Abusing "Duty"

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I. "Duty" in Modern Negligence Doctrine

"Duty" occupies an odd place in contemporary negligence law. On the one hand, it is hornbook law that duty—along with injury, breach, actual cause and proximate cause—is one of the elements of plaintiff's prima facie case.[2] As the first element of plaintiff's case—and the only element whose existence is a matter of law for the court[3]— duty seems to stand out even among the elements of the prima facie case. If a plaintiff cannot establish the existence of a duty— cannot establish that the defendant was required 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, if that breach was the actual cause of the plaintiff's injury; or if the defendant's

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[2]Whitcombe v. County of Yolo, 141 Cal. Rptr. 189, 193 (Ct. App. 1977); Kincaid v. Standridge, No. 98-5232, 2000 U.S. App. LEXIS 22340 at *4 (10th Cir. Aug. 30); McCarthy v. Olin Corp., 119 F.3d 148, 165 (2d Cir. 1997); Home Indem. Co. v. A & E Prods. Group, No. 96-1252, 1996 U.S. App. LEXIS 33269 at *4 (6th Cir. Dec. 17); Robertson v. Sixpence Inns of Am., 789 P.2d 1040, 1044 (Ariz. 1990). KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 2, 7 (1997); PROSSER AND KEETON ON THE LAW OF TORTS 357 (W. Page Keeton, ed., 1984) ("[W]hen negligence began to take form as a separate basis of tort liability, the court 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.") (hereinafter "PROSSER & KEETON"); DAN B. DOBBS, THE LAW OF TORTS 269 (2000) (listing "duty" as the first element of a *prima facie* case for negligence).

[3]Paz v. State of California, 994 P.2d 975, 979 (Cal. 2000); Schaaf v. Highfield, 896 P.2d 665, 668 (Wash. 1995); *Restatement (Third) of Torts: General 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.")

breach of its duty of care and actual causation of plaintiff's injury should be counted a proximate cause of that injury. Duty, in short, seems important.

On the other hand, equally good authority has it that, in most cases, duty is a "non-issue."[4] 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: General 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.[5]

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— that's why it is a question of law for the court, not a question of law application for the jury[6]— and defendants are generally under a duty to exercise reasonable care. To put it differently, people are generally obligated to conduct themselves with due regard for the safety of each other's person and property. When people impose risks of physical injury on others, they are "duty bound" to take reasonable precautions for the protection of those they endanger.[7]

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[4]*Restatement Draft*, supra note 2, § 6 cmt. d.

[5]*Restatement Draft*, *supra* note 2, § 7 cmt. a.

[6]John Goldberg and Benjamin Zipursky, the most vocal and articulate critics of the RESTATEMENT THIRD'S treatment of duty as a "nonissue", come very close to describing the role of duty in these terms. They write that the assignment of questions of duty to courts as a matter of law "asks courts to set general and relatively stable guidelines for how one must conduct oneself...."John C.P. Goldberg & Benjamin Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L.REV. 657, 712 (2001) (hereinafter Goldberg & Zipursky, *Place of Duty*). Kenneth Abraham's *The Forms and Functions of Tort Law*, an "analytical primer" for torts students, speaks of duty in the same manner, as "the legal duty to comply with the applicable standard of care". KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW at 2 (1997). So, too, does Dan Dobbs. DOBBS, *supra* note 1, at 270 ("In this book, the term duty is used... [to refer to] the legal standard by which the defendant's conduct is to be judged, or, in some cases, the absence of any standards that the defendant must meet.")

[7]It is one of the central theses of this paper that California's courts have exploited this aspect of duty law– that it is a question of law for the court to decide rather than a question of fact for the jury to decide– to shift the balance between judge and jury and empower courts that disagree with jury

The generality of this obligation is routinely noted, by both courts and commentators. "[I]n Wisconsin," that state's Supreme Court has proclaimed, "everyone has a duty of care to the whole world..[8] The California Supreme Court, echoing a 130 year old statute, has remarked "[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 a result of their conduct."[9] Commentators, for their part, have recognized a general duty to exercise reasonable care in one's conduct towards others at least since Oliver Wendell Holmes.[10]

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findings of negligence to overrule them on the basis that "no duty" was owed. Some examples of this phenomenon include *Knight v. Jewett*, 834 P.2d 696, 711-12 (Cal. 1992) (holding that issue of whether particular types of risky conduct were inherent risks of touch football that were assumed by participants was question of law for court to decide because it determined whether "duty" was owed); *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801, 804-05 (App. 2001) (holding that homehowner had no duty to supervise child despite telling child's mother that she would be home during day; child was sexually assaulted while homeowner was out getting pizza); *Kane v. National Ski Patrol Sys., Inc.*, 105 Cal. Rptr. 2d 600, 606 (App. 2001) (holding that being advised to ski down dangerous slopes is an inherent risk of taking skiing classes); *Record v. Reason*, 86 Cal. Rptr. 2d 547, 556 (App. 1999) (holding that boat pilot towing the plaintiff in an inner tube had no duty to operate the boat at a safe rate of speed); *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168 (App. 1998) (holding driver has "no duty" to change lanes on freeway); *Harrold v. Rolling J Ranch*, 23 Cal. Rptr. 2d 671 (App. 1993) (holding being given an unruly horse is an inherent risk of participating in equestrian activities); and *Stimson v. Carlson*, 14 Cal. Rptr. 2d 670 (App. 1993) (holding risk of captain of boat intentionally swinging the boom without warning the crew is an inherent risk of sailing).

