

**Abusing “Duty”**  
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## ARTICLES

### ABUSING “DUTY”

DILAN A. ESPER\* & GREGORY C. KEATING\*\*

“Duty” occupies an odd place in contemporary negligence law. On the one hand, it is hornbook law that duty—along with breach, actual and proximate cause, and injury—is one of the elements of a plaintiff’s prima facie case.<sup>1</sup> As the first element of a plaintiff’s case—and the only element whose existence is a matter of law for the court<sup>2</sup>—duty seems to stand out even among the elements of the prima facie case. If a plaintiff cannot

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1. Kincaid v. Standridge, No. 98-5232, 2000 U.S. App. LEXIS 22340, at \*4 (10th Cir. Aug. 30, 2000); McCarthy v. Olin Corp., 119 F.3d 148, 165 (2d Cir. 1997) (Calabresi, J., dissenting); Home Indem. Co. v. A&E Prods. Group, Inc., No. 96-1252, 1996 U.S. App. LEXIS 33269, at \*4 (6th Cir. Dec. 17, 1996); Robertson v. Sixpence Inns, Inc., 789 P.2d 1040, 1044 (Ariz. 1990); Whitcombe v. County of Yolo, 141 Cal. Rptr. 189, 193 (Ct. App. 1977); KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 2, 7 (1997); DAN B. DOBBS, THE LAW OF TORTS 269 (2000) (listing “duty” as the first element of a prima facie case for negligence); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 357 (5th ed. 1984) (“[W]hen negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability.”).

2. Paz v. California, 994 P.2d 975, 979 (Cal. 2000); Schaaf v. Highfield, 896 P.2d 665, 668 (Wash. 1995); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 cmt. f, § 8 cmt. b (Tentative Draft No. 1, 2001) [hereinafter RESTATEMENT DRAFT]; DOBBS, *supra* note 1, at 270 (“Judges, not juries, ordinarily determine whether a duty exists and the standard it imposes.”).

establish that the defendant was under a duty to exercise at least some care to ensure that its actions did not impose an unreasonable risk of injury on the plaintiff, then we need not ask if the defendant breached its duty of care and if that breach was the actual and “proximate” cause of the plaintiff’s injury. Duty, in short, seems important.

On the other hand, equally good authority has it that, in most cases, duty is a “non-issue.”<sup>3</sup> Duty’s priority among the elements of the plaintiff’s prima facie case is a logical or conceptual priority, not a practical one. The tentative draft of the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* explains:

[I]n cases involving negligent conduct that causes physical harm courts have recognized a general duty of reasonable care that operates on the defendant. This general duty is incorporated into the standard of negligence liability for physical harm . . . . In cases involving negligent conduct that causes physical harm, courts . . . are not obliged to refer to the general duty on a case-by-case basis.<sup>4</sup>

The plaintiff usually need not establish the existence of “duty” because duty doctrine is concerned with determining the legal standard by which the defendant’s conduct will be judged and—when people impose risks of physical injury on others—the negligence norm of reasonable care in the circumstances usually governs their conduct.

The generality of the legal duty of reasonable care is routinely noted by both courts and commentators. In Wisconsin, that state’s Supreme Court has proclaimed, “[E]veryone has a duty of care to the whole world.”<sup>5</sup> The California Supreme Court, echoing a 130-year-old statute, has remarked that “[i]n this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their

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3. RESTATEMENT DRAFT, *supra* note 2, § 6 cmt. d.

4. *Id.* § 7 cmt. a. The *Restatement* has gone through numerous subsequent drafts. Though the wording of the provision has changed, the presumption of a general duty of care has persisted. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005) [hereinafter RESTATEMENT FINAL DRAFT]. Notably, the present draft *Restatement* is quite concerned with “[t]he proper role for duty.” That, indeed, is the title of “Comment a” in section 7.

5. *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998). As that court elaborated, “[T]he proper analysis of duty in Wisconsin is as follows: The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act. *Id.* (quoting *Rockweit ex rel. Donohue v. Senecal*, 541 N.W.2d 742, 747 (Wis. 1995) (internal quotation marks omitted)).

conduct."<sup>6</sup> Commentators, for their part, have recognized a general duty to exercise reasonable care at least since the time of Oliver Wendell Holmes.<sup>7</sup>

Notwithstanding this near universal acknowledgment that the duty of due care is highly general and broadly applicable, "no duty" rulings are proliferating in California, especially in the intermediate appellate courts. This is an important development. California has played a leading role in the development of American tort law. Its Supreme Court pioneered the expansion of tort liability in the latter half of the twentieth century, castigating duty as "a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards."<sup>8</sup> The civil jury is now under growing attack<sup>9</sup> and California courts

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6. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997). See also CAL. CIV. CODE § 1714(a) (West 2002) (enacted 1872) (prescribing that everyone owes to everyone else a duty of ordinary care).

7. See G. EDWARD WHITE, *TORT LAW IN AMERICA* 12–13, 343 n.63 (expanded ed. 2003) (citing *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873), an unsigned article universally attributed to Holmes). Case law began to recognize the modern duty of due care in the 1830s. *Id.* at 15. See also *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850). But the duty was not general in the nineteenth century because it was hedged in by property and contract. See, e.g., *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 59 (1842) (holding that an employer has no duty to take precautions that would protect employees from injury at the hands of their fellow employees); *Losee v. Clute*, 51 N.Y. 494, 496–97 (1873) (holding that the manufacturer of a dangerous boiler owes no duty of reasonable care to anyone other than its employees); *Thomas v. Winchester*, 6 N.Y. 397, 407–08 (1852) (noting that sellers of goods had no general duty to those with whom they were not in privity of contract); *Robertson v. Mayor of New York*, 7 Misc. 645, 646 (N.Y. C.P. 1894) (reciting that landowners owe licensees and trespassers no affirmative duties to keep the premises safe); *Rex v. Smith*, (1826) 172 Eng. Rep. 203, 207 (G.A.) (holding that caretakers of a mentally disabled man owed no duty to tend to his health). It was not until the twentieth century that the duty of reasonable care became a highly general legal obligation.

8. *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968). For a discussion of the California Supreme Court's role in the expansion of tort law in the mid-twentieth century, see WHITE, *supra* note 7, at 180–210.

9. Andrew Frey has launched a head-on assault, calling for the abolition of the civil jury. Andrew Frey, Sidebar, *Smoke Signals*, AM. LAW. (SPECIAL ISSUE), Fall 2003, at 39, 41 ("The Seventh Amendment is one provision of our Constitution that time and social and technological evolution have rendered anachronistic."). Other critics wage a more limited war, calling for a reduction of the jury's role in some classes of cases. The issue of punitive damages, long a realm of broad jury discretion, is a particular favorite. See Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381, 383 (2003) (book review). Developments in the law have curtailed the authority of the jury in important ways. The U.S. Supreme Court has limited jury discretion with respect to punitive damages. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003). The scope of summary judgment has been expanded, augmenting the authority of judges and diminishing the authority of juries. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Additionally, the *Daubert v. Merrell Dow Pharmaceuticals, Inc.* decision has led to an increased gatekeeping role for judges with respect to expert testimony and this, too, has curtailed the authority of juries. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993), *superseded by statute*, FED. R. EVID. 702. See also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999).

may be writing a chapter in an ongoing conservative counter-revolution in torts.<sup>10</sup>

This Article argues that California's proliferating "no duty" decisions are abusing the concept of duty, misshaping the law, and disrespecting the role of the jury. The role of "duty" doctrine is to fix the legal standard applicable to the defendant's conduct. Duty rulings must therefore be categorical. They must specify the *general* standard of care owed by some class of potential injurers—common carriers, or ski lift operators, or sellers of prescription drugs. We can no more specify as a matter of law what constitutes negligent conduct in every case than we can "determine possession and transfer according to who is best qualified at this or that moment to use this or that piece of property, as the particular utilities of the case might decide it."<sup>11</sup> California courts, however, are particularizing duty in just this untenable way, using the doctrine's status as a matter of law as a cover for courts to issue rulings which reach no further than preferred outcomes in particular cases.

Because this abuse of duty involves issuing rulings of "no duty," the cumulative effect of the practice is to reshape—and misshape—the contours of civil obligation in California. "No duty" doctrines, which waned throughout the twentieth century—particularly assumption of risk and the use of status categories to determine the duties owed entrants onto real property—are now waxing. In ways which cannot be dismissed as wholly trivial, California courts are resuscitating nineteenth century doctrines and incorporating them into twenty-first century tort law, giving property rights and contractual freedoms priority over the physical integrity of the person. No rational person values her property or wealth more than her life, but California tort law is beginning to value some people's

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10. See William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 (1997) (stating that the Texas Supreme Court has increased the role of judges and diminished that of the jury by announcing particularized rules of duty and "no duty"). As one scholar has remarked,

In a growing number of cases, judges take the evaluation of conduct that would seem to fall within this general duty away from the jury, sometimes by announcing a particularized no-duty rule, and sometimes by an ad hoc no-duty decision. These cases are part of the on-going conservative counter-revolution in torts.

Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 430 (1999) (internal footnotes omitted). See also Stephen D. Sugarman, *Judges as Tort Law Un-makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 456 (1999) ("[I]n some important respects, [the California Supreme Court] is re-establishing a tort 'law' that removes power from juries and returns it to judges (and also tilts in favor of defendants).").

11. JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 65 (Barbara Herman ed., 2000) (explicating David Hume's view of justice). For a powerful statement that standards of legal obligation cannot be up for grabs on a case-by-case basis, see *Stagl v. Delta Airlines*, 52 F.3d 463, 469 (2d Cir. 1995).

property and wealth more than other people's lives. A universal duty of reasonable care expresses an admirably democratic commitment to the equal value of every citizen's life. Granting property and contractual interests priority over physical integrity subordinates the more urgent interests of some to the less urgent interests of others.

Making duty a live issue in every case also has a profound—and unprincipled—impact on the role of the jury. When reasonable people might disagree over whether the defendant exercised reasonable care in the circumstances at hand, long-settled doctrine holds that it is for juries—not judges—to decide the issue.<sup>12</sup> Articulation of the law is for judges; application of the law is for juries. But when duty is a live issue in every case it is impossible to draw a principled line between the provinces of judge and jury. Judges are inevitably drawn into second-guessing jury decisions on issues of reasonable conduct and care.

We are not alone in our conviction that scholars and courts alike need to be more attentive to the abuse of duty. The ongoing *Restatement (Third) of Torts*<sup>13</sup> is preoccupied with the role of duty, and the subject is attracting new attention from scholars, as well. In a series of important articles, John Goldberg and Benjamin Zipursky have argued that scholars and courts alike have become overly receptive to the idea that duty is merely an after-the-fact label applied to cases that courts wish to take from juries in order to hold liability levels in check.<sup>14</sup> Our aim in this Article is to contribute to

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12. See Gergen, *supra* note 10, at 424–39 (discussing the jury's role in deciding normative questions in negligence law). Gergen observes that

[w]here there is only normative doubt about what is reasonable conduct, a judge could decide the issue without intruding on the role of the jury as fact-finder. This possibility most clearly arises in a case where the facts are undisputed but breach is contested. In negligence law, the issue of breach goes to the jury in such a case.

*Id.* at 434. Gergen cites a number of recent authorities for this principle, but the principle is an old one. It is embraced, for example, by the majority opinion in *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898), over a vigorous dissent by Oliver Wendell Holmes. Section 8(b) of the proposed final draft of the *Restatement (Third)* adopts this rule: "When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination." RESTATEMENT FINAL DRAFT, *supra* note 4, § 8(b). The topic of section 8 is "Judge and Jury." *Id.*

13. See RESTATEMENT FINAL DRAFT, *supra* note 4, § 7.

14. See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1744 (1998) [hereinafter Goldberg & Zipursky, *Moral*] (criticizing the theory of duty as shorthand for policy considerations); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 661–62 (2001) [hereinafter Goldberg & Zipursky, *Place of Duty*] (criticizing the California Supreme Court and the *Restatement* Reporters for following Prosser's idea that duty is merely a shorthand for "no liability"). See also John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (developing an analytical duty framework in the context of emotional harm doctrine). Goldberg and Zipursky have

this emerging debate in two ways. First, we hope to show that modern negligence law is correct to recognize a “universal” duty of reasonable care, thereby making duty a nonissue in most cases. Second, we hope to show the depth and pervasiveness of the abuse of duty by California courts, and the morass into which that abuse has led.

Our argument proceeds in three parts. Part I explores the role of duty in modern negligence law. We argue that duty plays two basic roles. The first is to divide the labor of private law among competing legal fields. Rulings of “no duty” cede control over the conduct at issue to some other legal field—to contract or property—or leave that conduct legally unregulated. And when there is a duty, the highly general standard of reasonable care in the circumstances governs the defendant’s conduct. The great duty rulings of the twentieth century profoundly reconfigured the division of labor in the private law: property and contract receded and tort expanded. This is the legacy of *MacPherson v. Buick Motor Co.*<sup>15</sup> and *Rowland v. Christian*.<sup>16</sup> Reasonable foreseeability of physical harm to another suffices to trigger an obligation to exercise reasonable care—as it should. It is this development that has made duty a nonissue in most negligence cases.

The second basic role played by duty doctrine is to divide the labor of negligence law between judge and jury. Judges determine whether the defendant’s conduct will be judged by the standard of reasonable care, and juries apply that standard to particular controversies, even when its application involves the exercise of evaluative judgment. The *evaluative* role of the jury is one of the most distinctive features of negligence adjudication.

Lastly, Part I argues that the work done by duty doctrine in contemporary negligence law is modest. The division of labor among judge and jury is long-settled, and the basic boundaries between tort, contract, and property are firmly fixed, albeit not in every detail. Contemporary duty rulings, therefore, discharge the doctrine’s standard specifying role only in

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argued that a contentful notion of “relational duty” pertains to standards of conduct, and that, if courts adhered to their thick, relational notion of duty, they would be less prone to use this element as a means of usurping the jury’s function. *See, e.g.,* Goldberg & Zipursky, *Moral, supra*. Although we differ with Goldberg and Zipursky on several key points—especially in their heavy emphasis on the relationality of duty and on the strength of Cardozo’s views—we concur with their view that duty is intrinsically connected to obligations of conduct, and not simply a device for shielding defendants from liability in classes of negligence cases.

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

16. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005).

relatively narrow circumstances by carving out either domains in which especially stringent obligations are owed (for example, expert and common carrier duties of care), or domains in which no or relaxed duties are owed (for example, between coparticipants in sports activities). Other tasks performed by contemporary duty rulings are either variations of this role, or roles which ought to be assigned to different doctrines. The coordination of the respective responsibilities of parties to the distribution of prescription drugs is an example of a specialized sort of standard setting. The use of duty to limit the extent of liability is an example of a task which ought to be assigned to another doctrine—in this case, to proximate cause doctrine.

Part II argues that recent developments in California appear to challenge this modern regime. California courts are increasingly treating duty as a live issue in every negligence case. These developments fall into a variety of disparate doctrinal pockets, but the phenomenon is most evident in primary assumption of risk cases. Following *Knight v. Jewett*<sup>17</sup>—the California Supreme Court decision reviving primary assumption of risk in the wake of California's adoption of pure comparative negligence—the primary assumption of risk cases assign *both the choice of legal standard and its application to the facts* to the judge. Other developments have to do with the duties owed by owners and occupiers of land to entrants onto their land, and with the practical effect of customary practices and legislative enactments on tort duties.

Cumulatively, these decisions have had discernible effects on the substantive contours of California law. First, by determining that a wide range of risks are inherent in recreational—and even some nonrecreational—activities as a matter of law, the primary assumption of risk cases are expanding a domain that is implicitly contractual. The domain of assumption of risk is a realm where “the parties” allocate risks among themselves by entering into activities whose self-understandings are not consistent with the existence of a duty of ordinary care. This, surely, is a significant development. Second, by shrinking the duties of care owed by owners and occupiers of land, the courts are expanding the domain in which the free use of property trumps tort duties of reasonable care.

These are significant, and mistaken, developments. Free use of property and freedom of contract are being given priority over the physical integrity of persons. The wrongheadedness of this development is brought

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17. *Knight v. Jewett*, 834 P.2d 696, 703–04 (Cal. 1992).



out by an old Jack Benny joke: faced with the offer of “your money or your life,” no one says “take my life” and only Jack Benny says “I’m thinking! I’m thinking!” No rational person values her money more than her life. The implicit moral logic at work in the California court’s expansion of “no duty doctrine”—“my life is more important than my money, but my money is more important than your life”—is utterly untenable. If democratic political morality insists on anything, it insists on the equal value of each of our lives. And rightly so. If your life is more important than your property, then my life is also more important than your property.

But precisely because this incipient trend is characterized by a proliferation of highly particular determinations of “no duty,” two of its most disturbing effects do not have to do with the contours of substantive law. First, by proliferating highly particular “no duty” exceptions to California’s general duty of reasonable care, these developments threaten the concept of “duty” with incoherence and disintegration. A legal system is a set of public norms—rules, principles, and standards—designed to guide conduct. The rule of law is the enterprise of subjecting human conduct to the governance of relatively stable norms.<sup>18</sup> To make duty a live issue in every case is to introduce a pervasive instability into negligence law, placing the standard governing legal conduct perpetually up for grabs. This will not do. Judgments of duty must generally be made on a categorical basis and “duty” must be a nonissue in most litigated cases.

Second, the combined effect of these proliferating “no duty” decisions is to shrink the domains of jury and legislative authority and to expand the domain of judicial authority. Longstanding practice and established constitutional principles governing the right to a jury trial and separation of powers charge judges with articulating the law, patrolling the boundaries of jury discretion, and deciding cases on summary judgment only in circumstances devoid of material factual disputes. These same principles and settled practice authorize juries to apply the law to the facts within the domain in which people might reasonably disagree about how the law applies, and acknowledge the superior lawmaking power of the legislature. California’s emerging “no duty” jurisprudence rides roughshod over this division of labor. Courts are usurping traditional roles of jury and legislature, aggrandizing their own power at the expense of these more democratic institutions. And all in the name of nothing more than the freedom to reach the outcomes that they prefer.

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18. See *supra* note 9.

Part III considers cures for California’s condition. It argues that the remedy for most of what ails California duty law is at bottom a simple one: courts must go back to making duty decisions in an appropriately categorical way. Duty doctrine must be used to fix the boundaries among contract, tort, property, and legally unregulated conduct, and to articulate the more particular standards of care attached to particular roles (for example, operating an amusement park), or incurred by certain undertakings (for example, by entering into various “special relationships”). In those broad areas where the legal standard governing the defendant’s conduct is well-settled—when contract and property are out of the picture and tort is firmly in control of the terrain—the only recurring responsibility of duty doctrine is to identify those cases in which the conduct of the defendant is unregulated by law because the risks of the conduct are too remote for a reasonable person even to consider guarding against them. This remedy requires a substantial revision of contemporary California practice but only a modest reformulation of contemporary California law.

## I. THE ROLE OF “DUTY” IN MODERN NEGLIGENCE LAW

### A. DUTY AND THE DIVISION OF LABOR IN PRIVATE LAW

Black-letter law has it that duty is a nonissue in most cases of accidental physical injury because most cases of accidental physical injury are governed by negligence law. The existence of a duty of care means that the norms of negligence law determine the rights and obligations of the parties joined to a particular injury by the unity of the defendant’s inflicting and the victim’s suffering of that injury.<sup>19</sup> The absence of a duty means either that some other body of law—contract law, most often—determines the rights of the parties to the harm, or that no body of law does. In this latter case, the harm is legally unregulated.

Consider the circumstance where a design defect causes a turbine installed on a ship to fail. Suppose first that the product failure poses no risk of physical injury and, in fact, damages only the turbine itself, thereby inflicting a loss on the owner and purchaser of the turbine. In this circumstance, contract law will govern the purchaser’s claim against the seller of the turbine. The injury involved—physical damage to the product

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19. See Martin Stone, *The Significance of Doing and Suffering*, in *PHILOSOPHY AND THE LAW OF TORTS* 131 (Gerald J. Postema ed., 2001).

itself—is likely to be treated as a form of “pure economic loss,” and pure economic losses do not give rise to a cause of action for negligence. They fall squarely within the domain of contract law.<sup>20</sup> Suppose next that the product failure causes it to explode and the explosion physically injures the purchaser, who just happened to be in the vicinity of the turbine at the time it blew up. In this circumstance, the purchaser will have a tort claim against the seller. Physical injury to natural persons is as much the concern of tort law as pure economic loss is the concern of contract law.

