken by courts).

physical injury. But as a general matter, there is no liability for pure economic harm.⁴⁸ Rather, courts deny liability for pure economic harm by holding that there is no duty to take precautions against it, at least absent a special relationship between defendant and plaintiff or some other special circumstance.⁴⁹

- *Duties to Rescue.* The majority position is that there is liability for one who negligently causes another physical harm, but no liability for one who fails to rescue a plaintiff from harm caused by another source.⁵⁰ On the other hand, where there is a special relationship, or a commenced rescue, or a causal connection between defendant's conduct and plaintiff's peril, liability will attach for negligent failure to rescue, or for negligently performing a rescue.⁵¹ Overwhelmingly, courts' doctrinal explanation of these cases is that there is no general duty to rescue, but that there is a duty to rescue under the circumstances described above.

In each of these areas of the law, it is simply a misstatement to say that faulty conduct legally causing injury will make the defendant liable to the plaintiff. Rather, negligence is indisputably a four-element tort, and the satisfaction of the duty element is plainly of enormous practical importance in the courts. Even if some of these cases do in fact employ "no duty" in the manner Section 6 describes, there are many more instances in which courts that decline to impose liability under the rubric "no duty" are doing so because they have concluded that the defendant's duty of due care, insofar as it was alleged to have been breached, did not extend to the plaintiff in these cases. Moreover, there is no special salience to the negative cases here. It is perhaps even more important to consider the decisions imposing liability. They are imposing liability, for example in the case of an attorney and a beneficiary, or a funeral parlor owner and a family member, or a landowner and a guest, because they are deciding that a duty to take due care does extend to the persons in question, for the types of injury in question. The con-

48. The leading economic harm case is *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927).

49. See, e.g., *Glanzer v. Shepard*, 233 N.Y. 236 (N.Y. 1922) (liability for economic loss where commercial weigher of beans hired by seller knew that buyer would rely on weigher for accuracy).

50. See RESTATEMENT (SECOND) OF TORTS § 314 (1965).

51. See *id.* §§ 321-24.

cept of duty at work in each of these areas of negligence law, and in each of these cases, concerns whether defendant *was obligated to be vigilant* of the interests in question of the plaintiff. In ignoring this sense of duty, Sections 3 and 6 fail to explain or restate these important areas of negligence law.

Professor Schwartz might argue in defense of Sections 3 and 6 that they find precedential support in the *Restatement (Second) of Torts* because that document's basic negligence provision—Section 281—does not employ the four-part test for negligence. Rather, it lists the elements of negligence as (1) "invasion of a legally protected interest," (2) "negligence in relation to the plaintiff," and (3) "legal cause" (along with a now-obsolete element: "absence of contributory negligence").⁵²

As this recitation makes clear, however, Section 281 offers no precedent for Section 6—there is no mention of a policy-based exemption within it. Still, it is not surprising that Professor Schwartz might look to the Second Restatement at least for the negative proposition that duty is not an element of negligence. As we noted in the introduction, Prosser was an influential exponent of duty skepticism in tort, and one might thus expect to find an account of negligence cleansed of duty in the Restatement for which he served as a Reporter. But in this instance, appearances are misleading. Section 281 was not written by Prosser to avoid duty: It largely replicates Section 281 as it appeared in Francis Bohlen's *Restatement (First) of Torts*. Moreover, as Prosser understood, it provided only a semantic, not a substantive variation on the four-part formula. Section 281's formulation requires a "protected interest" (duty), "negligence in relation to the plaintiff" (breach of duty), "legal cause", and "invasion" (injury). In this usage, the defendant's duty of care is the flip-side of the idea of "protected interest": A protected interest is one that another actor has an obligation to take care not to invade.⁵³ Indeed, as Section 4 explains, negligence law requires "the actor . . . to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which the actor's conduct is a legal cause."⁵⁴ The equivalence of Section 281 and the traditional four-part formula is subsequently confirmed by Section 328A, which seems to have been introduced by Prosser into the Second Restatement precisely for the

52. *Id.* § 281; see also RESTATEMENT (FIRST) OF TORTS §281 (1934).

53. RESTATEMENT (SECOND) OF TORTS §4 cmt. c.

54. *Id.* § 4.

purpose of harmonizing Section 281's formulation with the traditional four-part test. Thus, under the heading, "proof of negligence," the latter section explicitly offers the four-part test as an alternative formulation of Section 281.⁵⁵

It would not be surprising to learn that Prosser was attracted to the formulation of Section 281 in part because it avoided talk of duty. However, Prosser kept some distance between his academic critique of the concept of duty in law review articles, and his active deployment of that concept in a Restatement or treatise. This may help explain why "duty" permeates the Second Restatement, why Section 328A was introduced into the Second Restatement, and why Prosser continued to rely on the traditional four-part formula through several editions of his treatise and casebook. Indeed, one can find in every edition of the treatise, from 1941 to 1984, the following cautionary advice: "[Duty] is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which defendant's responsibility may be limited, has been devised."⁵⁶ In this respect, Prosser is not authority *for* Sections 3 and 6, but *against* them. Their whole point is to discard duty even though that concept remains firmly embedded in our law.

B. Sections 3 to 17 as Limited to Accidents Causing Physical Damage

As a careful and learned scholar of tort law, Professor Schwartz is obviously aware that there are several areas of negligence law that his model fits poorly. It is just such awareness that appears to have led him to delineate expressly the scope of the project. As indicated above,⁵⁷ the Reporter's Introductory Note suggests that Sections 3-17 are *not* meant to cover claims for negligent non-feasance, negligent infliction of emotional distress, etc. Thus, Professor Schwartz might not only protest that our criticisms and complaints are misdirected; he might claim that everything we have said up to now *supports* his careful framing of the *General Principles* project.

In what follows, we argue that the saving strategy of the Reporter's Note fails because Sections 3-17 are not adequate even to restate the limited category of negligence cases described in the

55. *Id.* § 328A.

56. PROSSER, *supra* note 3, § 31, at 180; KEETON ET AL., *supra* note 3, § 53, at 358; *see also* RESTATEMENT (SECOND) OF TORTS § 4 cmt. b ("This usage [of duty as referring to an obligation of conduct] conforms to that of courts in dealing with negligence problems.")

57. *See supra* note 20 and accompanying text.

Note. Before proceeding, however, it is worth emphasizing that these problems are not resolvable merely through proper labeling. To be sure, there is a serious problem: Notwithstanding the Reporter's Note, the "*General Principles*" title of the project will cause academics, judges, and lawyers to read Section 3 as a general negligence provision. But even if the title of the present draft were changed—say, from the *Restatement of Torts: General Principles*, to the *Restatement of Torts: Physical Harm-General Principles*—the problems we describe will still remain.

1. The Description of the Domain of Sections 3-17 in the Reporter's Note Has No Stated Justification.

We see no reason to take for granted the appropriateness of the project that a Reporter has framed for himself, especially when it runs counter to the ordinary usage that it is meant to explicate. The Reporter's scope note does not follow the contours of a recognized body of law. Rather, it defines a hitherto unidentified category of cases under the heading "accidental personal injury and property damage." Of course, it is common to distinguish accidental injury from injury resulting from intentional acts. But that is not what the Note does. Instead, it separates "accidental personal injury and property damage" from other forms of accidental harm. Even given the unusual category on which Schwartz has chosen to focus, the provisions he offers to specify the law applicable to it seem underinclusive. In particular, they exclude professional liability, landowner liability, and nuisance, all of which concern "accidental personal injury and property damage." To explain these omissions, Professor Schwartz is required to introduce a further refinement in his scope note: He does not want to restate even the narrow category of negligent misfeasance causing physical damage. Rather, he aims to restate only the "general" or "core" components of that area.⁵⁸ This refinement is conclusory. For example, no attempt is made to explain why medical malpractice cases involving physical injury are "special" rather than "core" components of accident law, while many cases involving property damage but no physical injury are "core."

Some might accuse us of being coy in making these criticisms. The category of "negligent malfeasance causing physical damage or property damage, other than claims of malpractice and landowner liability" is awkward and confusing, they might suggest,

58. Discussion Draft, *supra* note 6, at xxi.

only because Professor Schwartz has chosen to describe the category negatively. A positive definition, by contrast, would render the category more recognizable. In particular, Sections 3 to 17 can intelligibly claim to restate the "core" of negligence law once we grasp that their aim is to restate the law of car accidents and other similar encounters, i.e., negligence as it applies to collisions and other physically harmful interactions between strangers.

The first thing to note in response to this imagined defense of the Reporter's Introductory Note is that Sections 3 to 17 in fact are not limited to collision cases or cases between strangers. For example, Sections 6, 16, and 17 are clearly meant to cover instances of negligence that occur without collisions and between non-strangers. Still, it may be that Professor Schwartz is gripped by the commonly-held notion that collisions and other physically harmful interactions between strangers are what modern negligence law is "all about." Perhaps this is what he means by treating malpractice as an instance of "special" rather than "general" negligence.⁵⁹ Yet, even if this is the case, the idea proves to be of little help in defending his apparent choice of scope, for it contains a basic confusion.

To say that collisions between strangers form the "core" of modern negligence might be to assert an historical or empirical claim. For example, it might be to claim that early nineteenth-century courts abandoned the language of trespass and case, and started treating negligence as a tort in its own right, in response to problems that arose in applying the old writs to collisions between strangers. Or it might be to claim that, today, most litigated negligence cases arise out of such collisions. Or it might be to assert that, when one thinks of negligence, the first example that comes to mind is that of a collision between strangers, such as a car accident. Each of these claims may well be true. Thus, if one wanted to provide an accurate historical account of negligence, or a "realist" study of the courts' handling of tort cases, one might well have reason to place such accidents front and center.

A restatement of negligence, however, is not a history of negligence, nor an empirical or sociological account of negligence law "in action." It is instead a document that purports to lay bare the elements of negligence as it is defined by the courts. Thus, for a restatement to treat collision cases between strangers as the "core" of negligence is *not* to assert that these cases are historically impor-

59. *Id.*

tant, or frequent, or familiar, but rather that they have some sort of analytic primacy in the explication of negligence, that they reveal negligence stripped down to its elements. As we have already noted at length, courts do *not* give this sort of analytic primacy to collision cases. Quite the opposite, they treat these cases as instantiations of the four-element tort of negligence with no greater or lesser significance than any other instantiations of negligence, including cases of malpractice, landowner liability, and affirmative duties. Indeed, this is perhaps the chief significance of the courts' use of the four-element account—it lays out the analytic framework common to *all* negligence cases. Thus, a decision to restate stranger-collision cases, and only such cases, cannot be defended on the ground that the courts treat those cases as capturing in an *analytic* sense what negligence is “all about.” To this extent, the selective domain assigned to Sections 3 to 17 remains undefended.

Professor Schwartz's project is also puzzling in terms of its motivation. Prior components of the *Restatement (Third) of Torts—the Restatement of Products Liability* and the *Restatement of Apportionment*—were devoted to a limited subject matter that the ALI specifically selected because judges, lawyers, and scholars believed them to be in need of thorough revision in light of modern case law developments.⁶⁰ The *General Principles* draft is based on a different idea. The areas of the law to which it was to be devoted are not new but old, although certainly evolving. The idea, apparently, was to take the opportunity of the Restatement to articulate general principles of the law as it evolves. Yet if generality was a key aim of the project, Professor Schwartz's project fails at the outset, for it chooses a self-conception that is particular, not general. To be sure, questions of finding the right level of generality are often delicate, but we would have thought Restatement Reporters start with an advantage: The courts have already picked their preferred level of generality, and the Reporters can report on it—even critically, if they like. If, however, the Reporter's Introductory Note is to be believed, that is not what has been done here.

60. As is well-known, Section 402A of the Second Restatement helped give birth to modern products liability, and therefore could provide only limited guidance to the case law that blossomed under it. Apportionment was by and large not covered in the Second Restatement because it was written before the triumph of comparative fault and the expansion of liability in multiple-tortfeasor cases.

2. Inclusion of a Meaningful Conception of Duty is Necessary Even Assuming the Project Specified in the Reporter's Note.

Suppose, despite these objections, we were to accept Professor Schwartz's conception of the project. Should we then join him in neglecting duty? We have already offered a set of reasons to think not, namely, that it conflicts with what courts actually say about the tort of negligence, at a linguistic and a substantive level. Beyond this, however, and even putting aside the categories of cases that Professor Schwartz wishes to put aside, his Draft and its neglect of duty still suffer from serious defects as a restatement of negligence law. First, duty in the "obligation" sense often is at issue in straightforward cases involving "accidental personal injury or physical damage." Moreover, as Professor Schwartz all but acknowledges, 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. Finally, the failure to include the duty element precludes the Restatement from offering a cogent account of the relation between breach and duty that exists in nearly all negligence cases, including those falling within the limited scope of Section 3.

a. Duty is Necessary to Restate Accidental Physical Damage Cases.

Three contemporary cases will serve as examples of courts wrestling with duty-as-an-element within the ambit of Section 3. These are simply indicative of the more general point made above that the duty element is an element in every case, even "core" or "easy" physical injury cases. In *Mussivand v. David*, the plaintiff acquired a sexually transmitted disease from his wife, who had in turn acquired it from the defendant, her secret lover.⁶¹ The defendant did not tell the plaintiff's wife that he had the disease, even though he knew it. The plaintiff sued the defendant in negligence, and the defendant responded that the duty element was not satisfied. The Ohio Supreme Court rejected this argument, in part on the ground that the lover's spouse was among those foreseeably put at risk by the defendant's lack of precautions.⁶² Therefore, the court concluded, the defendant owed a duty to the plaintiff to take care not to transmit the disease to him, at least until such time as the

61. *Mussivand v. David*, 544 N.E.2d 265, 267 (Ohio 1989).

62. *Id.* at 272-73.

plaintiff's wife knew or should have known that she was infected.⁶³ The court did not hold that the duty was owed generally to the public, but only to foreseeable plaintiffs such as known spouses.⁶⁴

Hopping v. College Block Partners is a slip-and-fall case against the owner of a building from which melting ice dripped onto a public sidewalk, causing it to become slippery.⁶⁵ The issue was whether the duty not to cause this hazard was dependent on notice of the particular problem and an opportunity to remove it. The Iowa Supreme Court decided that control over the condition that caused the hazard was the key determinant of duty, and that defendant had such control.⁶⁶ It therefore held that there was a duty to take reasonable precautions not to injure persons by causing this sort of hazard.⁶⁷

The defendant in *Parmely v. Hildebrand* built a home for himself and his family and several years later sold it to the plaintiff.⁶⁸ The plaintiff found defects in the home after purchase and sued defendant for fraud and negligence in constructing the house. On the negligence claim, the defendant argued that one who builds a home solely for himself and his family falls outside of the general rule of South Dakota law that builder-vendors owe a duty of due care to purchasers. The state Supreme Court (somewhat surprisingly) accepted this argument, reasoning that

[w]hat work [defendant] might have performed on his own home was done in the role of a homeowner, not a builder with intentions of resale. At the time the home was constructed, six years prior to its sale, there was no relationship between Hildebrand and Parmely that would give rise to any imposition of duty on Hildebrand.⁶⁹

These cases show that, even if we accept the Reporter's Introductory Note at face value, the Draft will still fail to capture a fundamental feature of the cases it purports to restate. The tort of "negligent misfeasance causing physical damage, excluding malpractice and landowner cases" has four elements, *including* duty, where duty denotes *not* the absence of an exemption from liability, but rather the concept of being obligated to take care not to injure the plaintiff or the class of persons to which she belongs. In *Mussivand*, the defendant's involvement with a woman he knew to be

63. *Id.* at 273.

64. *Id.*

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

66. *Id.* at 705.

67. *Id.*

68. *Parmely v. Hildebrand*, 1999 SD 157, ¶¶ 2-4, 603 N.W.2d 713, 714-15.

69. *Id.* at 718.

married was sufficient to trigger a duty to avoid the risk of transmitting a disease to the spouse. In *Hopping*, the defendant's control of the hazard was sufficient to engender a duty to control it. In *Parmely*, the defendant's supposed right to build simply for himself negated a duty running to purchasers. Our point is not to establish that *Mussivand*, *Hopping*, or *Parmely* is rightly decided. It is to illustrate holdings in physical damage cases based on duty that go not to the question of liability exemption, but to whether the defendant was, as an initial matter, obligated to be vigilant of the type of risk that caused harm to the plaintiff.

b. Duty in Sections 16 and 17

Section 16 (addressing negligent failure to warn) and Section 17 (concerning "conduct that is negligent because of the prospect of improper conduct by the plaintiff or a third party") confirm that it is not possible without duty to give a fair restatement of the law of "accidental personal injury and property damage."⁷⁰ The decision to address these areas is certainly commendable, for, like product liability and apportionment, these are areas in which there has been significant development since the *Restatement (Second)* and attending confusion. And in both areas, there is often a question removed from the jury for courts to answer as to whether a case should be dismissed as a matter of law. Unfortunately, Professor Schwartz's Draft cannot provide any meaningful guidance in these cases because it tries to state the issues they raise in a manner that does not rely upon the concept centrally at issue: duty. The problems in Section 16 go even beyond those we have already discussed. In this context, Professor Schwartz's struggle to articulate the law without relying upon duty leads him to press untenably hard on the notion of breach, and thereby to compromise the intelligibility of the basic textual provisions in both of these sections.

Section 16(a) states:

A defendant whose conduct creates a danger *can fail to exercise reasonable care by failing to warn* of the danger if the defendant knows or has reason to know of that danger and can foresee that those encountering the danger will be unaware of it, and if a warning might be effective in reducing the possibility of harm.⁷¹

The highlighted language is peculiar. The word "can" in the phrase "can fail to exercise reasonable care" is obviously not intended as a

70. Discussion Draft, *supra* note 6, §§ 16-17.

71. *Id.* § 16 (emphasis added)

grant of permission. Rather, the provision apparently aims to say: "It is possible that a defendant whose conduct creates a danger and who fails to warn of that danger will, by failing to warn of that danger, be failing to exercise reasonable care." But this, too, is a strange thing for a Restatement to say. The observation that people might be, or have been, successfully sued for negligent failure to warn is true, but nearly vacuous, and looks nothing like a statement of law.

A somewhat more charitable interpretation of Section 16 would take its permissive language to have procedural significance. Reasonable care is normally a jury issue. However, in certain categories of cases judges decide the reasonableness question as a matter of law. One way to understand "can fail to exercise reasonable care" is as a heads-up to courts that a jury might sometimes have grounds for finding unreasonableness in a case alleging failure to warn of a danger. Broadcasting this alert would perhaps have some value if it were the case that courts consistently dismissed this class of negligence cases on the ground that a failure to warn cannot be unreasonable. But this is not the backdrop of cases for Section 16. Indeed, if anything, failure to warn claims are often very powerful for plaintiffs on the issue of unreasonableness, because warnings typically cost little to give, and are often vital in averting an enormous injury. So as a matter of conjecture about whether it is *possible* that the failure to warn is unreasonable, the question is not a pressing one. And the same holds procedurally. Courts are likely more than willing to entertain the possibility that a juror could find that it was unreasonable to fail to warn. Thus, even if Section 16 is interpreted procedurally, it is still banal.

The issue that Section 16 obviously ought to address is whether warning cases fail to state a claim on the ground that there is no *duty* to warn, even assuming that it would have been prudent to warn. This point is nearly conceded in comment a, which states that "[t]he range of conduct that can give rise to the obligation to warn is so broad as to make clear that the failure to warn is a basic form of negligence."⁷² Indeed, the Reporter's Note then proceeds to discuss, paragraph by paragraph, the "obligations to warn" of electric power companies, railroads, business proprietors, drivers, golfers, public agencies, employers, physicians, product sellers, and others.⁷³ Section 16 could thus be understood as reflecting the current state of the law were it to state that, in a wide range of sce-

72. *Id.* § 16 cmt. a.

73. *Id.* § 16 Reporter's Note cmt. a.

narios, there is a duty to warn, and that breach of that duty will be actionable if it injures another. However, so long as duty is ignored, Section 16 will remain textually obscure and unhelpful as a guide for deciding future cases. The "warning" case law that Section 16 attempts to summarize is fundamentally duty case law, not reasonableness or breach case law. The effort to portray the pivotal issue in these cases as an issue about whether there "can be" a failure to use reasonable care is a further and dramatic example of straining to fit the four-sided peg of negligence into the triangular conceptual hole of the three-element model.