[8]Miller v. Wal-Mart Stores, Inc. 580 N.W.2d 233, 238 (Wis. 1998) ("[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....") (internal quotation omitted).

[9]California may not be unique. Something similar may be going on Texas. *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). In *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 Fordham L. Rev. 407, 430 (1999-2000) (fns. omitted) , Mark P. Gergen remarks:

> 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 an ad hoc no-duty decision. These cases are part of the on-going conservative counter-revolution in torts.

The tale we tell here may therefore be but a chapter in a larger narrative. If this tale is part of a larger narrative, that narrative may become an important— and unfortunate— part of tort history, as important as the fall of privity of contract and the demise of the categories. We hope that the narrative of tort law can be returned to a different course.

[10]See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY at 13 (1985) (citing *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873), an unsigned article all but universally attributed to Holmes) (hereinafter WHITE, TORT LAW IN AMERICA). Case law began to recognize the modern duty of due care in the 1830's. WHITE, TORT LAW IN AMERICA, *supra*, at 15; *see* Brown v. Kendall, 60 Mass. 292, 296 (1850) (Shaw, C.J.). But the duty was not general in the 19th Century

Notwithstanding this near universal acknowledgment that the duty is highly general and broadly applicable, "no duty" rulings are proliferating in California especially in the intermediate appellate courts.[11] What to make of this proliferation is an important question. In this article, we argue that it represents an abuse of "duty" doctrine. Part of the problem, we believe, is that the California courts are using "duty" doctrine in a way which wrongly inverts the relation between property rights and physical integrity, and reshaping the law accordingly. And part of the problem is that California courts are using "duty" doctrine in a way which wrongly usurps the authority of two more democratic institutions—the legislature and the jury. But the essence of problem lies elsewhere. The essence of the abuse of "duty" doctrine lies in making "duty" a potentially live issue in every tort case. Because the role of "duty" doctrine is to articulate the legal standard applicable to the defendant's conduct, putting "duty" up for grabs in every case puts the legal standard applicable to defendant's conduct up for grabs in every case. This is untenable: "Duty" cannot be a live issue in every case because the legal standard applicable to conduct cannot be up for grabs in every case. We can no more revisit duty incessantly that 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."[12]

There is, moreover, no way to expand the role of judges with respect to determinations of duty without infringing on the legitimate authority of juries. Once duty becomes an issue in every case, there is no principled way to draw the line between the provinces of judge and jury,

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because it was hedged in by property and contract. *See, e.g.,* Robertson v. Mayor, Etc., of the City of New York, 7 Misc. 645, 646 (N.Y. Common Pleas 1894) (reciting that landowners owe licensees and trespassers no affirmative duties to keep the premises safe); Losee v. Clute, 51 N.Y. 494, 496-97 (1873) (holding that manufacturer of 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 who they were not in privity of contract with); Farwell v. Boston & Worcesster R.R. Corp., 45 Mass. 49, 59 (1842) (Shaw, C.J.) (holding that employer has no duty to take precautions that would protect employee from injury at the hands of his or her fellow employees); Rex v. Smith, 2 Car. & P. 449, 456, 172 Eng. Rep. 203, 207 (Gloucester Assizes 1826) (holding caretakers of mentally disabled man owed no duty to tend to his health). It was not until the 20th Century that the duty of reasonable care became a highly general legal obligation. *See* text accompanying notes 12-31, *infra*.

[11]Randi. v. Muroc Joint Unified School Dist., 929 P.2d 582, 588 (Cal. 1997); *see also* Cal. Civ. Code § 1714(a) (West 2002)(originally enacted in 1872, prescribing that everyone owes to everyone else a duty of ordinary care).

[12]JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY, 65 (Barbara Herman, ed. 2000) (explicating Hume's view of justice).

and judges will inevitably be called on to second-guess jury decisions on issues of reasonable conduct and care. When reasonable people might disagree about whether the defendant exercised reasonable care in light of the particular facts at hand, it is the proper role of juries—not judges—to determine what reasonableness required.[13] Paramount among the reasons why juries not judges are properly charged with settling reasonable disagreements over the application of the negligence norm is the nature of the norm itself. The negligence norm of reasonable care in the circumstance is a classic instance—perhaps even the classic instance—of a legal standard.[14] Its application to the idiosyncratic details of particular negligence cases presents a mixed question of law and fact which calls for both the exercise of evaluative judgment and the finding of fact.[15] The case for leaving fact-finding to the jury is, of course, straightforward. At best, judicial preemption of the jury's role in finding fact is unlikely to lead to improved fact-finding because rulings of "no duty" are properly made before the facts are fully developed. At worst, judicial preemption of the jury's role in finding fact violates the right to a jury trial, entrenched in

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[13]*See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, esp. at 424-39 (2000)(discussing the jury's role in deciding normative questions in negligence law). At page 434 Professor Gergen observes "Where 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." 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, 170 Mass. 596,600 (1898) over a vigorous dissent by no less formidable a figure than Oliver Wendell Holmes himself..