Now consider a third possibility: the turbine fails in a frightening but physically harmless way, thereby inflicting emotional distress on the purchaser who happened to witness the turbine’s distressing demise. In this circumstance, the purchaser’s emotional injury will generally go unredressed. Pure emotional harm usually falls into a legally unregulated domain of “no duty”—people generally have no duty to exercise reasonable care to avoid emotional distress to others. Tort law does not generally extend its protections against accidental injury this far, and no other body of law generally steps into the opening, protecting the purchaser’s peace of mind in the way that contract law generally protects her economic expectancies.<sup>21</sup>

It was not, however, always well-settled that accidental physical harm is presumptively the province of tort. Nineteenth century tort law contained far more capacious domains of “no duty,” and assigned much of the

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20. We adapt this example from *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 859, 871 (1986). In *East River Steamship*, the U.S. Supreme Court rejected products liability and negligence claims in admiralty law made by charterers of a ship against the manufacturer of its turbines for defects in the turbines which necessitated repairs. The Court explained that the traditional functions of tort law were not served by allowing such an action:

The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the “cost of an injury and the loss of time or health may be an overwhelming misfortune,” and one the person is not prepared to meet. In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. . . .

Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer’s expectations, or, in other words, that the customer has received “insufficient product value.” The maintenance of product value and quality is precisely the purpose of express and implied warranties.

*Id.* at 871–72 (internal citations omitted) (quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944)).

21. In both these areas—emotional distress and pure economic loss—*intentional* inflictions of harm are tortious; only the negligent infliction of such harm usually goes uncompensated. See *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 273–74 (Cal. 2004) (holding that a plaintiff could sue for fraud but not negligence in a case involving a defective helicopter part which could have led to a fatal accident).

domain now held by tort to property and contract.<sup>22</sup> On the property side, the duties owed by those in control of real property to entrants onto that property were governed by categories framed to give property law considerations (that is, the existence and extent of the plaintiff's right to be on the property) priority over tort concerns.<sup>23</sup> On the contract side, when a chain of contracts was present—as it is in product accidents involving injuries to product purchasers—absent a contractual relation between injurer and victim, no duty of care was owed to those foreseeably injured by negligent conduct.<sup>24</sup> Contemporary tort law, however, is the heir to the twin revolutions of *MacPherson v. Buick* and *Rowland v. Christian*.<sup>25</sup> *MacPherson* overthrew privity of contract in the critical domain of product accidents (the doctrine had barred suits by product users against manufacturers where the product had been sold through an intermediary, such as a car dealership), allowing tort law to follow its own premise that “where danger is to be foreseen, a liability will follow.”<sup>26</sup> *Rowland*

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22. See, e.g., *Dillon v. Legg*, 441 P.2d 912, 916–17 (Cal. 1968); WHITE, *supra* note 7, at 183–84 (arguing that nineteenth century limitations on negligence recovery were intended to keep a leash on juries); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 928, 944–54 (1981) (arguing “that fault liability emerged out of a world-view dominated largely by no-liability thinking” and delineating domains of “no duty”).

23. See, e.g., ABRAHAM, *supra* note 1, at 227–29 (describing the “limited duties” of owners and occupiers of land); ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, TORT AND ACCIDENT LAW: CASES AND MATERIALS 441–45, 461–83 (4th ed. 2004); KEETON ET AL., *supra* note 1, at 432 (describing “[t]he traditional distinctions in the duties of care owed to persons entering land” as “based upon the entrant’s status as a trespasser, licensee or invitee”); WHITE, *supra* note 7, at 190 (“[T]he liability of landowners . . . has been persistently dominated by . . . ‘status’ conceptions of tort liability that had preceded the rise of modern negligence.”); Rabin, *supra* note 22, at 933–36.

24. See, e.g., ABRAHAM, *supra* note 1, at 186–89 (describing the “Era of Contract Privity” in product liability law); KEETON ET AL., *supra* note 23, at 254–59; ROBERT E. KEETON, LEWIS D. SARGENTICH & GREGORY C. KEATING, TEACHER’S MANUAL TO ACCOMPANY TORT AND ACCIDENT LAW: CASES AND MATERIALS 8-1, 8-2, 8-3, 8-4 (4th ed. 2004); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099–1100 (1960).

25. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005); *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). The developments, of course, are much broader than these cases. On the demise of “privity of contract,” see Prosser, *supra* note 24.

26. *MacPherson*, 111 N.E. at 1053. Before *MacPherson*, reasonable foreseeability of physical injury was the first and principal determinant of the existence of a duty of care within the constricted domain ceded to tort. See, e.g., *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047, 1049 (Exch.). Many contemporary American jurisdictions take reasonable foreseeability of physical injury to be, in general, the necessary and sufficient condition of a tort duty of care; the key to the obligation is to exercise reasonable care. See, e.g., *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 238 (Wis. 1998). A number of other jurisdictions are in accord. See *Thompson v. Mindis Metals, Inc.*, 692 So. 2d 805, 807–08 (Ala. 1997); *Rudolph v. Ariz. B.A.S.S. Fed’n*, 898 P.2d 1000, 1003 (Ariz. Ct. App. 1995); *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981); *Munson v. Otis*, 396 A.2d 994, 996 (D.C. 1979); *Fla. Specialty, Inc. v. H 2 Ology Inc.*, 742 So. 2d 523, 526 (Fla. Dist. Ct. App. 1999); *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695–96 (Ga. 1982); *Washington v. City*

spawned a less sweeping overthrow of the categories—invitee, licensee, and trespasser—by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth century.<sup>27</sup> Tort has triumphed over contract and property, and tort law—not contract or property law—generally determines the duties that people owe to each other with respect to the reasonably foreseeable risks of physical harm that their acts and activities create.

Within this framework, duty is not exactly a vestigial organ, but it is a shadow of its former self. In the nineteenth century, large domains of “no duty” were created by the hold of property and contract law over important realms of accidental injury. When workplace accidents, product accidents, or injuries to entrants onto land were at issue, tort law could not follow its own premise that reasonable foreseeability of risk of physical injury gives rise to duty, because property and contract trumped tort and cut off its duties of care.<sup>28</sup> At the outset of the twenty-first century, “no duty” doctrine

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of Chicago, 720 N.E.2d 1030, 1032–33 (Ill. 1999); *Melchers v. Total Elec. Constr.*, 723 N.E.2d 815, 818 (Ill. App. Ct. 1999); *Bain v. Gillispie*, 357 N.W.2d 47, 49 (Iowa Ct. App. 1984); *Seigle v. Jasper*, 867 S.W.2d 476, 483 (Ky. Ct. App. 1993); *Colvin v. A R Cable Servs.-Me.*, 697 A.2d 1289, 1290 (Me. 1997); *Balt. Gas & Elec. Co. v. Flippo*, 705 A.2d 1144, 1154 (Md. 1998); *Glick v. Prince Italian Foods, Inc.*, 514 N.E.2d 100, 101–02 (Mass. App. Ct. 1987); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 175 (Miss. 1999); *Horner v. Spalitto*, 1 S.W.3d 519, 522 (Mo. Ct. App. 1999); *Mulvey v. CuvIELLO*, 687 N.Y.S.2d 584, 588 (N.Y. Sup. 1999); *Hart v. Ivey*, 420 S.E.2d 174, 178 (N.C. 1992); *Nelson v. Gillette*, 571 N.W.2d 332, 340 (N.D. 1997); *D’Amico v. Delliquadri*, 683 N.E.2d 814, 815–16 (Ohio Ct. App. 1996); *Smith v. Speligene*, 990 P.2d 312, 315 (Okla. Civ. App. 1999); *Roberts v. Fearey*, 986 P.2d 690, 692 (Or. Ct. App. 1999); *Hicks v. Metro. Edison Co.*, 665 A.2d 529, 533 (Pa. Commw. Ct. 1995); *Horne v. Beason*, 331 S.E.2d 342, 344 (S.C. 1985); *Thompson v. Summers*, 567 N.W.2d 387, 392 (S.D. 1997); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Trail v. White*, 275 S.E.2d 617, 619 (Va. 1981).

27. *Rowland* formulates a multifactor approach to “duty” with “foreseeability” as the preeminent factor. *See infra* text accompanying note 193. After reciting *Rowland*’s factors, *Randi W. v. Muroc Joint Unified School District*, 929 P.2d 582, 588 (Cal. 1997), observes that “[t]he foreseeability of a particular kind of harm plays a very significant role in this calculus . . . .” The State of Connecticut is explicit in enumerating foreseeability as the most important of the factors. *See Jaworski v. Kiernan*, 696 A.2d 332, 336–38 (Conn. 1997). Some other jurisdictions list foreseeability as the first of a list of factors. *See Mesiar v. Heckman*, 964 P.2d 445, 450 (Alaska 1998); *Doe v. Garcia*, 961 P.2d 1181, 1184 (Idaho 1998); *Thorne v. Miller*, 722 A.2d 626, 629 (N.J. Super. Ct. Law Div. 1998).

28. The materials in KEETON ET AL., *supra* note 23, at 254–59, 271–79, 662–69, illustrate or discuss the structure of accident law in the late nineteenth century. Rabin, *supra* note 22, at 945–48, gives an excellent overview of the relation of the fault principle to various domains of “no duty,” showing that the general duty of reasonable care supposedly characteristic of late nineteenth century tort law governed only accidents among strangers producing physical harm. Outside that domain, the tort duty of reasonable care was preempted by domains of “no duty” governing (1) all entrants onto land except for invitees, (2) workplace and product accidents, and (3) purely emotional and economic harms. *Id.* at 946–54. Liability to entrants on land was controlled by property conceptions; workplace and product accidents were controlled by contract conceptions; and pure emotional and economic harms were legally unregulated. *Id.* *See also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860*, at 208–10 (1977) (describing how the doctrine of assumption of risk excluded tort

still nibbles around the edges of the reconfigured tort-contract and tort-property boundaries, and still enables courts to snatch cases away from juries in a variety of "unusual circumstances." But the boundaries are far different and the terrain controlled by torts far larger. So duty performs its old function, but in a more modest way.

In product liability law, for example, the recently developed "no duty" doctrine providing that there is no tort claim for damage caused to a defective product itself<sup>29</sup> helps to locate the boundaries between tort and contract, and self-consciously so. The normative and conceptual edge on the ruling is the conclusion that damage to the product itself—a kind of physical harm—is best thought of as a kind of purely economic harm, properly governed by the law of contract, designed, as it is, to regulate the economic expectations of the parties. "No duty" doctrine also continues to fix tort's boundaries with property, but here, too, the modern cases nibble along a perimeter that concedes far more terrain to tort. Although the triumph of tort over property came later and is less complete than tort's triumph over contract,<sup>30</sup> in the wake of cases like *Rowland*<sup>31</sup> the categories of licensee and invitee are gradually being abandoned, and the particular duties of care owed to persons who once fell into these categories are slowly being replaced by a general duty of reasonable care.<sup>32</sup>

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duties of care from the workplace). The grip of "no duty" ideas was so strong that even those who drove the movement to recognize a general duty of reasonable care and thereby bring modern negligence law into existence (preeminently, Oliver Wendell Holmes and the members of the "legal science" movement) preferred "doctrines limiting liability . . . to those expanding it." WHITE, *supra* note 7, at 50.

29. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986). The damage to property—to the ship's turbine—was treated as an instance of pure economic loss. *Id.* at 870. Accord *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901–02 (Fla. 1987). Cf. *Seely v. White Motor Co.*, 403 P.2d 145, 149–51 (Cal. 1965) (applying the economic loss rule to bar a strict liability claim for damage to the product itself). See also *supra* note 20 and accompanying text. Not every jurisdiction subscribes to the *East River Steamship* "damage to the product itself" rule. See, e.g., *Pratt & Whitney Can., Inc. v. Sheehan*, 852 P.2d 1173, 1177, 1179–81 (Alaska 1993) (reaffirming the rule that damages may be awardable for damage to the product itself if the defendant's conduct caused a safety risk that could have harmed lives as well as property). See also *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 274 (Cal. 2004) (holding that the economic loss rule does not bar a claim for product damage resulting from fraud rather than negligence).

30. ABRAHAM, *supra* note 1, at 186–89, 228–29 (noting, inter alia, that no courts retain privity of contract in product liability law whereas some courts do retain the categories in entrants onto real property cases); DOBBS, *supra* note 1, at 615–16; KEETON ET AL., *supra* note 1, at 432–33, 658; PROSSER, *supra* note 24, at 1099–1103.

31. *Rowland v. Christian*, 443 P.2d 561, 53–64 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005). *Rowland* is the seminal case establishing a single standard of care for cases involving landowner liability to entrants onto land. *Id.*

32. See, e.g., 740 ILL. COMP. STAT. 130/2 (1995), *declared unconstitutional* by *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997); *Sheets v. Ritt, Ritt & Ritt, Inc.*, 581 N.W.2d 602, 605–06 (Iowa 1998); *Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Cates v. Beauregard Elec. Coop., Inc.*,

To be sure, this second reconfiguration of the terrain of private law has not been neat. The proper treatment of trespassers has perplexed modern courts, prompting a proliferation of distinctions among categories of trespassers. Some courts have been receptive to the extension of a duty of reasonable care to innocent trespassers,<sup>33</sup> recreational trespassers, or child trespassers, but courts and legislatures alike have recoiled from the idea that felony trespassers are owed a duty of ordinary care.<sup>34</sup> The doctrine that no duty is owed to felony trespassers is both an acknowledgment that property rights still matter to the definition of tort duties, and an example of “no duty” doctrine performing its traditional task of fixing the boundaries between tort and neighboring bodies of civil law.<sup>35</sup>

The upshot of these developments, however, is the rule that a duty of reasonable care may generally be presumed.<sup>36</sup> As the boundaries of tort have expanded, the importance of duty doctrine has diminished, simply

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328 So. 2d 367, 371 (La. 1976); *Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973); *Poulin v. Colby Coll.*, 402 A.2d 846, 849–51 (Me. 1979); *Heins v. Webster County*, 552 N.W.2d 51, 57 (Neb. 1996); *Basso v. Miller*, 352 N.E.2d 868, 871–72 (N.Y. 1976); *Nelson v. Freeland*, 507 S.E.2d 882, 892 (N.C. 1998); *O’Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Mallet v. Pickens*, 522 S.E.2d 436, 446 (W. Va. 1999); *Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993). The trend toward eliminating these categorical distinctions has been carried to the point where the Colorado Supreme Court held that a statute which attempted to reinstate the categories lacked even a rational basis and was thus unconstitutional. COLO. REV. STAT. § 13-21-115 (2005), *declared unconstitutional by Gallegos v. Phipps*, 779 P.2d 856, 862–63 (Colo. 1989).

33. *See, e.g.*, *Moody v. Manny’s Auto Repair*, 871 P.2d 935, 937, 943 (Nev. 1994) (replacing the categories with a general duty of reasonable care in a case involving an “innocent trespasser”—a police officer who cut through the defendant’s parking lot while pursuing a suspect, only to collide with a steel cable strung across the entrance to the lot).

34. *See, e.g.*, CAL. CIV. CODE § 847 (West Supp. 2005) (immunizing landowners from liability “to any person” for “any injury or death” which occurs “during the course of or after the commission of” a list of enumerated felonies); *Basso*, 352 N.E.2d at 877 (Breitel, C.J., concurring) (“Surely a landowner is not obligated, even under the single standard, to make his property safe for adult trespassers entering upon the property to pursue criminal ends.”).

35. To be sure, even this might be contested. We might easily argue that the special treatment of felony trespassers under the single standard is driven not by deference to property rights (witness the very different treatment of other kinds of trespassers), but by the principle that criminals should not profit from their own wrongs. *See* CAL. CIV. CODE § 3517 (West 1997); *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889). But even if we concede more than we perhaps should, and suppose that the special treatment of felony trespassers reflects at least in part the influence of property rights, the generalization that tort has occupied much of the terrain once held by property holds true.

36. As Goldberg and Zipursky have noted, [L]andmark decisions such as *Heaven v. Pender*[(1883) 11 Q.B.D. 503], *MacPherson v. Buick Motor Co.*[(1916) 111 N.E. 1050 (N.Y. 1916)], and *Donoghue v. Stevenson*[(1932) A.C. 562 (H.L.) (appeal taken from Scot.) (U.K.)], 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.

Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 700 (internal footnotes omitted).

because the terrain held by tort has grown so large. Doctrines of "no duty" set far less significant limits to tort liability than they once did.

#### B. DUTY AND THE DIVISION OF LABOR BETWEEN JUDGE AND JURY

The negligence norm of reasonable care in the circumstance is tied to jury adjudication by both its form and its content. The formal tie arises from the fact that the norm is a classic instance—perhaps even *the* classic instance—of a legal standard.<sup>37</sup> Its application to the idiosyncratic details of particular accidents presents a mixed question of law and fact, which requires the exercise of evaluative judgment as well as the finding of facts.<sup>38</sup> The case for leaving fact-finding to the jury is, of course, straightforward. At best, judicial preemption of the jury's *fact-finding role* by rulings of "no duty" is unlikely to be an improvement because "no duty" rulings are made before the facts are fully developed. At worst, judicial preemption of the jury's role in finding facts violates the constitutional right to a jury trial.<sup>39</sup>

In negligence cases, however, the jury does more than find facts. Long-settled doctrine holds that the authority of the jury to determine the requirements of reasonableness is not exhausted by the general authority of juries to decide facts. Jury authority extends even to cases in which the facts are undisputed; negligence cases go to the jury whenever the

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37. The prevailing distinction between a rule and a standard holds that "a rule may be defined as a legal direction which requires for its application nothing more than a determination of the happening or nonhappening of physical or mental events—that is, determinations of *fact*." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). By contrast, a "standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings." *Id.* at 140 (citing the "idea of the common law that no person should drive 'at an unreasonable rate of speed'" as a canonical example of a standard). Thus the application of a legal standard involves evaluative judgment as well as fact-finding. Applying a legal standard to a case involves working out a highly circumstantial "rule" applicable to the particular facts at hand. *Cf.* Gergen, *supra* note 10, at 407 n.1 (distinguishing between rules and standards and discussing the literature).

38. The classic statement of this proposition is given in Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 111–12 (1924). Bohlen stresses that the application of standards raises mixed questions of law and fact.

39. The Seventh Amendment to the U.S. Constitution has been read as protecting the jury's power as fact-finder. *See, e.g.*, *Colgrove v. Battin*, 413 U.S. 149, 157 (1973) (stating that fact-finding is the essential function of the jury in civil cases). The Seventh Amendment, of course, does not apply to the states but the same requirement is embedded in most state constitutions. *See, e.g.*, CAL. CONST. art. 1, § 16.



*evaluation* of the facts is subject to reasonable disagreement.<sup>40</sup> Here the content—not the form—of the negligence norm is critical. The application of the reasonable person standard requires bringing a number of considerations to bear<sup>41</sup> and reasonable people may reasonably disagree over how to evaluate the significance of particular factors even when they agree on the facts. In apportioning culpable responsibility for an automobile accident, for example, people may reasonably disagree over the relative unreasonableness of a defendant's speeding through a yellow light on the crest of a hill, and a plaintiff's turning across three lanes of traffic beneath the crest of the hill to enter the driveway of a service station, without making certain that the coast is clear.<sup>42</sup>

Were a court to settle the relative culpabilities of this plaintiff and this defendant as a matter of *law*, its ruling would be an arbitrary assertion that *one* reasonable resolution was *the* reasonable resolution. That claim would betray the court's obligation to reach reasoned decisions even as it professed to discharge that obligation, and the ruling itself would be so fact-specific that it would fail to possess the generality required of law. Yet there is nothing unusual about the case. The rulings produced by ordinary negligence cases typically are so fact-specific that they do not apply beyond the circumstances at hand, and do not yield general "rules." There is thus no occasion to exercise the distinctively legal authority of judges.

To be sure, not all legal standards are applied by juries. Familiar standards of commercial law are a case in point.<sup>43</sup> The reasonable person standard of negligence law is specially tied to juries because it claims a presumptively universal range of application and invokes a common moral conception. Whereas the standards of commercial law cover only commercial activities and direct our attention to the conventional practices

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40. See Gergen, *supra* note 10, at 434 & n.121. *Lorenzo v. Wirth* gives a representative statement of the rule: "Even when there is no conflict of testimony, if there are acts and omissions, of which some tend to show negligence, and others do not, the question whether there was negligence or not is . . . a question for the jury." *Lorenzo v. Wirth*, 49 N.E. 1010, 1013 (Mass. 1898) (Knowlton, J., dissenting).

41. See, e.g., UNIF. COMPARATIVE FAULT ACT § 2 cmt. (1977) (amended 1979) (enumerating some of the factors relevant to the determination of negligent culpability: the burden of the precaution necessary to prevent the accident, the probability and gravity of the harm, the knowledge and capacity of the actor, and the advertence or in advertence of the relevant conduct).

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

43. The Uniform Commercial Code, shaped as it is by the vision of Karl Llewellyn, is the preeminent example of the use of standards in commercial law. Consistent with his intention to institute the actual morality of commercial communities, Llewellyn proposed the use of "merchant juries" to resolve commercial disputes. See generally Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 512-15 (1987). For thoughtful discussion of the relative roles of rules and standards, and the linkages between these norms and the respective roles of judge and jury in contract law, see Gergen, *supra* note 10, at 440-61.

of particular communities of commerce, each and every member of the community owes and is owed the obligation to impose *only* reasonable risks. Reasonableness itself is an irreducibly moral notion, concerned with what we owe to each other. We act reasonably when we take the well-being of other people who might be affected by our actions as a circumstance capable of affecting our conduct, and seek to act in ways which can be justified to the people that our actions affect.<sup>44</sup>

When reasonable people disagree about the culpability of a particular defendant's conduct, conflicting judgments about the reasonableness of that conduct are *prima facie* plausible. Defendants are entitled to have their conduct appraised by the moral conception that we hold in common, yet we are divided over how that conception applies to the defendant's conduct, and justifiably so. We must work our way from reasonable disagreement to reasonable agreement. Judicial judgments of "no duty" resolve this reasonable disagreement by arbitrary fiat, insulating harmful and questionable conduct from appraisal and accountability.