Much the same critique applies to Section 17, which states that "[t]he conduct of a defendant *can lack reasonable care* insofar as it can foreseeably combine with or bring about the improper conduct of the plaintiff or a third party."⁷⁴ In an effort to avoid the duty analysis that courts actually use, this provision, like its immediate predecessor in the Draft, employs "can" language to suggest, unhelpfully, that courts sometimes reject no-breach-as-a-matter-of-law claims. Once again, this "can" only makes sense if courts are in the habit of asserting that it is impossible to be careless with respect to the risk that another will injure the plaintiff. And again, this background is absent. Rather, in case after case, a powerful argument is made that, in light of a defendant's actual or possible knowledge of foreseeable injury from the tortious conduct of a third party, it was unreasonable for the defendant not to take certain precautions against such conduct. Courts that have rejected these suits have not held or assumed that these arguments fail. Rather, they have held that, *notwithstanding the defendant's fault*, the plaintiff's claim fails either because there is no duty of care owed by the defendant to the plaintiff, or because the improper conduct of plaintiff or a third party constitutes a superseding cause of plaintiff's injury. Today, these defense arguments tend to be less successful than they once were. In particular, the superseding cause argument, in cases of foreseeable improper conduct, is much less likely to succeed than in times past. But the duty issue continues to be hotly contested, and Professor Schwartz is correct to mark this as an important area where guidance is needed. Unfortunately, because Section 17 does not say anything about duty, it provides little guidance.

74. *Id.* § 17.

Hamilton v. Accu-Tek provides an excellent example of a recent case of the sort that Section 17 is intended to address.⁷⁵ The plaintiff argued that the defendant handgun manufacturers negligently sold their handguns in massive quantities to distributors who sold at gun shows, to straw-purchasers, and to non-storefront sellers, thus foreseeably creating a large pool of handguns to supply black markets in more tightly regulated states like New York. The plaintiff alleged that he was shot and severely injured by a handgun that was negligently marketed in this way. Defendants argued, among other things, that, since they do not control the conduct of distributors or of third parties, and since their sales were of a sort that was entirely legal in the states in which they were sold, they owed no duty to take precautions against the risks identified by the plaintiff. In a scholarly opinion, Judge Weinstein decided that such a duty exists. His decision did not rest simply or even centrally on the idea that it would be salutary public policy to find liability. Rather, it rested on his judgment that it was foreseeable that the refusal to adopt more careful policies in marketing would result in a larger black market hurting more people in the plaintiff's situation, and that the defendants were in a relatively good position to adopt more careful policies so as to prevent these injuries from occurring. In this, he likened the duty alleged by the plaintiff to the duty of a product manufacturer to take steps to protect customers and other users from harms stemming from the foreseeable misuse of its products.

Hamilton's duty analysis is not just about whether it "can" be unreasonable to market guns in the unrestricted manner of the defendants. Equally, it is not simply about whether the imposition of liability would raise special problems of policy or principle. It was about whether the enactment of restrictions on distributors was obligatory or merely advisable—something that manufacturers could do if they selected to, or must do. The same holds true of a wide range of cases involving the negligent entrustment of a dangerous instrumentality to an incompetent user, a landowner's failure to guard common areas such as lobbies and parking lots, a psychiatrist's failure to prevent a dangerous patient from injuring others, a social host's failure to limit the supply of alcohol to guests, and a college's failure to protect its student from injuring herself by drinking too much. In each of these cases, a duty issue arises.

75. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000) (certifying the issues of duty and market-share liability).

Ironically, a throw-away comment at the end of the Reporter's note to Section 17—the very last sentence in the negligence component of Professor Schwartz's Draft—refers approvingly to a scholarly article that "acknowledges" that what courts are really doing in these cases is dealing with "duty" issues.⁷⁶ This is too little, too late. The black letter law of Section 17 says nothing about duty, and this passing comment only winks at the idea that judges are concerned with the question of a "responsibility" to take care. What is needed is a fundamental re-orientation; one that recognizes the issues addressed in Section 17 are not principally about the "reasonableness" or "breach" issue, but among the most prominent instances of a "duty" issue with which today's courts must struggle in articulating the law of negligence.

c. Duty, Breach, and the Relationship Between Them

Thus far, we have criticized Professor Schwartz's Discussion Draft because of what it leaves out—the duty element. But Section 3's omission of duty also raises problems for other elements of the tort of negligence. To remove duty as an element, and to define the term as absence of an exemption from liability, compromises our ability to understand not just duty, but the negligence tort more generally. As we have discussed at length, Section 3's recasting of negligence eliminates altogether the well-established idea that negligence is concerned with obligations of careful conduct owed by one person to another (or others). At the same time, it also eliminates the equally well-established idea that to act negligently is to "breach" one of those obligations, and the related idea that only one who can establish a breach of a duty of care owed to her may sue in negligence. Each of these features belongs in a Restatement of negligence, regardless of its scope.

The point just made about duty and breach is definitional, but not trivial. If an instance of unreasonable or faulty conduct is to constitute a "breach," then it must be a breach of some duty. Thus, in the absence of a concept of duty, there is no basis for describing unreasonable conduct as "breach": It is simply unreasonable conduct, full stop. This is why Professor Schwartz's abandonment of duty forces him to stray further from established usage, when in

76. Discussion Draft, *supra* note 6, §17 (citing Andrew Jay McLurg, *The Tortious Marketing of Handguns: Strict Liability is Dead; Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995)).

Section 4, he uses the term "negligence" rather than "breach" to describe the "unreasonableness" component of the negligence tort. Negligence here is completely divorced from the idea that someone has neglected a duty owed to some other. Rather, it is defined in a vacuum: a wrong to the world at large, akin to the wrong of littering in a public park.

The problem with this move—even assuming that one has dealt with all of the aforementioned duty problems—is that black-letter negligence law permits liability only where the failure to take reasonable care is a breach of the duty owed to the plaintiff. Even Prosser, who was similarly enamored of reasonableness as an account of negligence, recognized how critical the relationality of breach was, and settled on an account that reflected this. Thus, *Restatement (Second)* Section 281 specifies that, to be actionable, the defendant's negligence must be "negligen[ce] with respect to the other."⁷⁷ Section 3 omits the language of duty and breach altogether, and neither in its comments nor in Section 4 or its comments, does it articulate through other words the requirement that the defendant's negligence must be a breach of a duty to act non-negligently toward the plaintiff before the plaintiff may prevail.

Professor Schwartz's Draft also is unable to recognize a related aspect of duty and breach that is very nicely captured in the Second Restatement's use of the phrase "negligence in relation to the plaintiff." This aspect concerns the rule that a plaintiff cannot prevail merely by establishing that the actor's conduct constituted the breach of a duty of care owed to *someone*, but must instead show that the breach was a breach of a duty owed to the plaintiff, or to a class of persons including the plaintiff. The classic case explaining this duty-breach "nexus" requirement is of course *Palsgraf v. Long Island Railroad*.⁷⁸ Indeed, as each of us has taken great pains to demonstrate,⁷⁹ and as Professor Weinrib has noted,⁸⁰ the holding of Cardozo's majority opinion was precisely that Mrs. Palsgraf's suit failed because she was complaining of the breach of a duty to a class of persons—those put at risk by the conductor's ac-

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

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

79. See Goldberg & Zipursky, *supra* note 17, at 1819-20; see also John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1462-63 (1999); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 8-11 (1998).

80. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 159-61 (1995).

tions with respect to the package-carrying passenger—of which she was not a member.⁸¹ But the point is hardly limited to *Palsgraf*.

A 1996 case from Massachusetts illustrates the relationality of breach in a modern and familiar setting. The plaintiff in *Matteo v. Livingstone* was an avid mountain-biker who regularly rode his bike off the defendant's raised porch.⁸² On the last of these occasions, the plaintiff rendered himself quadriplegic when he landed badly. He sued the owner of the store fronted by the porch, asserting that the defendant's failure to erect a railing for the porch was a violation of a local public safety ordinance requiring porch railings, and hence was unreasonable as a matter of law. However, the trial court did not permit evidence of the ordinance to go the jury. On appeal of the jury's verdict for the defendant, the appellate court held that, even if the statute were applicable to buildings like the defendant's, the trial court rightly excluded evidence of it because defendant's conduct, though negligent under the statute, was not negligent because of the risks it posed to those who, like plaintiff, took the railing-free porch as an opportunity for a certain kind of jump.⁸³ Rather, it was negligent because of the risk it posed to persons walking on the porch who might accidentally fall off. Plaintiff therefore was not within the class of persons to whom defendant behaved negligently. Citing *Palsgraf* and *Restatement (Second) Section 281*, the court dismissed the action.⁸⁴ Although cases like *Matteo* are not uncommon,⁸⁵ and although the *Restatement (Second)* deliberately retained the ability to recognize this aspect of the case law, the current Draft lacks the resources to do so, because it does not require, in word or in effect, that negligence consist of the breach of a duty owed to the plaintiff.

81. Thus it is no surprise to find Professor Schwartz, like Prosser before him, proudly acknowledging that he is incapable of finding any reasoning whatsoever in Cardozo's *Palsgraf* opinion. See William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 5-8 (1953), reprinted in WILLIAM LLOYD PROSSER, *SELECTED TOPICS ON THE LAW OF TORTS* 191, 209-28 (1953); Gary T. Schwartz, *Cardozo as Tort Lawmaker*, 49 DEPAUL L. REV. 305, 316 (1999). To understand that opinion, and Cardozo's decisions generally, one must allow for the intelligibility of duty. Goldberg & Zipursky, *supra* note 17, at 1812-24 (explaining and reconciling important Cardozo negligence opinions by reference to their unified treatment of duty).

82. *Matteo v. Livingstone*, 666 N.E.2d 1309 (Mass. App. Ct. 1996).

83. Plaintiff's conduct was probably negligent, but the court did not need to raise or consider the issue of comparative fault precisely because plaintiff's conduct took him outside the orbit of duty. On the relationship of the duty element to plaintiff-oriented defenses such as comparative fault and assumption of risk, see Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 846-57 (1997).

84. *Matteo*, 666 N.E.2d at 1312.

85. See, e.g., RESTATEMENT (SECOND) OF TORTS § 281(b)-(c) app. at 382-402 (1965).

Perhaps Professor Schwartz, like many who have struggled with cases like *Palsgraf* and *Matteo*, would strive to account for them under the rubric of "legal cause," and it is certainly true that Section 3 leaves plenty of issues to be resolved under that heading. However, the Second Restatement treats the relationality of breach as a distinct issue from proximate cause. So do many of the cases. The courts state the legal issue in these cases as whether there has been a breach of a duty of due care owed to the plaintiff. Questions of proximate cause do not even arise.

More generally, we note that one must be suspect of a Restatement whose strategy is to offer a broad and loose account of a certain area of negligence, and then to try to sweep all of the various qualifications and limitations found in the case law under the carpet of legal cause. Although we recognize that the account is not final and that this is a subject for another panel at this conference, we note in passing that Professor Perlman's text and language in section 105 of the Preliminary Draft Number 2 do not come near to presenting a comprehensive and workable account of legal cause. Nor is this surprising. Indeed, given the doctrinal difficulties notoriously associated with proximate cause, one would have thought it would be the last concept onto which one would wish to add new explanatory burdens.

III. RESTATEMENT (THIRD) §§ 2A AND 101-105: PROFESSOR PERLMAN ON NEGLIGENCE

Professor Perlman's general provisions—Sections 2A and Sections 101-105—cover some of the same ground as Professor Schwartz's, although they go about restating the "general principles" of tort and of negligence in a very different way. As we have seen, in dealing with negligence, Sections 3 to 17 purport to limit their focus to "core" instances of accidental physical injury cases, and even to the core within that core (i.e., not nonfeasance, malpractice, or landowner liability). Moreover, we have suggested, they adopt that limited aim in an (unsuccessful) attempt to provide an account of negligence without duty. Sections 2A and 101-105 also aspire to restate negligence without reference to duty. However, the reasons behind their aversion to duty are different, and this leads to a strategy that is the complete opposite of the "narrowing" approach articulated in the Introductory Note to Section 3. Thus, instead of being confined to one part of negligence law, Professor Perlman's provisions aim to restate all of tort law.

Section 2A purports to isolate the five "basic elements" common to every tort claim, whether for battery, trespass, intentional infliction of emotional distress, negligence, products liability, nuisance, fraud, intentional interference with contract, etc. These elements are: (1) an obligation to protect another against harm; (2) breach of that obligation; (3) causation to that other of harm; (4) harm within the scope of the actor's liability; (5) harm that is legally cognizable.⁸⁶ With this generic account of tort in place, Sections 101-105 set out to provide a new account of negligence. Section 101 states as the general rule for all negligence that an actor "has a legal obligation *in the conduct of the actor's affairs* to act reasonably to avoid causing legally cognizable harm to another."⁸⁷ Sections 102-104 then attempt to specify when acts or omissions can be said to occur "in" or "outside of" the conduct of an actor's affairs, so as to trigger (or not trigger) the general rule of negligence liability.⁸⁸ Finally, Section 105 notes that:

[i]n unusual circumstances courts limit the scope of [the rule of Section 101] based on policy considerations relating to the context of the actor's conduct, the relationship between persons in the position of the actor and persons in the position of the injured person, and the nature and scope of the potential damages.⁸⁹

Professor Perlman's apparent motivation for proceeding in this way is twofold. First, he seems to share our dissatisfaction with the failure of Sections 3 to 17 to incorporate any meaningful notion of obligation. Hence, the concepts of obligation and breach are featured prominently in Section 2A. Indeed, Professor Perlman may be even more adamant than we are on this point, for he not only insists that obligation is at the center of negligence, he further claims that all torts—even cases imposing genuine strict (no-fault) liability—consist of a defendant breaching an obligation to conduct him or herself in a certain way.⁹⁰

Second—and here is where we part ways—Professor Perlman adopts an aggressive conception of what it means to "restate" an area of law, under which the Reporter is at liberty to substitute new terminology in place of the language that judges and lawyers actually use to analyze tort cases (e.g., "duty," "foresee-

86. Preliminary Draft No. 2, *supra* note 6, § 2A.

87. *Id.* § 101 (emphasis added).

88. *Id.* §§ 102-04.

89. *Id.* § 105.

90. *Id.* § 2A cmt. a. As we note below, however, whether unwittingly or not, Professor Perlman fails to import a meaningful notion of obligation or duty into his restatement of negligence. See *infra* text accompanying note 155.

ability," and "proximate cause"). This approach, he believes, will allow him to isolate the common essence or elements of all torts, and then to eliminate some of the otherwise insoluble difficulties and ambiguities associated with ordinary lawyerly usage.

Our suspicion is that this "clean slate" methodology is unsound as a matter of theory. We leave it to the ALI to judge whether it offers a plausible account of what it means to "restate" the law, and whether there is any reason to suppose that a non-binding document like a Restatement can hope to imprint its own preferred language onto the law.⁹¹ For present purposes, it is enough to show that this method so far has not accomplished what Professor Perlman hoped for it. Indeed, at least as applied to negligence, it seems to provide a mere variation on Sections 3 and 6.

Section 2A(1) states that every tort action is premised on an obligation to "protect" another against harm. In its ordinary meaning, however, "protect" is not able to capture many standard instances of negligence, such as negligent driving, which involves not a failure to protect another from harm, but a failure to avoid causing harm, or a failure to take precautions against harming. Even were Professor Perlman to add the phrase "take precautions against causing harm" as a supplement to "protect against harm," Section 2A would still not cover intentional or strict liability torts. A battery is not a *failure* to protect or take precautions against harming someone: It is the act of wrongfully touching another. Nor is conduct amounting to a strict liability tort—say, the use of explosives in certain contexts—a failure to protect or take precautions against hurting another. The very assumption behind such actions is that the actor did *not* fail to do anything that he or she was supposed to do. Section 2A's underinclusiveness is also evident in its failure to find a place for the justified reliance component of claims for fraud and negligent misrepresentation.⁹² In such cases, justified reliance is an element of plaintiff's prima facie case distinct from any of Section 2A's five elements.

In these and other ways, Section 2A is substantially underinclusive as a definition of tort. Yet in other respects it is overinclusive. Consider, for example, its third and fifth elements: causation of legally cognizable harm. Proof of causation and harm *are* essen-

91. The failure of the courts to adopt the alternative account of the elements of negligence articulated in Section 281 of the First and Second Restatements probably counsels pessimism about these prospects. RESTATEMENT (FIRST) OF TORTS § 281 (1934); RESTATEMENT (SECOND) OF TORTS § 281 (1965).

92. DOBBS, *supra* note 4, § 474, at 1359.

tial to a prima facie case of negligence. But they are not part of the prima facie case of every tort. A plaintiff can establish offensive-contact battery and trespass without showing physical, emotional, or economic harm.⁹³ Likewise, a plaintiff can make out a case of libel or slander per se simply by showing that defendant published a statement concerning the plaintiff that has a tendency to defame, regardless of whether plaintiff actually suffered any harm.⁹⁴

The "obligation" element of Section 2A(1) may also be overinclusive, since genuine instances of strict liability arguably do not require an obligation on the part of the actor to protect the plaintiff from injury. By hypothesis, a defendant subject to strict liability is being held liable for harms he could not have prevented by reasonable measures. Hence, it may be incorrect or at least misleading to describe his conduct as violating a standard of conduct to which he was obligated to adhere. This, at least, is the position taken by the Second Restatement, which asserts that the concept of duty, taken to refer to an obligation to conduct oneself in a certain way,

is not, and cannot be, used in dealing with the liability which is the legal consequence of conduct which is at the peril of the actor The liability in such situations is often called liability without fault, and the words "without fault" preclude the idea that the conduct is a breach of duty to refrain from it. In a word, there is liability without breach of any antecedent duty. Such a duty as there is, is merely a duty to make reparation for the other's injury.⁹⁵

These examples demonstrate the inadequacy of Section 2A as a generic formula for tort. In fact, so long as it speaks in terms of an obligation to protect or take precautions, and in terms of a requirement of causation and harm, and without mention of justified reliance, Section 2A will be unable to accommodate most claims sounding in intentional tort and strict liability. To make the point conversely, Section 2A is not a restatement of tort. At best, it is a restatement of one particular tort: negligence. Of course, this is not what it set out to do. If section 2A is limited to negligence it cannot provide "a common framework and vocabulary for the various projects revising the Restatement, Second, of Torts."⁹⁶ At most, it offers a particular, idiosyncratic description of negligence that is redundant upon the more specific negligence provisions of Sections 101-105.

93. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160-61 (Wisc. 1997) (permitting award of compensatory and punitive damages for harmless trespass).

94. DOBBS, *supra* note 4, § 408, at 1140 (noting presumed damages rule).

95. RESTATEMENT (SECOND) OF TORTS § 4 cmt. b.

96. Memorandum from Harvey Perlman, *supra* note 6.

Turning now to those provisions, we must consider whether they succeed in clarifying negligence law by recasting it in the language of Section 2A and without reference to the concepts of "duty" and "proximate cause." Perhaps the major feature of these provisions is the distinction between acts or omissions that occur "in" and "outside" "the conduct of one's affairs." For the former category, Section 101 posits a general obligation to act reasonably. For the latter, there is no such obligation. Section 101's general obligation to act reasonably is then subject to the limitations of "scope" set out in Section 105.

The supposed value of this phraseology is that it will allow us to avoid talk of affirmative duties, acts and omissions, and misfeasance and nonfeasance. Without this change, Professor Perlman suggests, negligence law lacks the ability to explain why, for example, the omission of not applying one's brakes while driving is actionable negligence, whereas the omission of a pedestrian to prevent another from stepping into traffic is not actionable.⁹⁷ This distinction, he further suggests, is captured by Section 101. The former omission occurs "in" the conduct of the driver's affairs and hence entails liability; the latter omission occurs "outside" the pedestrian's affairs, and hence is a mere failure to protect or benefit.