[14]The normal 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 the determination of the happening or non-happening of physical or mental events—that is, determinations of *fact*." By contrast, a "standard may be defined broadly as a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of these happenings . . " HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS, 139-40 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994) (citing the "idea of the common law that no person should drive 'at an unreasonable rate of spee.'" as a canonical example of a standard). Thus a 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 9, at 407 n.1 (distinguishing between rules and standards and discussing the literature).

[15]The Seventh Amendment to the United States 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 the California Constitution. Cal Const. Art. I Section 16.

both the Federal and California Constitutions.[16]

The case for leaving the evaluation of facts to juries is both more complex and more important. Settled negligence doctrine holds that the authority of the jury to determine the requirements of reasonable care is not limited to finding disputed facts. That authority extends even to cases where the facts are undisputed but where the evaluation of those facts is subject to reasonable disagreement.[17] Why assign this role to the jury? First and foremost because judgments of reasonable care are fact-dependent in a way which makes them highly contextual, highly particular and not at all legal. A large number of factors are relevant to the determination of negligent culpability— the burden of the precaution necessary to prevent the accident, the probability and gravity of the harm, the knowledge and capacity of the actor, the advertence or inadvertence of the relevant conduct[18] — and reasonable people may disagree over how much weight to assign to these factors in any given circumstance.

In apportioning culpable responsibility for an ordinary automobile accident, for example, people may reasonably disagree over the relative unreasonableness of: (1) speeding through a yellow light on the crest of a hill, and (2) 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, even though they agree that the combination of these actions caused the ensuing accident.[19] Were a court to rule on these relative culpabilities as a matter of law, its ruling would be so fact-specific that it would not be law-like. Such a ruling would not possess any generality at all as an authoritative specification of what due care demands. It would not apply beyond the case at hand and could not serve to guide future conduct. In making such a fact-specific ruling, judges would not be called upon to exercise any distinctively legal skills or training. There is an evaluative

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

[17]Gergen, *supra* note 9, at 434 and the sources cited therein. *Lorenzo* supra note 9, at 600 gives a representative statement of the rule: "Even when there is no conflict in 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."

[18]See e.g., *"Percentages of Fault," Commissioner's Comments* to the UNIFORM COMPARATIVE FAULT ACT § 2 cmt. (1979).

[19]See Li v. Yellow Cab, 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226 (1975).

judgment to be made, but that judgment is not a legal one and when it is made it does not issue in anything that can be called law. The task at hand is not a judicial one.[20]

Further reasons for giving the jury responsibility for evaluating the reasonableness of the defendant's conduct in circumstances where reasonable people might disagree about just what the norm of reasonable care requires radiate out from this core. The reasonable person standard is distinctive even within the class of legal standards. The application of all legal standards requires the exercise of evaluative judgment, but not all legal standards call for the application of a common moral conception, or apply to everyone's conduct.[21] Familiar standards of commercial law, for example, direct our attention to the practices of particular communities of commerce, and apply only to people engaged in commerce.[22] The reasonable person standard is rooted in and appeals to ordinary ways of thinking and acting, and claims a kind of universality: Negligence law's requirement of reasonable risk imposition imposes an obligation on each and every member of the community to conduct himself or herself in accordance with a collectively articulated standard of reasonable conduct.

These characteristics bind the reasonable person standard to jury adjudication. When reasonable people disagree about the reasonableness of a particular defendant's conduct, opposing judgments about the acceptability of that conduct are prima facie plausible. The defendant is entitled to have his or her conduct appraised by—and only by—a shared

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[20]Professor Gergen takes a similar view of the proper division of labor between judge and jury under duty doctrine.. See Gergen supra note 9, at 431-33.

[21]The idea of "reasonableness" unlike the idea of "rationality" embodied by the economic conception of negligence is an irreducibly moral notion. We act rationally when we pursue our interests in an instrumentally intelligent way. We act reasonably when we take the well-being of other people who might be affected by our actions as a reason capable of affecting our conduct and seek to act in ways which could be justified to those whose actions our conduct affects. See Gregory C, Keating, *Reasonableness and Rationality in Negligence Theory* , 48 STAN., L. REV. 311, 311, 323-327 (1996); JOHN RAWLS, POLITICAL LIBERALISM 48-54 (1996) (distinguishing between reasonableness and rationality); W.M. Sibley, *The Rational and the Reasonable*, 62 PHIL. REV. 55, 5544 (1953) (discussing the distinction and the affinity between reasonableness and Kant's categorical imperative).