Unlike judicial fiat, jury adjudication attempts to resolve reasonable disagreement in a principled and procedurally fair way. Jury adjudication enjoins codeliberation among a community of reasonable persons. By virtue of their plurality and diversity, juries are far more likely than individual judges to embody the range of reasonable disagreement over the conduct at issue in a negligence case. Unlike judicial determinations of "no duty," jury adjudication proceeds on a fully developed factual record and reaches judgment after the airing of competing viewpoints on the reasonableness of the defendant's conduct. It is thus designed not to ignore or override the diverse viewpoints and biases that lead to reasonable disagreement, but to engage and reshape them in order to reach reasonable agreement.<sup>45</sup>

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44. See JOHN RAWLS, *POLITICAL LIBERALISM* 48–54 (1996) (distinguishing between reasonableness and rationality); THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* 191–97 (1998); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 311, 311–12, 323–27 (1996); W.M. Sibley, *The Rational v. the Reasonable*, 62 *PHIL. REV.* 554, 557–58 (1953) (discussing the distinction and the affinity between reasonableness and Kant's categorical imperative). John Rawls characterizes reasonableness as "basic intuitive moral idea" in JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 82 (Erin Keely ed., 2001).

45. See Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 *MICH. L. REV.* 2348, 2393–2410 (1990). Legal opinions recognize this point. It is, writes the court in *Havas v. Victory Paper Stock Co.*,

particularly appropriate to leave [a finding of negligence] to the jury, not only because of the idiosyncratic nature of most tort cases, or because there was room for a difference in view as to whether [the defendant's] conduct in the particular circumstances of this case did or did not evidence a lack of due care, but, perhaps above all, because, in the determination of issues

The prevailing understanding of duty and breach thus divides the labor of negligence adjudication between judge and jury in a principled way. Duty doctrine, properly deployed, assigns to judges the decidedly legal task of articulating the law—of stating *general* norms for the guidance of conduct.<sup>46</sup> Breach doctrine, properly deployed, assigns to juries the task of evaluating conduct when the reasonableness of that conduct is subject to legitimate disagreement, and when the resolution of that disagreement will not lead to the making of general law. Because negligence law's norm of reasonableness calls on our shared moral sensibility, it is more fair for a plurality of reasonable persons to settle reasonable disagreements over the adequacy of a defendant's care after full development of relevant facts and arguments than it is for judges to settle such disagreement before the facts are developed and the arguments aired.

### C. DUTY RULINGS IN CONTEMPORARY NEGLIGENCE LAW

This account of the broad sweep of duty may seem to overlook essential details. Casual perusal of contemporary case law suggests that "duty" is used in a number of different ways, and that these cannot all be reduced to law articulation.<sup>47</sup> We disagree. In this section we shall distinguish six apparently different uses of duty doctrine and argue that four of them in fact involve law articulation. The two uses that do not fit this template are better conceptualized, we believe, through the lenses of other doctrines—breach and proximate cause, respectively.

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revolving about the reasonableness of conduct, the values inherent in the jury system are rightfully believed an important instrument in the adjudicative process.

Havas v. Victory Paper Stock Co., 402 N.E.2d 1136, 1139–40 (N.Y. 1980) (internal citation omitted). See also Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 458 n.8 (N.Y. 1980) (stating that "[w]hat safety precautions may reasonably be required of a landowner is almost always a question of fact for the jury"). Both of these cases and the language quoted in the text are cited and quoted in Judge Guido Calabresi's opinion in *Stagl v. Delta Airlines*, 52 F.3d 463, 467, 470 (2d Cir. 1995). *Stagl* itself is a powerful and learned discussion of the "the age-old debate as to when it is appropriate for a court to decide the question of a defendant's due care as a matter of law, rather than allowing a jury to resolve it as an issue of fact." *Id.* at 470.

46. "The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality." LON L. FULLER, *THE MORALITY OF LAW* 33–62, 46 (rev. ed. 1969). Cf. H.L.A. HART, *THE CONCEPT OF LAW* 156–57, 202 (1961) (noting that because law is an attempt to control conduct by general rules, "formal justice"—the principle "summarized in the precept 'treat like cases alike'"—is integral to law); JOHN RAWLS, *A THEORY OF JUSTICE* § 38, at 206–13 (rev. ed. 1999) ("[F]ormal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system.").

47. See, e.g., Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 698–723 (distinguishing four uses of duty).

The first of the six uses of duty that we shall distinguish involves imposing an especially stringent duty of care on some class of actors—articulating a special rule of increased duty. The Colorado rule on the duties of ski lift operators is a case in point. Because they have near complete control over the operation of the lift and the safety of the passengers, ski lift operators in Colorado are required to exercise the “highest degree of care commensurate with the practical operation of the ski lift.”<sup>48</sup>

The second category is the flip side of the coin; it involves articulating a special rule of no duty. *Washington v. City of Chicago*, for instance, holds that installing raised planters in street medians does not create a “reasonably foreseeable” risk that a fire truck, attempting to bypass heavy traffic, would drive onto a raised median at thirty-five miles per hour, hit a raised planter, and careen out of control.<sup>49</sup> Because the risk was so remote, the defendant did not owe a duty even to contemplate the risks created by its conduct and the precautions which might reduce them. When all the

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48. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 72 (Colo. 1998) (en banc). See also *Foster v. City of Keyser*, 501 S.E.2d 165, 176 (W. Va. 1997) (holding that “a distributor of natural gas is required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas[—]a degree of care commensurate to the danger involved in the transaction of its business.”). Here, the principal justification for the imposition of such a stringent duty is the exceptionally dangerous character of gas and its tendency to escape. *Id.* Courts have imposed comparably stringent duties of care on suppliers of electric current. See *Brillhart v. Edison Light & Power Co.*, 82 A.2d 44, 47 (Pa. 1951); *Miller v. Monongahela Power Co.*, 403 S.E.2d 406, 411 (W. Va. 1991), *overruled on other grounds by Mallet v. Pickens*, 522 S.E.2d 436, 437 (W. Va. 1999).

49. *Washington v. City of Chicago*, 720 N.E.2d 1030, 1030–33 (Ill. 1999). Goldberg and Zipursky discuss this as a no “breach-as-a-matter-of-law” case. Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 714. We believe that the case is a true “no duty” case because cases in which there is no reasonably foreseeable risk of physical injury are cases of legally unregulated conduct. Prospective injurers are not under any duty to exercise reasonable care for the protection of prospective victims, and the ground ceded by tort is not occupied either by property or by contract. Goldberg and Zipursky, by contrast, see this as a circumstance in which the defendant has discharged its duty of care *as a matter of law*. *Id.*

The choice between these two descriptions is a close one. We believe, however, that our “no duty” characterization better represents the thinking of courts in this category of cases. Consider another Illinois case, *Van Skike v. Zussman*, in which the court held that peddling miniature toy lighters to minors by way of gumball machines did not create a “reasonably foreseeable risk of harm” to anyone, even though a small child was inspired by his toy lighter to pour lighter fluid on it and set himself on fire. *Van Skike v. Zussman*, 318 N.E.2d 244, 246–47 (Ill. App. Ct. 1974). In actuality, however, the selling of lighter fluid to a small child *did* create a reasonably foreseeable risk of harm. The plaintiff’s claim against the defendant who sold the lighter fluid failed only because the court ruled that the precaution necessary to prevent the harm—prohibiting the sale of lighter fluid to minors—was not justified by the low probability of a minor using the fluid to start an “uncontrolled ignition.” *Id.* at 248. This is no breach as a matter of law.

risks of physical injury created by some conduct are so remote that they are not reasonably foreseeable, no tort duty of care is owed *to anyone*.

The third use involves defining and coordinating shared responsibility for a single harm. The rules of learned intermediary doctrine are a case in point. Those rules divide the labor of warning about the risks of prescription drugs between pharmaceutical firms and prescribing physicians.<sup>50</sup> Generally speaking, this doctrine relieves the pharmaceutical manufacturer of its duty to warn the ultimate user on the condition that it warn the prescribing physician, who then inherits the obligation to warn the user. The articulation of *both* special rules of responsibility and special rules of no responsibility thus distinguishes this use of duty.

Fourth, courts deploy the language of duty to specify obligations in affirmative duty cases. In affirmative duty cases, the risk that endangers the victim does not arise out of a course of conduct initiated by the defendant whose responsibility for preventing or mitigating the victim's injury is at issue. The defendant's only relation to the risk is that it is in a position either to prevent the risk from harming the victim *ex ante*, or to mitigate the harm *ex post*.<sup>51</sup> Because there is no general tort duty to prevent or mitigate

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50. See RESTATEMENT DRAFT, *supra* note 2, § 7 cmt. e. Bulk suppliers of materials to sophisticated buyers—sellers of natural gas shipped through a pipeline to a distributor, for instance—are likewise not generally subject to duties of care extending to the ultimate users of the materials supplied. See generally DOBBS, *supra* note 1, § 366, at 1012–13. For the natural gas example, see *Jones v. Hittle Serv., Inc.*, 549 P.2d 1383 (Kan. 1976). Such bulk suppliers can generally rely on the expertise of their purchasers; sophisticated buyers of bulk materials are aware of the materials' risks and can usually be relied on to pass on warnings about those risks. Moreover, the bulk supplier often does not maintain much control over the final use of the product. This reduces the supplier's ability—relative to the reseller's ability—to take effective precautions. See *Jacobs v. E.I. du Pont de Nemours & Co.*, 67 F.3d 1219, 1236–38 (6th Cir. 1995); *Stoffel v. Thermogas Co.*, 998 F. Supp. 1021, 1024–26 (N.D. Iowa 1997); *Ditto v. Monsanto Co.*, 867 F. Supp. 585, 593 (N.D. Ohio 1993). The same principles extend to sellers of raw materials and component parts to buyers who integrate them into final products—such as sellers of silicone to firms that manufacture breast implants. See *In re Silicone Gel Breast Implants Prods. Liability Litig.*, 887 F. Supp. 1455, 1461–62 (N.D. Ala. 1995). Such sellers are not generally subject to duties of care running to the ultimate users of the products into which their raw materials or component parts are incorporated. The manufacturers of the end products into which the raw materials are incorporated are usually in a better position to warn end users of the risks of the raw materials that those end products incorporate.

51. Affirmative duties, therefore, come in two basic forms: duties to prevent potential victims from coming to harm in the first instance, and duties to mitigate a harm that will otherwise befall an already injured victim. In both cases, the party charged with the duty has not acted to imperil the party in danger. Affirmative duties are thus duties to benefit others. Typical tort duties are “negative”; they are duties to refrain from harming others. The circumstance in which a defendant might have prevented the harm entirely is illustrated by *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 344–46 (Cal. 1976), which held that a therapist had a duty to warn the plaintiff parents of a young woman who was killed by a patient of the therapist of the fact that the patient had expressed a credible intention to kill the young woman. The circumstance in which a defendant might have mitigated the

harm caused by someone else's conduct, this branch of the law starts from a default rule of "no duty."<sup>52</sup> This makes affirmative duty cases special in a number of ways, but duty doctrine continues to perform its customary role. Structurally, affirmative duty cases which impose duties to act parallel negative duty cases which relieve actors of the duty to exercise reasonable care. Both uses of duty carve out exceptions to the general rules of their respective domains.

The fifth category involves using the language of "no duty" to express the significantly different conclusion that no reasonable juror could find a breach of duty. *Akins v. Glens Falls City School District*<sup>53</sup> is often treated as an example. There, the plaintiff had been struck in the eye and permanently injured by a foul ball while standing near third base at a high school baseball game. The school district had built a twenty-four foot backstop behind home plate, but only a three-foot high fence along the baselines.<sup>54</sup> The court ruled that "in the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest,"<sup>55</sup> describing its ruling as a "definition of the duty owed by an owner of a baseball field to provide protective screening for its spectators."<sup>56</sup> The tentative draft of the *Restatement (Third) of Torts*, however, takes the position that the decision is best described as

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harm is illustrated by *Union Pacific Railway v. Cappier*, 72 P. 281, 282 (Kan. 1903), which held that the railway was under no duty to rescue the victim, a trespasser who had one leg and one arm cut off when he was run over by one of Union Pacific's rail cars. The court concluded that "the acts of [the] trespasser himself[. . .] his own negligent conduct [was] alone the cause" of his injury. *Id.*

52. Arguably, affirmative duties are categorically different from negative ones. Negative duties not to injure others carelessly are usually regarded as matters of right and justice, whereas affirmative duties to rescue others are taken to be matters of generosity or beneficence. See, e.g., JOHN STUART MILL, *UTILITARIANISM* 50 (2d ed., Hackett Publishing Co. 2001) (1861) ("Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence."). Anglo-American law has certainly held to a traditional distinction between "negative" rights and "affirmative" rights, with the former receiving far more protection. How best to understand affirmative duties in tort in light of this categorical distinction between negative and positive duties is a matter beyond the scope of this Article.

53. *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981). Goldberg and Zipursky discuss this case and this category of cases. Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 712–17. Our analyses are very similar, except that we believe that *Washington v. City of Chicago*, one of the cases they classify as "breach-as-a-matter-of-law" should instead be classified as a true "no duty" case, falling into the second of the six categories distinguished here. See *supra* note 49 and accompanying text.

54. *Akins*, 424 N.E.2d at 532.

55. *Id.* at 533.

56. *Id.*

recognizing the existence of a duty, but holding that, as a matter of law, it had not been breached.<sup>57</sup>

We agree. *Akins* decides that due care does not require the screening of the first and third base lines, in addition to home plate. Stated this way, the ruling in *Akins* is an example of a court specifying the precise precaution that reasonable care requires in a recurring circumstance. *Akins* and the small number of cases that are like it are all that has become of Holmes' prescription and prophecy that courts ought to—and would over time—fix precise standards of conduct, for the sake of certainty.<sup>58</sup> Whatever one thinks of that failed aspiration, the handful of cases where it has come to fruition is properly classified under breach doctrine. They settle the precise precautions required in a small number of recurring circumstances—not the standard by which conduct will be judged. *Akins* and cases like it are cases of “no breach as a matter of law.”<sup>59</sup>

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57. RESTATEMENT DRAFT, *supra* note 2, § 7 cmt. a, § 8 cmt. c. According to the draft of the *Restatement (Third)*, the ruling that the school district had no duty to protect the plaintiff against the ball that injured her by building a higher fence is best understood as ruling that the school district did not breach its duty to provide protection for spectators against fly balls by failing to build taller fences or screens along the first and third base lines.

58. A portion of the tentative draft of the *Restatement (Third)* describes these cases well:

In other situations, reasonable minds can differ as to the application of the negligence standard to the case's particular facts, yet the case presents a recurring problem that leads courts to conclude . . . that the negligence determination should be rendered by the court rather than by the jury. It is common for courts to express the conclusions they reach in such cases in terms of “duty.” When conducting such a duty analysis, the court primarily considers, as would the jury in dealing with the issue of negligence, the magnitude of the foreseeable risk and the burden of risk prevention. In a duty case, however, the court considers those factors from the perspective not of the individual plaintiff and defendant but rather of the entire categories of plaintiffs and defendants whose liability situation is being considered. In conducting such an analysis, the court can take into account factors that might elude the attention of the jury in a particular case, such as the overall social impact of imposing some significant precaution burden on a category of actors.

*Id.* § 7 cmt. f.

Holmes's view has been discussed in several cases. *See, e.g.*, *Balt. & Ohio R.R. v. Goodman*, 275 U.S. 66, 70 (1927) (Holmes, J.) (announcing a “stop, look, and listen” rule for railroad crossings because “when the standard is clear it should be laid down once for all by the Courts”); *Pokora v. Wabash Ry.*, 292 U.S. 98, 102–04 (1934) (Cardozo, J.) (criticizing the “stop, look, and listen” rule of *Goodman* as requiring a precaution “very likely to be futile” and limiting it accordingly); *Stagl v. Delta Airlines*, 52 F.3d 463, 470 (2d Cir. 1995) (Calabresi, J.) (noting that Holmes's view that courts ought over time to specify precise rules of conduct has been mostly rejected); *Lorenzo v. Wirth*, 49 N.E. 1010, 1011 (Mass. 1898) (Holmes, J.).

59. Another no breach case analyzed as a “no duty” case is *McGettigan v. Bay Area Rapid Transit District*, 67 Cal. Rptr. 2d 516 (Ct. App. 1997), in which a mass transit authority was held to have no duty to a drunk passenger who it escorted off the train at end of line and onto the platform, where the passenger was too drunk to care for himself and placed himself in the path of a train, causing injury. *Id.* at 520–21. The court held that the transit agency owes a duty only to those embarking and disembarking from trains; it owes no duty to persons on the platform. *Id.* This is incorrect; the transit authority should owe a duty to maintain a reasonably safe platform. Would the *McGettigan* court reject the claim of a person who was electrocuted by exposed wires on the platform on the ground that the

In the sixth category, courts use "no duty" language to take cases away from juries when courts are convinced that—on the particular facts of the case—no responsibility at all for the plaintiff's injury should be placed on the defendant, even though modern principles of comparative negligence appear to counsel in favor of placing *some* responsibility on the defendant.<sup>60</sup> *Williams v. BIC Corp.* is illustrative.<sup>61</sup> The victim in *Williams* was a two-year-old girl, severely burned when her three-year-old brother started a fire by playing with a cigarette lighter, which he had found on his

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transit authority had no duty to persons on the platform? The better rationale for *McGettigan* is that it is not negligent as a matter of law to escort a passenger to a reasonably safe platform. *See also* *Estes v. Tripson*, 932 P.2d 1364, 1367 (Ariz. Ct. App. 1997) (holding that an accidental injury in a company softball game did not present a jury question); *Calhoun v. Lewis*, 96 Cal. Rptr. 2d 394, 400 (Ct. App. 2000) (holding that a property owner has no duty to remove a planter that injured a skateboarder from the driveway); *Domenghini v. Evans*, 70 Cal. Rptr. 2d 917 (Ct. App. 1998) (holding that a ranch owner owes no duty to hold a more safe (and less challenging) cattle roundup using mechanical devices—the same result could have been reached by holding that no reasonable jury could find the choice to hold an "old-fashioned" cattle roundup to be negligent).

Another example of such a case is *Lindstrom v. Hertz Corp.*, in which the claimed breach was a rental car agency's renting a car to a foreign driver without ascertaining whether that driver knew the rules of the road. *Lindstrom v. Hertz Corp.*, 96 Cal. Rptr. 2d 874, 877 (Ct. App. 2000). The driver injured the plaintiff while making an allegedly illegal U-turn. The plaintiff's entire argument was premised on the contention that foreign drivers are more likely to get into accidents than American drivers are. *Id.* at 878. The court found no duty based on unforeseeability, but the real problem with the plaintiff's case in *Lindstrom* is that no reasonable juror would require rental car companies to do driving tests before they rent cars—to foreigners or to any other licensed driver. (The finding of no duty has real consequences: the court holds that the extent of the rental car agency's duty, as a matter of law, is to ensure that the drivers are licensed. This holding shows a remarkable lack of sensitivity as to what fact patterns might arise in the future and might justify negligence liability.)

For a good discussion of these kinds of cases, see Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 712–17.

60. The point is to short-circuit the application of comparative negligence principles which would appear to call for pinning some responsibility on the defendant. In his classic article, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, then-Professor, now Judge Guido Calabresi argued that courts often used proximate cause doctrine to pin liability on the cheapest cost-avoider, that is, the party who could take the lowest cost (and therefore most economically efficient) precaution that would prevent the accident in circumstances in which straightforward application of less flexible tort doctrines would not have enabled them to do so. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 103–04 (1975). The use of "no duty" doctrine that we are describing is very similar to the use of proximate cause doctrine described by Calabresi. Indeed, we will argue shortly that this use of duty would be better conceptualized in proximate cause terms. Proximate cause analogs to this category of "no duty" cases are not hard to find. *See, e.g., Egan v. A.J. Constr. Corp.*, 724 N.E.2d 366, 368 (N.Y. 1999) (holding that the plaintiff's act of "jumping out of a stalled elevator six feet above the lobby floor after the elevator's doors had been opened manually was not foreseeable in the normal course of events resulting from defendants' alleged negligence. . . . [P]laintiff's jump superseded defendants' conduct and terminated defendants' liability for his injuries."). *Egan* is a proximate cause decision because it treats the plaintiff's actions as a superseding cause which extinguished the defendants' breach of its duty of care.