This is hardly an advance. The driver's careless failure to apply the brakes is negligent driving, not negligent failure to rescue, and we do not need a specialized vocabulary to tell us that. Professor Perlman seems to assume that the distinction between the driver and pedestrian cases cannot be handled by the act/omission or misfeasance/nonfeasance distinction because in both cases, the last thing that happens before the injurious impact is that the defendant fails to move his or her musculature in a way that would prevent the accident. In fact, there is a familiar test perfectly suited to capture the difference between the two examples, namely the one (in)famously enunciated by Cardozo in *H.R. Moch Co. v. Rensselaer Water Co.*⁹⁸ It asks "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."⁹⁹ That no major advance is brought about by the terminological change is also evidenced by

97. Preliminary Draft No. 2, *supra* note 6, § 101 & cmt. b.

98. *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898-99 (N.Y. 1928) (denying liability of public waterworks for negligent failure to provide water sufficient to douse fire that destroyed plaintiff's building).

99. *Id.* at 898.

Sections 102-104, which basically reproduce in new language the provisions of the Second Restatement specifying when actors are under affirmative duties to protect and rescue.¹⁰⁰

Perhaps the most significant failure of Sections 101 and 105 is that they largely reproduce Professor Schwartz's Sections 3 and 6. Indeed, for all the talk of obligation in Section 2A and its commentary, the notion of obligation does almost no work in these provisions. As we have seen, Section 101 simply posits a "general" obligation to act reasonably so as not to cause any sort of cognizable harm to others. This is a notion of obligation without any teeth—one which treats the duty element as merely setting "the . . . standard of care against which to measure the actor's conduct."¹⁰¹ Because Section 101 does not specify that the obligation must be owed to a particular person or class of persons, it is a trivial element—one that it always satisfied for instances of conduct deemed to be "in the conduct of one's own affairs."¹⁰² In this way, Section 101 produces an account of negligence equally devoid of a notion of a defendant being obligated to conduct himself in a certain way with regard to the interests of certain others. Moreover, Section 101, unlike Section 3, purports to encompass all of negligent misfeasance and some nonfeasance, including misfeasance producing emotional and economic harm. And so, when it comes time to cut back on the scope of the clearly over-broad liability rule of Section 101, we find Section 105 employing not notions of obligation or duty, but rather liability exemption language practically identical to that of Section 6.

IV. ASSESSING THE REPORTERS' DUTY SKEPTICISM

In different ways, Sections 3 to 17 and Sections 101 to 105 fail to restate negligence. As we have explained, they do so because their authors are eager to avoid inclusion of the notion of obligation conveyed by the duty element of the negligence tort. This eagerness to avoid duty apparently stems from certain convictions held by the Reporters about the incoherence or unhelpfulness of the concept of duty. We have elsewhere surveyed and criticized various bases for

100. Compare Preliminary Draft No. 2, *supra* note 6, §§ 102-04 (defining conduct as within an actor's affairs so as to capture duty to rescue cases in which duty is imposed because the actor created the peril, because the actor undertook to rescue, and because of the existence of a special relationship between defendant and plaintiff), with RESTATEMENT (SECOND) OF TORTS § 314A (defining conduct as within an actor's affairs in substantially the same way).

101. Preliminary Draft No. 2, *supra* note 6, § 2A cmt. c.

102. See *infra* text accompanying notes 152-57 (elaborating on this point).

such convictions as they appear in the works of others, particularly Holmes and Prosser.¹⁰³ We pause briefly here to consider which of these might be at work in this context.

Duty skepticism in law takes various forms. The most virulent is a global or jurisprudential skepticism about the possibility of legal concepts such as duty and obligation having any content or meaning. Holmes, for example, seems to have advocated such a claim when he argued that a description of an actor being under a legal duty to do X is always a dressed-up and confusing way of saying that the actor runs the risk of sanction if he does not do X.¹⁰⁴ This skepticism is "global" or "jurisprudential" because it does not merely assert that courts or commentators *sometimes* confuse the notion of being obligated with the notion of fearing sanction. Nor is it content to claim, with economic theory, that it would be *useful* for developing predictive models of human behavior to *assume* that individuals act only in response to sanctions (or rewards). Rather, it claims that it is unintelligible to assert that there is a duty to behave in a particular way, unless one is simply asserting that the failure to behave as described will be attended by certain consequences. In short, "duty" cannot convey the notion of an obligation, but only that of a threat.

The Holmesian position on legal duties is, of course, strongly counter-intuitive. The idea of being under a duty—of being obligated to behave in a certain way toward certain persons—is quite a comprehensible feature of ordinary moral thought. Few of us would have difficulty accepting that promises create duties to particular persons. Nothing more mysterious is involved in saying that, by our conduct, our offices, and our relationships, we incur duties to be careful not to injure certain others. What reason, then, is there to suppose that this intuitive idea suddenly collapses when employed in negligence? The reduction of duty to sanction has also been carefully parsed and criticized by scholars in various jurisprudential camps, including, for example, Lon Fuller and H.L.A. Hart.¹⁰⁵ Finally, it is difficult to see how an ALI reporter could proceed on the a priori assumption that a central, embedded feature of a given body of case law is incoherent. Indeed, as Judge Posner has made clear in his writings, claims about the emptiness of legal concepts provide a basis not for restating but for "*overcoming*" law: for get-

103. Goldberg and Zipursky, *supra* note 17, at 1752-64, 1807-12.

104. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

105. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 92-95 (1940); H.L.A. HART, *THE CONCEPT OF LAW* 82-91 (2d ed. 1994).

ting rid of legal concepts and replacing them with other, supposedly superior concepts, such as those employed in economic analysis.¹⁰⁶

For all these reasons, the Reporters cannot defend their neglect of duty simply by treating the Holmesian view as if it were obvious or non-controversial. At some level, they recognize this. Although he does not like the term "duty" for reasons explored below, Professor Perlman clearly likes the idea of obligations: It is a featured component of his provisions. Likewise, although he has elsewhere made Holmesian comments,¹⁰⁷ Professor Schwartz also at times treats the idea of being obligated or under a duty as intelligible. As we have already noted, at the very end of the commentary to his last negligence provision, he acknowledges the role that duty considerations play in negligence enabling others to commit torts against the plaintiff. Likewise, in explicating the liability exemption of Section 6, he notes in comment g that, "[i]n certain cases, a duty issue arises because it is unclear whether the responsibilities of a certain category of actors include the safety function that is the subject of the plaintiff's claim."¹⁰⁸ In other words, there is a meaningful question to be asked in some cases as to whether the defendant was obligated to exercise reasonable care not to injure the plaintiff.¹⁰⁹

Another form of duty skepticism does not claim that obligation is unintelligible. It merely claims that, as the courts use the term in negligence cases, it is always a stand-in for other issues and considerations, particularly those of "public policy." At one time, this argument typically proceeds, courts needed to hide behind the language of duty to avoid letting on that they were making policy. In this day and age, however, they increasingly do so openly, as evidenced by the many cases asserting that resolution of the duty question in individual cases requires that courts "balance" various

106. RICHARD A. POSNER, *OVERCOMING LAW* 15-21 (1995) (rejecting law conceived as an autonomous discipline).

107. See Schwartz, *supra* note 81, at 316 (suggesting, in the context of a critique of Cardozo's duty analysis in *Palsgraf*, that the only analysis that counts as "genuine legal philosophy" is analysis that "deals with the purpose or function of the tort system").

108. Discussion Draft, *supra* note 6, § 6 cmt. g.

109. Consider also the discussion of negligence per se in comment g to Section 12: "To invoke negligence per se, a party must show that the plaintiff was within the class of persons the legislature was endeavoring to protect." *Id.* § 12 cmt. g. Although it is a question of statutory interpretation rather than common law analysis, the "protected class" question in negligence per se is in many respects similar to the duty question of common law negligence. In both instances, we seek to identify the class of persons to whom the defendant was obligated to be vigilant.

policy factors, such as the factors listed by the California Supreme Court in *Rowland v. Christian*.¹¹⁰

It is possible that the Reporters give some credence to this sort of argument, so it is worthwhile to point out two sets of problems with it. First, as we have seen, almost every state court, even courts that use *Rowland*-type analysis, continue to talk about duty in the sense of obligation in all manner of negligence cases. This suggests that *Rowland* policy analysis is not understood by the courts as a substitute for, but at most a complement to, analysis of duty in the sense of obligation. Perhaps a proponent of the argument we are considering might assert that courts still feel the need to talk about duty in the obligation sense only because of some residual need to "hide [their] light under a bushel."¹¹¹ This claim, however, is far-fetched. Negligence is not an area, like some areas of constitutional law, where courts might feel a lurking insecurity about their authority to resolve the issues before them. Moreover, modern courts are hardly shy about discussing policy in the context of negligence cases.

The second problem with this sort of argument is that it confuses the issue of whether courts generally use the term "duty" to raise the question of obligation with the issue of whether the duty issue in a given case is subject to resolution under clear rules or looser standards. It is true enough that, when confronted with hard duty questions, courts often invoke multiple considerations in an effort to resolve those questions. For example, they are wont to assess the degree to which harm to the plaintiff was foreseeable,¹¹² what, if any, relationship existed between the parties,¹¹³ the degree of control exercised by the defendant over the situation¹¹⁴ and whether there are any prevailing social norms as to whether the conduct being demanded of the defendant was required or merely advisable.¹¹⁵ But so what? Courts also face lots of easy duty cases in

110. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (listing factors including foreseeability, moral blame, deterrence, and insurance).

111. Grant Gilmore used this phrase to describe what he mistakenly took to be Cardozo's technique of hiding policy judgments in the formal language of the law. See Goldberg, *supra* note 79, at 1440-41 (explaining and refuting Gilmore's claim as applied to Cardozo).

112. See, e.g., *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 126-27 (Cal. 1999) (holding that attack on plaintiff was not "sufficiently foreseeable" to impose duty to protect on defendant).

113. See, e.g., *Valentine v. On Target, Inc.*, 727 A.2d 947, 950 (Md. 1997) (finding relationship and foreseeability critical to duty analysis).

114. See, e.g., *Hopping v. Coll. Block Partners*, 599 N.W.2d 703, 705 (Iowa 1999).

115. 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.").

which they can readily cite and apply an established rule to resolve the matter before them. To take a familiar example, if a person happens to come upon but fails to rescue a stranger who is drowning, he will not incur liability in most states because of the clear rule holding that he has no obligation to attempt a rescue. The fact that hard cases call for more extended analysis does not mean that the court has suddenly changed the question it is asking. Rather, it indicates that questions of obligation are often contestable, and that resolving those questions requires the courts to address various considerations.¹¹⁶

Another argument against the employment of concepts like "duty" and "obligation" is that their use would commit the Restatement to adopting a "corrective justice" theory of tort, or that it would ask judges to be moral philosophers, or at least rely upon them.¹¹⁷ The latter sort of concern is unwarranted. The concept of intent is a psychological one, and the concept of causation is in some ways a scientific one, yet judges in battery cases need not be psychologists, and judges in negligence cases need not be scientists. To point out the family of concepts with which one is dealing is not to say that judges and scholars must now operate from within a special expertise in that area. It is to recognize the dimension and depth of the concepts, and to recognize the kinds of considerations with which they are connected. The judicial task is not to decide what is "true" about duties of care, considered abstractly or as part of a Kantian theory of morality. It is to understand the body of decisions courts have made under the heading of "duty" and how this body fits within negligence law more generally.

The former concern is no more genuine. It is certainly the case that many corrective justice theorists analyze torts in terms of duties. But they are hardly alone in doing so. For example, Prosser and Wade, who surely were not "corrective justice" theorists in the modern sense, were content to put many specific provisions into the Second Restatement concerning duty and obligation.¹¹⁸ As we have explained, the only theory that in principle cannot find room for a

116. Some might argue that, to the extent duty questions call for this sort of analysis, they are so indeterminate as to be avoided. No one can dispute that there are hard duty questions, and that courts reach divergent conclusions in answering those questions. But how does this distinguish duty from proximate cause? From foreseeability? From liability-exemption analysis under Sections 6 and 105? The application of any legal concept will sometimes entail discretion and require judgment.

117. Cf. Schwartz, *supra* note 81, at 316 (suggesting that the best that can be said for Cardozo's duty analysis in *Palsgraf* is that it carries with it a certain "corrective justice quality").

118. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 314-24, 333-44 (1965).

notion of obligation in tort law is one committed to the extreme, Holmesian claim that being under a duty always and necessarily reduces down to the idea of being under a threat of sanction.¹¹⁹ To reject this jurisprudential claim about the nature of law is not to take a position on the best substantive theory of tort law.

A final and more down-to-earth argument against use of the concept of duty in the Restatement is one we suspect has had the most salience for the Reporters. It asserts that duty should be avoided simply because it causes confusion among judges, lawyers, and scholars. That is to say, as one slogs through scores of negligence decisions, one finds that courts do not always seem to mean the same thing when they invoke duty, are not always clear in articulating the principles and rules concerning duty, and sometimes make mistakes in part because of confusion about duty. For example, the California Supreme Court in *Kentucky Fried Chicken v. Superior Court* held that a restaurant is under "no duty" to accede to a robber's demand for cash in order to protect its patrons from being attacked by the robber.¹²⁰ Is this really a ruling on whether the restaurant owed a duty to take steps to protect its patrons from crime? Or is it a ruling concluding as a matter of law that it was not unreasonable for the restaurant to refrain from acceding to the robber's demand?

This practical argument for excluding mention of duty in the *General Principles* rests on a plausible premise, and bears directly on the task faced by the Reporters. The ways in which the courts employ the duty element in analyzing negligence surely is in need of clarification. But this does *not* support the outright banishment of duty from negligence law. Rather, if as a Reporter for the Third Restatement of Torts, one discovers that the duty element has introduced confusion into the law, the task at hand is surely to rectify that confusion by clarifying the ways in which the courts use the concept. The appropriate response, in other words, is to *restate* the law, rather than to recast it completely. At a minimum, a draft Restatement should attempt to refine existing usage before jettisoning it—and then only after explaining why refinement and clarification will likely generate more problems than radical revision. The current drafts of the *Restatement (Third)*, however, make no such attempt, nor do they explain or justify their departure for the new world of post-duty, three-element negligence.

119. See *supra* text accompanying note 104.

120. *Ky. Fried Chicken v. Superior Court*, 927 P.2d 1260, 1266-69 (Cal. 1997).

V. DISTINGUISHING BETWEEN FOUR SENSES OF DUTY IN NEGLIGENCE LAW

We have shown that the provisions drafted by Professors Schwartz and Perlman distort the law of negligence by eliminating almost any mention of duty. We have also shown, here and elsewhere, that this distortion is unmotivated, that the reasons commonly thought to mandate this aggressive re-working of the law are not compelling. At the same time, we have conceded that the application of the concept of duty in negligence contains traps and confusions for judges, lawyers, and academics. To make this observation, however, is not to join sides with the Reporters in their effort to reinvent negligence law without duty under the guise of restatement. It is merely to concede the premise of the *General Principles* project: that the law of negligence would benefit from a clarification of its basic provisions. Duty is ineliminable in a restatement of negligence. Its confusions should precipitate a more refined analysis that clarifies the law of duty, rather than concealing or obfuscating it. The remainder of this Article is devoted to that task.

Our method is in one respect very direct: We present our own draft provisions that, we believe, would provide the basis for a sounder restatement of negligence law than provisions such as Sections 2A, 3, 6, and 101. These provisions, as well as accompanying comments, are presented in the Appendix. In this Part and the next, we set forth the doctrinal and theoretical grounds for the central features of these proposals. In brief, we claim that an actor is subject to liability to a plaintiff for negligence if the traditional four-part test of duty, breach, causation, and injury is met; that the duty element of negligence centrally concerns whether defendant was obligated to the plaintiff to take care to avoid causing the type of injury plaintiff suffered, but that courts use duty in at least three other senses beyond this sense; that there is a general duty to exercise reasonable care to avoid causing physical injury or property damage to others, but that this general duty complements the four-part test rather than contradicts it; and that a more limited set of duties obtains with regard to nonfeasance and other sorts of harm.

Our principal doctrinal aim in this Part concerns the second point just mentioned. Sub-Part V.A displays the central role in case law of duty in the primary or obligation sense, and attempts to refine that sense. Sub-Part V.B suggests how duty may be clarified by recognizing the three alternative issues that courts at times raise under the duty element: (1) whether there is an appropriate nexus between the defendant's breach and the duty the defendant owed to

the plaintiff; in short, whether the breach of a duty is a breach of duty owed *to the plaintiff*; (2) whether the plaintiff's case on breach is such that a court ought to rule that there is *no breach as a matter of law*; and (3) whether the broader policy implications of permitting plaintiff to recover justify creating an exemption from negligence liability.¹²¹

A. Duty in Its Primary or "Obligation" Sense

1. The Issue and Illustrations

Duty in its primary sense raises the issue: Was the defendant obligated to the plaintiff to exercise care to avoid causing (or to prevent) the sort of harm suffered by the plaintiff? The further issues raised by this element concern how the defendant was obligated to conduct herself, the general category of harm (physical, emotional, economic) she was obligated to guard against, and the class of persons afforded protection by that obligation. In the words of the Illinois Supreme Court, the duty inquiry concerns "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of the plaintiff."¹²² Or, in one of Prosser's less skeptical formulations, "a duty in negligence cases, may be defined as an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another."¹²³ In the language of the Second Restatement, "[t]he word 'duty' is

121. Three caveats are in order. First, this list of issues is meant to be descriptive, but not exhaustive. It may be, for example, that courts sometimes raise issues of assumption of risk or proximate cause under the heading of duty.

Second, in dividing the four senses of duty into one primary and three alternative senses, we do not mean to suggest that the members of the latter group are less well-entrenched or less plausible normatively than duty in its primary sense. Rather, our point is that courts use the term "duty" to characterize certain rulings that do not squarely raise the question of whether the defendant was obligated to the plaintiff to take care to avoid causing the type of injury the plaintiff alleges, but instead raise these other "secondary" questions.

Finally, although we think that there are many clear instances of courts using duty in each of the senses described above, we do not mean to suggest that these categories are always clear in application. Certain cases will raise issues that could fall into two or more of these categories. Thus, it is likely that, in these cases, courts do and must make pragmatic judgments about how to employ these categories to the issues and facts in front of them.

122. *Ward v. K-Mart Corp.*, 554 N.E.2d 223, 226 (Ill. 1990). See *infra* Part V.A.2 (discussing relationality, relationship-sensitivity, and relationship-dependence).

123. KEETON ET AL., *supra* note 3, § 53, at 356; see also *id.* at 358 (noting that no-duty rulings are rulings holding that "the defendant is under no legal obligation toward the particular plaintiff to act with the care of a reasonable man, and he is not liable even though his conduct falls short of that standard, and the other is injured as a result").

used . . . to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other."¹²⁴

As we noted previously,¹²⁵ the issue of duty in its primary sense is part of every negligence suit, including the Section 3 physical damage suits that Professor Schwartz believes can be restated without reference to duty. Before there can be legal negligence, there must be an obligation of care owed by the defendant to the plaintiff.¹²⁶ However, it is certainly true that the relatively straightforward Section 3 cases we discussed earlier, in which courts explicitly confronted the primary duty issue,¹²⁷ are less common than cases in which such issue is not litigated. This is because landmark decisions such as *Heaven v. Pender*,¹²⁸ *MacPherson v. Buick*,¹²⁹ and *Donoghue v. Stevenson*,¹³⁰ have helped establish a general rule governing the application of the duty element which specifies that each of us ordinarily owes a duty of care to others to go about our business in a manner that does not impose unreasonable risks of physical harm to others. Because of the breadth of this substantive rule of duty, courts generally do not, and should not, go out of their way looking for "live" duty issues in run-of-the-mill traffic accident and malpractice cases. But this ratio of easy cases to hard cases does not justify using the misfeasance-physical harm cases of Section 3 as proof that there is no duty element. Indeed, the same ratio will likely be found in any area of negligence law in which there are well-established duty rules, including malpractice, landowner li-

124. RESTATEMENT (SECOND) OF TORTS § 4 (1965). One might be tempted to interpret the phrase "required to conduct himself in a particular manner at the risk [of becoming] subject to liability" as endorsing a liability-rule conception of duty, in which being "required" to do X is equivalent to being "exposed to sanction" for failing to do X. *Id.* That reading of Section 4 is belied by its commentary, however. *See id.* § 4 cmt. a. ("The duty which is defined in this Section is a duty that the actor shall conduct himself or not conduct himself in a particular manner."); *id.* § 4 cmt. b ("[Duty] is particularly valuable in describing the requirement that action shall be taken for the protection of the interests of others. It is also useful to describe the requirement that the actor, if he acts at all, must exercise reasonable care to make his acts safe for others."); *id.* § 4 cmt. c (" 'Duty,' as the word is used in all the Subjects of this Restatement, is a duty to conduct one's self in a particular manner.")