[22]The UCC, shaped as it is by the vision of Karl Llewellyn, is the preeminent example of the use of standards and their linkage to actual commercial practice in commercial law. Consistent with these twin aspirations 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 esp. at 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 9, at 440-61

sense of reasonableness yet we are divided over the reasonableness of the defendant's conduct, and justifiably so. We must work our way from reasonable disagreement to reasonable agreement. Jury adjudication is a device for dealing with this predicament Prominent features of jury adjudication suit it to fashioning reasonable agreement out of reasonable disagreement: Jury adjudication is collective, deliberative and democratic, it proceeds on a fully developed factual record, and it reaches judgment after the airing of competing viewpoints on the reasonableness of the defendant's conduct. Jury adjudication is thus designed to reshape the diverse moral viewpoints and biases that lead to reasonable disagreement so that they yield reasonable agreement.[23]

Jury adjudication can thus claim a process legitimacy, a democratic legitimacy and an epistemological legitimacy[24] unavailable to judges. Jurors are meant to be representative members of the community in a way that members of a judicial elite never can be. Jury decisions can therefore claim to construct and embody the community's sense of reasonableness. And jurors are plural: They are therefore far more likely than individual judges to embody the range of reasonable disagreement over the conduct at issue in a negligence case. By contrast, in circumstances where reasonable people may legitimately disagree about the reasonableness of the defendant's conduct, judicial determination of the matter under the doctrine of duty expresses arbitrary fiat, not reasoned decision. Judicial determination of the matter under the doctrine of duty insulates harmful conduct whose reasonableness is in doubt from all appraisal and evaluation— and it does so through the exercise of elite power.

As the justifications for jury adjudication radiate outward in ever broader circles, the choice between elite and popular judgment looms large. Tort folklore and scholarship tell of important changes in substantive tort law— the rise of workers compensation, the shift from contributory to comparative negligence, and the emergence of strict products liability— prompted or presaged by popular values as expressed in jury adjudication.[25] Viewing the matter through English eyes, P.S. Atiyah describes the distinguishing characteristics of American tort law by saying that the

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[23]See Catherine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2393-2410 (1990).

[24]*Id.*

[25]*See* Gergen, *supra* note 9, at 426-27.

prominence of tort law in America and the prominence of juries within American tort law express distinctively American distrusts: Of the state, of centralized authority and of rule by elites.[26] Fair enough. But the view from withing the practice adds an important point to Atiyah's: There is principle as well as populism in the division of labor between judge and jury under the doctrines of duty and breach. Duty doctrine, properly deployed, assigns to the judicial elite the decidedly legal task of articulating the law —of stating general norms for the guidance of conduct.[27] Breach doctrine, properly deployed, assigns to lay juries the task of evaluating conduct when the evaluation of that conduct will not lead to the making of general law.

From within the practice, of course, we risk missing the forest for the trees. So it bears underscoring that the aggressive use of "duty" doctrine to snatch cases from juries does more than upend the roles of judge and jury. The practice also imposes systemic and expressive costs: A universally applied standard of reasonable care expresses the powerful proposition that every citizen is entitled to have their interest in physical safety and bodily integrity given equal consideration under the law and by their fellow citizens. A universally applied standard of reasonable care thus embodies a democratic ethic of equal respect for the physical integrity of every citizen. Judicial respect for the universality of that standard embodies an attractively democratic ideal of decision according to law. Abusing "duty" disrespects the lives and safety of equal democratic citizens even as it embodies a disturbing kind of judicial lawlessness.

A. Duty and the Division of Labor in the Private Law

Contemporary California aside, "duty" is a nonissue in most cases of accidental physical injury because the legal regime applicable to such cases is well-settled. Most— though not all— cases of accidental injury are governed by law, and most cases of accidental physical injury are

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[26]*See* P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L. J. 1002, 1017-18, 1043-44, cited in Gergen, *supra* note 9, at 437.

[27]"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, esp. at 46 (rev. ed. 1969). *Compare* JOHN RAWLS, A THEORY OF JUSTICE, § 38 ("The Rule of Law") (rev. ed. 1999); *id.* at 206 ("[F]ormal justice, the regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."); H. L .A. HART, THE CONCEPT OF LAW,156-57, 202 (1961) (noting that because law is an attempt to control conduct by general rules, "formal justice"— the principle that "like cases must be treated alike"— is integral to law).

governed by tort law. Where accidental physical injury is concerned, duty delineates the respective domains of tort, contract and the legally unregulated realm of loss without legal redress. 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.[28] The absence of a duty means that either 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 for starters that the product failure only damages the turbine itself, thereby inflicting a loss on the owner and purchaser of the turbine. In this circumstance, the purchaser's claim against the seller of the turbine will probably be governed by contract law. The injury involved— physical damage to the product itself— will most likely be treated as a form of "pure economic loss," and pure economic loss falls squarely within the domain of contract law.[29] 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 law 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

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[28]*See* Martin Stone, *The Significance of Doing and Suffering*, in GERALD J. POSTEMA, ED., PHILOSOPHY AND THE LAW OF TORTS, 131 (2001).

[29]We adapt this example from *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871 (1986). In *East River Steamship*, the U.S. Supreme Court rejected products liability and negligence claims 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 (citations omitted)

consider a third possibility: that 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 probably go unredressed. Pure emotional harm usually falls into a legally unregulated domain of "no duty." Tort law does not generally extend its protections against accidental injury so far, and no other body of law generally protects the purchaser's emotional tranquility in the way that contract law generally protects her economic expectancies.

At the turn of the twenty-first century, "duty" is a non-issue in most cases of accidental physical injury because it is well settled that accidental physical harm is presumptively the province of tort. To be sure, this was not always the case. Nineteenth century tort law contained far more capacious domains of "no duty," and assigned much of the domain now held by tort to property and contract.[30] 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 (i.e., the existence and extent of plaintiff's right to be on the property) priority over tort ones.[31] 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.[32] Contemporary tort law, however, is the heir to two revolutions. It is the

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[30]*See, e.g.*, Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GEORGIA 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"); WHITE, TORT LAW IN AMERICA, *supra* note 8, at 184 (arguing that 19th Century limitations on negligence recovery were intended to keep a leash on juries); Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968) ("The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.").