61. *Williams v. BIC Corp.*, 771 So. 2d 441 (Ala. 2000).



mother's dresser.<sup>62</sup> The lighter was not child-resistant and the parents brought suit against its manufacturer. The Alabama Supreme Court upheld a jury instruction that "where a young child is under the sole custody and supervision of a parent, it is not foreseeable that the parent would fail to undertake basic precautions to safeguard her children from an obvious risk that is well known to the parent."<sup>63</sup> The general idea animating this instruction is that it would be wrong to let the parents recover for a harm to their child for which they are more culpably responsible than the defendant.<sup>64</sup>

Here, the language of duty is being used to settle the *extent of liability*, not the *existence of obligation*. *Williams* not only accepts that product liability law puts the manufacturers of lighters under a duty to not market defective products, but also it accepts that this duty extends to designing against foreseeable misuse. It rules only that it is simply unforeseeable that parents would be so careless as to permit their small children to play with

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62. *Id.* at 442–43.

63. *Id.* at 448–50. On casual inspection, the ruling in *Williams* sounds exactly like a category two case—a case in which there is “no duty” because the risk is so remote. But the risk of children setting themselves afire with real lighters is hardly unforeseeably remote in the way that the risks of children doing so with toy lighters may be. The point of real lighters, after all, is to start fires. And it is hardly surprising that some real lighters fall into the hands of small children. It has been estimated that “children under age 5 cause 5800 residential fires, 170 deaths, and 1190 injuries each year by playing with lighters.” Thomas M. Peters & Hal O. Carroll, *Playing with Fire: Assessing Lighter Manufacturers’ Duties Regarding Child Play Lighter Fires*, 9 LOY. CONSUMER L. REP. 339, 339 (1997). In response, the Consumer Products Safety Commission has promulgated safety standards for the childproofing of cigarette lighters, see 16 C.F.R. §§ 1210.1–3 (2005). The risk of children setting themselves on fire with real lighters is foreseeable in a way that the risk of children setting themselves on fire with toy lighters is not. The Alabama Supreme Court’s conclusion in *Williams* is consistent with that of other courts that have considered the issue. Peters & Carroll, *supra*, at 343 (“[T]he cases are surprisingly uniform in their results. Specifically, courts appear reluctant to hold manufacturers liable in child play lighter fire cases for failing to design childproof lighters because the lighters worked as intended by creating a flame.”) (internal footnote omitted).

64. Goldberg and Zipursky identify another category of duty cases which they call “immunity” cases. Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 720. In these cases, courts use “no duty” rulings to insulate state agencies (for example, the police) from liability for failure to protect particular individuals from injury. Goldberg and Zipursky cite *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968), as an example of “no duty” language being used to insulate a public agency charged with protecting the public from harm (an agency with a *duty* to protect the public) from suit for failing to protect a particular victim from harm. *Riss* refused to allow a woman who alleged (on strong facts) that the New York City Police failed to protect her against a stalker, who subsequently blinded her with lye, to receive damages from the city for her injuries. The court held that the city owed no duty to the plaintiff on the ground that the imposition of a duty would interfere in an undesirable way with the police department’s authority to coordinate the provision of police protection. *Id.* at 860–61. We see *Riss* and the class of cases it instantiates as a particular kind of affirmative duty case and therefore do not classify them, even provisionally, as a seventh kind of duty case.

cigarette lighters.<sup>65</sup> So it affirms the trial court's application of the law to the facts, attributing full responsibility for the accident to the intervening agency of third parties. It is this attribution of full responsibility to someone other than the defendant—the "intervening" or "superseding" actions of third parties—that defines this class of decisions.<sup>66</sup> Whatever one makes of the merits of doing this, the correct description is that extent of liability—"proximate cause"—not existence of duty is being settled.

Close inspection of these seemingly diverse uses of duty thus discloses that duty usually does fix the legal standard that governs the defendant's conduct. And when it does not, clarity would be better served by assigning the task to another doctrine. Because the primary task of "duty" doctrine *is* to specify the legal standard that governs the defendant's conduct, and because modern tort law is the heir to both the *MacPherson* and *Rowland* revolutions, "duty" is a nonissue in most cases where the responsibility at issue is the negative responsibility not to act in ways which unreasonably endanger the property and physical integrity of others. Modern tort law imposes a duty on almost all potential injurers to guard against the reasonably foreseeable risks of physical injury created by their conduct. And the determination of whether that broad obligation has been breached belongs to juries as long as people might reasonably disagree about the matter.

## II. CONTEMPORARY DEVELOPMENTS IN CALIFORNIA

Thirty years ago, California was at the forefront of the movement to sweep aside duty limitations rooted in property and contract law. California was the first state to adopt the strict products liability of the *Restatement (Second)*;<sup>67</sup> the first state to replace the categories of invitee, licensee, and trespasser with a single standard of reasonable care;<sup>68</sup> and a state where "duty" limitations were openly criticized as "a legal device of the latter half

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65. See *supra* notes 61–63 and accompanying text.

66. This is roughly analogous to the activity described by then-Professor Calabresi in *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, in which he argued that courts often used proximate cause doctrine to pin liability on the cheapest cost-avoider in circumstances where straightforward application of less flexible tort doctrines would not have enabled them to do so. Calabresi, *supra* note 60, at 103–04.

67. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

68. "Beginning with the 1968 California Supreme Court decision in *Rowland v. Christian*, we have observed the growing number of well-reasoned decisions abandoning the common law distinctions and adopting the simple rule of reasonable care under the circumstances." *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976) (internal citation omitted).

of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”<sup>69</sup>

In contemporary California, however, “duty” may be on its way to being reborn as a live issue in each and every case. Although a California statute provides that “[e]very one is responsible . . . for an injury occasioned to another by his or her want of ordinary care,”<sup>70</sup> California courts have been steadily expanding “no duty” doctrines, particularly under the guise of assumption of risk. The terrain of tort may be starting to shrink while the domains of property and contract expand. Institutional roles are also being reconfigured; the divisions of labor between judge and jury and between courts and legislatures are becoming increasingly confused and corrupted.

To make out these emerging figures in the carpet of California’s tort law, we need to examine a number of disparate developments—developments concentrated in the domains of assumption of risk and landowner liability to entrants onto real property. Assumption of risk doctrine has assumed unusual importance in California as courts have carved out substantial domains of “no duty” by interpreting the scope of the doctrine broadly and assigning extraordinary control over cases in this newly enlarged domain to courts. Landowner liability has contracted in ways that privilege the free use of property over personal and public safety. And in both domains courts have devised rules that undermine the authority of the legislature as well as the jury, and even the understandings of the parties themselves.

#### A. ASSUMPTION OF RISK

Assumption of risk is an expression of a contractual idea within the law of torts. In all of its various forms, it holds that injurers should be relieved from liability for otherwise tortious conduct because the victim made a tacit or explicit choice to bear the risk. Negligence law is concerned with carelessness; assumption of risk is concerned with choice. Tort norms express collective judgments about our responsibilities to one another, principally our responsibilities not to endanger each other’s physical integrity or property. Assumption of risk purports to express individual judgments about the amount of risk that a potential victim is prepared to accept without either the protections of others’ reasonable care or

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69. *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

70. CAL. CIV. CODE § 1714(a) (West 2002).

compensation in the event of injury.<sup>71</sup> The legal protection and enactment of individual choices, of course, is the domain of contract law. The scope of assumption of risk within tort thus tells us much about the balance of power between tort and contract at any given moment in time. It is, therefore, telling that assumption of risk has undergone a pronounced expansion in California over the course of the past decade.<sup>72</sup>

Classical assumption of risk—the doctrine of implied assumption of risk developed during the latter part of the nineteenth century—was an absolute defense to negligence liability, and a powerful, wide-ranging defense at that. In the workplace setting to which it principally applied,<sup>73</sup> assumption of risk operated to relieve employers of their ordinary duties of care, barring a broad range of claims by injured employees against their employers. Classical assumption of risk held that continuing to work in the face of a known or obvious risk was enough to trigger the application of the defense.<sup>74</sup> The effect of this rule was to replace the employer's duty to use reasonable care to ensure a reasonably safe workplace with a duty to make unsafe conditions in the workplace obvious. Put differently, the rule replaced the employer's duty of ordinary care with a duty to warn, and held that duty to warn satisfied by the mere rendering of the risk obvious. The doctrine thus invited employers to create egregiously unsafe conditions; by so doing, employers could relieve themselves of their ordinary duties of care.

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71. Particularly in its nineteenth century incarnation, the doctrine of assumption of risk supposes that each person both has an interest in tailoring that person's level of protection against injury to match the person's individual tastes and is in a position to bargain for that level of protection. As G. Edward White remarks, "Assumption of risk strikes the twentieth century observer as the archetypal doctrine of an age entranced with the idea that each [person] was equally capable of protecting himself against injury." WHITE, *supra* note 7, at 41.

72. Express assumption of risk, that is, where persons contract away their right to sue for a specific risk, is a recognized defense that survived the partial demise of assumption of risk in the past century, subject, of course, to the expansion of doctrines such as unconscionability that protect parties from being coerced into waiving their right to sue for negligence. It is *implied* assumption of risk, which bars recovery on the ground that, although no express *agreement* to consent to the risk occurred, the victim's conduct manifested consent, which has been subjected to sustained attack. So long as the contractual consent is real and fairly obtained, express assumption of risk does not raise the issues that implied assumption of risk does, and is thus outside the scope of this Article.

73. Assumption of risk never had much application to accidents among strangers. See *Clayards v. Dethick*, [1848] 116 Eng. Rep. 932, 934 (Q.B. 1816). Principled application of the doctrine requires some choice on the part of the victim to encounter and accept the risk of the defendant's negligence and this is absent when injurer and victim are strangers to one another. Accidents in the workplace are one of the paradigm cases of accidents among those who are acquainted with one another, so it is not surprising to see classical assumption of risk cases concentrated in that area.

74. See *infra* text accompanying notes 77–84.

Over the course of the twentieth century the classical doctrine underwent a slow, and conceptually elaborate, decline.<sup>75</sup> First, implied assumption of risk was divided into “primary” and “secondary” forms. The “primary” form of the doctrine holds that in some circumstances—almost always recreational ones—no duty of ordinary care ever arises.<sup>76</sup> “Primary” assumption of risk is thus a true “no duty” doctrine, but one with modest significance and scope. Most importantly, “primary” assumption of risk does not cover the workplace accidents that were at the heart of the classical doctrine and which gave the doctrine its importance. Contemporary primary assumption of risk applies almost exclusively in the domain of recreational activities, activities whose pursuit is not necessary in the same way that earning a living is.

Secondary assumption of risk is quite a different matter, both conceptually and practically. The secondary form of implied assumption of risk is, like contributory negligence, a defense to a breach of an established duty of care. Unlike contributory negligence, however, secondary assumption of risk is concerned with choice or consent, not with carefulness or reasonableness. Secondary assumption of risk embodies the idea that the plaintiffs sometimes implicitly consent to bear the risks of the defendant’s negligent conduct. The doctrine is, therefore, concerned not with the reasonableness or unreasonableness of the plaintiff’s encounter with the defendant’s breach of its duty of care, but with the voluntariness of that encounter. Knowing, voluntary encounters with negligently created risks operate to bar all recovery on the part of the person encountering the risk.

Classical assumption of risk was an instance of this secondary form of the doctrine. The employer’s duty of reasonable care was never formally repudiated—as it would be under a primary form of the doctrine—it was just made subject to a defense any time an employee could broadly have been said to consent to bear the risk. If a risk was “open and obvious” any employee who chose to continue working in the face of that risk assumed it. *Lamson v. American Axe & Tool Co.*,<sup>77</sup> a leading case and a Holmes opinion, illustrates the operation of the doctrine. Lamson was injured when a hatchet fell from a drying rack in front of the spot where he worked

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75. See *Knight v. Jewett*, 834 P.2d 696, 703–04 (Cal. 1992); *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1240–41 (Cal. 1975); DOBBS, *supra* note 1, at 535; 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (1st ed. 1956) § 21.1, at 1162; KEETON ET AL., *supra* note 1, at 496–98.

76. *Knight*, 834 P.2d at 703–04.

77. *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585 (Mass. 1900).

painting the hatchets.<sup>78</sup> Lamson had worked for the defendant for many years. The rack from which the hatchet fell was a new one, however, having been put in place about a year before the accident. Lamson had complained that the new rack was more dangerous than the old one, and was told "in substance, that he would have to use the racks or leave."<sup>79</sup> When the accident Lamson feared came to pass, he brought suit and was told that he had assumed the risk. He "appreciated the danger . . . [,]stayed, and took the risk."<sup>80</sup> Nothing more was needed. By flagrantly and blatantly refusing to provide a reasonably safe workplace, American Axe and Tool had relieved itself of any duty to do so. And therein lies both the sweep and the notoriety of the doctrine.

The claim that people implicitly agree to relinquish their right to be free of others' negligence came under sustained attack during the first half of the twentieth century.<sup>81</sup> In response to that attack, courts and commentators broke "secondary implied assumption of risk" down further, into "reasonable" and "unreasonable" branches. "Reasonable" implied secondary assumption of risk—such as Lamson's decision not to quit his job and to run the risk of being struck by a hatchet falling from the unsafe drying rack—did not bar recovery, or even reduce recovery. "Unreasonable" implied secondary assumption of risk, by contrast, continued to bar all recovery.<sup>82</sup> This conceptual splitting of the doctrine effectively abolished implied secondary assumption of risk as a distinct defense. Because implied secondary assumption of risk now barred recovery only when the conduct it covered was unreasonable, the defense was now identical to the defense of contributory negligence.

The final stage in the classical doctrine's demise came with the rise of comparative negligence. The triumph of comparative negligence eliminated the last vestige of the classical defense—its operation as a complete bar to recovery. With the rise of comparative negligence, the plaintiff's failure to exercise due care for the plaintiff's own protection was now compared with the defendant's failure to exercise due care to protect others from the

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78. *Id.* at 585.

79. *Id.*

80. *Id.*

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

82. See *Koutoufaris v. Dick*, 604 A.2d 390, 397–98 (Del. 1992); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13–14 (Wash. 1992) (en banc); KEETON ET AL., *supra* note 1, at 497.

reasonably foreseeable risks of the defendant's actions, and the plaintiff's recovery reduced in proportion to that plaintiff's relative culpability.<sup>83</sup>

At the end of this long process, implied assumption of risk was a shadow of its former self. Implied secondary assumption of risk operated as a bar to recovery only in the special circumstance of the "firefighter's rule" prohibiting a firefighter from recovering from a person who negligently started a fire;<sup>84</sup> every other part of the defense was absorbed into comparative negligence. Implied primary assumption of risk was confined to a limited domain of cases, far removed from the realm where the classical defense earned its notoriety. In most American jurisdictions, implied assumption of risk now takes this shrunken and relatively unimportant form. Until the early 1990s, implied assumption of risk took this vestigial form in California as well. Since that time, however, the doctrine has dramatically expanded in California.

At the beginning of the 1990s, implied assumption of risk doctrine in California was dormant, if not quite dead. *Li v. Yellow Cab Co.*, the California Supreme Court decision abolishing contributory negligence and replacing it with a system of pure comparative negligence, had abolished "the defense of assumption of risk . . . to the extent that it is merely a variant of . . . contributory negligence."<sup>85</sup> Assumption of risk, the court explained was now "to be subsumed under the general process of assessing liability in proportion to negligence."<sup>86</sup> This language was sufficiently expansive to leave doubt as to whether even primary assumption of risk had survived the adoption of comparative negligence. In the years following *Li*, California's lower courts took a variety of approaches to the question.<sup>87</sup>

The doctrine's renaissance began in 1992, with the California Supreme Court's decisions in *Knight v. Jewett*<sup>88</sup> and its companion case, *Ford v. Gouin*.<sup>89</sup> In *Knight*, the defendant crushed and broke the plaintiff's

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83. See *Lipson v. Superior Court*, 644 P.2d 822, 830-31 (Cal. 1982); *Kendrick v. Ed's Beach Serv., Inc.*, 577 So. 2d 936, 938 (Fla. 1991); *Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306, 312 (Utah 1980).

84. See, e.g., *Walters v. Sloan*, 571 P.2d 609, 614 (Cal. 1977), *overruled on other grounds by Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347 (Cal. 1994); *Terhell v. Am. Commonwealth Assocs.*, 218 Cal. Rptr. 256, 258-60 (Ct. App. 1985); *Santangelo v. State*, 521 N.E.2d 770, 771-72 (N.Y. 1988), *superseded by statute*, N.Y. GEN. MUN. LAW § 205-e (McKinney 1999).

85. *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975).

86. *Id.*

87. See *Von Beltz v. Stuntman, Inc.*, 255 Cal. Rptr. 755, 759-61 (Ct. App. 1989) (discussing the approaches of various courts).

88. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

89. *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992).

finger in the course of a coed touch football game conducted during halftime of the 1987 Super Bowl.<sup>90</sup> The injury proved irreparable and the finger was amputated.<sup>91</sup> Just before her finger was broken, the plaintiff had complained about defendant's play,<sup>92</sup> and had threatened to quit if he did not tone it down. On the very next play, the defendant leaped to intercept a pass and collided with the plaintiff, eventually stepping backward onto her hand and breaking her finger.<sup>93</sup> The plurality opinion in *Knight* acknowledges that secondary assumption of risk was abolished by *Li*.<sup>94</sup> The opinion goes on to hold, however, that primary assumption of risk is still alive and well, and it applies to recreational activities such as touch football.<sup>95</sup>

This holding does no more than align California with the growing number of jurisdictions that have recognized primary assumption of risk, and have applied it to recreational activities.<sup>96</sup> But three other aspects of *Knight* and its companion case, *Ford*, are not so orthodox. First, *Knight's* articulation of primary assumption of risk doctrine, and its ruling on the facts of the case, appear to ignore the distinction between questions of law for the court and questions of fact for the jury. The opinion does not merely decide what legal standard applies to the case—that is, that parties to recreational activities do not owe each other duties of ordinary care with respect to inherent risks of the activities, and owe a duty only to refrain

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90. *Knight*, 834 P.2d at 697.

91. *Id.* at 698.

92. *Id.* at 697.

93. *Id.*

94. *Id.* at 703. As the court stated,

Properly interpreted, the relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., "primary assumption of risk" cases, whereas cases involving "secondary assumption of risk" properly are merged into the comprehensive comparative fault system adopted in *Li*.

*Id.* The court continued to explain that

[f]or these reasons, use of the "reasonable implied assumption of risk" / "unreasonable implied assumption of risk" terminology, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and those in which he or she is not barred, is more misleading than helpful.

*Id.* at 704.

95. The court held,

In cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery.

*Id.* at 707.

96. See, e.g., *Gauvin v. Clark*, 537 N.E.2d 94, 96–98 (Mass. 1989); *Crawn v. Campo*, 643 A.2d 600, 605–07 (N.J. 1994); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 14–15 (Wash. 1992) (en banc).



from intentional or reckless wrongdoing. The opinion also applies that standard to the facts of the case, holding that the plaintiff's claim fails as a matter of law.<sup>97</sup> Second, *Knight* mistakenly classifies the "firefighter's rule" as an instance of primary assumption of risk, not as the last surviving sliver of secondary assumption of risk.<sup>98</sup> Third, *Ford*, a companion case to *Knight* decided the same day, utterly mangles a California statute to avoid finding a duty of ordinary care in a context where the court's common law analysis would call for the application of primary assumption of risk, but where the legislature saw and specified a duty of reasonable care.<sup>99</sup>

From these three seeds grew an unprecedented expansion of "no duty" law, impinging on areas traditionally reserved for juries, and disregarding the limitations on duty law that evolved in the twentieth century and that are discussed in Part II. The result is a new, vibrant doctrine of "no duty" in California that allows appellate courts to decide negligence cases on their facts and which reimposes views of the division of labor among tort, contract, and property law which were properly rejected in the nineteenth century. The subsections that follow explore this expansion of "no duty" law in detail.

#### 1. Disregard of the Jury Function in Assumption of Risk Law

*Knight v. Jewett* did not hold merely that primary assumption of risk survived the adoption of comparative negligence.<sup>100</sup> Nor did it hold merely that primary assumption of risk, having survived the adoption of comparative negligence, governs many (perhaps most) recreational activities.<sup>101</sup> *Knight* decided these issues and also affirmed a summary judgment for the defendant—a judgment that the crushing of the plaintiff's hand in a touch football game was covered by the doctrine of primary assumption of risk.<sup>102</sup> In order to affirm the lower court, the California Supreme Court ruled that because primary assumption of risk holds that the defendant owed "no duty" to the plaintiff, the question of primary assumption of risk is one of law, for the trial court (not the jury) to determine and for appellate courts to review de novo.<sup>103</sup> Thus, trial and

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97. *Knight*, 834 P.2d at 707–08, 712.

98. *Id.* at 704 n.5.

99. *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992).

100. *Knight*, 834 P.2d at 706.

101. *Id.* at 708.

102. *Id.* at 711–12.