125. *See supra* text accompanying notes 29-35, 61-71.

126. *See id.*

127. *See supra* text accompanying notes 61-71.

128. *Heaven v. Pender*, 11 Q.B.D. 503, 509 (C.A. 1883).

129. *MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916).

130. *Donoghue v. Stevenson*, 1932 App. Cas. 562.

ability, failures to protect or rescue, economic loss, and emotional distress.¹³¹

The cases that present the primary duty issue in its cleanest form tend to be those in which it is relatively clear what the prudent course of action toward the plaintiff would have been; the squarely-presented question is whether the defendant had any obligation to persons such as the plaintiff to pursue that course. Thus, for example, in *Harper v. Herman*, the adult plaintiff was a social guest on defendant's personal yacht.¹³² The plaintiff suffered a severe spinal cord injury when he dove in the water from the yacht. He argued that the defendant boat-owner should have warned him that the boat was in shallow water, but the defendant argued that he did not owe the plaintiff a *duty* to warn. In this case, there is no real question about whether it would have been reasonable or prudent for defendant to speak up. The question was whether defendant, as the boat-owner, was *obligated* to do so. The court decided that he was not.¹³³

Similarly, in cases such as *Tarasoff*,¹³⁴ it is sometimes quite clear that *if* the defendant had an obligation to act prudently in order to safeguard the plaintiff's interests, his failure to warn was imprudent. The real question is whether the therapist did have such an obligation to the plaintiff. In *Tarasoff* itself, the court sided with the plaintiff, deciding that there was a duty of care to identifiable victims that contained within it the duty to warn.¹³⁵ In *Gammon v. Osteopathic Hospital*, the defendant hospital mistakenly included dismembered body parts in a package of belongings they gave to the family of a deceased patient.¹³⁶ It seemed clear that, if there was an obligation to be prudent with regard to plaintiff's emotional distress, defendant failed disastrously in that duty. The question was whether defendant was obligated to be vigilant of this sort of distress, and the court decided it was.¹³⁷ All of these cases involve duty in the primary sense, because they pose the question of whether taking reasonable care to safeguard plaintiff is simply

131. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 818 (E.D.N.Y. 1999); *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000) ("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.")

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

133. *Id.* at 474.

134. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). We do not mean to take a position on whether *Tarasoff* itself was an easy breach case.

135. *Id.* at 343.

136. *Gammon v. Osteopathic Hosp.*, 534 A.2d 1282, 1283 (Me. 1987).

137. *Id.* at 1285.

commendable, on the one hand, or whether it is obligatory, on the other.

Cases involving duty in the primary sense often arise in the context of claims brought by non-clients against professionals. Once again, these are cases in which the plaintiff is able to point to the course of conduct that would have been prudent, but the question is whether defendant was obligated to the plaintiff to be careful toward her. In *Arnona v. Smith*, for example, the defendant, an attorney for the prospective buyers of the plaintiffs' home, negligently and falsely identified a cloud on the plaintiffs' title, scotching the deal.¹³⁸ The court held that the plaintiffs' suit in negligence failed nonetheless because the attorney undertook the investigation into the sellers' title for the benefit of his client, and owed no duty of care to the sellers as non-clients.¹³⁹ In *Doe v. McKay*, the Supreme Court of Illinois held that a recovered-memory therapist owes no duty of care to avoid causing emotional distress to the patient's family members, in part because it would conflict with the duties owed by the therapist to the patient.¹⁴⁰

As Professor Rabin has observed, some of the most contested duty-as-obligation issues turn on whether the defendant was under a duty either to protect plaintiff from physical injury at the hands of herself or another, or to avoid "enabling" another to injure the plaintiff.¹⁴¹ Questions of this sort that have been raised and decided in recent cases include: Do a university and a sorority owe a duty to take reasonable steps to ensure that sorority members do not injure themselves while intoxicated?¹⁴² Does a private security firm hired by a hotel owe a duty to employees to take reasonable steps to protect them from attacks on hotel premises?¹⁴³ Does a crossing guard owe a duty of reasonable care to the children whom she directs across the street?¹⁴⁴ Does a church diocese with actual knowledge of a priest's pedophilia owe a duty of care to protect children who may come into contact with the priest from being molested?¹⁴⁵ Does a

138. *Arnona v. Smith*, 98-CA-01360-SCT, 749 So. 2d 63, 64-65 (Miss. 1999).

139. *Id.* at 65.

140. *Doe v. McKay*, 700 N.E.2d 1018, 1022 (Ill. 1998); see also *Jacoby v. Brinckerhoff*, 735 A.2d 347, 352-53 (Conn. 1999) (determining that therapist owed no duty to spouse of patient to take care not to injure their marriage).

141. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 437-38 (1999).

142. *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 310-12 (Idaho 1999).

143. *Holshouser v. Shaner Hotel Group Props. One Ltd. P'ship*, 518 S.E.2d 17, 21-22 (N.C. Ct. App. 1999).

144. *Isenhour v. Hutto*, 517 S.E.2d 121, 124-26 (N.C. 1999).

145. *Hutchinson v. Luddy*, 742 A.2d 1052, 1059-60 (Pa. 1999).

gun manufacturer or dealer owe a duty to a gunshot victim to take steps to ensure that the gun does not reach the hands of those intending to use it for criminal purposes?¹⁴⁶ Some of these may be easy cases, some difficult. But each is a genuine duty case: Each addresses directly the issue of whether the defendant was obligated to take steps to ensure her well-being.

Another fertile ground for cases involving duty in the primary sense is the area of non-tangible harms such as emotional distress and economic loss. In *RK Constructors, Inc. v. Fusco Corp.*, for example, the plaintiff, a general contractor, alleged that defendant negligently operated a crane on a worksite supervised by plaintiff, resulting in injury to plaintiff's employee.¹⁴⁷ As a result, plaintiff incurred increased workers' compensation premiums. Plaintiff sued defendant, plausibly claiming that its economic loss was a foreseeable consequence of the worksite accident caused by defendant. The court, however, concluded that defendant had no duty to take care to avoid causing economic loss to the plaintiff.¹⁴⁸ In a spate of recent suits, courts have also confronted the question of whether a laboratory hired by an employer to conduct drug-screening tests on employees owes a duty to exercise care in conducting those tests to employees at risk for termination in the event of a negligent and inaccurate test result.¹⁴⁹

It is, of course, always *possible* to describe these cases as "breach" rather than "duty" cases. Thus, a duty-skeptic might say of a case like *Tarasoff*, that the "real" issue was whether reasonable psychiatric care includes warning likely victims of patients who threaten violence against them. But, absent a compelling philosophical argument as to the primacy of the concept of breach over the concept of duty, the attribution of greater "reality" to the breach analysis is simply rhetoric. By contrast, if one accepts that both duty and breach analysis are intelligible and practicable, the judicial task is to identify when a case presents a dispute as to whether

146. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 818-27 (E.D.N.Y. 1999); *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36 (2d Cir. 2000) (certifying the issues of duty and market-share liability); *Valentine v. On Target, Inc.*, 727 A.2d 947, 950 (Md. 1999).

147. *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 155 (Conn. 1994).

148. *Id.* at 156-57.

149. *Compare Duncan v. Afton, Inc.*, 991 P.2d 739, 744-46 (Wyo. 1999) (imposing such a duty), with *Willis v. Roche Biomedical Labs., Inc.*, 61 F.3d 313, 315-16 (5th Cir. 1995) (rejecting such a duty). These cases arguably are better handled as defamation cases, where the issue is whether the defendant's misconduct is sufficient to defeat the privilege to defame the employee for purposes of evaluating his or her fitness for employment. Among other things, isolating the wrong in these cases as harm to reputation rather than loss of employment can make sense of why at-will employees might be entitled to recover in such suits.

the defendant owed an obligation to the plaintiff, as opposed to a dispute over whether the defendant met that obligation.

The former question frequently arises when courts are confronted with a plaintiff claiming, as in *Tarasoff*, that defendant ought to have attended to the safety of a new class of persons beyond the class(es) to whom the defendant already owes well-established duties of care. It also arises, however, when a plaintiff within a class of persons to whom the defendant owes some recognized duties of care claims a distinct genus of obligation. In *Harper*, for example, the defendant was already obligated to take care to maintain the boat-deck so that it was free from hidden traps or hazards, and to drive with reasonable care. Plaintiff's claim was that, in addition, the defendant was required to warn him of the hazards posed by his diving off the stationary boat into the shallow water. Such a claim does not concern whether the defendant behaved reasonably in maintaining or operating the boat. Thus, when the court addressed the duty issue, it did not focus on the question of the feasibility or cost of warning, or the custom of boat owners regarding warnings to guests. Rather, the court asked whether the defendant incurred an affirmative obligation to alert his passengers to dangers they might encounter incidental to the use of the boat. It therefore considered questions pertinent to the obligation issue: whether the defendant had disabled the plaintiff from protecting himself, whether plaintiff expected protection from the defendant, and whether defendant stood to profit from his interactions with plaintiff.

The line between duty and breach issues is sometimes blurry, of course, particularly in cases in which the defendant already owes the plaintiff certain obligations, yet the plaintiff alleges a new and different set of obligations. A currently contentious example concerns the obligations of pharmacists to their customers. The traditional conception has been that a pharmacist owes her patient a strictly clerical duty of care: She must take care to follow the physician's prescription, and can be held liable for failure to do so. In recent years, however, pharmacists have sought out and obtained a more active role in the delivery of medical services, have revamped and expanded training for the job, have held themselves out to the public as competent to perform more than a clerical function, and have become subject to new legislative norms of conduct. These developments have led plaintiffs to assert that pharmacists now incur additional duties to their customers, such as the duty to take reasonable care to evaluate whether a particular prescription is medically contra-indicated.

It may be that some of the pharmacist litigation that goes under the heading of "duty" involves cases in which an obligation to the customer to take reasonable precautions is presupposed, and the dispute is over what reasonable precautions would entail. These cases are more accurately depicted as raising breach rather than duty questions.¹⁵⁰ But, as Professor Schwartz correctly points out in the notes to Draft Section 6, much of the current pharmacist litigation does not concern the feasibility, prudence, professionalism, or reasonableness of precautions against certain risks to customers.¹⁵¹ Instead, it concerns whether certain sorts of risks (e.g., that a prescription patient has a substance abuse problem) are properly within the ambit of a pharmacist's responsibility. These are genuine duty issues.

2. Clarifying Duty in Its Obligation Sense

Questions of duty in the primary sense are fundamentally questions about whether the defendant had it within his discretion to attend to the plaintiff's interests, or whether he was under a *duty* or *obligation* to act with vigilance of the plaintiff's interests. Modern scholars sometimes have assumed that the question, and the notion of obligation as it exists in negligence, is trivial because it is clearly satisfied in every case. Prosser conveyed this idea when he said: "[I]n negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk."¹⁵² Others, most famously Judge Andrews in dissent in *Palsgraf*, have made the point by stating that there is a "duty to the world" to act reasonably.¹⁵³ Professor Schwartz offers his own version when he says that duty is ordinarily a "non issue."¹⁵⁴ These are facile answers, however, which conceal as much as they elucidate.

In some sense, it is accurate to say that each person owes a duty of due care to all other persons in the world not to cause her physical injury or property damage. For example, assuming the regime established by decisions like *Heaven* and *MacPherson* would apply, plaintiff P, living halfway around the world from defendant D, can justifiably claim that D owes her a duty to avoid conduct that risks physical damage to her or her property, and hence P can

150. We thank Ken Simons for raising this point.

151. Discussion Draft, *supra* note 6, § 6 cmt. g, Reporter's Note cmt. g.

152. KEETON, ET AL., *supra* note 3, § 53, at 356.

153. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102-03 (N.Y. 1928) (Andrews, J., dissenting).

154. Discussion Draft, *supra* note 6, § 6 cmt. a.

make out a *prima facie* case of negligence if she can show that D breached that duty so as to proximately cause P such damage. This is not to say that D will likely have any occasion on which to consider the consequences of his conduct for P's physical well-being. Rather, one might say that D owes a conditional duty to P (and every other person) of the following rough description: Should P ever enter the domain where physical injury to her person or property from D's conduct becomes a non-trivial possibility, at that point D's obligation to be vigilant of P's physical well-being will kick in. This notion of universal duty is reflected in provision D1 of our Appendix, concerning what we call the general duty to act reasonably to avoid causing physical harm and property damage. Conjoined with the four-element description of the tort in provision N, provision D1 captures much of what Professor Schwartz wishes to achieve with Section 3, as constrained by his Introductory Note. Critically, however, it does so from within the language of duty, rather than by rejecting it.

While we thus cheerfully acknowledge a general or universal duty to take care to avoid causing physical harm to another's person or property, we maintain that it is a mistake to try to capture this notion in phrases like "duty to the world" or "duty is a non-issue," for these phrases are often interpreted to mean that the duty of due care is an obligation to behave reasonably, period—an obligation owed to no particular person or class of persons. This is the usage that Professor Perlman, perhaps unwittingly, invokes when he claims that he means by "obligation" nothing more than the idea that a defendant's acts will be judged against a legal standard of conduct.¹⁵⁵ On this rendering, duty in its primary sense necessarily disappears from negligence. The claim that a given defendant was not under an obligation to take care to avoid injuring the plaintiff becomes unintelligible, because every defendant is defined to be under an obligation to behave reasonably, regardless of who is complaining of his conduct. In this sense, the duty-to-the-world formulation is entirely unsatisfactory in accounting for the language of duty within negligence law, as the myriad examples here and in Parts II and III indicate. By contrast, what we have termed the generality or universality of duty—the fact that some duties of due care are owed to everyone—avoids entailing that there are no interesting or important questions about duty in the primary sense.

155. Preliminary Draft No. 2, *supra* note 6, § 2A cmt. c.

In this, it is consistent with case law, which demonstrates continuing concern for the primary duty issue in a variety of contexts.

Another way to express the preceding points is to note that duty in its primary sense is an *analytically relational* concept: It concerns obligations of care that are owed by certain persons to certain other persons. In this respect, the duty issue within common law negligence has the same analytical structure as the issue in negligence per se of whether the statute allegedly violated by the defendant was enacted for the benefit of a class of persons that includes the plaintiff.¹⁵⁶ Both invoke the idea that the defendant was obligated to someone or some persons within a definable group. It may be that the class is very large—it may even be appropriate to describe the class as in some sense including each person in the world—but that fact does not render the concept analytically non-relational. The defendant still owes a duty to some defined class of plaintiffs.

As we have described them, the obligations captured by the concept of duty in its primary sense are also *relationship-sensitive*. In other words, the existence and scope of the duty or duties owed by the defendant to another will vary according to the nature of the relationship—including the lack of one—between defendant and that other at the time of the tortious conduct. The “universal” duty of care owed to strangers is limited to a duty to take care to avoid physical harm or property damage. By contrast, duties to take care to avoid causing economic harm or emotional distress are usually limited to instances in which the defendant and plaintiff stood in some sort of pre-existing relationship. Likewise, certain affirmative duties are only owed from one to another by virtue of a special relationship.

As the foregoing makes clear, however, the fact that duty is relational and relationship-sensitive *does not* entail the further claim that the existence of a prior relationship between defendant and plaintiff is a prerequisite to the existence of an obligation of care running from the defendant to the plaintiff.¹⁵⁷ Hence our account of the duty of care in negligence describes it as relational in

156. See *supra* text accompanying notes 77-85, 109 (discussing negligence per se).

157. We stress this point because both Reporters have misunderstood us to claim that duties of care can exist only given the presence of a pre-existing relationship between defendant and plaintiff. See Discussion Draft, *supra* note 6, § 6 Reporter's Note cmt. a (attributing to us the claim that nineteenth-century duty cases required a pre-existing relationship); Preliminary Draft No. 2, *supra* note 6, § 2A Reporter's Notes (attributing to us the claim that negligence liability is “tied to specific relationships”); Goldberg & Zipursky, *supra* note 17, at 1748, 1823-24 (taking pains to disavow both of these claims).

structure and relationship-sensitive, but *not relationship-dependent*. The existence of a relationship between defendant and plaintiff at the time of the conduct in question may bear on the existence and scope of the defendant's duty to the plaintiff, but it is not a sine qua non for the existence of such a duty.

Consider two simple scenarios. In the first, motorist M drives carelessly so as to crash into nearby pedestrian P1, who is a stranger to M. In the second, M is enjoying a pleasurable drive in the country, and is driving reasonably, when she notices stranger P2 on the far side of the road about to step into the path of another oncoming vehicle. M declines to shout a warning, even though she could have done so safely and easily, and P2 is run over by the other car, causing P2 a broken leg. After seeing the collision, M stops and volunteers to take P2 to the hospital. En route, however, M drives unreasonably and crashes into a tree, resulting in P2 suffering a broken arm.

With respect to the first incident, there can be no dispute that, under a regime of modern negligence law, M owed a duty of care to pedestrian P1 notwithstanding that M and P1 were strangers to one another. Here is an instance of the "universal" duty owed by M to others to take care not to risk physical injury to them. Yet, as the second example makes clear, even though M clearly owes duties of care independently of prior relationships, the duties owed by M to others are relationship-sensitive. Under the rule in most states, M had no initial duty to aid or rescue P2 precisely because they were strangers to one another. By contrast, once M commenced a voluntary rescue of P2, M incurred a duty to do so with reasonable care.

The important point to emphasize is that the recognition of duties of care as *universal*—as potentially owed to everyone regardless of pre-existing relationship—does not entail understanding duty in its primary sense as non-relational and therefore trivial. Rather, it requires seeing primary duty as relational in analytic structure without being relationship-dependent. In *The Moral of MacPherson*, we argued that the greatness of Cardozo's *MacPherson* opinion lay in part in its emphatic announcement that obligations to be vigilant of serious physical harm to others do not rest on contract or some other pre-existing relationship.¹⁵⁸ Yet, as Cardozo himself later made clear in *Palsgraf*, to applaud this move toward a conception of the duty of due care that is universal (i.e., not rela-

158. Goldberg & Zipursky, *supra* note 17, at 1812-25.

tionship-dependent) is not to embrace Andrews' fallacious jump to the notion that "duty" in negligence is non-relational, and hence has no real conceptual space to occupy within the tort.¹⁵⁹ Avoiding this fallacy permits a restatement of negligence that, unlike Sections 3 and 101, can account for the law's current expansive reach while still retaining the idea, equally central to modern case law, that negligence is the breach of an obligation of care owed to others.

B. Duty in its Alternative Senses

As we noted above, when courts analyze negligence suits under the duty element, they do not always refer to duty in its obligation sense, but also invoke at least three other ideas. We consider each of these in turn, and explain what they are, and how they fit into the tort of negligence.

1. The Nexus Requirement.

The second judicial use (the first of our "alternative" uses) of the term "duty" pertains to the connection between breach and duty. As our earlier discussions indicated, it is not sufficient to have injury, duty, breach, and causation; these elements need to be connected in the right way. In particular, the defendant's breach must be a breach of a duty owed to the plaintiff herself, or to the class of persons to which she belongs. In cases in which there is a breach and a duty, but the breach is not a breach of the duty owed to the plaintiff, the plaintiff has no cause of action in negligence. Courts often reject such claims under the rubric of denying that there is a duty, which is really a shorthand way of stating that there is no duty *owed to the plaintiff* to refrain from the conduct in which the defendant engaged, which is in turn a somewhat confusing way to say that, insofar as there was a breach of a duty of care, it was not a breach of a duty of care owed to the plaintiff, but, at most, a breach of a duty owed to someone else. A more felicitous way of putting the point might be that there must be a certain "nexus" between the breach and the duty, or the breach must be a breach of a duty to the plaintiff. The phrase "no duty" is sometimes used to convey that the required nexus between duty and breach is missing.