[31]See, e.g., ROBERT E. KEETON, et al., eds., TORT AND ACCIDENT LAW at 254, 254-58, 271-79 (3d ed. 1998) (hereinafter KEETON, TORT AND ACCIDENT LAW); Rabin, *supra* note 12, at 933-36; ABRAHAM, *supra* note 5, at 227-30 (describing the "limited duties" of owners and occupiers of land); WHITE, TORT LAW IN AMERICA, *supra* note 8, at 190 (1985) ("[T]he liability of landowners... has been persistently dominated by... 'status' conceptions of tort liability that had preceded the rise of modern negligence."); PROSSER & KEETON, *supra* note 2, at 432 (describing "the 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").

[32]*See e.g.*, KEETON, TORT AND ACCIDENT LAW, *supra* note 13, at 254, 254-59; *id., Teacher's Manual* at 8-1, 8-2, 8-3, 8-4; ABRAHAM, *supra* note 5, at 186-89 (describing the "Era of Contract Privity" in product liability law); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099 (1960).

heir to *MacPherson v. Buick Motor Co*.[33] which overthrew privity of contract in the critical domain of product accidents, and to *Rowland v. Christian*,[34] which 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. 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.[35] At the outset of the twenty-first century, "no-duty" doctrine 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 tort far larger. So "duty" performs its old function, but in a more modest way.

In product liability law, for example, the recently developed "no

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[33]111 N.E. 1050 (N.Y. 1916) (Cardozo, J.)

[34]443 P. 2d 561 (Cal. 1968).

[35]The materials in KEETON, TORT AND ACCIDENT LAW, *supra* note 13, at 254-59, 271-279, & 662-69, illustrate or discuss the structure of accident law in the late nineteenth century. Rabin, *supra* note 12, at 944-54, 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 over 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. 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. *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 at 208-210 (1977) (describing how the doctrine of assumption of the risk excluded tort 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, TORT LAW IN AMERICA, *supra* note 8, at 50.

duty" doctrine that there is no tort claim for damage caused to a defective product itself[36] helps to locate the boundaries between tort and contract, and self-consciously so. Tort is assigned responsibility for "physical harm"— with physical harm covering harm to persons and to property other than the defective product itself— and contract is assigned responsibility for purely economic losses. The doctrinal edge on the ruling that there is no liability in tort for damage to the property itself is the conclusion that physical harm— property damage— of this particular kind counts as pure economic loss.[37] The normative and conceptual edge on the ruling is the conclusion that damage to the product itself 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,[38] in the wake of cases like *Rowland v. Christian*[39]— the seminal California case establishing one standard of care for landowner liability cases— 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.[40]

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[36]*See East River Steamship*, 476 U.S. at 871.

[37]Thus, in *East River Steamship*, damage to the property—to the ship's turbine—was treated as an instance of pure economic loss. 476 U.S. at 870; *accord* Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899, 902 (Fla. 1987); *cf.* Seely v. White Motor Co., 403 P.2d 145, 149 (Cal. 1965) (applying economic loss rule to bar strict liability claim for damage to product itself). Not every jurisdiction subscribes to the *East River Steamship* "damage to the product itself" rule. *See, e.g.,* Pratt & Whitney Canada, Inc. v. Sheehan, 852 P.2d 1173, 1180 (Alaska 1993) (reaffirming rule that damages may be awardable for damage to the product itself if 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 (Cal. 2004) (holding economic loss rule does not bar claim for product damage resulting from fraud rather than negligence).

[38]PROSSER & KEETON, *supra* note 2, at 432-33; DOBBS, *supra* note 1, at 615, 615-16; Prosser, *supra* note 14, at 1099; ABRAHAM, *supra* note 5, at 186 & 228 (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).

[39]443 P. 2d 561 (Cal. 1968).

[40]*See, e.g.,* 740 Ill. Comp. Stat. 130/2 (West 1995); Mallet v. Pickens, 522 S.E.2d 436, 446 (W.Va. 1999); Sheets v. Ritt, Ritt & Ritt, Inc., 581 N.W.2d 602, 605 (Iowa 1998); Nelson v. Freeland, 507 S.E.2d 882, 892 (N.C. 1998); Heins v. Webster County, 552 N.W.2d 51, 57 (Neb. 1996); Jones v. Hansen, 867 P.2d 303, 310 (Kan. 1994); Clarke v. Beckwith, 858 P.2d 293, 296 (Wyo. 1993); Poulin v.