103. *Id.* at 706. When we say that *Knight* held that there was "no duty" (language also used by the California Supreme Court), we mean by that "no duty to use ordinary care." *Knight* held that even where primary assumption of risk would otherwise apply, the plaintiff could still recover if the

appellate courts are asked to make factual findings as to what risks are inherent in common activities.<sup>104</sup> In *Knight* itself, for instance, the court found that summary judgment was properly granted because the risk of one player stepping on another player’s hand due to rough play was inherent in a casual touch football game.<sup>105</sup> Most other states treat the question of whether the risk was inherent in the activity as one of fact to be decided by the jury.<sup>106</sup>

A number of lower court cases in California have followed *Knight* by determining, on summary judgment, that all sorts of risks are inherent in activities and thus trigger the doctrine of primary assumption of risk.<sup>107</sup> In

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defendant’s conduct was reckless or intentional. *Id.* at 711. *See also* Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 33 (Cal. 2003) (holding that even though the *Knight* “no duty” standard applied to swimming, the plaintiff showed a triable issue of fact as to the recklessness of the defendant swimming instructor). While it would be more accurate to say *Knight* relaxes the duty of care, because the cases speak in terms of “no duty” when they mean “no duty to use ordinary care,” we shall do so as well.

104. Not all California courts appreciate taking on this burden. “To make a decision concerning duty we must know the nature of a particular sport, and even if we do have such knowledge, we still may have no idea how imposing liability will affect or ‘chill’ the sport—which is a major factor in making a determination of duty.” Moser v. Ratinoff, 130 Cal. Rptr. 2d 198, 204 (Ct. App. 2003).

105. *Knight*, 834 P.2d at 711–12. The dissent in *Knight* pointed out that some touch football games are rougher than others, and it is difficult to determine the extent to which the participants in any given touch football game were consenting to various kinds of rough play. *Id.* at 722 (Kennard, J., dissenting). This points out exactly why the question should be one for the jury to answer. Under California law, as elsewhere, summary judgment is permitted only when there are no triable issues of fact, either because the facts are undisputed, or they can lead to only one legal conclusion. CAL. CODE CIV. PROC. § 437c(c) (West 2005). Only by recharacterizing the factual issue of the inherent nature of the risk into a question of law can the court in *Knight* justify the granting of summary judgment. *See Knight*, 834 P.2d at 706.

106. *See, e.g.,* Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989) (adopting a recklessness standard as the scope of duty for recreational sports activities and the leaving question of recklessness to the jury, since the trial court’s only role is to determine whether the activity is a sport); Sheppard *ex rel.* Wilson v. Midway R-1 Sch. Dist., 904 S.W.2d 257, 259–60 (Mo. Ct. App. 1995); Martin v. Buzan, 857 S.W.2d 366, 370 (Mo. Ct. App. 1993); Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1044 (Nev. 1994) (rejecting a relaxed duty in sports cases and leaving the negligence question to the jury); Crown v. Campo, 643 A.2d 600 (N.J. 1994) (adopting a recklessness standard as the scope of duty for recreational sports activities, and remanding for a new *jury* trial under the recklessness standard, since the trial court’s only role is to determine whether the activity is a sport); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 12, 14–16 (Wash. 1992) (en banc) (adopting the primary assumption of risk doctrine for recreational activities but ruling that the factual issue of whether risk is “inherent” in an activity and thus assumed by the participant is to be decided by the jury, not the judge). *See also* Jaworski v. Kiernan, 1996 Conn. Super. LEXIS 2023, at \*7–8 (Aug. 1, 1996) (rejecting a relaxed duty in sports activities and leaving the negligence question to the jury); Becksfort v. Jackson, 1996 Tenn. App. LEXIS 257, at \*19 (Apr. 30, 1996) (rejecting a relaxed duty in sports cases).

107. *See* Kane v. Nat’l Ski Patrol Sys., Inc., 105 Cal. Rptr. 2d 600, 606 (Ct. App. 2001) (holding that being advised by a ski instructor to ski down dangerous, icy slopes is an inherent risk of taking skiing classes); Dilger v. Moyles, 63 Cal. Rptr. 2d 591, 591–92 (Ct. App. 1997) (holding that the risk of an errant golf shot where the defendant fails to yell “fore” is inherent in the sport of golf); Harrold v. Rolling J Ranch, 23 Cal. Rptr. 2d 671, 676–77 (Ct. App. 1993) (holding that being given an unruly

close cases, moreover, the concept of an “inherent” risk has been interpreted by these courts in ways which favor defendants.<sup>108</sup> Thus, in *Record v. Reason* the court found that a boat pilot towing the plaintiff behind him in an inner tube owed no duty to the plaintiff to operate the boat at a safe rate of speed, notwithstanding the fact that the plaintiff had specifically asked the pilot to go slowly.<sup>109</sup> The court found the risks imposed by the boat’s excessive speed inherent in the activity at issue.<sup>110</sup> Yet the question at issue is a highly particular one, utterly unsuited to determination as a matter of *general* duty.<sup>111</sup>

These decisions distort beyond recognition the concept of “inherent risk” at the heart of primary assumption of risk doctrine. The central—and defensible—idea behind the rule that there is no duty to reduce the “inherent risks” of a recreational activity is that the “inherent risks” of recreational activities are constitutive of their character and essential to their enjoyment. Eliminate those risks and you destroy or degrade the activity. Eliminate mogul fields from expert ski slopes and you eliminate a

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horse is an inherent risk of participating in equestrian activities); *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670, 672–73 (Ct. App. 1992) (holding that the risk of the captain of a boat intentionally swinging the boom without warning the crew is inherent in the activity of sailing).

108. See, e.g., *Record v. Reason*, 86 Cal. Rptr. 2d 547 (Ct. App. 1999).

109. *Id.* at 554, 556.

110. *Id.* at 556. *Record* also took the question from the jury of whether the parties expressly agreed that the driver would undertake a duty to operate the boat at a safe rate of speed. *Id.* at 554. The court stated that there was no evidence from which a jury could conclude that such an agreement existed, despite the fact that the plaintiff specifically told the defendant to go slowly. *Id.* at 555 n.3.

111. In *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801, 804–05 (Ct. App. 2001), the court rejected the contention that a homeowner assumed a duty to supervise children when she told a child’s mother that the homeowner would be home during the day, because the mother approved an excursion by the children to the drug store. *Id.* at 804–06. The homeowner later allowed the children to stay home without adult supervision and without the mother’s permission while the homeowner went out for pizza with her boyfriend, and one child sexually assaulted a younger child. *Id.* at 806. The court decided the claim on summary judgment despite the conceded existence of a special relationship that would give rise to a duty, denying the jury the opportunity to resolve the contentious question of fact of whether the homeowner’s conduct constituted an agreement to supervise the children. *Id.* at 807–08, 815.

It is true, of course, that as *Romero* is an affirmative duty case, it is not improper in the abstract for the court to be determining the scope of duty as well as its existence. The manner in which the issue was resolved by the *Romero* court, however, nonetheless shows the same callous disregard for the actual intentions of the parties when determining questions of duty as the primary assumption of risk cases do. California courts seem to be going out of their way to imply agreements by victims to assume risks, and at the same time disregarding even express agreements by injurers to assume duties. *Cf.* *Lund v. Bally’s Aerobic Plus, Inc.*, 93 Cal. Rptr. 2d 169 (Ct. App. 2000) (applying an express waiver that a gym member had signed when she first joined, and which barred any claims for negligent supervision or instruction by gym personnel, to bar a claim based on dangerous advice the plaintiff had received from a personal trainer employed by the gym, despite the fact that the plaintiff had entered into a separate oral contract at a later time to engage the personal trainer’s services that did not incorporate the waiver).

characteristic which makes expert runs more challenging and demanding than intermediate ones. Absent a statutory duty, it is entirely appropriate for the law to let the loss lie where it falls when someone water-skiing barefoot and backwards collides with an overhanging branch,<sup>112</sup> because the challenge of that (perhaps perverse) enterprise lies in negotiating such hazards blind. Yet the risks that California courts are finding inherent are not risks essential to the challenge and pleasure of the activities that occasion them. The California Supreme Court and the Courts of Appeal are, rather, expanding the idea of inherence to find swinging booms on sailboats without warning an inherent risk of sailing,<sup>113</sup> the failure of golfers to yell "fore" after errant shots an inherent risk of golfing,<sup>114</sup> and a ski instructor's bad advice to novice skiers to try expert runs an inherent risk of learning to ski.<sup>115</sup>

None of these risks is "inherent" in the appropriate sense. The risk that the boom will be swung without the customary and appropriate warning is "inherent" in the enterprise of sailing only in the sense that it is a distinctive danger of the activity. It is not inherent in the sense that counts—its occurrence does not improve the activity of sailing and its absence does not worsen that activity. Unlike moguls on an expert ski run, swinging the boom without warning does not make for a better day of sailing. It makes for a worse one. Similarly, it in no way improves the game of golf that golfers are not yelling "fore," or degrades one's experience in learning to ski that the instructor is not doling out bad and dangerous advice.<sup>116</sup> Through such expansions, a doctrine which is reasonable in its

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112. See generally *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992). To be sure, there is no reason why a scheme of accident law could not shift the loss in order to provide the plaintiff with compensation for the injury suffered. The point is that it would be self-defeating to impose a *duty of reasonable care* to reduce the risk at issue.

113. *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670, 672–73 (Ct. App. 1992).

114. *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 591–92 (Ct. App. 1997).

115. *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 820 (Ct. App. 1996).

116. While a case such as *Sanchez v. Hillerich & Bradsby Co.* may get the result right, it nonetheless demonstrates how the jury function is being usurped. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 535–39 (Ct. App. 2002) (holding that the risk of a baseball player being hit with a super-fast batted ball due to the use of an unsafe bat that increased the ball's velocity was not inherent in the sport of collegiate baseball). Rather than juries determining what risks are inherent in sports based on their common-sense knowledge, appellate judges, who are hardly experts in this area, are making the determinations. Since they are deciding what are essentially factual issues, they reach completely inconsistent results, thus failing to achieve one of the potential advantages of decisions by judges rather than juries. How, after all, is an errant golf shot unaccompanied by a shout of "fore" an inherent risk of golfing while a batter using a souped-up bat is not an inherent risk of playing baseball?

Similarly, *Kahn v. East Side Union High School District*, 75 P.3d 30 (Cal. 2003), may get the result right by allowing a plaintiff to bring her case before a jury on a theory of recklessness when she

core form has been twisted into an all-purpose tool for exculpating wrongdoers from responsibility for the consequences of their carelessness.<sup>117</sup>

Finally, under recent California case law, even if a risk is found by the court not to be “inherent” in an activity, allowing the plaintiff to escape summary judgment, the deck is still stacked against the plaintiff. At least one published opinion has reversed a judgment for the plaintiff in a recreational activity case because the jury was not instructed that the defendant’s conduct could only be actionable if it increased the risk of the activity above the “inherent” risks.<sup>118</sup> The result of this rule is that the “matter of law” determination made by the court benefits the defendant only—if the court determines the plaintiff has shown as a matter of law that the risk is not inherent in the activity, the jury can find otherwise and deny the plaintiff any recovery. This indicates that the new “no duty” may be the same as the old “no duty” doctrines condemned by *Dillon v. Legg*—nothing more than a formula to contain juries seen as too favorable to plaintiffs.<sup>119</sup>

## 2. The Firefighter’s Rule and the Revival of Secondary Assumption of Risk

The firefighter’s rule bars firefighters from recovering for injuries they sustain in the course of fighting fires from people negligently responsible for starting those fires.<sup>120</sup> The rule is clearly a form of secondary assumption of risk. We are all, plainly, under a duty not to start fires through our carelessness, whereas participants in a football game do not owe any duty to each other to avoid the sort of “illegal” contact that is incidental to the game. The duty not to carelessly start fires runs to

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was injured after being ordered by her swim coach to perform a shallow water dive that she had not practiced, but it again indicates how the jury function is being usurped by *Knight* and its progeny. Rather than juries determining the inherent risks of the activity and whether the defendant’s conduct was reasonable, *judges* have an enhanced power to throw out many suits on their facts, even where the defendant acted wholly unreasonably, because such conduct cannot, in the judge’s opinion, rise to the level of recklessness.

117. A useful definition of “inherent risk” is provided in Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming’s Recreational Safety Act—An Update*, 33 LAND & WATER L. REV. 249, 251 (1998) (stating that inherent risks fall “into two general categories: 1) those risks that are essential characteristics of a recreational activity and . . . that participants desire to confront: e.g., moguls, steep grades, exciting whitewater; and 2) those undesirable risks which simply exist, e.g., falling rock or sudden, severe weather changes”).

118. *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 384–86 (Ct. App. 2004).

119. *See Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

120. *See Krauth v. Geller*, 157 A.2d 129, 130–31 (N.J. 1960).

everyone that our fires might injure, including, generally speaking, those who might be injured in the course of rescuing others from the fire. As Cardozo famously recognized, "danger invites rescue,"<sup>121</sup> and that doctrine preexisted Cardozo's naming of it.<sup>122</sup> The firefighter's rule deprives firefighters of the benefits of this general duty, and it does so on the theory that firefighters, by their choice of occupation, assume the risks of fighting fires.

One might have expected the firefighter's rule to be abolished along with the remainder of secondary assumption of risk law. Instead, it has survived, even when every other instance of secondary assumption of risk has disappeared. In most American jurisdictions, the firefighter's rule is all that remains of that once robust doctrine, albeit a relatively robust remnant.<sup>123</sup> Special circumstances account for its survival. First, the risks of fires—often negligently started ones—are the risks of the firefighter's workplace. Firefighters work wherever fires are found. Second, the package of benefits that firefighters receive includes both high pay *ex ante*, and generous provisions for compensation *ex post* in the event the risks of the job result in injury—generous provisions for medical treatment, for disability, and for death. Because that package of wages and benefits compensates firefighters in the event that they suffer injuries in their workplace, it can and should be seen, in part, as equivalent to the worker's compensation insurance which covers most workplace accidents, displacing and usually precluding recovery in tort.<sup>124</sup>

Third, the analogy between the package of benefits available to firefighters and worker's compensation schemes does not end here. Worker's compensation premiums are paid by employers. The payment of those premiums immunizes employers against tort liability to their employees for their own negligent conduct. The firefighter's rule likewise immunizes those who pay the wages and benefits of firefighters against tort

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121. *Wagner v. Int'l Ry.*, 133 N.E. 437, 437 (N.Y. 1921). *See also Solgaard v. Guy F. Atkinson Co.*, 491 P.2d 821, 824–25 (Cal. 1971) (applying the "danger invites rescue" rule in California).

122. *See, e.g., Eckert v. Long Island R.R.*, 43 N.Y. 502 (1870).

123. *See Thomas v. Pang*, 811 P.2d 821, 823 n.1 (Haw. 1991) (noting that, at the time, only Minnesota and Oregon had abolished the firefighter's rule); *June v. Laris*, 618 N.Y.S.2d 138, 140 (App. Div. 1994) (holding that the firefighter's rule bars a cause of action based on inhalation of pesticide fumes at the site of the fire). *But see Minnich v. Med-Waste, Inc.*, 564 S.E.2d 98, 103 (S.C. 2002) (declining to recognize the rule in South Carolina because policy rationales for it are jumbled and the rule has been persuasively criticized).

124. *See Moody v. Delta W., Inc.*, 38 P.3d 1139, 1142 (Alaska 2002) ("[T]he officer is employed by the public to respond to such conditions and receives compensation and benefits for the risks inherent in such responses.").

liability for their own negligence in starting fires. Just as the risks of firefighting are the risks of firefighter's workplaces—and just as the package of benefits available to firefighters is a very generous version of worker's compensation insurance—so too those who are immunized against tort liability for the consequences of their own negligence are those who purchase the insurance and benefits that protect firefighters in the event they come to harm at the hands of that negligence. Permitting firefighters to recover in tort for the negligence of those taxpayers who carelessly start fires would amount to allowing firefighters to extract the very double compensation from employers that the worker's compensation laws forbid.<sup>125</sup>

Fourth, because the risks of the job are so salient a part of being a firefighter—the risks *are* the job to an extraordinary extent—compensation for bearing those risks is probably built into a firefighter's wages as a “risk premium” in a way true of very few jobs. Most occupational risks are not a comparably prominent aspect of the occupation and so are less likely to be reflected in wage premiums.<sup>126</sup> The specific risks of being a prominent academic—more travel, say, and therefore more risk of dying in transit—probably do not figure in academic pay packages. The prominence of the occupational hazards of firefighting also strengthens the argument from consent. The risks of slightly elevated levels of travel are not one of the *attractions* of an academic career. By contrast, the risks of firefighting may well be a principal attraction of the job, affording as they do a rare opportunity to perform acts of heroism at great risks to oneself. Firefighters knowingly “consent” to the specific risks of their trade in the sense that they choose the job because they prize its dangers.<sup>127</sup>

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125. See *id.* at 1141–42. As the court in *Day v. Caslowitz* noted, [But for the firefighter's rule,] public-safety officers would be able to obtain what would effectively amount to double compensation from the very citizens they are paid to protect: initial compensation derived from taxpaying property owners in the form of a fair salary plus available injured-on-duty benefits for braving dangerous situations as part of their normal job responsibilities and then additional injured-on-duty tort damages from the responsible property owners after they sustain such injuries.

*Day v. Caslowitz*, 713 A.2d 758, 760 (R.I. 1998).

126. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 506 (1961) (noting that “[b]efore workmen's compensation the individual worker simply did not evaluate the risk of injury to be as great as it actually was” and concluding for this reason that “wages and prices in certain industries simply did not reflect the losses those industries caused”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1110 (1972); Sidney A. Shapiro, *The Necessity of OSHA*, 8 KAN. J.L. & PUB. POL'Y 22, 24 (1999).

127. Indeed, some firefighters may even fall into the rare category of economic actors who are actually *risk-preferring*, in that they choose the job in part because it affords them the chance, not available in many other occupations, to heroically overcome great risks in order to save people's lives.

Viewed as a remaining vestige of secondary assumption of risk which has survived the merger of most secondary assumption of risk into victim negligence by virtue of its mooring in special circumstances, the firefighter's rule is more or less unproblematic. *Knight*, however, makes a crucial move—not necessary to the result in the case—of claiming that the firefighter's rule is a rule of primary assumption of risk.<sup>128</sup> This clear mischaracterization has allowed the firefighter's rule to expand along with the rest of California's growing "no duty" jurisprudence to cover areas where the special circumstances that justify the firefighter's rule are wholly absent.

For instance, in *Herrle v. Estate of Marshall*,<sup>129</sup> the court utilized the firefighter's rule and held that a convalescent home aide—paid \$6.75 an hour<sup>130</sup>—assumed the risk of a patient's violence. In *Nelson v. Hall*,<sup>131</sup> decided before *Knight*, the court held that primary assumption of risk in the guise of the firefighter's rule barred recovery by a veterinarian's assistant who was attacked by an animal in her care.<sup>132</sup> In *Cohen v. McIntyre*,<sup>133</sup> the court reaffirmed *Nelson*, applying the firefighter's rule to hold that a pet owner owes no duty to a treating veterinarian.<sup>134</sup> In *Dyer v. Superior*

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128. *Knight v. Jewett*, 834 P.2d 696, 704 n.5 (Cal. 1992).

129. *Herrle v. Estate of Marshall*, 53 Cal. Rptr. 2d 713 (Ct. App. 1996).

130. *Id.* at 724 n.4 (Wallin, J., dissenting).

131. *Nelson v. Hall*, 211 Cal. Rptr. 668 (Ct. App. 1985).

132. *Id.* at 672–73. It is notable that section 3342 of the California Civil Code prescribes a *strict liability* standard for dog bites such as the one in *Nelson*; that is, even *non-negligent* pet owners are liable for the injuries inflicted by their pets. The *Nelson* court states that California courts long held that this statute is subject to an assumption of risk defense. *Id.* at 671 (citing *Gomes v. Byrne*, 333 P.2d 754 (Cal. 1959); *Burden v. Globerson*, 60 Cal. Rptr. 632 (Ct. App. 1967); *Greene v. Watts*, 26 Cal. Rptr. 334 (Ct. App. 1962); *Smythe v. Schacht*, 209 P.2d 114 (Cal. Ct. App. 1949)). These pre-*Li* cases, however, are applying *secondary* assumption of risk, that is, even though the statutory duty is owed (in fact, the duty is strict, not simply ordinary care), assumption of risk precludes liability. *Nelson* simply applies these cases to say that *primary* assumption of risk applies, that is, there is no duty (despite the statute). *Id.* at 672. The court does not explain why it is permissible to make this leap.

133. *Cohen v. McIntyre*, 20 Cal. Rptr. 2d 143, 145–46 (Ct. App. 1993).