A recent decision of the California Court of Appeals illustrates this second sense of duty. In *Bryant v. Glastetter*, the defen-

159. *Id.*

dant was a drunk driver pulled over by police on a highway.¹⁶⁰ The plaintiff, a tow truck operator, was killed after being summoned by police to remove defendant's automobile. Plaintiff argued that defendant's negligent conduct caused his injury, but the court rejected the claim as a matter of law.¹⁶¹ It reasoned, essentially, that drunk driving is negligent because of the danger it poses to others on or near the roads, not to persons who are summoned after the fact to remove the driver's vehicle.¹⁶² The court expressed its reasoning in the language of "duty," holding that there was no duty to the tow truck driver, and therefore no cause of action.¹⁶³ The court did not deny that the defendant owed a duty to avoid physically endangering others by his drunk driving. Nor did it deny that the defendant breached that duty with respect to *someone*. Rather, the problem for the tow truck operator was that the driver's misconduct was not a breach of the duty that the driver owed to *him*, only a breach of duty to those on or near the roads as she drove. In the language of *Palsgraf*, the tow truck driver was not within the orbit of duty generated by the defendant's conduct, and hence was attempting to sue as the "vicarious beneficiary" of negligence toward others.¹⁶⁴ Although *Bryant* thus provides a relatively clear example of a "nexus" case, the court, following the lead set by the California Supreme Court in *Rowland v. Christian*,¹⁶⁵ confusingly framed and analyzed the question as if it were one of duty in the primary sense or of public policy.

The requirement of a nexus between the breach and the duty is pivotally important, if only tacitly, in many categories of duty cases that involve duty in the primary sense. This is particularly so in cases that involve three parties. In the typical negligence case there is almost always *some* duty owed from a defendant to a plaintiff, and often the defendant acted negligently toward *someone* (or at least the court assumes the defendant acted negligently toward someone). The problem is that the plaintiff is not the right someone, and hence the negligence does not amount to a breach of the duty that the defendant owes to the plaintiff.

For example, consider the *McKay* case, cited above, in which the court ruled that a recovered-memory therapist owed no duty of

160. *Bryant v. Glastetter*, 32 Cal. App. 4th 770, 774 (Cal. Ct. App. 1995).

161. *Id.* at 777.

162. *Id.* at 779-80.

163. *Id.* at 777.

164. *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928).

165. *Rowland v. Christian*, 443 P.2d 561, 568-69 (Cal. 1968).

care to avoid causing emotional distress to the parent of her patient. Given that the therapist was not obligated to prevent the parent from experiencing emotional distress, it follows that the therapist did not breach any duties of care owed to the parent. Still, there was an allegation of unreasonable conduct in the case, namely irresponsible therapy administered to the child. That alleged negligence, the parent might argue, even if not a breach of any duty owed to the parent, was a breach of duty to the child. And that breach proximately caused injury to the parent. Thus, assuming the jury could find a breach, the parent ought arguably to have a valid claim. Unfortunately for the plaintiff, this is exactly the type of argument that is barred by the nexus requirement. In *Palsgraf*, and in Section 281 of the Second Restatement, the requirement is explicitly raised and articulated as the basis for defeating this argumentative move. In *McKay*, it is defeated without discussion because the requirement is taken for granted.

Like other parts of negligence law, the "nexus" requirement is sometimes disputed and even abandoned. Consider, for example, the vexing issue of whether or when to permit claims by a relative who suffers emotional distress when a defendant negligently causes physical injury to a loved one. Many commentators and courts regard this issue as turning almost entirely on a prediction of the volume and relative merit of litigation that would flow from recognition of such claims. Thus, a decision like *Dillon v. Legg*¹⁶⁶ is viewed as expressing the belief of the California Supreme Court that the lower courts could handle these claims and weed out the meritless among them, whereas, in *Tobin v. Grossman*¹⁶⁷ the New York Court of Appeals made the opposite policy prediction. In fact, what is at stake in these cases is not only (or even chiefly) the predictive floodgates question, but the legal issue of whether or not to suspend the nexus requirement so as to allow a particularly sympathetic class of plaintiffs to pursue negligence claims. Indeed, the upshot of decisions like *Dillon* is that, under certain circumstances, family members are now permitted to "step into the shoes" of their injured kin, and sue as the vicarious beneficiaries of a defendant's breach of a duty of care owed to their relatives.¹⁶⁸

166. *Dillon v. Legg*, 441 P.2d 912, 924-25 (Cal. 1968).

167. *Tobin v. Grossman*, 249 N.E.2d 419, 423 (N.Y. 1969).

168. Seen in this light, the infamous "zone-of-danger" rule from decisions such as *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963), which is often mocked by courts and commentators as setting an arbitrary line for identifying those bystanders who may recover, becomes more intelligible as a not-entirely-successful effort to retain the nexus requirement, while slightly expanding it. Thus, the zone of danger test specifies that the only bystander-

Even though the nexus requirement can thus be controversial, its recognition in the Second Restatement, as well as treatises and leading cases, including *Palsgraf*, is more than sufficient to merit its inclusion in a restatement of the general principles of negligence law.¹⁶⁹ In taking this "positivistic" stance, we do not mean to suggest, however, that the nexus requirement has no justification. On the contrary, one of us has offered detailed explanations and arguments explaining why this requirement is cogent and principled.¹⁷⁰ The nexus requirement arguably goes to one of the basic ideas of our tort law—that a person is entitled to an avenue of civil recourse against another person only because the other person has wronged *her*.¹⁷¹ In negligence, that means that the duty breached must be a duty to the plaintiff. We do not mean to argue that the nexus requirement is demanded as a matter of justice; we simply assert that it is coherent and plausible, and hence that it can and does play a fundamental role in the structure of negligence law.

2. Breach-as-a-Matter-of-Law

It is among the more well-settled rules of negligence that, whereas the fault or breach issue is ordinarily to be decided by the jury, the duty question—in our parlance, the question of duty in the primary sense—is for the court.¹⁷² The implication of the first part of the rule is that courts must leave the breach question to the jury unless the evidence is such that a reasonable juror could resolve the breach question only one way.

As we have explained elsewhere, this division of labor is intelligible, in that it asks courts to set general and relatively stable guidelines for how one must conduct oneself, while leaving to juries

plaintiffs who can recover for emotional distress claims are those who *would have been* entitled to sue the defendant in their own right for negligently causing them fear for their own safety, if only they had in fact suffered the physical injury of which they were unreasonably endangered, or experienced a traumatic, assault-like injury of apprehending being hit (as opposed to distress over the injury to another).

169. The relationship between what we have called the "nexus" requirement and the "risk rule" found in the proximate cause literature and (implicitly) case law is a subject meriting a separate article of its own. A closely related discussion is found in Zipursky, *supra* note 79, at 34. For present purposes, our point is not that "duty-breach-nexus" is the best way to analyze cases of a certain sort; it is simply that some courts use the label "duty" to refer to the issue of whether the breach and duty are connected in a certain way.

170. *Id.* at 16.

171. *Id.* at 87.

172. See DOBBS, *supra* note 4, § 149, at 355.

more fact-intensive issues of whether those guidelines are met or breached in a given case.¹⁷³ Still, this division—or rather the temptation among judges to blur this division—is probably the greatest single source of confusion over duty. As many before us have pointed out, including Professor Schwartz, courts, both knowingly and unwittingly, sometimes decide what are surely breach questions under the guise of deciding the question of “duty” in its primary sense.¹⁷⁴ In this usage, the language of duty is used not to raise the issue of whether defendant was obligated to act with due regard for plaintiff’s physical, emotional or economic well-being. Nor is it used to refer to the issue of the duty-breach nexus—of whether plaintiff is complaining of a breach of a duty owed to her, rather than someone else. Instead, the court is using the duty element as a platform on which it may stand in order to decide for itself the unreasonableness or breach issue, and thus surreptitiously to shrink the scope of the rule stating that the breach issue ordinarily is for the jury.

Examples of this use of duty language are not hard to find in contemporary case law. In *Albert v. Hsu*, plaintiff, a patron of defendant’s restaurant, was killed when a car driven by a third party backed across a parking lot, over a curb, across a sidewalk and through the wall of the restaurant.¹⁷⁵ The court concluded that the “there was no duty” owed by defendant to plaintiff because the accident was too unforeseeable “to give rise to a duty owed and breached.”¹⁷⁶ Clearly, however, restaurant owners do owe a duty to patrons to ensure their premises are safe, including safe from the threat posed by forces outside the walls of the restaurant.¹⁷⁷ What plaintiff failed to establish was that the restaurant owner breached that duty by not building barriers or a reinforced wall that would have prevented the car from colliding with the plaintiff. This defendant had a particularly strong argument on breach in light of the fact that the building was constructed in accordance with local building codes.

173. Goldberg & Zipursky, *supra* note 17, at 1839-42.

174. See Discussion Draft, *supra* note 6, § 6 cmt. h.

175. *Albert v. Hsu*, 602 So. 2d 895, 898 (Ala. 1992).

176. *Id.* at 897-98.

177. Thus, for example, one would expect that the owner of a restaurant with curbside outdoor seating would owe a duty to its patrons to take steps to protect them from traffic. Likewise, the owner of a restaurant with large windows adjacent to a road might well owe a duty to use glass that can withstand the impact of rocks thrown out from under the tires of moving cars.

Another "breach-as-a-matter-of-law" case is *Washington v. City of Chicago*.¹⁷⁸ While proceeding on a city street, the plaintiffs' car was struck by a fire truck that, in an attempt to circumvent heavy traffic, drove onto a raised median at 35 mph, hit a planter box in the median, and lost control. The plaintiffs sued the City alleging negligence in the design and construction of the median. The Illinois Supreme Court held that the City owed "no duty" to the plaintiffs because "the accident which gave rise to plaintiffs' injuries was not a reasonably foreseeable consequence of the condition of the median."¹⁷⁹ In fact, as the court acknowledged, the City has a duty to exercise reasonable care in building and maintaining public ways so as to protect ordinary users such as the plaintiffs from physical injury.¹⁸⁰ As a matter of law, however, the court concluded that the City did not fail in that duty simply by deciding to build raised medians with planter boxes, in part because the risk of injury flowing from that design choice was very small.¹⁸¹

In *Peterson v. Spink Electric Cooperative*, a farmer owned a grain-loading device that, for reasons he could not determine, continually blew its electrical fuses.¹⁸² The farmer summoned the defendant's employees to repair the machine, telling them only that the machine was experiencing a power shortage. The farmer and the employees then arranged for the repair to occur at a time when the farmer would not be present, so the farmer told his adult son to direct the employees to the machine. Seeing a blown fuse and not having any other information, the employees assumed that the fuse was the problem rather than a symptom of a larger problem. After replacing the fuse, they asked the plaintiff, who was observing the repair, to connect a plugged-in extension cord owned by the farmer to an electrical cord running from the machine. Because of a hidden defect in the cord, plaintiff suffered an electrical shock. The South Dakota Supreme Court ruled that the defendant had "no duty" to guard against the plaintiff being shocked by the extension cord because the risk was unforeseeable and not in the control of the defendant. It is likely the case, however, that the employees did have a duty to go about their repairs with reasonable regard for P's physical safety, but fulfilled that duty as a matter of law. The defendants had no basis for knowing of any unusual danger associ-

178. *Washington v. City of Chicago*, 720 N.E.2d 1030 (Ill. 1999).

179. *Id.* at 1033.

180. *Id.*

181. *Id.* at 1033-34.

182. *Peterson v. Spink Elec. Coop.*, 1998 SD 60, ¶ 1, 578 N.W.2d 589, 590.

ated with use of the extension cord. Hence, as a matter of law, it was not unreasonable conduct simply to ask an adult present at the scene to plug it in.

A particularly self-conscious application of the use of the term "duty" to refer to breach as a matter of law is found in the New York Court of Appeals decision in *Akins v. Glens Falls City School District*.¹⁸³ Plaintiff, a spectator at a high school baseball game, was struck by a foul ball while standing near third base. The city school district had erected a 24-foot high backstop behind home plate, but only a three-foot high fence where plaintiff was standing when struck. The Court reversed a jury and lower court ruling in favor of the plaintiff, treating the case as raising a question about the "scope" of a landowners' duty of care to invited guests. In the face of a dissent complaining of the court's usurpation of the jury's function, however, it acknowledged that it was in fact entering a judgment of no breach as a matter of law.¹⁸⁴

Some of these cases (for example, *Albert* or *Peterson*) are probably instances in which the court was entitled to conclude that no reasonable jury could find breach on the evidence presented. That the courts in these cases chose to express that conclusion in terms of a ruling on duty in the primary sense is only mildly troubling. Of greater concern is the fact that courts sometimes trade on their authority to decide the obligation question in a manner that takes breach questions away from the jury even when the summary judgment/ j.n.o.v. standard is not met. In these cases, as Professor Green famously observed, courts use the duty element as a broad grant of jurisdiction to render no-breach-as-a-matter of law decisions.¹⁸⁵

In fact, Green himself went quite a bit further, asserting that the power-conferring aspect of the duty element was the *only* feature that distinguished "duty" from "breach." A duty skeptic, he claimed that the duty question is in its substance identical to the breach question,¹⁸⁶ and hence that the only thing the duty element accomplishes is to enable courts to police more vigorously the

183. *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981).

184. *Id.* at 535.

185. Leon Green, *The Duty Problem in Negligence Cases (Part I)*, 28 COLUM. L. REV. 1014, 1030 (1928).

186. Green shared Holmes's skeptical view that the duty question collapses into the breach questions because both turn on the same considerations of probability of harm, ease of precaution, etc. *Id.* at 1040. Hence, for Green, the significance of courts rendering duty as an independent element of the tort was entirely procedural: it permitted courts to serve a gatekeeping function by deciding whether to let the jury have the breach question. For a critique of the redundancy argument, see Goldberg & Zipursky, *supra* note 17, at 1808-09.

breach issue. In making this argument, however, Green was not being critical. Quite the opposite, he believed as a normative matter that it was extremely useful for judges to have a base from which to exercise control over juries' handling of the breach question because it permitted them to regulate the operation of negligence law in light of various policy considerations.¹⁸⁷

Green's empirical observation still stands: Modern courts at times use duty as a power-conferring device by which to render decisions on the breach question that normally would be left for a jury. Whether, all things considered, this is a sensible way for judges to proceed is a much-debated subject that is beyond the scope of this Article.¹⁸⁸ We do note, however, that if one rejects (as we do) the strongly skeptical view that the duty issue necessarily collapses into the breach issue, one has at least two reasons to question these decisions. First, if one rejects the view that the duty element lacks any substantive content, but instead calls on judges to make meaningful decisions as to whether the defendant owed an obligation of care to the plaintiff, then the need for surreptitious judicial breach decisions will be lessened. As we saw with regard to Sections 3 and 101 of the respective Drafts, accounts of negligence that try to do without duty in the obligation sense face enormous overbreadth problems that require courts to insert liability constraints elsewhere in the tort, either by piling limitations into "legal cause," by granting judges discretionary authority to grant exemptions to negligence liability, or by empowering them to take away breach decisions from (presumed-to-be-pro-plaintiff) juries. By contrast, if there are meaningful duty limitations to be articulated with the duty element, the need for these sorts of rear-guard tactics is lessened.

Second, breach-as-a-matter-of-law decisions handed down under the heading of "no duty" generate a real risk of substantive confusion. For Green, there was no such risk because he believed that a "no duty" ruling was never anything other than a "no breach" ruling expressed in different words. In our view, by contrast, judicial decisions referring to matter-of-law decisions as "duty" decisions necessarily confuse the distinct issue of duty in its obligation sense with the breach issue. And this confusion imposes a cost not

187. Green, *supra* note 185, at 1025.

188. See Discussion Draft, *supra* note 6, § 5 & cmts. c-d (providing Professor Schwartz's brief, but incisive, comments on this issue); see also William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1701-04 (1997) (reviewing the debate on this point between Keeton and Green).

only on legal academics and students, but also on lawyers and judges trying to litigate and resolve negligence cases. Moreover, it permits judges unwittingly to slide into the habit of taking negligence cases away from the jury through the simple expedient of reframing breach questions for the jury as duty questions for the court.

To the extent courts have fallen into this confusion unintentionally, we offer the following suggestion as a helpful (but hardly foolproof) guide to avoiding the problem. When courts find themselves talking about "duty" at a very high level of specificity, they may well be talking not about duty at all, but about breach. Thus, for example, in *Washington v. City of Chicago*, the court framed the "duty" issue as whether the City had an obligation to users of its roads not to build street medians containing raised planters. In one sense, this usage is intelligible. Were the court to have permitted the jury verdict to stand, for example, it would have been correct to say: "The City is under an obligation to road users not to build medians with planters." But in fact, the question all along was whether that particular or specific obligation was encompassed by the duty of reasonable care owed by the city to protect against physical harm befalling road users, i.e., whether it was reasonable or unreasonable to build the medians with planters.¹⁸⁹

3. Exemption from the Operation of Negligence Law

a. Nature of the Inquiry

The "duty" inquiries that we have described thus far do not much resemble the inquiry laid out in Draft Sections 6 and 105. Nor do they look like the analysis called for under California decisions like *Rowland v. Christian*.¹⁹⁰ That is intentional. We believe that, as general accounts of what duty means in negligence, each is inaccurate. Indeed, each misses the core meaning of duty, while con-

189. In suggesting that the Illinois Supreme Court ought to have framed the issue differently, we do not claim to have demonstrated that it reached the wrong result. On the facts of the case, it may have been appropriate for the court to rule that there was no breach as a matter of law. If so, however, the court should have said as much. Alternatively, the Court might have been able to justify its decision on the very different ground that, even though the plaintiff established a valid claim of negligence, denial of recovery was necessary to protect the ability of the city to furnish essential public facilities such as roads. Again, however, it would have been confusing and unhelpful for the court to express this conclusion by stating that the defendant owed "no duty" to the plaintiff. As we now explain, however, it is not uncommon for courts to engage in this sort of misstatement.

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

flating many of its different senses. Nevertheless, our account of negligence case law would be incomplete without acknowledging a fourth sense of "duty" found in decisions that do indeed resemble the notion of duty encapsulated in Sections 6 and 105, and in decisions like *Rowland*. Our aim all along has not been to deny the existence of "no-duty" decisions of this nature, but rather to point out that they are only one part of the story,¹⁹¹ and that it is vitally important to a clear understanding of negligence law that they be put in their proper place.

To refer to an inquiry such as that called for under Section 6 as a "duty" inquiry is as misleading as treating no-breach-as-a-matter-of-law decisions as no-duty decisions. As we explained earlier, these cases hold that, even if the defendant owed a duty of due care in the primary sense to the plaintiff and breached that duty so as to proximately cause injury to the plaintiff, there are special reasons of policy or principle not to permit the cause of action to go forward. Unfortunately, courts that decline liability in such cases often do so by declaring that there is "no duty," even though they do not mean to take a position on whether there was an obligation to be vigilant running from the defendant to the plaintiff. Consequently, a defendant who wishes to avoid liability for a reason of policy or principle notwithstanding the otherwise well-formed nature of plaintiff's negligence claim, will present the court with arguments styled as "no duty" arguments. Likewise, when courts find liability in a case in which the defendant has made such arguments, they will express their conclusions by saying there *is* a duty. Again, this is misleading: for the existence of duty in its other senses is assumed in such cases, and the statement that there is a duty, to the extent that it is meaningful in the litigation, is really just a statement that the liability that usually flows from a valid claim of negligence will also attach in the case at hand.