To be sure, this particular reconfiguration of the terrain of private law has not been neat. The proper treatment of trespassers has perplexed modern courts. Paradoxically, the extension of the tort duty of reasonable care into the sphere of real property has prompted a proliferation of distinctions among kinds of trespassers. Some courts have been receptive to the extension of a duty of reasonable care to innocent trespassers[41] 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.[42] Courts and legislatures have, in sum, rejected the simple property idea that all violations of a "landowner's"[43] right to exclude relieve that the landowner of any duty of care,[44] but have retained a part of the old rule by agreeing that some violations have that effect. 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.[45]

Colby College, 402 A.2d 846,849 (Me. 1979); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977); Cates v. Beauregard Elec. Coop., 328 So.2d 367, 371 (La. 1976); Basso v. Miller, 352 N.E.2d 868,871 (N.Y. 1976); Mounsey v. Ellard, 297 N.E.2d 43, 47 (Mass. 1973). The trend towards 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. Gallegos v. Phipps, 779 P.2d 856,863 (Colo. 1989).

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

[42]*See, e.g.,* Basso v. Miller, 352 N.E.2d 868, 877 (N.Y., 1976) (Breitel, 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."); Cal. Civ. Code § 847 (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).

[43]"Landowner" here is shorthand for a longer, more cumbersome but more accurate, expression such as "party in possession of the property" or "party with the legal authority to permit or forbid entry onto the property". For our purposes, "landowner" will do, so long as we understand its approximate character.

[44]*See, e.g.,* Young v. Garwackie, 402 N.E.2d 1045, 1047 (Mass. 1980) (describing traditional categories of landowner duty as based on landowner's role as "sovereign" over his or her land, with different duties flowing based on the plaintiff's particular relationship with the "sovereign").

[45]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, Cal. Civ. Code § 3517; *Riggs v. Palmer*, 22 N.E. 188, 190 (1889), and by the general unreasonableness of requiring people to exercise care for the benefit of those who are attempting to intentionally injure them. But even if we concede more than we perhaps should, and

The upshot of these developments is that a duty of reasonable care may generally be presumed.[46] As the boundaries of tort have expanded the importance of duty doctrine has diminished, simply 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. Except, perhaps, in contemporary California. Thirty years ago, California was at the forefront of the movement to sweep aside duty limitations rooted in property and contract. California was the first state to adopt the strict products liability of Section 402A of the *Second Restatement*,[47] and the first state to replace the categories of invitee, licensee and trespasser with a single standard of reasonable care.[48] *Dillon v. Legg*, a 1968 California Supreme Court case expanding liability for negligent infliction of emotional distress, openly castigated "duty" limitations as "a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards."[49] In contemporary California, however, "duty" may be on its way to being reborn as a live issue in each and every case. Although California statutory law has it that "[e]very one is responsible... for an injury occasioned to another by his [or her] want of ordinary care,"[50] California courts— especially some intermediate appellate courts— have been steadily expanding "no duty" doctrines— particularly under the guise of assumption of risk. Their expansion may be starting to shrink the terrain of tort and expand the domains of property and contract. This paper is an exploration— and, in the end, a criticism— of these efforts.

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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.

[46]"[L]andmark decisions such as *Heaven v. Pender*[, 11 Q.B.D. 503, 1883 WL 19069 (1883)], *MacPherson v. Buick*[*Motor Co.*, 111 N.E. 1050 (N.Y. 1916)], and *Donoghue v. Stevenson*[, 1932 A.C. 562], have helped establish a general rule governing the application of the duty element specifying that each of us ordinarily owes a duty of care to others to about our business in a manner that does not impose unreasonable risks of physical injury on others." Goldberg & Zipursky, *Place of Duty*, *supra* note 5, at 700 (footnotes omitted).

[47]Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1963).

[48]"Beginning with the 1968 California Supreme Court decision in *Rowland v. Christian* [443 P.2d 561, 568 (Cal. 1968)] 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, 872-73 (1976)

[49]441 P.2d 912, 916 (Cal. 1968).

[50]Cal. Civ. Code § 1714(a).

But before we explore these current developments in California law, we must plunge more deeply into the thicket of duty doctrine. The word "duty" is, arguably, used in a bewildering variety of ways by contemporary courts. We shall, therefore provisionally distinguish six ways in which courts use the doctrine. We shall then argue that there is far less going on here than these six categories suggest. Within the boundaries fixed by the reconfiguration of the tort-contract and tort-property boundaries, "duty" rulings perform two fundamental tasks, both of which are continuous with the basic role of the doctrine in fixing standards of conduct. One task performed by duty rulings is to relieve defendants of the general duty of care in certain categories of cases where special considerations call for such an exemption. The other task is essentially the opposite: Courts also issue rulings of duty to specify especially exacting duties of care applicable in other categories of cases where special considerations call for stringent precaution . The first use of duty yields particular domains where people whose conduct puts others at risk are relieved of their usual responsibility to conduct themselves carefully; the second use yields particular domains of heightened responsibility. Other uses of duty should be seen either as instances of these functions, or as discharging performed more clearly and coherently by other doctrines. Some rulings expressed in the language of "no duty," for example, would be better expressed in the language of "no breach as a matter of law." Or so we shall argue.

B. Six Uses of "Duty"

A perusal of case law and commentary suggests that we might, provisionally, distinguish six kinds of cases where it seems that "duty" is being used to settle something other than the existence of obligation in tort. First, there are cases where it is plain that some tort duty of care is owed, but where courts choose to define the stringency of the duty with more particularity than usual. Second, there are cases where courts rule that a defendant had "no duty" to take any precautions against the harm that befell the plaintiff because the harm was not "reasonably foreseeable" as a matter of law. Third, courts frequently use the language of duty to define and coordinate the spheres of responsibility different parties have for taking precautions against a single class of harms. Fourth, courts sometimes use the language of "no duty" to express the significantly different conclusion that no reasonable juror could conclude that a defendant did not, as a matter of law, breach its duty of care.