134. *Cohen*, which involved a professional veterinarian rather than an assistant, is much more defensible than *Nelson*. Besides the prior compensation that the vet receives and the intensive training and knowledge that the vet has regarding the risks of handling animals, there is also a definite interest in not deterring people from seeking treatment for their animals' ailments, which can, in certain circumstances, pose a danger to other animals and even to human beings. Further, the failure to control one's dog is generally neither as careless nor as risky as negligently starting a fire. *Cohen*, however, draws no distinction between professional veterinarians and veterinary assistants in its firefighter's rule analysis. *Cf. Hommel v. Benshoff*, 682 N.Y.S.2d 546, 549 (Sup. Ct. 1998) (holding that a horse identifier employed to protect racetrack bettors by ensuring that horses entered in a race are the same as those that actually run was barred by primary assumption of risk from pursuing a claim based on injury caused by an unruly horse).



*Court*,<sup>135</sup> the court held that a motorist who negligently maintains a car in breach of that motorist's duty to other motorists<sup>136</sup> owes no duty to a tow truck driver who is injured while assisting the motorist.<sup>137</sup> In *Hamilton v. Martinelli & Associates* the firefighter's rule was held to bar an action for negligent instruction by a police officer against a service that provides in-house training for police departments.<sup>138</sup> One commentator suggests that California courts will continue to expand the firefighter's rule to various forms of private employment.<sup>139</sup>

All of these cases treat the firefighter's rule as a vibrant doctrine, expanding along with the remainder of California primary assumption of risk law, rather than as a vestigial form of secondary assumption of risk justified by unique circumstances rarely present in other settings. As the firefighter's rule expands, it also transforms. It changes from a rule barring highly compensated, well-trained professional rescue workers who are attracted to their occupations by the special and great risks of these occupations from recovering when those risks materialize, into a rule that bars any worker from recovering for workplace injuries, because they are being "compensated" to run the risk and knowingly "consent" to it. The danger of this is obvious—the discredited notion of classical assumption of risk that held that even lowly paid workers who "chose" to take appalling risks forced on them by their employers or fellow workers could not obtain compensation would lead to just these results. Just as the ax shop employee "assumed" the risk of the falling hatchet in *Lamson v. American Axe & Tool*,<sup>140</sup> convalescent home workers and veterinary assistants now shoulder

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135. *Dyer v. Superior Court*, 65 Cal. Rptr. 2d 85 (Ct. App. 1997).

136. In some cases, a *nondelegable* duty. See CAL. VEH. CODE § 26453 (West 2000).

137. *Dyer*, 65 Cal. Rptr. at 89, 92. *Dyer* features a particularly weak rationale—that the imposition of liability might chill the motorist from seeking assistance from towing services. *Id.* at 91. The argument that liability will discourage the purchase of a good or service applies only to goods and services which consumers can do without, and which therefore exhibit an elastic demand curve. For instance, a consumer might go without taking the family pet to the veterinarian (especially for non-life-threatening situations, but possibly even for life-threatening ones) if the price (including the potential cost of liability perceived by a fully informed consumer) is too high. The notion that motorists who cannot get their cars to start to take it to a mechanic (and who face an *involuntary* tow at the owner's expense if the car is abandoned on the road) are going to forgo calling the towing service is ridiculous—demand is obviously severely inelastic in such situations, a fact reflected in the often-exorbitant prices charged for a "hook-up" to the tow truck.

138. *Hamilton v. Martinelli & Assocs.*, 2 Cal. Rptr. 3d 168, 171–72, 176–77 (Ct. App. 2003).

139. Mitchell Ehrlich, *Backdraft: The Fireman's Rule Is Not Just Limited to Firefighters and Police*, L.A. DAILY J., June 2, 2000, at 7.

140. *Lamson v. Am. Axe & Tool*, 58 N.E. 585, 585 (Mass. 1900). The vivid injustice of this ruling was that the rack from which the ax fell was unsafe, a fact which the plaintiff had pointed out and which violated the employer's statutory duty to provide a safe workplace. By recognizing assumption of risk as a defense, the court reduced the employer's duty from the duty to provide a (reasonably) safe

the risk that they will be injured through wrongdoing characteristic of their occupations, and will now have to bear the costs of their injuries without the benefit of compensation from those who wronged them, and without the benefit of deterrence of dangerous conduct that the general duty of reasonable care provides.<sup>141</sup> Yet, unlike firefighters, convalescent home workers and veterinary assistants are not compensated generously by significant wage premiums and benefits packages for bearing the distinctive risks of their respective occupations. And the argument that they have consented to bear the financial costs of injuries arising out of those risks is as much a fiction as it has ever been.

### 3. The Disregard of Preexisting Duties

In most cases involving accidental physical injury, the duty of care owed by the parties is the default common law duty of reasonable care. But statutes, custom, special relationships, contracts, and even the informal understandings of the parties to an activity may also play prominent roles. They may establish duties where duties might otherwise not exist, and they may specify duties of reasonable care whose existence is already acknowledged by courts, but whose contours are open to more precise definition. Statutes frequently perform the latter role. Courts show great respect for statutes which articulate the common law's general standard of "reasonable care in the circumstances" into more precise and detailed rules, and rightly so. Both the principle of legislative supremacy and the special expertise of legislative bodies support such deference.

The customary conduct of injurers is likewise given deference, albeit less deference than statutes. Customary conduct is treated as evidence of due care, whereas statutes are usually treated as either conclusive or

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workplace to the duty to make the unsafe features of its workplace obvious. The expansion of the firefighter's rule in modern California law may have an even worse effect—employers (of nurses), customers (of veterinarians), and strangers (to tow truck drivers) lose their duties of care whether or not the risk is obvious and, in the case of motorists who injure tow truck drivers, even absent a contractual relationship which makes the claim of *ex ante* compensation at least *possible*.

141. After intense lobbying by firefighters, an exception to the firefighter's rule was passed by the California Legislature for emergency workers who sue over statutory or regulatory violations which increase the risk of harm in the performance of their jobs. CAL. CIV. CODE § 1714.9 (West 2002); Garry Abrams, *Mom's "Noble Quest" Changes Firefighter's Rule to Ensure Fairness*, L.A. DAILY J., Oct. 11, 2001, at 1. While this change is welcome, it actually may exacerbate the problem, because it is firefighters, police officers, and emergency medical technicians—for the most part well-compensated—who have the ear of the legislature, while the firefighter's rule still applies in full force to home health care workers and others who are not compensated in the manner that emergency workers are.

presumptive proof of due care.<sup>142</sup> Customary conduct is given weight both because it makes negligence law's general standard of reasonable care more concrete and rule-like, and because customary practice generally reflects special expertise. Customs are given less weight than statutes both because the customary conduct of injurers cannot claim to express the general will and because injurers often stand to gain by pitching the standard of care below its justified level.

Special relationships, for their part, can both overcome the general rule that there is "no duty to act"<sup>143</sup> and increase the stringency of the otherwise applicable general duty of reasonable care.<sup>144</sup> Special knowledge—the knowledge of an expert, for example—or special control—such as the control of a ski resort over its lifts—can also increase the stringency of the otherwise applicable general duty of reasonable care.<sup>145</sup> Finally, private agreements allow parties who are knowledgeable about the riskiness of their activities to impose duties according to both their intentions and their perceptions of the pertinent risks.<sup>146</sup>

Recent California case law, in its rush to expand both primary assumption of risk and the domain of "no duty," disregards these sources of tort duties and instead imposes exculpatory rules of "no duty" in situations where the legislature, industry, or even the parties themselves have imposed duties.

a. Statutes

The California Supreme Court itself has led this assault on preexisting tort duties. In *Ford v. Gouin*, a water-skier who was injured skiing barefoot and backwards sued the pilot of the boat pulling him.<sup>147</sup> A state statute spelled out the details of the duty of due care running from the boat operator to the water-skier, clearly protecting skiers as a class against the risks of bad piloting.<sup>148</sup> The plaintiff in *Ford*, however, seems, quite plainly, to have been skiing in a foolish and reckless fashion—he was skiing barefoot and backwards down a narrow channel lined with

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142. Compare *T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737, 739–40 (2d Cir. 1932), with CAL. EVID. CODE § 669 (West 1995).

143. See *supra* note 51 and accompanying text.

144. See *Gomez v. Superior Court*, 113 P.3d 41, 43 (2005); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

145. See *Bayer v. Crested Butte Mountain Resort*, 960 P.2d 70 (Colo. 1998) (en banc).

146. See, e.g., *Tidmore v. Auto. Club of S. Cal.*, 78 Cal. Rptr. 2d 836, 838 (Ct. App. 1998) (holding that a contract can create a special relationship that gives rise to tort duties), *depublished by* 1999 Cal. LEXIS 376 (Cal. Jan. 20, 1999).

147. See *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992).

148. CAL. HARB. & NAV. CODE § 658(d) (West 2001).

overhanging tree limbs.<sup>149</sup> Facts like these flush out a flaw in pure comparative negligence. Some victim carelessness seems egregious enough to call for forfeiture of the right to recover, not reduction in the amount of recovery. Under the classical doctrine, where assumption of risk was an affirmative defense that defeated all liability in the face of a breach of duty, this would be an easy case—the court would *rule* that the driver breached his duty *and that* the skier assumed the risk.<sup>150</sup>

Because the California Supreme Court has made assumption of risk into an issue of duty, and because the statute in *Ford* at the very least assumes the existence of a duty of care running from boat pilot to water-skier, whose contours the court takes upon itself to spell out, the lead opinion in *Ford* tortures the statute to reach the conclusion that it was not intended to protect a plaintiff it plainly intended to protect.<sup>151</sup> The torture was, no doubt, at once reluctant and unavoidable. The instinct to deny the plaintiff all recovery in *Ford* stems from the conviction that—by virtue of his egregiously foolish conduct—the plaintiff has forfeited his right to due care on the part of the pilot of the boat. The doctrine of secondary assumption of risk gives legal voice to that moral intuition. Had that doctrine been in effect in California, it could have been used to deny recovery in *Ford* without denying the existence of a duty. Because secondary assumption of risk is now subsumed by comparative negligence, the court's inclination to deny recovery in *Ford* had to be shoehorned into the language of primary assumption of risk. That could only be done by torturing the statute.

If *Ford* were an isolated case, it might be dismissed as an embarrassment to the California Supreme Court, but nothing more. In *Cheong v. Antablin*, however, the court hinted at its approval of a far more revolutionary step.<sup>152</sup> In *Cheong*, two skiers collided with each other on the slopes; one sued the other for the ensuing injuries. A county ordinance provided that "[i]t shall be the duty of all skiers to ski in a safe and reasonable manner, under sufficient control to be able to stop or avoid other skiers or objects,"<sup>153</sup> and "[s]kiers shall not overtake any other skier except in such a manner as to avoid contact with the overtaken skier, and shall grant the right of way to the overtaken skier."<sup>154</sup>

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149. *Ford*, 834 P.2d at 726–27.

150. *Id.* at 740 (Kennard, J., concurring).

151. *Id.* at 728–32 (plurality opinion).

152. *Cheong v. Antablin*, 946 P.2d 817, 817 (Cal. 1997).

153. *Id.* at 821 (quoting PLACER COUNTY, CAL. art. 9.28.050(A)).

154. *Id.* (quoting PLACER COUNTY, CAL. art. 9.28.060(C)).

The court interpreted the statute as not articulating the duty of care urged by the plaintiff.<sup>155</sup> While this analysis is at least colorable,<sup>156</sup> the court goes further:

Plaintiff argues that the ordinance imposes a higher duty on defendant than *Knight* establishes. We disagree. We recognize that *Knight* was a development of the common law of torts. Within constitutional limits, the Legislature may, if it chooses, modify the common law by statute. Whether a local ordinance such as the Placer Code can modify *Knight* is less clear. We need not decide this question here because we conclude that the ordinance does not modify the *Knight* standard even if we assume it could.<sup>157</sup>

This assumption *arguendo* is a clear invitation for lower courts to start disregarding locally imposed duties wholesale. According to California's negligence *per se* statute, violations of ordinances and regulations, as well as of statutes, presumptively count as negligence.<sup>158</sup> Under this doctrine, the common law looks to statutes—just as it looks to custom—to set more precise standards of care. The common law's default requirement of "reasonable care in the circumstances" is a general legal standard; statutes and customs render that general requirement more precise. The court's assumption *arguendo* in *Cheong* disregards an express legislative enactment which brings the doctrine of statutory negligence into play, and sets up the common law authority of the court as a superior source of law. This inversion of authority invites courts to disregard *all* violations of local ordinances, on the theory that they cannot "modify" the common law.

*Shipman v. Boething Treeland Farms, Inc.*<sup>159</sup> is another example of the disregard of a statutory duty. In *Shipman*, the plaintiff was injured

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155. *Id.* at 821–22. The ordinance was hardly a model of clarity, as it also provided that skiers assume the inherent risks of skiing, including collisions. Thus, there was room to interpret this ordinance (unlike the California Harbors and Navigation Code in *Ford*) to not specify tort duties because of its broad statement about risks assumed.

156. *But see* *Ninio v. Hight*, 385 F.2d 350, 352 (10th Cir. 1967) (holding that there is a triable issue of fact where skiers' "rule of the road" required that faster skiers steer to avoid slower skiers).

157. *Cheong*, 946 P.2d at 821 (internal citations omitted).

158. Section 669(a)(1) of the California Evidence Code is explicit on this point, extending the presumption of negligence to violations of "a statute, ordinance, or regulation of a public entity," thus clearly covering local ordinances. CAL. EVID. CODE § 669(a)(1) (West 1995). *See also* *Delfino v. Sloan*, 25 Cal. Rptr. 2d 265, 270–71 (Ct. App. 1993) (holding that a violation of a local dog leash ordinance gives rise to a claim of negligence *per se*); *Garson v. Juarique*, 160 Cal. Rptr. 461 (Ct. App. 1979) (same). Moreover, section 669.1 of the Evidence Code creates an *exception* to the negligence *per se* doctrine for violations of rules, policies, manuals, or guidelines of state or local governments by public employees. CAL. EVID. CODE § 669.1 (West 1995). Such an exception would not be necessary for local governments if the legislature had not provided that negligence *per se* doctrine applied to their actions.

159. *Shipman v. Boething Treeland Farms, Inc.*, 92 Cal. Rptr. 2d 566 (Ct. App. 2000).

while driving his all-terrain vehicle in an accident that was allegedly due to the negligence of defendant's employee, driving another vehicle.<sup>160</sup> Under section 17150 of the California Vehicle Code,

[e]very owner of a motor vehicle is liable and responsible for . . . injury to person or property resulting from a negligent . . . act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission . . . of the owner<sup>161</sup>

Despite the broad wording of that statute, the California Court of Appeal affirmed a summary judgment for the defendant, based on the *Ornelas v. Randolph*<sup>162</sup> doctrine, which bars liability arising out of the recreational use of property. In *Moser v. Ratinoff*, Justice Richard Mosk of the California Court of Appeal concluded flatly after surveying the cases that "[s]tatutory violations do not displace the *Knight* rule."<sup>163</sup>

The import of all these cases is clear. Legislative judgments about reasonable care and conduct, traditionally given deference by courts in negligence cases, are now being disregarded in favor of the California appellate courts' own duty of care determinations. This is both a striking departure from established law and an improper encroachment on legislative authority and expertise. Legislatures, after all, are democratic bodies, and their judgments are entitled to deference because they often result from both careful study of an issue and careful balancing of the interests of different groups in society. The recognition of statutory negligence is thus a recognition that legislative judgment should, in general, take precedence over a court's judgment as to the obligations of citizens in a democratic society.<sup>164</sup> California case law has departed from that sensible principle.

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160. *Id.* at 567.

161. *Id.* at 571 n.3 (quoting CAL. VEH. CODE § 17150 (West 2000)).

162. *Ornelas v. Randolph*, 847 P.2d 560, 562–63 (Cal. 1993).

163. *Moser v. Ratinoff*, 130 Cal. Rptr. 2d 198, 207 (Ct. App. 2003) (holding that violations of the California Vehicle Code by bicyclists are not actionable because long-distance bicycling is a recreational activity). *Accord* *Peart v. Ferro*, 13 Cal. Rptr. 3d 885, 900–01 (Ct. App. 2004) (holding that statutes regulating personal watercraft do not displace primary assumption of risk); *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883, 889 (Ct. App. 2003) (same); *Distefano v. Forester*, 102 Cal. Rptr. 2d 813, 829–30 (Ct. App. 2001) (holding that statutes regulating off-road vehicle use do not displace primary assumption of risk).

164. To be sure, statutory negligence is not an absolute principle. Sometimes tort duties are not imposed because the plaintiff is not within the class of persons intended to be protected by the statute. CAL. EVID. CODE § 669(a)(4) (West 1995). In other situations, the presumption that noncompliance with the statutory duty constitutes negligence is rebutted by evidence that in fact the defendant's conduct was reasonable. *Id.* § 669(b)(1). While these doctrines allow some latitude to constrict statutory

Moreover, California law has rejected, since at least the time of adoption of the California Civil Code in 1872, the common law rule that statutes in derogation of the common law are strictly construed.<sup>165</sup> By rejecting statutory duties that conflict with their conception of what the common law should provide, California courts have resurrected this discredited maxim in an even stricter form—statutes that impose duties in derogation of the common law are not only strictly construed, but they are also ignored.<sup>166</sup>

b. Customs, Special Relationships, and Private Agreements

In addition to disregarding statutorily imposed duties, California courts also find no duty even in circumstances in which defendants disregard established customs designed to protect those in the plaintiff's position. Thus, in *Stimson v. Carlson*, a skipper of a boat was held to have no duty to warn the crew to duck before intentionally swinging the boom, even though such warnings were customary.<sup>167</sup> In *Dilger v. Moyles*,<sup>168</sup> a golfer was held to have no duty to yell "fore" after an errant golf shot, despite the well-known custom to the contrary.<sup>169</sup>

California appellate courts have also found no duty to exist in cases in which a defendant has a special relationship with a plaintiff, even though special relationships are a fertile source of unusually stringent tort duties. In *Stimson*, the skipper had two special relationships with his crew. First, he was in charge of the boat and thus was responsible for the crew's safety

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duties to serve the purposes of the common law, they do not permit wholesale disregard of statutory duties in circumstances where the plaintiff *is* within the class of persons intended to be protected. In that situation, the question of whether the presumption of negligence was rebutted is a jury question and is a question of breach, not duty.

165. CAL. CIV. CODE § 4 (West 1982) ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.")

166. The California Supreme Court has also disregarded statutory language in the firefighter's rule context. In *Calatayud v. State*, the court ignored the language of section 1714.9(a)(1) of the California Civil Code, which limits the firefighter's rule by making "any person" liable for negligently caused injuries to rescue personnel whom the defendant knows are present at the scene, as inapplicable to injuries caused by the negligence of other rescue workers, despite the fact that there is not a shred of legislative history that indicates that "any person" was not intended to mean "any person." *Calatayud v. State*, 959 P.2d 360, 364–66 (Cal. 1998). Just as the court does with statutes imposing tort duties when it feels there should be no duty, the court simply ignores the plain language of legislation that is inconsistent with the court's conception of the proper scope of the firefighter's rule. See CAL. CIV. CODE § 1714.9(a)(1) (West 2002).

167. *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670, 672–73 (Ct. App. 1992).

168. *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591, 594 (Ct. App. 1997).

169. In contrast, a court in New Jersey has ruled that not only does a golfer owe a duty to other golfers on the course, but also held that yelling "fore" after an errant shot might not even be sufficient to discharge that duty. Neil MacFarquhar, *Extra and Errant Tee Shot May Hit Golfer's Wallet, Too*, N.Y. TIMES, at A1 (Jan. 28, 2000), available at 2000 WLNR 3223212.

in general.<sup>170</sup> Second, he had absolute authority to decide when to swing the boom. His crew could not help but entrust themselves to his judgment and protection on that matter; they could not help but be imperiled by his poor judgment or careless action. The court nonetheless ruled that the skipper had no duty to act with due regard for the serious harm his carelessness might cause his crew. In *Romero v. Superior Court*, the court held that a homeowner who promised to take care of and supervise a thirteen-year-old child, but instead left the child alone with older children, one of whom sexually assaulted the thirteen-year-old, owed no duty.<sup>171</sup> Even though the court conceded the existence of a special relationship, the court held that there was still no duty unless the homeowner knew of prior incidents of sexual assault by the older child.<sup>172</sup>

These are not isolated examples. In *Allan v. Snow Summit, Inc.*, a ski instructor employed by the ski resort was held not to have a duty either to warn a novice skier of the dangers of skiing a run whose difficulty exceeded his skill, or to exercise reasonable care in recommending runs to the novice.<sup>173</sup> The ski instructor is, of course, both an expert on the runs at the resort and on the skill level of his pupil. His role as an instructor, moreover, means that his pupils entrust their safety to his protection. None of this mattered to the court. The rule that participants in recreational activities assume the inherent risks of these activities was both construed broadly to include the risks of bad advice from ski instructors as one of the inherent risks of the activity, and to override the countervailing considerations which called for the imposition of a duty of reasonable care on the instructor. *Pfau v. Kim's Hapkido*, extended this indifference to the special responsibilities inherent in the teacher-pupil relationship.<sup>174</sup> The court held that the fact that the defendant was the plaintiff's instructor "does not make a difference" and therefore affirmed a summary judgment against a plaintiff who was injured by his instructor in a martial arts class.<sup>175</sup> And in *Harrold v. Rolling J Ranch*, the court found a resort had no duty to utilize reasonable care where it provided an unruly horse to its guests, despite the resort-guest relationship, and even though the resort, rather than the guests, was in the best position to determine the proclivities

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170. *Stimson*, 14 Cal. Rptr. 2d at 672-73.