A widely recognized "no duty" decision within this category is *Strauss v. Belle Realty Co.*¹⁹² In *Strauss*, the plaintiff was the tenant of an apartment building that lost electricity due to the gross negligence of the electrical company, Con Edison. Because of the loss of electricity, plaintiff was without running water in his apartment and had to retrieve some from the basement in his building. Also because of the blackout, the basement steps were unlit. Plaintiff fell and injured himself, and sued the landlord and

191. See *supra* text accompanying notes 160-68.

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

Con Edison. Plaintiff was himself a subscriber of Con Edison, but the losses of electricity that allegedly caused his injury were due to Con Edison's failure to provide electricity to the building owner, not to him. Con Edison therefore argued that there was no privity between it and the plaintiff, and consequently no duty.¹⁹³

The New York Court of Appeals accepted Con Edison's argument on the grounds of "no duty," explicitly stating that this determination was partly intended to keep liability at tolerable levels, given that millions of individuals and businesses in New York City were without electricity for 48 hours.¹⁹⁴ The wording of the decision was particularly unfortunate. No-privity arguments were once accepted as valid arguments against the existence of a primary duty owed by a defendant to a plaintiff. Thus, the Court's issuance of a no duty decision on the strength of a no-privity argument made it appear as if the decision concerned duty in the primary sense. In reality, of course, the plaintiff's argument for duty in the primary sense was extremely strong because (as in a case like *MacPherson*) the very point of providing electricity to building owners is to provide for the needs and safety of their tenants. Moreover, by 1985, privity was quite appropriately undermined as a basis for no-duty arguments in the primary sense, at least for physical injury caused by a defendant's negligence. The driving force behind the decision was instead the court's concern about the burden that would be imposed on New York's major electrical supplier if it permitted ordinary negligence liability for all the harm that was caused by the blackout. "No duty" is simply a conclusory label for that policy rationale.

In other areas of substantial litigation, and in other areas of tort law, one finds special defenses that have been developed to perform the kind of task that "no duty" serves in *Strauss*. For example, in antitrust law, the "filed rate doctrine" curtails a private plaintiff's ability to sue a utility for antitrust violations.¹⁹⁵ This doctrine is motivated in part by concerns of judicial competence in setting rates, in part by the recognition that litigation by customers of utilities could be incredibly socially costly—both in terms of liability and litigation, the costs of which would ultimately be borne by consumers—and in part by the belief that utilities would be scrutinized more successfully in other fora. In defamation law, there are numerous immunities that preclude litigation against witnesses in

193. *Id.* at 35.

194. *Id.* at 36-37.

195. *See, e.g., Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 22 (2d Cir. 1994).

connection with legal proceedings. This is not to deny the possibility that a witness might in fact have performed the wrong of slander or libel against another. Rather, it is to recognize that we wish to have a domain of conduct that is cut free from the expectations, pressures, and incentives of the ordinary obligation not to defame.¹⁹⁶ This is essentially a decision of institutional design, based, in part on considerations of principle and policy.

Historically, negligence law has had its share of its immunities including, most notoriously, sovereign immunity. The blanket form of this immunity has been lifted in every jurisdiction. Yet we continue to find "no-duty" cases that in effect partially reinstate the immunity. For example, in *Riss v. City of New York*, the New York City Police failed to provide protection to a woman who told the police she was in imminent danger of being injured by a stalker. The stalker partially blinded her with lye. The Court of Appeals concluded that the police owed "no duty" to the plaintiff, but the claim that the police do not have a duty to "serve and protect" citizens against the violence of stalkers is preposterous. This is not to say that the decision is wrongheaded. It is only to say that, as in *Strauss*, and unlike the many "primary sense" cases we have described, "duty" as it is used in *Riss* does not refer to the issue of whether the police were under an obligation to act in a manner that was vigilant of the needs of the class of persons to which plaintiff belongs. Rather, it concerns the issue of whether there are institutional and other policy reasons for suspending the operation of negligence law in this class of cases. As the *Riss* court saw things, a decision to permit the tort system to operate in its normal manner would shift significant policymaking authority from the executive branch to the judicial branch and would invite a flood of litigation, the costs of which would be borne by the courts and the taxpayers. This is clearly using "duty" as a label for a policy decision that, in effect, reinstates some of sovereign immunity, and operates like an immunity.

b. Does Duty in its Obligation Sense Collapse into Duty in its Exemption Sense?

Our recognition of this last sense of duty as allowing exemptions from the operation of negligence law will naturally invite a series of questions. Isn't it the case that all the work that needs to

196. See DOBBS, *supra* note 4, § 412, at 1153-54 (describing absolute privilege to defame in judicial proceedings).

be done under the heading of duty is in fact done, or ought to be done, under duty in its exemption sense? Why not simply describe the considerations at stake in determining whether to grant an exemption to negligence liability to include any considerations that might factor into the analysis of whether or not to acknowledge duty in the obligation sense? Is this not a more elegant solution, and, indeed, precisely what is intended by Sections 6 and 105? These questions may helpfully be parsed into three distinct inquiries. The first asks whether, as a matter of course, courts do collapse the first into the fourth sense of duty. The second challenges whether it is analytically possible to distinguish the two senses. The third asks, even if it is possible to distinguish between them, is it desirable to do so?

On the first count, our analysis fares well. Courts often do not engage in all-things-considered assessments of institutional and policy considerations when analyzing the duty question. Instead, at different times, they often raise under the heading of duty the obligation, nexus, and breach-as-a-matter-of-law inquiries we have discussed above. These are the contours of duty doctrine. Hence, any Restatement that purports to follow case law ought to recognize the distinction between these different senses unless the second or third arguments against it prove compelling.

What of the second claim, that courts are mistaken in engaging in these distinct inquiries, because it is not analytically possible to separate them out? Unfortunately, this claim invokes a complex jurisprudential argument well beyond the scope of this Article.¹⁹⁷ However, as we noted earlier in responding to the Holme-

197. One such argument would run as follows. An actor cannot be said to be under a legal obligation to exercise care toward another until an authoritative court decision recognizes a duty of care running from someone in the actor's situation to persons such as the other. Thus, unless there is a clearly controlling precedent—which there often isn't—one cannot say whether the actor is under a duty of care to someone until the court first engages in all-things-considered “exemption” analysis and, on the basis of that analysis, declares that an obligation of care does or does not exist. Thus, when a court holds that the defendant was “not obligated” to take care to avoid injuring the plaintiff, it is merely announcing its conclusion that, all things considered, it would be bad policy to recognize an obligation running from persons in the position of defendant to persons in the position of plaintiff. Hence, all duty inquiries of the first type necessarily collapse into inquiries of the fourth type.

Implicit in this argument are a number of contentious jurisprudential claims, including the claim, associated with H.L.A. Hart, that when courts undertake to resolve “penumbral” or “hard” duty questions, they cannot help but “legislate,” i.e., make discretionary judgments of the sort just described. H.L.A. HART, *THE CONCEPT OF LAW* 131-33 (2d ed. 1994). In addition, it presupposes that such legislation necessarily takes the form of “top-down” policymaking, rather than, say, the Rawlsian idea of reflective equilibrium, JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971) (on the method of reflective equilibrium), or Cardozo's notion of decisions articulating social norms of responsibility embedded in law. See John C. P. Goldberg, Note, *Community and the*

sian argument that duty is always a shorthand reference to threat of sanction, we think it not at all obvious that it is the business of an ALI Reporter to base his or her interpretation of case law on a very strong and highly contentious jurisprudential claim. Such a claim is precisely what is being advanced here.

And so we are left with the normative question of whether the two inquiries ought to be collapsed. We will have more to say about the normative case for recognizing duty in its obligation sense in Part VI. For now, however, it is worth noting three virtues that attend a refusal to collapse that sense of duty into the exemption sense.

The first is that one almost certainly cannot preserve the distinct duty questions now recognized by the courts within the envisioned mega-duty provision. Courts that conclude that there is a duty in the primary sense are not necessarily expressing a judgment that, all-things-considered, it would be better to impose liability in the relevant category of cases. They may think it is not better to have liability, or they may not inquire into that question at all. The same goes for the nexus and breach-as-a-matter-of-law inquiries. In other words, while a court engaged in an all-considered judgment could consider many factors that are pertinent to the first three senses of "duty," the converse is not necessarily true. As we have argued, the concept of an obligation under the first sense, the concept of a nexus between a breach and a duty, and the question of whether there is no breach as a matter of law are narrower and more highly structured than all-considered judgments. Relatedly, when courts engaged in all-considered judgments do consider some of the same factors contemplated under these tests, they do not necessarily bring them to bear in the same manner. The point of deciding whether there is an obligation to be vigilant of plaintiff's interest is not simply to get certain factors into the decisional mix, it is to decide whether the conduct in question was conduct that violated an obligation to the plaintiff. If not, then there is no cause of action. This is not simply a matter of getting all the relevant considerations onto the decisionmaker's scale. Similar arguments apply for the second and third senses of duty.

Second, structured concepts like those underlying the obligation sense of duty are superior to all-considered policy judgments to the degree that they are more law-like. As numerous scholars from

across the jurisprudential and political spectrums have argued, all-considered policy judgments lack features that are critical to rule-of-law values. They do not engender predictability or stability. They undercut the capacity of the law to guide. They open up courts to various political pressures, both at an individual level and on a broader level. There is little distinction between decisions of this nature and decisions that are mere exercises of discretion by those who have power. In all of these respects, a general duty-as-policy exemption provision, such as Section 6, disables negligence law from functioning as law. By restating the principal aspects of a concept of duty that is found in the case law and that displays content and structure, we hope not only to have elucidated the case law, but also to have enhanced its capacity to serve as law.

Third, it seems to us that, by the very open-endedness of their terms, provisions like Sections 6 and 105 will defy the intent of their authors that they remain of limited applicability. Most would agree with Professors Schwartz and Perlman, as do we, that the occasions calling for the grant of an all-things-considered exemption to negligence liability are, and ought to be, extraordinary. This judgment is supported by a number of considerations implicit or explicitly raised in the discussion above: the limited institutional competence of the judiciary and its place in a framework of separated powers; the default norm that the civil justice system will provide a remedy for every wrong; etc. Indeed, one of the most pressing challenges faced by courts and tort scholars is to articulate more precisely the contours of the policy-based exemption to negligence liability. We do not claim to have gone a great distance toward that end. But we have presented a framework that isolates for discrete consideration many issues that Professors Perlman and Schwartz can only regard as falling under the ambit of their respective blunderbuss exemption provisions. As a result, courts following their approach will have many more occasions on which to address the all-things-considered question, and may well find themselves issuing exemptions even in less-than-extraordinary cases.

VI. WHY DUTY OUGHT TO HAVE A PLACE IN NEGLIGENCE LAW

This Article was prompted by a conference devoted to discussing the *General Principles* portion of the Third Restatement while in draft form, with the thought that it might still be amenable to modification in light of reasoned critique. Thus, it has been primarily concerned with asking whether the provisions prepared

by the Reporters fairly and helpfully restate the law. We have concluded that, in important respects, they do not, and have offered many examples to support that conclusion. We have also demonstrated that these examples are not haphazard, but instead express a consistent effort by the Reporters to restate negligence without duty. We have argued that this effort is ill-considered. Finally, we have offered positive suggestions in the form of case analysis and draft restatement provisions as to how a General Principles draft that is careful in its use of duty can bring greater order and intelligibility to negligence law.

Some readers will notice that we have paid relatively little attention to what the implications are of interpreting the tort law one way or another, and more attention to describing the structure of common law tort doctrine. As we have indicated here and elsewhere, we do not contend that such an inquiry occurs in a moral or political vacuum, but we do contend that it is sometimes a valuable enterprise. In this we are surely not alone. Even Holmes acknowledged that one must "get the dragon out of his cave" before deciding whether to kill or tame him.¹⁹⁸

Still, we do not mean to deny the salience of the "so what?" question. Thus, we conclude our analysis, first, by briefly canvassing some of the ways in which our arguments will likely have significance for the work of lawyers, judges, and lawmakers, and second, by offering a rejoinder to what we anticipate to be a common, Realist-inspired objection to our analysis.

A. Restating Negligence with Duty

A restatement that recognized the four different senses of duty that we have identified would have numerous salutary features. First, and at the most basic level, it would surpass the current drafts in the comprehensiveness of its account of "duty" case law, and in its capacity to provide a well-organized overview of this important area of tort. If there are these different uses of the term "duty," certainly a restatement should say so. We have done so in a manner that is sensitive to the variety of contexts in which "duty" is used, and the variety of different doctrinal, historical, and procedural ramifications of these uses.

Second, our account would also permit the Restatement to return to the four-element articulation of the tort of negligence: It

198. Holmes, *supra* note 104, at 469.

explains, against prevailing academic wisdom, how it can be that courts treat duty as a genuine, non-trivial element. We agree with the Reporters that this element is typically satisfied in many classes of cases, in particular, in cases involving malfeasance causing physical injury.¹⁹⁹ But in many cases and many classes of cases, the duty issue raises a significant question. And the question it raises is not always, or even typically, the question of whether there are policy reasons for not applying negligence law to the conduct in question. Instead, the issue is whether the defendant's negligent causing of injury was or was not a breach of an obligation to act vigilantly toward the plaintiff. Only if it was a breach does the defendant's unreasonable, injurious conduct ground a right of action in negligence.

We have also made it clear that satisfying duty in the obligation sense will not always address defense arguments couched as "no duty" arguments. There are second, third, and fourth senses of "duty" that do not reflect that sense, and do not fit squarely within the duty element of the tort. In today's negligence law, a defendant asserting "no duty" may be saying that the proper nexus between the breach and the duty does not exist, a point more accurately captured by insisting that the breach must be a breach in relation to the plaintiff. Or she may be saying that there was no breach, and, moreover, that the plaintiff's case for breach is so weak that there is no breach as a matter of law. Finally, a defendant may simply be asserting that it would be ill-advised, in light of the place of the courts within their broader institutional setting, to permit a cause of action for negligence. Courts who accept these arguments often articulate their conclusions by stating that there is no duty, even though there may well be an obligation of vigilance.

A restatement should recognize that these "no duty" pockets of the case law exist, and that they have certain contours. But this does not entail denying the existence of "duty" in the obligation sense or the fact that the four-element test is the law. On the contrary, it permits both. It permits an account of duty in the obligation sense to remain viable because it does not water down this concept in order to encompass the range of no-duty cases that currently exist. It welcomes the observation that *some* "duty" cases are really disguised forms of other decisions, while insisting that many centrally important issues that go under the heading "duty" really involve duty-as-obligation. And since it is able to capture what duty

199. See *infra* Appendix § D1.

in that sense means, what turns on it, and why duty in that sense is frequently easily fulfilled, it is able to retain the four-element test as a fundamental tenet of negligence law.²⁰⁰

In the third place, by offering the standard doctrinal framework for negligence law conjoined with a deeper account of duty, we have suggested how a *Restatement (Third) of Torts: General Principles* could plausibly tackle not just part, but the whole of negligence law, including its most controversial and confused aspects. Sections 3 to 17 are supposed to support a restatement of the "General Principles" of negligence law, yet they exclude nonfeasance, landowner law, professional malpractice, emotional harm, and economic harm, in large part because these areas raise difficult questions of duty. The result is a Restatement that, by its own admission, focuses on the part of negligence law that, generally speaking, is *least* in need of restatement.

By restoring duty and the four-element test, we hope to permit a restatement that focuses on and illuminates difficult areas, instead of avoiding them. For example, landowner cases present certain difficulties because they involve deeply entrenched, yet difficult-to-apply doctrines relating to the existence and scope of obligations. These cases have been controversial, in part, because some of those doctrines—particularly those differentiating between commercial visitors and social guests—have struck courts as wrong-headed. This debate—one of the most conspicuous in negligence law during the second half of the twentieth century—is simply omitted and unapproachable under Professor Schwartz's Draft.²⁰¹ Our analysis of duty provides the conceptual tools to bring landowner liability back within the scope of the project.

The same applies to other areas of the law excluded by Professor Schwartz's scope note, such as professional malpractice. Many of the most important issues of law within negligence today involve professionals. Thus, for example, courts are being forced to decide whether psychotherapists have a duty to avoid causing emo-

200. We leave it as an open question whether courts should continue to follow the terminology that they now typically employ, which is to regard all of these issues under the element of "duty," or whether they should expressly revise their linguistic usage so as to provide other labels for the second, third, or fourth senses of "duty." Our inclination is to think that as an abstract matter, there should be other labels for these other senses, but that it is possible that *stare decisis* carries weight even with "mere terminology," and we cannot therefore say precisely how aggressive courts should be, if at all, in this revision of the language.

201. Notwithstanding the Reporter's Scope Note, even the Discussion Draft seems to concede that landowner cases raise paradigmatic issues of duty in the obligation sense. See Discussion Draft, *supra* note 6, § 6 cmt. c.

tional harm to their patients' family members, whether lawyers have a duty to non-clients in complex transactions, and whether pharmacists have a duty of care to customers that extends beyond filling prescriptions carefully and accurately. These are all *duty* issues, and largely ones that involve "duty" in the obligation sense. That is why these areas are at least nominally omitted from Professor Schwartz's Draft, even though they are vital to modern negligence law. Our approach's advantage is that these issues and cases can be included within, and analyzed as part of, the "core" of negligence.

Beyond this, a thorough and nuanced account of duty would help courts to articulate both old and new controversies in a way that the Discussion Draft now skirts. As argued above, Sections 16 and 17 can do little more than note the existence of failure-to-warn and negligent enabling cases, describing them as actions that "can" be brought. Obviously, this does not even begin to capture the language in which courts articulate and reason about issues such as the liability of social hosts or gun manufacturers. Lacking an account of duty that sheds light, the Draft once again unhelpfully suppresses the manner in which the courts contemplate these issues. Our account permits us to ask these questions and to begin to find answers.

A fourth salutary feature of our account is its capacity to provide courts with guidance on thorny and confusing issues that cut across negligence law. The most obvious of these is the confusion surrounding the concept of foreseeability. Sometimes foreseeability is treated as an issue of law, sometimes as an issue of fact. Sometimes courts stretch for foreseeability and sometimes they are narrow or hard-nosed. Foreseeability is in the language of duty, the language of breach, and the language of proximate cause. To this date, majorities, concurrences, and dissents battle over this.

As we have explained in greater depth elsewhere, foreseeability plays a special role in the context of questions about obligation, but it is not the only question relating to duty in that sense.²⁰² However, since foreseeability also plays a role in breach, it is important to keep clear what is involved in these different contexts. In a case like *Tarasoff* or *MacPherson*, the courts predicate their recognition of a duty of care in part on the ground that the defendants as a class are uniquely well-positioned to foresee the risk of injury to members of the plaintiff class. Thus, the obligation question

202. Goldberg & Zipursky, *supra* note 17, at 1837-38.

turns in part on the degree to which a type of defendant can foresee a certain kind of harm. By contrast, in the breach context, the foreseeability of harm to persons such as the plaintiff figures in an argument over whether the harm was so unlikely that the plaintiff has failed to raise a sufficiently strong case on breach to merit sending to the jury. Although foreseeability is invoked in both instances, the questions being asked are quite different. A court should not generally be in the business of second-guessing jury findings of breach on the ground that particular precautions were unnecessary because the harm in question was not sufficiently probable.²⁰³ Conversely, plaintiffs should not be permitted to stretch the parameters of duty by recasting genuine and difficult duty questions—such as the question of whether a defendant owes a duty to avoid causing emotional distress to the plaintiff—as breach questions for the jury.²⁰⁴ Our approach recognizes that the duty and breach elements raise distinct questions, and that foreseeability analysis is not unitary but varied. In pointing this out, we do not mean to suggest that we have untangled the foreseeability mess. Rather, we merely mean to demonstrate the potential utility of a nuanced analysis of duty in dealing with the sorts of problems that courts face, both procedurally and substantively.

While foreseeability is important in standard duty analysis, there is a variety of different formulations and factors that courts use. What has been conspicuously absent in leading appellate opinions, at least since landmark decisions such as *MacPherson* and *Heaven v. Pender*, is an effort to articulate what it is that the factors in duty analysis are supposed to be probative of. That is what our Draft Section D aims to provide. The purpose of providing this sort of analysis is that judges and lawyers, in considering the “factors” associated with duty analysis, are supposed to be doing something other than weighing all the policy considerations that are listed in the factors. They are supposed to be deploying a concept of something to which the factors in question are probative. We have suggested that, at least in the analysis of duty in the primary sense, they are supposed to be asking the question of whether de-

203. See *Sharon P. v. Arman, Ltd.*, 91 Cal. Rptr. 2d 35, 52 (Cal. 1999) (Mosk, J., dissenting) (criticizing majority for misunderstanding the foreseeability question before them in a duty-to-protect case and thereby usurping the jury's function).

204. Cf. *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (positing a general or universal duty to take care not to cause emotional distress to others, and hence inviting litigants to argue these cases under the headings of breach, causation, and injury).

defendant was obligated to be vigilant of a certain sort of harm to the plaintiff.