Fifth, contemporary courts sometimes use the language of "no duty" to take cases away from juries when they are convinced that— on the

particular facts of the case— no responsibility at all for the plaintiff's injury should be placed on the (or a) defendant, even though modern principles of comparative negligence appear to call for placing some responsibility on the defendant in question.[51] Sixth, in "affirmative duty" cases where the defendant is not responsible for creating the risk that imperiled the plaintiff, but might prevent or mitigate the harm that will otherwise occur, courts deploy the language of duty to settle the scope of obligation as well as its existence.

1. Fixing the Stringency of the Standard

Bayer v. Crested Butte Mountain Resort,[52] a recent Colorado ruling, illustrates the first of these six uses of "duty." *Bayer* holds that ski lift operators must exercise the "highest degree of care commensurate with the practical operation of the ski lift."[53] The Colorado Supreme Court imposed this specially stringent duty of care because of "the degree of control [ski lift operators] exercise over passengers, the relative powerlessness of a passenger to secure his or her own safety... and the consequent state of dependence and trust which a passenger must place in the lift operators."[54] *Foster v. City of Keyser*[55] similarly holds 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

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[51]In his classic article, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven Jr.* 43 U. CHI. L. REV. 69 (1973), then Professor, now Judge, Guido Calabresi argued that courts often used proximate cause doctrine to pin liability on the cheapest cost-avoider (i.e., the party who could take the lowest cost (and therefore most economically efficient) precaution that would prevent the accident in circumstances where straightforward application of less flexible tort doctrines would not have enabled them to do so. 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 that this use of duty would be better conceptualized in proximate cause terms. See discussion *infra* Part I.C.3.) "Proximate cause" analogs to this category of "no duty" cases are not hard to find. *See, e.g.,* Egan v. A. J. Construction Corp. 1999 N.Y. Slip. Op. 10694 (holding that "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 defendant's alleged negligence... plaintiff's jump superseded defendant's conduct and terminated defendant's liability for his injuries.") *Egan* is a proximate cause decision because it treats plaintiff's actions as a superseding cause which extinguished defendant's breach of its duty of care.

[52]960 P.2d 70 (Colo. 1998) (en banc) (reaffirming Summit County Development v. Bagnoli, 441 P.2d 658, 664 (Colo. 1968)).

[53]*Id.*, at 72.

[54]*Id.* at 75.

[55]501 S.E.2d 165, 168 (W.Va. 1997).

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. Courts have imposed comparably stringent duties of care on suppliers of electric current.[56]

2. Ruling that Risks are not "Reasonably Foreseeable"

Washington v. City of Chicago[57] exemplifies this use of "no duty" language. In *Washington*, the Illinois Supreme Court held that installing raised planters in street medians did not create a "reasonably foreseeable" risk that a fire truck, attempting to bypass heavy traffic, would drive onto a raised median at 35 mph, hit a raised planter, and careen out of control. *Van Skike v. Zussman*[58] is another case in point. In *Van Skike* an intermediate Illinois appellate court held that peddling miniature toy lighters in 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.[59] Because harm was not "reasonably foreseeable" in either of these cases, neither defendant was under a "duty" even to contemplate the risks of their actions and the precautions which might reduce them. When no reasonable person might be expected to guard against the injury that befell the plaintiff, no

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[56]*See* Miller v. Monongahela Power, 403 S.E.2d 406, 411 (1991); Brillhart v. Edison Light & Power Co., 82 A.2d 44, 47 (1951).

The premise of these cases is challenged in *Bethel v. New York City Transit Auth.*, 703 N.E.2d 1214, 1215 (N.Y. 1998), a recent decision of the New York Court of Appeals. *Bethel* overrules the traditional rule that common carriers owe their passengers duties of extraordinary care and replaces that special standard with the single standard of reasonable care in the circumstances. The *Bethel* court supposes that differences of fact and only differences of fact account for differences in the amount of care actually owed in particular instances: "[T]here is no stratification of duties of degrees of care as a matter of law.... Rather, 'there are only different amounts of care, as a matter of fact." *Id.* at 1215 (citing PROSSER & KEETON, *supra* note 2, § 34 at 210, 211). This idea, of course, undermines the use of duty doctrine to specify particular standards of care for particular social roles. At present, however, special standards of care are hardly uncommon.

[57]720 N.E.2d 1030 (Ill. 1999). Goldberg & Zipursky, *Place of Duty*, *supra* note 5, at 714 discuss this as a "no breach-as-a-matter-of-law" case. We believe that the case is a true "no duty" case because cases where 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 by either by property or by contract. Goldberg & Zipursky, by contrast, see this as a case where defendant has discharged its duty of care *as a matter of law*.

[58]318 N.E.2d 244 (Ill. App. 1974).

[59]*Id.*, at 245.

reasonable jury can hold the defendant liable for failing to have done so.