171. *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801, 804-05 (Ct. App. 2001).

172. *Id.*

173. *Allan v. Snow Summit, Inc.*, 59 Cal. Rptr. 2d 813, 819-21 (Ct. App. 1996).

174. *Pfau v. Kim's Hapkido*, 87 Cal. Rptr. 2d 588 (Ct. App. 1999), *depublished by* 1999 Cal. LEXIS 8611 (Cal. Dec. 1, 1999).

175. *Id.* at 590.



of the horse.<sup>176</sup> In *Lupash v. City of Seal Beach*, the court found a swimming instructor had no duty to determine the depth of the ocean before encouraging students to swim there.<sup>177</sup> *Hamilton v. Martinelli & Associates* held that a firm that provided in-house training to police officers had no duty to protect its students from injury during its training seminars.<sup>178</sup>

Last, California courts have also disregarded the parties' own agreements regarding the duties owed. In *Record v. Reason*, a boat pilot was held to owe no duty to the plaintiff, who was being towed in an inner tube, to drive slowly, even though the plaintiff had specifically requested that the pilot do so.<sup>179</sup> And in *Lund v. Bally's Aerobic Plus, Inc.*,<sup>180</sup> the court deprived the plaintiff of a jury trial where the claim arose out of an oral agreement to utilize a personal trainer that did not contain any express assumption of risk, based on the plaintiff's earlier execution of a written membership agreement with the gym that contained a waiver, which waiver was not incorporated into the oral agreement.<sup>181</sup>

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176. Harrold v. Rolling J Ranch, 23 Cal. Rptr. 2d 671, 675-77 (Ct. App. 1993).

177. Lupash v. City of Seal Beach, 89 Cal. Rptr. 2d 920, 924-25 (Ct. App. 1999).

178. Hamilton v. Martinelli & Assocs., 2 Cal. Rptr. 3d 168, 175-76 (Ct. App. 2003). The folly of these cases' holdings can be seen from the fact that the seminal California case on *express* (that is, contractual) assumption of risk holds that courts will *invalidate* and *refuse to enforce* an exculpatory provision of a contract that shifts responsibility for negligence from an injurer to a victim who is not "better or equally able to bear" the risk. Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 447 (Cal. 1963). Thus, while California law prohibits an injurer who has the ability to prevent a victim's injury from shifting responsibility to a victim who cannot prevent the injury, California's primary assumption of risk doctrine *requires* such a shift of responsibility *as a matter of law*. Interestingly, in *Kahn v. East Side Union High School District*, 75 P.3d 30, 44 (Cal. 2003), the California Supreme Court limited the effect of the "no duty" cases involving instructors by finding a triable issue of fact as to *recklessness* (which remains actionable under the *Knight* standard) when a swimming coach directed a swimmer to perform a shallow water dive that she was not trained to perform and threatened to remove the swimmer from the team if she did not do it. It remains to be seen whether the California Court of Appeal will interpret *Kahn* narrowly and continue to refuse to recognize that instructors have any special duties or expertise, or whether *Kahn* will seriously blunt the effect of the "no duty" cases in this area.

179. Record v. Reason, 86 Cal. Rptr. 2d 547, 556 (Ct. App. 1999).

180. Lund v. Bally's Aerobic Plus, Inc., 93 Cal. Rptr. 2d 169 (Ct. App. 2000).

181. Indeed, there is some indication that the expansive attitude of the California courts toward implied assumption of risk is leaching into express assumption of risk cases, as well. In *Lund*, the court applied, *on nonsuit* (which takes a case away from the jury and is thus adjudicated under an equivalent standard to a summary judgment), an express waiver that a gym member had signed when she first joined, and which barred any claims for negligent supervision or instruction by gym personnel, to bar a claim based on dangerous advice the plaintiff had received from a personal trainer employed by the gym, *despite the fact that the plaintiff had entered into a separate contract at a later time to engage the personal trainer's services and that contract was oral and there was no express incorporation of the waiver from the original health club service contract*. *Id.* at 171. Surely the issues of whether (a) the contract for personal training services incorporated the earlier waiver or was separate, and (b) the

## B. DUTY AND REAL PROPERTY LAW

1. *Rowland v. Christian* and Twentieth Century Landowner Duties

*Rowland v. Christian*<sup>182</sup> is, arguably, the leading California case developing the doctrine of duty in negligence law. Prior to *Rowland*, California, like many jurisdictions, utilized a categorical approach drawn from property law to determine the duties owed by landowners to those entering their property.<sup>183</sup> Business invitees—people whose presence on the property conferred an economic benefit on its owner—were owed the ordinary duty of reasonable care.<sup>184</sup> A landowner's social guests, by contrast, were classified as "licensees," a category of entrants who were not owed the ordinary duty of reasonable care.<sup>185</sup> Landowners owed licensees duties only of warning.<sup>186</sup> They were required either to make any dangerous conditions "open and obvious"—so that the condition itself discharged the duty to warn—or to warn of dangers which were not "open and obvious."<sup>187</sup> They were not required to correct dangerous conditions so as to make the property "reasonably safe."<sup>188</sup> Finally, trespassers—persons who enter property without the express or implied permission of its owner—were owed no duty of care at all.<sup>189</sup>

During the latter half of the twentieth century, the common law came to the conclusion that these distinctions—especially the distinction between invitees and licensees—had outlived whatever usefulness they might once have had.<sup>190</sup> In *Rowland*, the California Supreme Court acknowledged this

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advice of the personal trainer was "supervision" or "instruction" covered by the waiver were jury questions.

182. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005).

183. *See, e.g., Oettinger v. Stewart*, 148 P.2d 19, 22 (Cal. 1944).

184. *Id.* at 21.

185. *See Rowland*, 443 P.2d at 565.

186. *Id.*

187. *See generally id.*

188. *See, e.g., id.* at 566 (discussing cases in which landowners were held liable for "traps," that is, for dangers known to the landowners that were not made obvious to entrants onto the property).

189. *See Fernandez v. Consol. Fisheries, Inc.*, 219 P.2d 73, 77 (Cal. Ct. App. 1950).

190. Indeed, even where the categorical approach to landowner liability was not discarded, jurisdictions have stretched the concept of "invitee" to include social guests and thereby eviscerated the distinction between an invitee and a licensee. *See Clarke v. Beckwith*, 858 P.2d 293, 299 (Wyo. 1993). Trespassers, on the other hand, present a more complicated case. On the one hand, where a trespasser is injured because of an untaken precaution that could have caused the same injury to a person permitted onto the property, the deterrent effect of tort law is served by permitting the trespasser to recover. On the other hand, society also has an interest in deterring trespassing and preventing trespassers from profiting from criminal conduct. *See CAL. CIV. CODE* § 3517 (West 1997). These policies certainly

and abolished the distinction between the various categories, imposing a unitary standard of reasonable care on all landowners.<sup>191</sup> A duty of reasonable care, the *Rowland* court stated, would be presumed in all circumstances. Only in special situations where policy considerations counseled strongly against duty would that presumption be overcome and an ordinary duty of reasonable care not be imposed.<sup>192</sup> The *Rowland* court listed several factors that should be taken into account in deciding whether the presumption in favor of a duty of reasonable care should be overcome:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.<sup>193</sup>

In recent years, *Rowland's* presumption of a duty of reasonable care has been significantly undermined by California courts. The categorical approach to questions of duties owed to entrants onto real property is quietly being resurrected. Foreseeability is being used by courts as an aggressive constraint on the duty of ordinary care, particularly in the area of premises liability. This is the very reverse of its role throughout most of the twentieth century. From *MacPherson v. Buick Motor Co.*<sup>194</sup> to *Dillon v. Legg*,<sup>195</sup> the concept of foreseeability was used to expand liability, not to contract it. Now, in a reversal of the thrust of *Rowland*, the property rights of landowners are being elevated over the physical safety of persons on or near their property. And some courts have gone so far as to replace the duty of reasonable care with a duty to merely make dangers obvious. This is a thoroughgoing revival of the relaxed duty rule that used to apply to licensees before *Rowland* explicitly eliminated it. The result is a regime that more and more values property rights over personal safety. As we enter the twenty-first century, California's courts are resurrecting the legal regime of the late nineteenth century.

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could support precluding trespassers from recovering for accidents that would not have occurred had they not been trespassing.

191. *Rowland*, 443 P.2d at 568.

192. *Id.* at 564 (holding that "[a] departure from this fundamental principle [that is, that persons are always owed a duty of care] involves the balancing of a number of considerations").

193. *Id.*

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

195. *Dillon v. Legg*, 441 P.2d 912, 919 (Cal. 1968).

## 2. Resurrecting the Categorical Approach

As we have observed, the common law prior to *Rowland* recognized different levels of landowner duty depending on the status of the victim.<sup>196</sup> *Rowland* was one of a number of cases in numerous jurisdictions which eliminated the categorical approach and imposed a single standard of reasonable care on landowners, at least with respect to those legally on the property.<sup>197</sup> *Rowland*, of course, went further by extending the same duty of reasonable care to trespassers. The California Legislature soon passed a statute that largely reinstated the pre-*Rowland* rules with respect to various felony trespassers, including murderers, rapists, burglars, and other enumerated serious felonies.<sup>198</sup> The statute, however, preserved *Rowland*'s duty of ordinary care for other classes of trespassers (such as innocent adult trespassers, child trespassers, or trespassers committing misdemeanors).<sup>199</sup>

Even before *Rowland*, well-established doctrine held that landowners could be liable for creating "attractive nuisances"—dangerous conditions on their property that were likely to attract child trespassers.<sup>200</sup> In *Ornelas v. Randolph*,<sup>201</sup> however, the California Supreme Court interpreted a statute, section 846 of the California Civil Code, which immunized landowners from liability for injuries sustained in the recreational use of their property.<sup>202</sup> The court held that the statute not only immunized the

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196. See *supra* Part II.B.1.

197. See *supra* note 32.

198. See CAL. CIV. CODE § 847(b) (West Supp. 2005).

199. *Id.*

200. See *O'Keefe v. S. End Rowing Club*, 414 P.2d 830, 837–39 (Cal. 1966); *Barrett v. S. Pac. Co.*, 27 P. 666, 667 (Cal. 1891).

201. *Ornelas v. Randolph*, 847 P.2d 560, 562–63 (Cal. 1993). The authors' analysis of *Ornelas* is influenced heavily by an unpublished paper, Casey T. Fleck, *Ornelas v. Randolph: A Broad-brush Approach to Recreational Use Immunity* (Sept. 1998) (unpublished manuscript, on file with authors).

202. *Ornelas*, 847 P.2d at 562–63. The text of section 846 reads:

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing and enjoying historical, archaeological, scenic, natural, or scientific sites.

An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur

owners of property suitable for recreational use, but also immunized owners of property that was left in a dangerous condition—property not suitable for recreational use—when the victims were injured during a recreational activity.<sup>203</sup>

*Ornelas* involved a landowner, Randolph, whose farm abutted a residential subdivision.<sup>204</sup> He stored old farm equipment, machinery, and irrigation pipes on a portion of his property.<sup>205</sup> The plaintiff, an eight-year-old child who lived in the subdivision, disobeyed his parents' instructions and trespassed onto Randolph's property with five other children.<sup>206</sup> While the other children played on the machinery, the plaintiff was playing with a hand-held toy, and was injured when a pipe was dislodged and fell on him.<sup>207</sup>

The *Ornelas* opinion repudiated a series of California appellate cases which had held that section 846 immunity did not apply to property that was not suitable for recreational use.<sup>208</sup> In repudiating these opinions, the court argued that the legislature intended section 846 to encourage landowners to afford access to their property for recreational purposes.<sup>209</sup> This appeal to putative legislative intent ignored both the fact that the legislature had amended the statute numerous times and had not chosen to reverse the suitability exception cases,<sup>210</sup> and the perversity of encouraging landowners to grant children access to certain kinds of property—construction sites, for example—for recreational purposes. A post-*Ornelas* case, *Bacon v. Southern California Edison Co.*,<sup>211</sup> vividly illustrates this

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liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any paid, to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

CAL. CIV. CODE § 846 (West Supp. 2006).

203. *Ornelas*, 847 P.2d at 563–55.

204. *Id.* at 561.

205. *Id.*

206. *Id.* at 561–62.

207. *Id.*

208. *Id.* at 565–67. See *Domingue v. Presley*, 243 Cal. Rptr. 312 (Ct. App. 1988), *abrogated by Ornelas*, 847 P.2d 560; *Potts v. Halsted Fin. Corp.*, 191 Cal. Rptr. 160 (Ct. App. 1983), *abrogated by Ornelas*, 847 P.2d 560; *Paige v. N. Oaks Partners*, 184 Cal. Rptr. 867 (Ct. App. 1982), *abrogated by Ornelas*, 847 P.2d 560.

209. *Ornelas*, 847 P.2d at 565.

210. *Id.* at 565–69.

211. *Bacon v. S. Cal. Edison Co.*, 62 Cal. Rptr. 2d 16 (Ct. App. 1997).

perversity. In *Bacon*, the California Court of Appeal held that section 846’s recreational immunity applied when a child was shocked and knocked to the ground after climbing the defendant’s electrical transmission tower.<sup>212</sup> (The plaintiff had complained of the defendant’s negligence in permitting the sign warning of high voltage to become obscured by shrubbery, and in letting the barbed wire designed to deter climbers become rusted, cut and dangling loose.)<sup>213</sup> What rational legislator would, or should, have wanted to encourage Southern California Edison to make its transmission lines available for recreational use by children (or adults, for that matter)?

The suitability exception that the California Supreme Court rejected in *Ornelas* was, moreover, grounded in the long-established doctrine of “attractive nuisance.” In its standard modern formulation, “attractive nuisance” doctrine requires that, where landowners can foresee that children might enter their land and be injured by a dangerous condition whose dangerousness they might reasonably fail to appreciate, the landowners are under a duty to protect the child against the dangerous condition.<sup>214</sup> The court’s interpretation of section 846 holds, essentially, that the legislature impliedly repealed “attractive nuisance” doctrine when it enacted the statute.<sup>215</sup> More generally—and perhaps more importantly—*Ornelas*’ interpretation of section 846 creates a categorical “no duty” exception to *Rowland*, specifically stating that the landowner’s duty to a “nonpaying, uninvited recreational user” is the same as the duty owed to all trespassers prior to *Rowland*—a “duty” of “no duty” to exercise reasonable care.<sup>216</sup>

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212. *Id.* at 18.

213. *Id.*

214. For the general doctrine, see DOBBS, *supra* note 1, at 609. For the doctrine in California, see *Domingue v. Presley*, 243 Cal. Rptr. 312, 313 (Ct. App. 1988), *abrogated by Ornelas*, 847 P.2d 560.

215. It is extremely questionable that the legislature intended to do this. Section 846 of the California Civil Code was passed along with section 831.8 of the California Government Code, which provides immunity to public entities for certain uses of reservoirs, canals, conduits, or drains, but contains an exemption from that immunity where the plaintiff is less than twelve years old. The Legislative Comment to section 831.8 indicates that the exemption was intended to track the liability of private landowners under the attractive nuisance doctrine. *Water District Liability: Hearing on Assemb. B. 2023 Before the S. Comm. on the Judiciary*, 1997–1998 Assemb., Reg. Sess. 5 (Cal. 1998) (citing *Cardenas v. Turlock Irrigation Dist.*, 73 Cal. Rptr. 69 (Ct. App. 1968)).

The Legislative Comment would not make sense if, at the same time the legislature was passing section 831.8, it was intending to repeal the attractive nuisance doctrine by way of section 846. See *Fleck*, *supra* note 201, at 24–25. See also *Delta Farms Reclamation Dist. v. Superior Court*, 660 P.2d 1168, 1172 (Cal. 1983) (stating that it was “particularly appropriate” that sections 831.8 and 846 be construed harmoniously); *Isobe v. Unemployment Ins. Appeals Bd.*, 526 P.2d 528, 532 (Cal. 1974) (stating that statutes passed together should be construed harmoniously).

216. *Ornelas*, 847 P.2d at 561.

*Ornelas* thus resurrects a piece of the categorical scheme rejected long before *Rowland* repudiated the categories. Landowners no longer owe a duty of reasonable care to everyone except felony trespassers. They now owe no duty of reasonable care to nonpaying, uninvited recreational users—that is, the “licensees” and “trespassers” of the old categorical system—even if they are children who would have been owed a duty under the long-established doctrine of attractive nuisance. Under *Ornelas*, the safety of children too young to protect themselves (as well as the safety of innocent adult trespassers) counts for less than the landowner’s interest in not bearing the burden of either making the property safe or withdrawing it from recreational use. This upends the moral hierarchy of *Rowland*. *Rowland* gives safety—physical integrity—priority over property rights. *Ornelas* gives landowners’ interests in the free use of their property priority over physical integrity.

### 3. Using Foreseeability Rules to Constrict Premises Liability

In many jurisdictions, foreseeability is the main determinant of whether a duty is owed.<sup>217</sup> In California, under *Rowland*, foreseeability is one factor, and usually the primary factor, in determining duty.<sup>218</sup> As negligence law developed, the concept of foreseeability expanded under the pressure of recurring rare accidents so that only the most unlikely accidents were said to be unforeseeable.<sup>219</sup>

The critical distinction here is between an average conception of foreseeability and a probabilistic one. Average foreseeability, a conception warmly embraced by some nineteenth century cases,<sup>220</sup> holds that defendants need only consider precautions against risks that normally arise. The more modern idea of probabilistic foreseeability recognizes that some harms—once every fifth year floods or freezes, for example—may not be normal but may still be frequent enough to prompt careful consideration of possible precautions. Under a probabilistic conception of foreseeability, only harms which are so unlikely that their connection to a defendant’s conduct may fairly be said to be essentially coincidental—in the way that a child’s purchase of a toy lighter and that child’s decision to play with fire are coincidental—are held to be “unforeseeable.” Only the extraordinarily rare—not the simply unusual—is classified as unforeseeable.

217. See *supra* note 26.

218. See *Talbott v. Csakany*, 245 Cal. Rptr. 136, 139 (Ct. App. 1988); *O’Hara v. W. Seven Trees Corp. Interstate Mgmt.*, 142 Cal. Rptr. 487, 490 (Ct. App. 1977).

219. DOBBS, *supra* note 1, at 336.

220. See, e.g., *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047 (Exch.).

Recent California premises liability cases are expanding the domain of “no duty” by constricting the concept of foreseeability. In *Sharon P. v. Arman, Ltd.*, the California Supreme Court held that operators of commercial parking garages had no duty to take precautions against criminal activity in the absence of similar crimes in the past.<sup>221</sup> Even more importantly, the court gave a narrow interpretation of “similar crimes,” rejecting the contention that a string of robberies would satisfy that requirement when the plaintiff was raped rather than robbed. These constrictions of the realm of the foreseeable are artificial and forced; the possibility of rape is plainly foreseeable when robbery has already occurred. *Nicole M. v. Sears, Roebuck & Co.* is similarly restrictive.<sup>222</sup> It holds that, in the absence of prior criminal attacks, a crime committed on a landowner’s premises is not foreseeable as a matter of law and thus does not give rise to a duty.<sup>223</sup> In fact, if not in name, these cases move us back toward average foreseeability analysis. Indeed, the question that these cases ask—“Has this happened before?”—may be more than just a marked

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221. *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 126–27 (Cal. 1999).

222. *Nicole M. v. Sears, Roebuck & Co.*, 90 Cal. Rptr. 2d 922 (Ct. App. 1999).

223. *Id.* at 928. The limitations on foreseeability are also imposed by California courts through the doctrine of proximate cause. In *Saelzler v. Advanced Group 400*, 23 P.3d 1143, 1145 (Cal. 2001), the California Supreme Court reinstated a summary judgment against a Federal Express employee who was assaulted while attempting to make a delivery on the premises of the defendants’ apartment building. The plaintiff was able to adduce evidence that satisfied the prior similar incidents doctrine (there had been forty-one reports of trespass, along with various prior crimes committed on the defendants’ premises). *Id.* at 1147. Despite this, the plaintiff’s claim still never reached the jury because the court held that there was no causation because the plaintiff could not show that the increased security that she proposed would have prevented the incident, because the assailants were never caught and could have come from inside the complex. *Id.* at 1151. Further, the court noted that “assaults and other crimes can occur despite the maintenance of the highest level of security.” *Id.* at 1153. *Saelzler* thus seems to imply that even the limited duty recognized in *Sharon P.* to protect those on the premises from harms made foreseeable based on prior similar incidents is in fact illusory—after all, if crimes can occur no matter what precautions are taken, and the plaintiff must prove a “but for” relationship between the lack of a precaution and the crimes committed to even get past summary judgment, the plaintiff will never be able to meet this standard.