From this perspective, consider whether it is proper to incorporate within duty analysis the probability that recognizing a "duty" in a certain context will lead to a rise in liability insurance premiums for those in defendant's class (e.g., accountants), and consequently to a variety of market effects. Is this an appropriate factor to consider in deciding whether accountants owe a duty of due care to a certain category of non-client plaintiffs? The answer is no, insofar as we are dealing with the threshold question of duty in the primary sense: whether there is an obligation to take care not to injure this person economically through providing carelessly prepared information. Some important factors would be: the nature of the institutional setting, the foreseeability of consequences for non-clients, the existence of potential conflicts of interest, and the mutual understandings of the parties with regard to reliance. Not only are courts permitted to ask and answer these questions; it is built into the very fabric of negligence law that they must. The consequences for liability insurance premiums, and, in turn, the cost and availability of accounting services, are not parts of this inquiry, except perhaps as a way of checking to ensure that the imposition of an obligation is not wildly impractical.²⁰⁵

On the other hand, in special "no duty" cases, such as those involving utilities, defendants might argue that there are serious policy and market problems that arise from permitting negligence to operate in a particular area, and it is certainly possible to make the argument that severe problems in certain markets will be the result of accountant-liability to non-specific investors, and that such investors should therefore not have a cause of action. This is a type-four argument—a policy-based exemption use for the "no duty" label. But note that the legal and institutional posture of this argument is different from that of the threshold question. Courts do not *have* to address this policy issue. There is a well-formed negligence claim (assuming that there is duty in the obligation sense). Moreover, "no-duty" holdings from other areas, if based on duty in the obligation sense, will provide tenuous support for an invented policy-based exemption. And even policy exemptions will offer at most analogous support here. In this area, courts are stepping into the land of policy predictions, rather than articulating the applicability of common law notions of duty to a changing terrain of profes-

205. See Goldberg, *supra* note 79, at 1464-65 (describing Cardozo's limited incorporation of "floodgates" and other policy considerations); Zipursky, *supra* note 41, at 671-72 (same).

sional and institutional arrangements. We are not saying that courts do not or should not step into this land. We are merely pointing out that courts do recognize, and should recognize, a variety of problems of institutional competence, both direct and comparative, associated with such inquiries.

These remarks on liability insurance, like the remarks on foreseeability, are intended to raise support for the sort of account we believe will be available with our analysis of duty, not necessarily to demonstrate that account. We must see both that duty means something and connotes a particular concept that plays a vitally important doctrinal role, and is not simply a name for judicial policymaking, and also that it is sometimes used to refer to such a device, or to a procedural device. This is necessary not simply because it is accurate to the body of law, but also because the kinds of tangles in which courts find themselves, and the kinds of good and bad decisions they make, are really only understandable when we recognize these different senses of duty.

These institutional considerations bring us to a fifth salutary feature of our account of duty, one that we hope speaks to the Reporters themselves. Negligence law is genuinely a form of law, not simply a moving target that packages different clusters of rules on different occasions, depending on what suits a court's tastes for the dispute before it. Of course, it is a truism by now that one should not overstate the importance of form, and that some of the founders of the ALI may have been unduly enchanted with the possibilities of legal formalism. Still, between the extremes of "formalism" and radical skepticism, there is substantial room in which to operate. Presumably, the current ALI has chosen to go forward with further Restatements because it continues to believe in the idea that there is really some kind of order in the law, such that it merits restatement and organization. Professor Schwartz's Draft reveals, above all, an adherence to that conviction. His decision to avoid duty so far as possible, and to exclude areas that make duty-avoidance impossible, seems to reflect a strategy for keeping this conviction alive. In the area of physical injuries and property damage caused by misfeasance, it seems to him that one can articulate a set of rules and principles that have their own order, and do not amount to a game of hiding the ball under evocative but empty terms such as "duty."

We have argued, from a negative point of view, that this strategy will not work, even given his unjustifiably narrow definition of scope. Yet this does not mean that we are giving up on the notion that there is a body of law capable of being grasped and or-

ganized. Keeping "duty" in the obligation sense within negligence is essential, not inimical, to restating the law *and* to depicting it as a body of law, as opposed to a collection of ad hoc policy decisions. Professor Schwartz takes fault-causing-injury to be the core legal principle of negligence, and he takes malfeasance resulting in physical damage to be the core domain governed by that principle. By contrast, he views the many other areas of negligence that import additional considerations, such as duty, to be "outside" the core, and in some respects, outside the law. Moreover, he concedes that even within the core, there is an area of non-legal, discretionary decisions to be made about the scope of liability that will follow from fault, cause and injury. In short, because of his unduly narrow account of the legal core of negligence, Professor Schwartz is compelled to write off huge chunks of tort law as being outside the arena of "general principles" and outside the law.

Duty in the primary sense is important because it links fault and liability. The reason one person's neglect generates liability for the injuries it causes to another is that the careless actor has a duty of care toward the other to avoid causing that sort of injury. The breach of the duty causing the injury generates liability. We put this forward as a point of principle, but not as a point of moral principle. It is a point of legal principle, for it is only *duties recognized by courts* that generate liability. Areas in which negligence causing injury are non-actionable are (at least at the level of basic doctrine) those in which the defendant did not have any duty to the plaintiff to be prudent with regard to the interests in question. It is because the common law of torts itself contains a cohesive doctrine of *duty* that negligence doctrine contains *general principles* and constitutes a body of law, not simply policy-generated pockets of rule-like decisions.

Professor Perlman's Preliminary Draft No. 2 shows less concern than Professor Schwartz's for capturing black-letter doctrine. Indeed, his provisions display a surprising level of skepticism as to the value of capturing the language and concepts the courts have actually used—surprising because he is an ALI Reporter working on a restatement. On the other hand, those provisions display greater interest than Professor Schwartz's in developing an account of the general principles of negligence that would govern the full range of negligence cases. They also display a genuine interest in the concept of obligation. For reasons we have already belabored, we do not believe the project of Sections 2A and 101 is viable. Nevertheless, recognition of their aspirations brings us to a sixth salutary feature of our account, and it is related to the fifth. Our account displays

the respects in which negligence and tort law generally are about legal obligation and not simply about legal liabilities. Negligence is about the conduct we owe one another, under the law, and not simply about the money we may be obliged to pay others if we injure them. In its ability to capture the respect in which the law of negligence is—at least in part—about the care we owe others, our model of duty captures the best in what Professor Perlman has rightly inserted into the *Restatement (Third)* project.

In suggesting that the law of negligence is, in part, about *duties of care*, we are not saying anything novel, but we are running against the grain of decades of torts scholarship. Leading twentieth-century scholars, including Professor Schwartz, have endeavored to avoid this seemingly moralistic aspect of negligence law, partly in the hope of finding a more “pragmatic” approach. We have argued elsewhere against the false dichotomy between concepts of obligation, on the one hand, and the practical concerns of law and policy, on the other. Indeed, as the recent social norms literature suggests, there are good reasons to believe that the law functions most smoothly as a system of rules to guide conduct if it meshes well with entrenched moral norms, and that adjudication proceeds more predictably and more effectively if judges conceptualize issues through language that reflects those norms.²⁰⁶

B. A Rejoinder to Realists

As we noted at the outset, many of the weaknesses and anomalies contained in the *General Principles* drafts derive from skepticism about duty, which is in turn driven by the law- and concept-skepticism associated with the Legal Realist movement of the early twentieth century. Modern realists therefore are likely to be underwhelmed by our critique. They will regard our assumption that there is a law of negligence that can be represented fairly or unfairly as a mere pretension. They will question whether anything of significance really hangs on the taxonomic and organizational choices that we have discussed. They will point to the political perils of academics leading judges to believe that doctrine has a conceptual structure of its own, and point out that “duty” has historically served as a device for limiting the remedies of those injured through negligence.

206. See Goldberg & Zipursky, *supra* note 17, at 1830-32, 1839-42; Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

Both in earlier sections of this Paper and in a variety of other places, we have indicated reasons why we find Legal Realism philosophically unpersuasive both as a general matter, and as applied to the common law of torts. Here we offer some additional responses to this expected line of criticism.

First, we should note that we have deliberately postponed addressing this sort of criticism because we believe that there is only so much to be gained from a priori arguments about the validity or invalidity of projects such as the Restatement and the alternative Restatement provisions for which we have argued. Even in jurisprudence, the proof often has to be found in the pudding. To this point, we have offered an historical and philosophical defense of the place of duty in negligence, and a sketch of an incomplete, but nonetheless relatively coherent framework for analyzing negligence cases derived from the language and decisions used by the courts. Having done so, we believe that we have shifted the burden of proof to the Realist to explain why our efforts are unsuccessful, or of no practical significance, or in the service of a politically reactionary agenda.

Second, we find it hard to understand why a Realist would think that a change in the framework of analyzing negligence cases would have no practical difference. At least some among the first generation of Realist torts scholars were deeply concerned to change tort doctrine precisely because they believed it would effect better case outcomes. Furthermore, to state the obvious, different jurisdictions with different doctrines reach different results. What we are suggesting is that our proposed account differs from the Reporters' account in several clear and important ways, just as one jurisdiction's doctrine might differ from another.

Most fundamentally, it will make a difference whether courts acknowledge the element of duty in its obligation sense—as we suggest—or see “duty” as nothing more than an invitation to consider granting a policy-based exemption to liability for unreasonable conduct causing harm. A recent case from New York—*Lauer v. City of New York*—illustrates the point.²⁰⁷ The defendant was a medical examiner whose initial autopsy report on a deceased child concluded that the child had been the victim of severe trauma by an adult abusing him. The father immediately became the chief suspect in the homicide investigation, and his life predictably fell apart around him. Eighteen months later, the *New York Daily News*

207. *Lauer v. City of New York*, 733 N.E.2d 184, 188 (N.Y. 2000).

broke a story revealing that the medical examiner had done a second autopsy only three weeks after the first, and discovered that his initial report was mistaken, and that the death was of natural causes. Apparently fearing for his job and reputation, the medical examiner did not reveal the results of the second autopsy until the newspaper broke the story. The father sued the medical examiner for the emotional distress inflicted upon him.

Chief Judge Kaye, writing for a 4-3 majority, concluded that the medical examiner could not be held liable to the father because his failure to provide the report correcting the initial findings was not a breach of any duty owed to the father. Never did Chief Judge Kaye confront the point that, if a medical examiner is aware that a person is likely to be subject to investigation of a serious crime because of the examiner's report, then he or she will or should be aware that the person's ability to lead a normal life hinges on whether an initially erroneous report is or is not corrected. That observation naturally leads to an assertion that, under such circumstances, the examiner has an obligation to provide the suspect with the relief from the false prosecution that the examiner helped initiate and alone was situated to halt. This is a powerful and obvious argument in support of the plaintiff's claim that the examiner owed him a duty of care not to cause him emotional distress. Yet because Chief Judge Kaye appeared to treat "duty" simply as Section 6's dummy variable, she framed the question of the case in terms of whether permitting liability would open up a large vein of litigation against medical examiners. With the question thus posed, she unsurprisingly rejected plaintiff's suit. We do not mean to claim too much for this example. Certainly, we do not claim that the majority's recognition of duty in its obligation sense would have been outcome-determinative: A reasonable court could have answered this "policy" question in the affirmative, or it could have answered the obligation question in the negative. But we see no reason to doubt that the framing of the question bore on how it was resolved.

Finally, although the Realist concern that adherence to the common law would lead to conservative results was certainly well justified in its time, and still counsels caution today, the modern Realist would do well to consider whether this refrain has become counter-productive in today's legal and political climate. Like most jurisprudential debates, the common law-realism debate has the potential to swing both ways, politically. And it is not at all clear that the greatest risk today to a plaintiff's right to a tort remedy resides in taking common law seriously. Indeed, one can very credibly argue that it resides, in part, in the state court judge who treats

the plaintiff before her as having a right of redress *only insofar* as considerations of policy or efficiency do not counsel otherwise. Equally, the threat comes from a Supreme Court, Congress, and state legislatures that see a tort system flailing with no internal order, no sense of itself as law, and hence believe that it is desirable and legitimate for each to dictate whatever limitations it regards as sensible on the rights and remedies of tort. If the core of tort law is a broad fault principle for physical injury and property damage, limited by constructive policy choices under the headings of "duty" and "proximate cause," it makes perfect sense to think such policy choices would be more effectively made by legislatures and administrators. Yet our legislatures have not recently seen themselves as protectors of the individual's right to a remedy. Likewise, the federal courts, headed by the Supreme Court, display an increasing willingness to find tort law preempted by parallel regulatory law. In this way, the three-element, policy-intensive view developed and championed by Realists may actually help bring about the dismantling of the system of private rights and remedies that they sought to expand in the name of fairness and justice.

By contrast, if we are right, negligence law can and should be viewed as a reasonably coherent body of rules and principles articulating a particular kind of legal wrong, namely the wrong of breaching an obligation to take due care toward another person, thereby injuring her. Thus described, negligence forms one part of a broader system of substantive, remedial, and procedural law that sets out certain responsibilities that individuals and entities have to avoid injuring one another, and that empowers citizens to seek legal redress for injurious breaches of those responsibilities. This body of substantive and remedial law in turn can be seen to constitute but one aspect of a legal and political system that is designed to protect the rights of citizens against unjustified infringement by both state and private actors. Seen against this backdrop, negligence (and tort generally) emerge as intelligible components of our legal and political system, as something more coherent and more defensible than a regime of ad hoc judicial policymaking, or a haphazard scheme of deterrence, or an inefficient system of third-party insurance.

We are not arguing for our system on the basis of its capacity to support a political agenda against tort reform. We are simply pointing out that those who wish to push realist challenges must be realistic. The question is not simply how a different way of seeing the law will play out in a particular case. It is also how that way of seeing law will affect a whole set of institutions. Once we take this

larger view, there seems little reason to believe that a vision of negligence combining Holmesian skepticism about law with Prosser's recasting of tort law as "social engineering" will entail anything but the continued erosion of the individual's right to redress in the name of public policy.

VII. CONCLUSION

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, from explaining the sense in which it is a *law* of torts and from capturing a plausible sense in which it is *general* or *principled*—all because of trepidation about the concept of duty. This hostility was a central feature in the work of the grandfather of American torts scholarship, Oliver Wendell Holmes, Jr., and it developed into a visceral distaste in the work of subsequent tort scholars such as William Prosser. Yet our current Reporters, Professors Schwartz and Perlman, have calmly, quietly, and professionally proposed to do something none of their ancestors were willing to do—wipe the concept of duty right out of the law of negligence.

Alas, the Holmes-Prosser strategy of boiling down negligence to the concepts of unreasonableness, causation, and injury was never right, for their hostility toward duty was never intellectually or legally justified. Duty is not scary, mysterious, or empty, nor is it "grandiloquent quasi-philosophical rhetoric;"²⁰⁸ it is an aspect of legal doctrine that has conceptual content of its own, just as intent, causation, defect, and many other concepts do. Today's negligence law intermingles a primary sense of "duty" with other senses of the term. It is therefore something of a mess. That is no reason to walk away from duty, or to select one of these alternative senses of "duty" as its "true" meaning. It is a reason for academics charged with drafting a Restatement to roll up their sleeves and try to clean up the mess. That is what we have begun to do here.

208. Schwartz, *supra* note 81, at 316 (disparaging Cardozo's use of duty language in *Palsgraf*).

APPENDIX

§ N. Negligence

An actor is subject to liability to a plaintiff for negligence if:

- (a) the plaintiff has suffered an injury;
- (b) the actor owed a duty to the plaintiff, or to a class of persons including the plaintiff, to take reasonable care not to cause an injury of the kind suffered by the plaintiff;
- (c) the actor breached that duty of care;
- (d) the actor's breach of duty was a cause-in-fact and a proximate cause of plaintiff's injury.

Comment:

a. Prima Facie Case. As indicated by the phrase "subject to liability," § N sets out a prima facie case of negligence. Whether plaintiff will ultimately obtain judgment will also be determined by the existence or non-existence of exemptions, privileges and other affirmative defenses.

b. Negligence, Intent, and Inadvertence. Negligence involves an actor unintentionally causing injury by failing to exercise due care. The actor's failure to exercise care may be inadvertent or advertent. An example of inadvertent negligence is that of a driver who fails to pay attention to his speed and road conditions and thus drives unreasonably under the circumstances. An example of advertent negligence is that of a driver who knowingly decides to drive faster than is reasonable under the circumstances. The latter driver may have no intent to injure another, may not know that his conduct will cause injury to another, and may not be acting recklessly with regard to the safety of others. Rather, he may simply be advertent to the risks of his unreasonable conduct.

c. History. Section N reproduces with one variation the familiar four-part test for negligence: duty-breach-cause-injury. This test has routinely been invoked by courts and commentators since the emergence of the tort in the nineteenth century. The variation con-

sists in placing injury as the first rather than the last element. See Comment d, *infra*. In this variation, § N follows the main formulation of negligence in the Second Restatement. See *Restatement (Second) of Torts* § 281 (1965) (listing the elements of negligence as invasion of a legally protected interest, negligence in relation to the plaintiff, legal cause, and absence of fault on the part of the plaintiff). The Reporters of the Second Restatement apparently regarded the two variants of the four-part test for negligence as equivalent. Compare *Restatement (Second) of Torts* § 281 with *Restatement (Second) of Torts* § 328A (listing the elements of negligence as duty, breach, legal cause, and legally cognizable harm).

d. Injury. Placing injury as the first element of the prima facie case of negligence has two advantages. First, it emphasizes that injury is the crux of negligence, both in the sense that an injury is the triggering event underlying every negligence suit, and that injury is central to negligence in a way not true of other torts, as well as crimes. Second, this ordering allows the elements of the prima facie case to be presented in a logical sequence, whereby each subsequent element incorporates the prior element.

It is axiomatic that only a person suffering some sort of injury may sue another in negligence. A person who is nearly struck by a careless driver, but who suffers no physical injury, property damage, emotional distress, or economic loss as a result of the incident, has no right to complain in negligence about the driver's misconduct, even if it posed a significant risk of serious injury to that person, and even if society would benefit from the deterrent effect of such a suit. When nominally uninjured parties are entitled to sue in negligence, it is only because they have "stepped into the shoes" of an injured party, as is the case with survival actions.

e. Relation of Duty and Breach Elements. Section N(c) is phrased so as to indicate that an actor's conduct is not actionable in negligence unless it constitutes the breach of a duty of care that is owed to the plaintiff, or to a class of persons including the plaintiff. Conversely, a plaintiff may *not* complain in negligence of an injury flowing from the breach of a duty owed to some other person or class of persons. See *Restatement (Second)* § 281(b) (requiring that "the conduct of the actor [be] negligent with respect to the other, or a class of persons within which he is included."); see also *Restatement (Second)* § 281, comment c ("In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons—

as for example, all persons within a given area of danger—of which the other is a member.”).

In an ordinary negligence case, such as one involving a driver striking another driver with his car, or a doctor committing malpractice on her patient, this requirement will obviously be satisfied. By definition, it only comes into play where the defendant is alleged to have breached a duty of care owed to someone other than the plaintiff without thereby breaching a duty of care owed to the plaintiff herself. The most famous judicial articulation of this requirement is found in Chief Judge Cardozo's majority opinion in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928). According to that opinion, Mrs. Palsgraf could not prevail precisely because the train conductor's actions at most amounted to a breach of the duty of care owed to the package-carrying passenger and those near him, not a breach of the duty of care owed to her. As to the passenger and those around him, the conductor's behavior arguably was negligent. As to Mrs. Palsgraf, it was not, because to her it posed no observable risk of harm whatsoever. Mrs. Palsgraf's suit thus failed because she was suing the railroad not for a breach of the duty of care owed to her (there was no breach of *that* duty), but as the “vicarious beneficiary of a breach of duty to another.”

§ D. Duty

The duty element of negligence poses the issue of whether the defendant was obligated to the plaintiff, or a class of persons including the plaintiff, to take care to avoid causing, or to protect against, the type of injury alleged by the plaintiff.

Comment:

a. Duty as an Element. The second element of negligence as defined in § N requires a showing that the defendant owed a duty of reasonable care to a class of persons that includes the plaintiff to avoid causing the type of harm suffered by the plaintiff.