The court claims that it is not foreclosing premises claims based on criminal acts of third parties because there may be situations where there is evidence, either in the form of a perpetrator’s testimony or that the perpetrator took advantage of a particular untaken precaution (such as fingerprints on the gate, eyewitness testimony, or a security camera). *Id.* at 1154. This analysis treats causation as a *legal issue* that is properly resolved on summary judgment, rather than as the jury question that it surely is, once duty is found to exist. The ruling is especially outrageous given the fact that, as Justice Werdegarr noted in her dissent, one of the precautions proposed was to allow the daytime security guard, who already escorted the manager of the complex during the day, to escort Federal Express employees as well. *Id.* at 1158 (Werdegarr, J., dissenting). There is no doubt that *that* precaution would have protected the delivery person from the assault, and yet a majority of the court nonetheless held that the plaintiff had presented *no* evidence that raised a triable issue of fact as to whether the precautions would have prevented the incident. *Id.* at 1145.



retreat from the question asked by the probabilistic approach to foreseeability analysis—“Is there a reasonable chance of this happening?” The question—“Has this happened before?”—may be even more restrictive than the question asked by average foreseeability analysis—“Does this generally happen?”

This retreat to strict historical precedent is undesirable. It means that a landowner has no duty to protect against a crime, however likely it may be, until one such crime has actually occurred. This “one free attack on a patron” policy is both unjust and bad policy. It is unjust because it sacrifices the safety of the first victim to no good end. Why should one person suffer a rape which might have been avoided at reasonable cost just because no one has yet been raped? It is bad policy because it creates an incentive for landowners to disregard the safety of their patrons and take an unjustifiably low level of precaution. The artificially truncated conception of foreseeability now being deployed by California courts makes this problem particularly acute. Many of the precautions which would make robbery less likely in a parking structure (adequate lighting, security cameras) will also make rape less likely. If, however, landowners can escape liability for guarding against rape even when (1) they had a duty to guard against robbery, (2) they breached that duty, (3) their breach of that duty was a “but for” cause of the plaintiff’s rape, because (4) no prior rape had occurred, it may well be perfectly rational for landowners not to take even those precautions which might prevent robberies.<sup>224</sup>

Constricting foreseeability in the way that these cases do gets matters wrong morally in just the way that *Ornelas* does. The upshot is the creation of a realm of “no duty” which gives property rights priority over physical

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224. In *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1173 (Cal. 2005), the court limited *Sharon P.* by holding that even where there has not been a showing of “prior similar incidents,” a business still has a duty to take “minimal” precautions to protect its patrons. Again, one can see the court acting as jury, attempting to calibrate the precise level of precaution in each case rather than leaving these issues for the jury to weigh. *Delgado* could also lead to a perverse result, in that the specific holding was that a bar that had chosen to hire bouncers could be held responsible if the bouncers did not intervene in a fight to protect the patrons. *Id.* at 1168–71. As a result of *Delgado* and *Sharon P.*, the rational course of action for a business might be to *not* hire security guards, because if no guards are hired, *Sharon P.* may shield the business from liability unless the “prior similar incidents” test is met.

In *Morris v. De La Torre*, 113 P.3d 1182, 1191 (Cal. 2005), the court applies the *Delgado* “minimal precautions” standard and held that a restaurant owes a duty to call 911 if employees know that a violent crime is being committed in the parking lot. Again, the most notable thing about *Morris* is that the court is once again acting as jury, determining which specific precautions are reasonable for the restaurant to take under the circumstances.

The reach of these cases is limited to business invitees, further suggesting that there may be a revival of the categories eliminated by *Rowland v. Christian* in California.

safety. Landowners’ interest in unfettered use of their property categorically trumps patrons’ interest in physical integrity.

#### 4. No Duty to Your Customers

*Kentucky Fried Chicken of California, Inc. v. Superior Court (KFC)*<sup>225</sup> continues this theme. The plaintiff was seized at gunpoint at a Kentucky Fried Chicken (“KFC”), and her assailant threatened to kill her unless the store’s employee gave him all the money in the cash register.<sup>226</sup> The employee failed to comply promptly, causing the plaintiff severe emotional distress.<sup>227</sup> KFC moved for summary judgment, claiming no duty.<sup>228</sup> The California Supreme Court upheld KFC’s claim, agreeing that there was “no duty” to comply with an armed robber’s demand that property be surrendered.<sup>229</sup> The court relied on the privilege to defend property with reasonable force, claiming that it would be inconsistent with that privilege to impose liability here.<sup>230</sup> This extension of “no duty” law is disturbing. *KFC* held, not only that the store’s property rights outweighed the lives of those in the store, but also that the property interest in the small amount of money in the cash register—perhaps \$150—outweighed the lives of even a large number of customers.<sup>231</sup>

*KFC* lays bare the absurdity of the moral logic at work in the California Supreme Court’s decisions expanding property rights and constricting tort duties. The court holds that any business may value even a trivial amount of money over a large number of lives. The implicit moral logic at work here—“my life is more important than my money, but my money is more important than your life”—is utterly untenable. If democratic political morality insists on anything, it insists on the equal value of each of our lives. And rightly so. If your life is more important

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225. Ky. Fried Chicken of Cal., Inc. v. Superior Court (*KFC*), 927 P.2d 1260 (Cal. 1997).

226. *Id.* at 1266–70.

227. *Id.*

228. *Id.* at 1236.

229. *Id.*

230. *Id.* at 1270. This rationale amounts to a bald vigilante fantasy. Defense of property with reasonable force was not the issue in *KFC*. The fact that *defense* of property is (sometimes) privileged (though not when deadly or disproportionate force is used that unduly endangers third parties!) does not mean that a refusal to turn over money alone is similarly privileged. Further, the court really does not believe its own analysis, as it expressly refuses to decide that landowners never have a duty not to resist an armed robbery with force when invitees are present. *Id.*

231. *Id.* at 1270–71 (Mosk, J., dissenting).

than your property, then my life is also more important than your property.<sup>232</sup>

### 5. No Duty to Your Neighbors

While not strictly a landowner liability case, *Parsons v. Crown Disposal Co.* stands for a proposition that represents a further extension of the doctrine of “no duty.”<sup>233</sup> In *Parsons*, the plaintiff was thrown by a horse after the horse was scared by noise from the defendant’s garbage truck.<sup>234</sup> There were factual disputes as to whether the driver of the truck saw the horse and had time to react.<sup>235</sup> The court, however, affirmed summary judgment for the defendant. The court held that a machine operator generally owes no duty to the rider of a horse when the machine is operated in a regular and necessary way.<sup>236</sup>

This is an overly facile response to the problem of neighbors engaging in incompatible activities. Tort law recognizes that some plaintiffs are peculiarly susceptible to harms from certain activities and that those activities should not be liable for those harms—a classic example is the “ultrasensitive plaintiff” doctrine in abnormally dangerous activity liability, which exonerates, for example, those who operate blasting equipment for the cannibalistic behavior of minks in the wake of nearby explosions.<sup>237</sup> In general, however, the common law recognizes that people have a duty not to engage in negligent conduct likely to injure their neighbors, even if they

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232. In *Morris v. De La Torre*, the court held that a jury could find that a restaurant had a duty to call 911 when a crime was being committed in its parking lot. *Morris v. De La Torre*, 113 P.3d 1182, 1189 (Cal. 2005). The court acknowledges that sometimes, there would not be such a duty because such a call could increase the risk of harm. *Id.* at 1193. But nowhere does the court reconcile its holding with the holding of *KFC*. For two different juries to come to these differing results might be understandable; for the California Supreme Court to do so simply confirms that it is acting as nothing more than a jury in deciding under which specific fact patterns plaintiffs may recover.

233. *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 72 (Cal. 1997).

234. *Id.* at 71.

235. The court stated that the defendant was not liable because (1) the driver did not operate the machinery in a careless or imprudent manner before the horse showed up, and (2) the driver did not know the horse was there and thus was not required to take precautions. *Id.* at 83. The plaintiff’s deposition testimony, however, was that he saw the driver in the driver’s side view mirror when the horse began to spin and bolt. *Id.* at 73 n.2. This should have created a triable issue of fact, because either (1) the defendant’s driver did not check the side view mirrors before operating the machine, and thus operated the machinery in a careless manner before the horse showed up, or (2) the defendant’s driver did check the side view mirror and thus knew the horse was there and should have taken precautions, such as cutting the motor. Certainly, in the face of this evidence, it was up to a jury to decide whether to believe the driver’s testimony that he did not see the plaintiff or the horse until the harm had occurred. *See id.* at 100 n.2 (Kennard, J., dissenting).

236. *Id.* at 72.

237. *See Madsen v. E. Jordan Irrigation Co.*, 125 P.2d 794 (Utah 1942).

are engaging in lawful activities.<sup>238</sup> *Parsons* overturns that principle, imposing a special rule for the operation of machinery that might scare nearby horses, and it does so in the face of factual disputes as to the negligence of the machine operator.<sup>239</sup>

### III. PUTTING "DUTY" BACK IN ITS PROPER PLACE

In a series of sharp dissents, Justice Kennard has advanced a concise description of one basic problem with emerging California practice: it treats problems of breach as problems of duty.<sup>240</sup> This, surely, is a fundamental part of the problem. Judges are performing the law-applying role rightly reserved to juries, in the guise of applying the law-articulating role rightly reserved to judges. "[R]eason," as Henry Hart long ago reminded us, "is the life of the law and not just votes for your side."<sup>241</sup> The

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238. See, e.g., *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 493 (C.P.D.). See also CAL. CIV. CODE § 1714(a) (West 2002).

239. *Parsons*, 936 P.2d at 87–89. Closer inspection of the *Parsons* opinion shows that the "no duty" doctrine announced therein was created out of whole cloth. The court claimed that there were exceptions to the general principle of no liability for interactions between horses and machinery when (1) the device is operated in a careless manner, (2) the defendant fails to take reasonable precautions after it knows the horse is frightened, (3) the defendant acted maliciously or with an intent to frighten the horse, or (4) the defendant's conduct violates a statute. *Id.* at 78, 83–84. Three of these exceptions ((1), (2), and (4)), even as drawn by the court, seem to indicate that the rule is really one of reasonable care and that there is no per se rule of nonliability. Exception (1), carelessness, sounds just like a reasonable care standard. See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 173 (10th ed. 1996) (defining "careless" as "negligent"). Exception (2), failure to take reasonable precautions after the horse is frightened, is also a negligence standard and has elements of the archaic "last clear chance" doctrine which allowed recovery despite contributory negligence. See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1230 (Cal. 1975) (citing RESTATEMENT (SECOND) OF TORTS § 467 (1965)). Exception (4) duplicates negligence per se. Moreover, the court shoehorns cases into the exceptions. For instance, the court categorizes cases in exception (2) where drivers failed to keep a lookout ahead for horses and were held liable for negligence in not seeing the horses. *Parsons*, 936 P.2d at 78 n.12 (citing *McIntyre v. Orner*, 76 N.E. 750, 752 (Ind. 1906); *Shinkle v. McCullough*, 77 S.W. 196, 197 (Ky. Ct. App. 1903); *Tudor v. Bowen*, 67 S.E. 1015, 1017 (N.C. 1910)). These cases cannot fairly be categorized as cases where the defendant failed to take precautions *after* knowing the horse was frightened.

*Parsons* also misinterprets the holding of the seminal *Rowland* case, which established modern California duty doctrine. *Rowland* set forth a balancing test to be used in proscribing narrow exceptions to the general rule that a duty of care is always owed. *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005). According to the *Parsons* court, the social value of the defendant's activity is the primary consideration in determining whether a duty of care is owed. *Parsons*, 936 P.2d at 72, 80. This factor was not even directly mentioned in *Rowland* and is instead taken from Prosser and Keeton.

240. See *Parsons*, 936 P.2d at 101 (Kennard, J., dissenting); *Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC)*, 927 P.2d 1260, 1275 (Cal. 1997) (Kennard, J., dissenting); *Knight v. Jewett*, 834 P.2d 696, 714 (Cal. 1992) (Kennard, J., dissenting).

241. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 125 (1959).

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role of reason is to articulate law. When reason and law run out, the legitimate authority of judges comes to an end. Juries—whose legitimate authority arises from very different sources—are rightly empowered to settle disputes over the requirements of reasonableness in circumstances where reasonable people might disagree over just what reasonableness requires.

The *Rowland* test of duty is a legal standard. To determine if a duty should be recognized courts must bring multiple factors to bear, and the list of factors they must apply bears a close resemblance to those that juries must bring to bear when they determine if a duty of care has been breached. The duty and breach inquiries are distinct only insofar as determinations of duty are—or should be—categorical whereas determinations of breach are and should be particular. Determinations of duty fix the legal standard which governs some realm of conduct—the duties of parties in control of real property to entrants upon that property, in the case of *Rowland* itself—whereas judgments of breach determine whether a particular defendant complied with the legal standard governing its conduct, in a particular instance. The signature claim of contemporary California “no duty” cases is the assertion that—on these particular facts—the defendant owed no duty of care, as a matter of law, to the plaintiff. For courts to take upon themselves the task of specifying utterly particular duties in this piecemeal way is a mistake, and a glaring one.

Abusing the power of the court and usurping the legitimate authority of the jury is only part of the problem. Once judicial practice makes duty a live element of every case, it becomes difficult to know when “duty” does and does not exist. The *Rowland* test of duty involves balancing a number of factors; the balance among those factors might reasonably be struck in a number of different ways, even given a single set of facts. When judicial decisions strike a balance for a particular class of cases—when they fix the legal standard to which entrants onto land or parties in charge of ski lifts are subject—they eliminate uncertainty about how the balance among those factors might be struck in that class of cases. But when courts feel free to strike the balance anew in any case that comes before them, they introduce enormous uncertainty into the law. Precisely because the balance among *Rowland*'s factors might reasonably be struck in a number of different ways, once that balance is not more or less fixed in broad categories of cases, it becomes extremely difficult for anyone—prospective injurer, prospective victim, litigant, or lower court judge—to predict exactly how

some appellate court will balance the *Rowland*'s factors in a particular case.<sup>242</sup>

If the fundamental error of California law is plain enough—treating duty as a live issue in every case, instead of as something which must be determined on a categorical basis—the source of that error is less evident. One possibility is that the test of duty articulated by *Rowland v. Christian*, the leading modern California duty decision, is flawed in a way that invites present practice. *Rowland* is often and naturally read as *Parsons* reads it, namely, as a decision that makes questions of duty matters of social policy to be settled by determining what best promotes the general good.<sup>243</sup> This may undermine the integrity of duty doctrine in two distinct ways. First, the instrumental nature of the *Rowland* test may tend to undermine the victim's claim to the benefit of the *preexisting* standard of care, the one the victim counted on for protection when going about business in the world. Instrumentalism looks forward, and forward only. It assigns no independent weight to the backward-looking claim that the parties to a lawsuit are entitled to the benefits of a preexisting standard of care. That forward-looking focus facilitates setting duty aside.

Second, *Rowland*'s instrumentalism may tend to undermine the sense that “duty” is a matter of obligation, a matter of the limit set on potential injurers' freedom of action by the claims of potential victims.<sup>244</sup> Tort obligation arises, at least in part, directly out of the respect owed other people, not out of considerations of the general good. Potential victims

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242. That said, putting duty in play in large numbers of cases is a particular threat to the security of victims, because the uncertainty works in only one direction, holding out for injurers the tantalizing possibility that they may be immune from liability for their negligence. Indeed, even if the claim survives summary judgment, the jury gets an instruction that it cannot find negligence unless the defendant increased the risk of harm above the risk level that is inherent in the activity. *Vine v. Bear Valley Ski Co.*, 13 Cal. Rptr. 3d 370, 384–86 (Ct. App. 2004). This effectively allows the defendant to win if it convinces the judge, the jury, or the appellate courts that the risk is inherent in the activity, while the plaintiff has to convince all three bodies to win. Injurers might thus gamble and choose not to take justified precautions.

243. See *supra* note 239.

244. Cf. Goldberg & Zipursky, *Place of Duty*, *supra* note 14, at 694–95 (arguing that the instrumentalism of *Rowland* tends to undermine the sense of duty as obligation). In their *The Moral of MacPherson*, Goldberg and Zipursky trace *Rowland*'s formulation of the elements of duty to Prosser, who was himself popularizing the views of Leon Green and following in the footsteps of Oliver Wendell Holmes. Goldberg & Zipursky, *Moral*, *supra* note 14. In *Judge and Jury in the Texas Supreme Court*, William Powers, Jr. likewise finds the proliferation of “no duty” rulings by the Texas Supreme Court to be related to a shift from Page Keeton's view of duty to Leon Green's. Powers, *supra* note 10, at 1701–03.

have a moral claim to the security of their persons and their property.<sup>245</sup> That claim stands on par with the claim of potential injurers to freedom of action and directly limits the freedom of potential injurers to go about their business as they please. Considerations of what would be best for society as a whole are best conceived as grounds on which this right of victims to have their property and physical integrity respected might be justified.<sup>246</sup> *Rowland*'s recognition of the link between "duty" and respect for the security of others is inadequate.<sup>247</sup>

There may well be much to both these criticisms of *Rowland*, but the fundamental flaw in contemporary California practice lies elsewhere. The fundamental problem is that courts are distorting the role of duty in negligence law by proceeding as though the existence of obligation in tort is always an open question. Duty cannot be an eternally open question in this way, and duty decisions must be made categorically, not on a case-by-case basis. The cure for this problem is to return duty to its proper place. If *Rowland* were so confined, the practical effect of its faults would be substantially less.

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245. See CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 183–206 (1970) (arguing that risk imposition should be understood in terms of a Kantian principle of equal right which permits each of us to impose risks on others in pursuit of our ends, so long as others may impose equivalent risks on us); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 550 (1972) (suggesting that one tradition of tort thought conceives of accident law in terms of an equal right to maximal security); Keating, *supra* note 44 (describing accident law as a realm of equal freedom whose central problem is to reconcile the competing liberties of freedom to impose risk on others and freedom from accidental physical harm at the hands of others). But see CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW 13–36 (2003) (arguing that the only proper objective for the tort system is the minimization of the sum of accident costs).

246. This is the view of rights expressed by John Stuart Mill when he writes, "To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility. If that expression does not seem to convey a sufficient feeling of strength of the obligation . . . [it is because of] the extraordinarily important and impressive kind of utility which is concerned. The interest involved is that of security, to everyone's feelings the most vital of all interests. All other earthly benefits are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil and for the whole value of all and every good, beyond the passing moment, since nothing but the gratification of the instant could be of any worth to us if we could be deprived of everything the next instant by whoever was momentarily stronger than ourselves."

MILL, *supra* note 52, at 52–53.

247. The connection is at least hinted at: "A man's life or limb does not become less worthy of . . . compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters . . ." *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005).

The remedy for most of what ails California duty law is therefore a simple one: courts must go back to making duty decisions in an appropriately categorical way. Duty doctrine must be used to fix the boundaries among contract, tort, property, and legally unregulated conduct, and to articulate the more particular standards of care owed by certain positions (for example, by ski lift operators), or incurred by certain undertakings (for example, by entering into various "special relationships"). In those broad areas where the legal standard governing the defendant's conduct is well-settled—when contract and property are out of the picture and tort is firmly in control of the terrain—the only recurring responsibility of duty doctrine is to identify those cases in which the conduct of the defendant is unregulated by law because the risks of the conduct are so remote.

Here, it may be worth amending California "duty" doctrine. In areas where it is plain that tort (not contract or property) controls the obligations of those affected, reasonable foreseeability of physical injury should be the primary test of duty.<sup>248</sup> The elaborate balancing test of *Rowland* is misplaced. Potential injurers and potential victims stand on a moral par, as do their respective interests in liberty and security. To make the existence of duty in such cases turn on the balance of a set of factors designed to identify the general welfare both denies the equal importance of potential victims' interest in security by presuming that potential injurers may endanger them unless the social good would be served by protecting them, and invites courts into a quicksand where the general good shifts incessantly, with each and every change of fact. When it is plain that the conduct at issue is conduct governed by the law of torts—not contract or property—reasonable foreseeability of injury and reasonable foreseeability alone should be the touchstone of duty. Beyond the threshold requirement of reasonable foreseeability that arises because negligence liability only extends to accidents that could have been foreseen and so are candidates for prevention, duty must be used sparingly. Its core and proper role is to articulate the law and the law does not require continuous articulation.

To be sure, these remedies leave open one large question raised by California's ongoing abuse of duty: should the boundaries among tort, contract, and property be recast in a way which gives freedom of contract and the free use of property precedence over the physical integrity of the person? We think not. Only fools value their property and their wealth

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248. Many contemporary American jurisdictions assert that reasonable foreseeability of physical injury is the key to the obligation to exercise reasonable care. *See supra* note 26.



more than their lives. And the lives of others stand on a par with one's own. But if California courts disagree, they should at least be prepared to articulate their convictions openly and categorically.