The duty element has been the subject of ongoing academic debate. Some scholars have suggested that it does not or should not constitute an independent component of the negligence tort. Others have argued that the duty element is a distinct and vital component of negligence law. Much of the disagreement may trace to the fact that courts use the term “duty” in several different senses.

In its primary signification, the duty element raises the following question: Was the defendant obligated to the plaintiff to be vigilant of the type of harm suffered by the plaintiff? The issues raised by this element concern how the defendant was obligated to conduct himself, the type of harm he was obligated to guard against, and the class of persons to whom that obligation extends. This connotation of "duty" is primary in the sense that it is a necessary complement to breach: The breach must be a breach of some duty. Although, as a practical matter, "duty" is often (and properly) omitted from courts' analyses, this is not because "breach" can stand on its own, but because the existence of a duty to exercise reasonable care toward others is uncontested in many cases. See § D1, *infra*. Even in these cases, duty remains an essential element of the tort of negligence.

b. Factors to be Considered in Determining the Existence and Nature of a Duty of Care. Courts have crafted certain general rules for the determination of some duty issues. These are stated in §§ D1-D2 *infra*. They hold that most actors are subject to a general obligation to refrain from causing through their conduct physical injury or property damage to another. By contrast, an actor's obligations to take affirmative steps to protect or rescue another, or to avoid causing emotional distress or pure economic loss, are fewer, although at times more onerous. See § D2, *infra*. Courts have also crafted more detailed duty rules governing specific contexts, such as those governing the obligations owed by a property owner to those who enter her property.

Beyond these rules, courts must address the duty element by interpreting precedent in light of various factors, each of which will vary in salience in different settings. To do so, however, is not to alter the issue at stake: The issue still concerns defendant's obligation of care, and the job of the courts is to identify and assess considerations relevant to that issue. These include: the degree to which the defendant could foresee and prevent the harm in question, the existence and nature of any relationship between the defendant and the plaintiff, the professional or institutional setting in which the harm arose, the extent to which recognition of an obligation to the plaintiff would impede the satisfaction of obligations already owed by the defendant to others, and the extent to which social norms treat the conduct demanded of the defendant as required rather than merely advisable.

c. Duty: Shield and Sword. By their nature, “no duty” holdings, which entail the dismissal of the plaintiff’s case, are more conclusive and hence more prominent than “duty” holdings, which still leave the remaining questions of breach, causation, and defenses. There is thus an understandable tendency to regard the duty element exclusively as a shield against liability, not as a sword supporting the imposition of liability. This association, however, is accidental, and unfounded as a matter of history and experience. As negligence first emerged in the nineteenth century, it was plaintiffs who used duty arguments to expand the realm of obligation. See M.J. Prichard, *Scott v. Shepherd* (1773) and *the Emergence of the Tort of Negligence* 33 (Selden Soc’y 1976) (noting that, in the mid-1800s, “[w]here we find duty asserted is where the plaintiff is least sure that it exists, that is, in those cases in which he is endeavouring to extend the boundaries of liability.”) That trend, of course, continued and in some ways accelerated in the twentieth century with, for example, the expansion of manufacturer’s obligations to avoid injuring consumers and their property. Thus, depending on the context, duty can operate as a sword or a shield. It has no inherent bias toward either function.

d. Alternative Senses of Duty. Courts also use the term “duty” in at least three senses different from the primary sense described above. First, duty is occasionally used by courts to refer to the requirement, already described in comment e to § N, *supra*, that the plaintiff establish that the defendant’s faulty conduct constitutes the breach of a duty to the plaintiff, rather than the breach of a duty owed to another.

Second, courts at times use a “no duty” holding to express the judgment that, on the facts of a given case, no reasonable jury could find that the defendant behaved unreasonably toward the plaintiff. The expression of such “breach” rulings in the language of duty is perhaps ill-advised insofar as it can unwittingly lead courts to encroach on the jury’s primary role in deciding the breach question.

Finally, courts also raise under the heading of duty the question of whether a given actor should be exempted from liability notwithstanding that the plaintiff has satisfied each of the elements of the *prima facie* case, and notwithstanding that the actor cannot avail himself of any specified affirmative defense, such as assumption of risk or governmental immunity. The nature and scope of this limited exemption are discussed in § E, *infra*.

e. Scholarly Criticism of Duty in Its Primary Sense. Some scholars have encouraged courts not to employ duty in its primary sense. They have done so mainly on the strength of three arguments. First, they observe that duty is frequently a "non-issue": that the existence and nature of the obligation often is uncontroversial. For example, if a patient alleges physical injury stemming from ordinary malpractice by her treating physician, or if a car accident victim alleges physical injury caused by negligence on the part of a driver who crashes into him, the duty issue is not seriously contested. Second, they note that, historically, courts at one time adopted an extremely narrow account of duty in its primary sense, by which they limited negligence liability exclusively to wrongs occurring within a pre-existing status or contractual relationship between defendant and plaintiff. Third, they argue that the duty element does not pose a discrete or judicially manageable question apart from the issue of breach.

Collectively, these arguments may counsel judges to be circumspect in the application of the duty element. However, they do not support its outright elimination. Certainly there are many cases in which the existence and scope of an actor's obligation is uncontroversial. As indicated below in § D1, these are typically cases in which the defendant's unreasonable act directly causes physical injury or property damage. But the existence of such cases no more supports the outright elimination of the duty element than the existence of easy causation cases supports the elimination of the cause-in-fact element. Moreover, there are many instances in which the existence and scope of the defendant's obligation presents a difficult question that goes to the very crux of the plaintiff's claim. Are social hosts obligated to monitor their guests' consumption of alcohol so as to prevent physical injuries to drivers and pedestrians put at risk by guests who drive away intoxicated? Is a physician under an obligation to take reasonable steps to ensure that her patient has every chance to survive an illness? Must a therapist take care to avoid causing emotional distress to the patient's immediate family? Is one under an obligation to one's friend to undertake reasonable efforts to protect or rescue? Each of these presents a case that poses a meaningful and important question as to the existence and scope of an obligation of care running from the defendant to the plaintiff.

With respect to the historical argument, even if one assumes it is accurate, the appropriate response is not to eliminate the duty element, but to state emphatically that duties of care can and do exist between "strangers." A pre-existing status or contractual relationship is not necessary to support the existence of some duties of

care. As indicated above and in § D2, *infra*, the existence and scope of the duty of care owed by a given defendant to a given plaintiff may be *informed* by the presence or absence of such a relationship. For example, a special relationship will sometimes support the existence of an affirmative duty to protect or rescue. But such a relationship is not a necessary predicate to the existence of any duty of care, particularly when the duty allegedly breached is to avoid causing physical injury or tangible property damage.

Finally, as indicated in comment a, *supra*, the duty element does pose a salient, discrete, and judicially manageable question: What harms to the plaintiff was the defendant obligated to take care to avoid? Evidence as to the intelligibility and manageability of the question is provided by the fact that courts routinely ask and answer the same sort of question when applying the doctrine of negligence per se. See *Restatement (Second)* § 286 (negligence per se doctrine applies if the court determines that the defendant violated a statute or regulation designed to protect a class of persons including the plaintiff from harms of the sort suffered by the plaintiff). Of course negligence per se is a distinct doctrine in that it looks to statutes and regulations rather than common law to determine the existence and scope of an actor's obligation of care. Nevertheless, as in the negligence per se context, the duty issue in an ordinary negligence case turns in part on a proper account of the class of persons to whom the actor was obligated, and the type of harm the actor was obligated to avoid.

f. Duty: A Question of Law for the Court. Although courts and commentators have at times disagreed over whether certain questions pose duty or breach questions, most accept that a genuine duty question of the sort described above is a question of law for the court.

g. Scope of No-Duty Decisions. A judicial conclusion that the defendant was not obligated to conduct himself with due care to avoid a certain type of injury to a given class of plaintiff does not entail a finding that the defendant breached no duties of any kind to the plaintiff. For example, a defendant who owes no duty of reasonable care to a plaintiff may still be under a duty to avoid injuring that plaintiff intentionally, or through recklessness. "No duty" in this context is shorthand for no duty of reasonable care owed by the defendant to the plaintiff to avoid causing the type of injury alleged by the plaintiff.

§ D1. General Duty to Avoid Causing Physical Injury and Property Damage

An actor is under a general duty to exercise reasonable care to avoid causing through his or her own conduct physical injury or property damage to another.

Comment:

a. Sources. The general duty expressed in § D1 is widely acknowledged. *See, e.g.*, Dan B. Dobbs, *The Law of Torts* §110, at 257 (2000) (“A person who negligently causes personal injury or property damage is subject to liability in tort.”).

b. Scope. The duty described in § D1 is general in the sense that it runs between strangers regardless of the presence of a pre-existing relationship between them. It applies to unreasonable conduct undertaken by an actor that causes personal injury and property damage to another. The existence and scope of an actor’s duty to another to reduce the likelihood that that other will suffer personal injury or property damage through the intervening misconduct of a third party is addressed separately in §§ __ - __, *infra*.

c. Vicarious Liability. The reference in § D1 to the actor’s “own conduct” is intended to limit its application to instances of misfeasance. It is not intended to address issues concerning the application of vicarious liability.

§ D2. Limited Duties of Care

(a) **Duty to Protect or Rescue.** An actor is under a duty to undertake reasonable affirmative actions to prevent another from suffering physical harm or property damage, or to ameliorate such harm, if:

(1) the actor’s conduct, whether reasonable or unreasonable, has created a recognizable risk to the other of physical harm or property damage; or

(2) the actor’s conduct, whether reasonable or unreasonable, has caused physical harm to the other or harm to the other’s property; or

(3) the actor has undertaken to protect the other from physical injury or property damage, or to rescue the other from physical peril; or

(4) a special relationship exists between the actor and the other, or between the actor and a third person whose conduct is under the control of the actor.

(b) Duties to Avoid Causing Serious Emotional Distress.

(1) An actor is under a general duty to exercise reasonable care to avoid causing another to experience serious emotional distress through fear of imminent, harmful physical contact;

(2) An actor is under a duty to exercise reasonable care to avoid causing serious emotional distress to another if:

(A) the actor undertook on behalf of the other to exercise care in handling an extremely sensitive matter that, if mishandled, would likely cause serious emotional distress in a person of ordinary sensibilities; or

(B) by prior conduct, the actor rendered the other unusually vulnerable to extreme emotional harm; or

(C) a special relationship exists between the actor and the other.

(c) Duties to Avoid Causing Pure Economic Loss.

(1) An actor is under a general duty to take reasonable care to avoid causing substantial interference with the ability of another to exercise his or her right to appropriate tangible property or occupy real property or improvements.

(2) An actor is under a limited duty to take reasonable care to avoid causing pure economic loss if:

(A) in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, the actor undertook to provide accurate information while knowing or having reason to know that the information was likely to be relied upon by an identifiable group of persons including the other; or

(B) a special relationship exists between the actor and the other.

Comment:

a. Scope. Section D2 sets out certain broad principles pertaining to limited duties of care. The courts have developed an array of more specific limited duty rules applicable in particular contexts, including duties owed by landowners to those on their property, duties owed to bystanders who observe accidents, duties owed to unborn children, etc. When courts are confronted with such cases, they should make reference in the first instance to those specific rules.

b. Sense in which Duties are Limited. Section D2 follows the usage of the courts in describing as "limited" those duties of affirmative action and duties to avoid causing pure emotional distress and pure economic loss recognized in the law of negligence. As indicated in §§ D2(b)(1) and D2(c)(1), this may be a misnomer, since it is arguable that certain of these duties are owed to all those whom one might injure. Nevertheless, the courts' usage is helpful in drawing a sharp contrast between these cases and those involving the "general" duty of care of § D1 to avoid causing physical injury or property damage.

To the extent these duties are rightly described as "limited," it is because (some of them) only apply in the limited circumstances set out in the text of this Section. The use of the term "limited" is *not* meant to suggest that these principles impose only limited or weak obligations on the actors to whom they apply. Indeed, "limited" obligations such as the obligation to protect or rescue may be considerably more onerous at the level of conduct than the general obligation to avoid causing physical injury or property damage. The greater onerousness of some of these duties is in fact one reason why they are "limited" in the sense of applying only in certain circumstances.

The extent to which these limited duties should be expanded is, of course, one of the central normative questions of modern negligence law. In assessing these developments, it is important to note that many of the courts that have expanded the circumstances in which these duties obtain have also noted that this expansion may call for increased reliance on liability-control devices such as heightened proof requirements (e.g., for emotional distress), as well as the policy-based liability exemption stated in § E, *infra*.

c. Duty to Protect or Rescue: Misfeasance v. Nonfeasance. Section D2(a) sets out the basic rule for unreasonable nonfeasance as

opposed to misfeasance. Conduct is not rightly characterized as nonfeasance simply because the crux of the plaintiff's allegation is that the defendant omitted to do a specific act. Rather, the question is whether the defendant's overall course of conduct amounted to misfeasance or nonfeasance. A plaintiff who complains that a manufacturer unreasonably failed to inspect its products, alleges unreasonable manufacturing practices, not mere nonfeasance. By contrast, a plaintiff who alleges that a nearby pedestrian failed to shout a warning to her to prevent her from stepping into a hole is complaining of nonfeasance.

d. Duty to Protect or Rescue: Grounds of Duty. Section D2(a) sets out the grounds commonly recognized by courts as supporting liability for nonfeasance. Section D2(a)(1) indicates that an actor who, during the course of his conduct, recognizes that his conduct poses a risk of physical injury or property damage to another, must take reasonable steps to prevent the injury. This duty applies regardless of whether the initial conduct was reasonable or unreasonable. Thus, for example, a driver who, through no fault of his own, crashes in a manner that poses dangers to subsequent drivers is obliged to take reasonable measures to prevent or reduce those dangers. Section D2(a)(2) sets out a similar rule that applies when an actor has innocently or culpably caused the plaintiff injury or property damage. Thus, for example, where a train owned by railroad company R crashes into a truck owned by T, R's employees are under a duty to take reasonable steps to rescue injured occupants of the truck, and to protect any property that might be lost as a result of the accident. Section D2(a)(3) covers cases in which an actor expressly or implicitly undertakes to protect or rescue another. Finally, § D2(a)(4) notes that, where the actor and the other person, or the actor and a third party under the actor's control, were in a pre-existing relationship, that relationship can support an obligation to protect and rescue.

e. Duties to Avoid Causing Emotional Distress: Scope. The duties described in § D2(b) apply to instances of pure emotional distress unaccompanied by physical injury or property damage. When either of the latter forms of injury is present, plaintiff can ordinarily recover emotional distress damages as consequential or parasitic damages. The latter is a rule of damages rather than duty. Pure emotional distress cases are also to be distinguished from cases in which the actor causes the plaintiff physical injury (for example, a miscarriage, or a heart attack) by means of causing the plaintiff

severe emotional distress. The latter are physical injury cases subject to the general duty described in § D1.

Section D2(b) applies only to negligent infliction of emotional distress. For rules pertaining to intentional infliction of emotional distress, *see infra*. Finally, § D2(b) governs only instances of negligence infliction of "direct" emotional distress. Liability for negligent infliction of emotional distress to bystanders is treated separately.

f. Duties to Avoid Causing Emotional Distress: Seriousness Requirement. Section D2(b) reflects the fact that a majority of courts require plaintiffs alleging negligent infliction of emotional distress to demonstrate that their distress was particularly acute in that it extended beyond passing upset. Some courts convey this requirement by asking the plaintiff to prove, often with expert testimony, that they suffered "severe" emotional distress. Others articulate this element in the form of a requirement that the plaintiff demonstrate physical symptoms that serve as a warrant of the seriousness of the distress.

g. Limited Duty to Avoid Causing Emotional Distress: Grounds of Duty. The provisions in § D2(b)(1) and (2) set out grounds traditionally recognized by courts as supporting a cause of action for direct negligent infliction of emotional distress. Section D2(b)(1) covers cases of negligently induced fright; as for example when a negligent driver causes a pedestrian reasonably to apprehend that she is about to be struck by the car, which apprehension results in the pedestrian suffering serious emotional distress. Section D2(b)(2)(A) attempts a generic description of cases involving false death telegrams, mishandling of corpses, and other instances in which the actor undertakes to exercise care in handling a sensitive matter where lack of care is likely to cause serious emotional distress to a person of an ordinary constitution. Sections D2(b)(2)(B) and (C) allow that certain special relationships may generate a duty to take care not to cause emotional distress to another.

h. Limited Duty to Avoid Causing Pure Economic Loss: Scope. Section D2(c) sets out the basic rules concerning the duty to take care not to cause pure economic loss. Pure economic loss cases are distinguished by the absence of personal injury or tangible property damage. Section D2(c) is limited to negligent conduct; it does not address fraud or intentional interference with contract or business expectancy.

i. Limited Duty to Avoid Causing Pure Economic Loss: Grounds. Section D2(c)(1) recognizes that courts have allowed recovery for economic loss even absent harm to tangible property when the plaintiff can establish that the defendant's conduct seriously interfered with plaintiff's ability to appropriate or use property. Thus, for example, courts have held that fishermen may sue a negligent polluter of public waters on the ground that the polluter's negligence substantially interfered with their right to appropriate fish from those waters. Whether passing or less serious interference of this sort will support a cause of action for negligence causing pure economic loss is a source of controversy. Section D2(c)(1)(A) governs instances of negligent misrepresentation. It follows the *Restatement (Second)* § 552 in limiting the duty to take care to provide accurate information to a class of identifiable persons. As in negligence cases generally, the plaintiff must in addition to duty establish breach and causation, as well as the requirement of justified reliance. Section D(2)(c)(1)(B) allows that certain special relationships may generate a duty to take care not to cause pure economic loss to another.

§ E. Duty: Policy-Based Liability Exemption.

Notwithstanding that the plaintiff can establish the elements of a prima facie case of negligence, and notwithstanding defendant's inability to invoke a specific affirmative defense, a court may in unusual circumstances exempt the defendant from liability to the plaintiff, if the recognition of a negligence cause of action would:

(a) unduly interfere with legislative or administrative allocations of authority and responsibility; or

(b) generate litigation or liability that would be judicially unmanageable because of its enormous magnitude or because (with respect to litigation) it poses issues unusually ill-suited for adjudication.

Comment:

a. Source. The notion that duty can serve as the locus for a judicial inquiry into the overall desirability of permitting the imposition of liability in a class of negligence cases traces back at least to Holmes. See Oliver W. Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 2-3, 9-10 (1894) (noting the existence of policy-

based privileges to negligence liability). This way of comprehending duty was aggressively championed by mid-Twentieth Century scholars including, most importantly, William Prosser. See William L. Prosser, *Handbook of the Law of Torts* §31, at 180 (1941) (duty is ... only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is [or is not] entitled to protection."). Prosser's formulation has been widely cited by the courts.

b. Scope. The exemption of liability contemplated in § E must be limited in scope to avoid substantially undermining the law of negligence. One relatively well-recognized application of the exemption, covered in § E(a), involves suits against government officials for failing to perform a public duty, or against quasi-governmental entities such as public utilities for negligently failing to maintain water or electric service. When in these contexts, the courts deny plaintiffs the right to proceed with otherwise well-formed negligence claims, they demonstrate concern not to interfere directly with a legislative or administrative decision to allocate scarce public services such as police protection, or with considered legislative or administrative judgments as to how to price essential services in light of the risks that attend their negligent interruption. Section E(b), by contrast, follows court decisions often in the area of negligent infliction of emotional distress that recognize "floodgates" concerns as a legitimate basis to exempt defendants from liability.

The narrow scope given to this form of duty analysis by the courts is supported by at least five reasons. First, as Prosser himself made clear, the effort to characterize duty as raising a macro-policy question concerning socially desirable liability levels was originally intended to provide a basis for the rejection of various no-duty rules, including, for example, the privity requirement in cases involving product defects. Second, the limited duty rules articulated in § D2 and elsewhere already place significant limits on actions for negligence. Third, courts must be sparing in their application of this defense insofar as it calls for large-scale policy judgments that they may not be especially competent to make. Fourth, the lack of definiteness in the defense also threatens rule of law values of notice, predictability, and adjudicability. Finally, undue reliance on a policy-driven defense to liability in the face of otherwise unexcused and unjustified negligent conduct runs directly counter to the basic principle that negligence law, like tort law generally, exists to provide remedies for every instance of legally wrongful and injurious conduct.