3. Coordinating Responsibilities

The rules of and exceptions to learned intermediary doctrine are the preeminent instance of this phenomenon. All of these rules pertain to a single, shared responsibility, and to a single class of risks. Learned intermediary doctrine operates to define the obligations owed by manufacturers and doctors to patients with respect to prescription drugs; the concept of "duty" is used to divide the labor of warning about those risks between the pharmaceutical firms and doctors.[60] 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.[61] 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—to take effective precaution.[62] The same principles extend to sellers of raw materials and component parts to buyers who integrate them into final products— sellers of silicone to firms which manufacture breast implants out of them, for instance.[63] 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.

4. "No Breach" as a Matter of Law

Courts are often thought to say "no duty" when they really mean

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[60]*See Restatement Draft, supra* note 2, § 7, cmt. e ("Definition of Responsibilities").

[61]*See generally,* DOBBS, *supra* note 1, § 366 at 1012-13 ("Warning through Sophisticated Users and Other Intermediaries"). For the natural gas example, *see Jones v. Little Serv., Inc.*, 549 P.2d 383 (Kan. 1976).

[62]*See* Ditto v. Monsanto Co., 867 F. Supp. 585, 593 (N.D. Ohio 1993); Jacobs v. E.I. du Pont de Nemours & Co., 67 F.3d 1219 (6th Cir. 1995); Stoffel v. Thermogas Co., 998 F. Supp. 1021 (N.D. Iowa 1997).

[63]*Id.* See also In re Silicone Gel Breast Implants Products Liability Litigation, 887 F.Supp. 1455 (N.D. Ala. 1995).

"no breach"— when they mean not that the defendant never had a duty of care, but that the defendant discharged its duty of care, and no reasonable jury could think otherwise. *Atkins v. Glens Falls City School District*[64] is often cited as a case in point. The plaintiff in *Atkins* 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 24-foot backstop behind home plate, but only a three-foot high fence along the first and third base lines. Plaintiff sued, alleging that the school district was negligent in not providing better screening along the base lines. At trial, the jury returned a verdict in plaintiff's favor, apportioning 35% of the culpable responsibility for the injury to the plaintiff and 65% to the school district. A divided Appellate Division affirmed the verdict.

The New York Court of Appeal reversed, ruling 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 greatest."[65] The court described its ruling as a "definition of the duty owed by an owner of a baseball field to provide screening for its spectators."[66] The court's language thus uses the terminology of duty. The Tentative Draft of the *Restatement (Third)*, however, takes the position that the sense of the decision is best captured by saying that the court recognizes the existence of a duty of care but holds that, as a matter of law, that duty of care has not been breached.[67] According to the Draft Restatement, 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.

5. Plaintiffs who Bring their Injuries Upon Themselves

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[64]424 N.E.2d 531 (N.Y. 1981). The *Restatement Draft* uses this example. *Restatement Draft*, *supra* note 2, § 7, cmt. f. Goldberg & Zipursky, *Place of Duty*, *supra* note 5, at 712-17, discuss this case and this category of cases. Our analyses are very similar, except that we believe that *Washington v. City of Chicago*, 720 N.E.2d 1030 (Ill. 1999), one of the cases they classify as "no breach-as-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 39 and accompanying text.

[65]*Atkins*, 424 N.E.2d at 533.

[66]*Id.*

[67]*Restatement Draft*, *supra* note 2, § 7, cmt. a, § 8 cmt. c.

Th fifth class of cases where courts or commentators sometimes use the idea of "no duty" to take cases away from juries consists of cases where courts are convinced that— on the particular facts of the case— no responsibility at all for the plaintiff's injury should be placed on some defendant, even though modern principles of comparative negligence appear to call for placing some responsibility on the defendant. *Williams v. Bic*,[68] a recent Alabama decision illustrates this circumstance. The victim in *Williams* was a two-year-old girl, who had been severely burned when her three-year-old brother started a fire by playing with a cigarette lighter which he had found on his mother's dresser.[69] The lighter, manufactured by Bic, was not child resistant. 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 take basic precautions to safeguard her children from an obvious risk that is well known to the parents."[70] This instruction relieves Bic of any duty to guard against the accident at issue.

On casual inspection, the ruling in *Williams* sounds exactly like a category two case— a case where 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.[71] The point of real lighters, after all, is to start fires. And it is hardly surprising that some real lighters fall into the hands

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[68]771 So.2d 441 (Ala. 2000).

[69] 771 So.2d at 442-43.

[70] 771 So.2d 448-50. The Alabama Supreme Court's conclusion is consistent with that of other courts to have considered the issue. Thomas M. Peters & Hal O. Carroll, *Playing with Fire: Assessing Lighter Manufacturers' Duties Regarding Child Play Lighter Fires*, 9 LOYOLA CONSUMER L. RPTR. 339, 343 (1997) ("[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.") (footnote omitted).

[71]In *Van Skike v. Zussman*, 318 N.E.2d 244, 247 (Ill. App. 1974), a minor plaintiff won a toy lighter as a prize from a gumball machine operated by Zussman in another defendant (Rivera's) store, purchased lighter fluid from Rivera and "set himself on fire when he attempted to fill the toy lighter with the lighter fluid." The court concluded "that the complaint failed to state a cause of action against defendant Zussman" because it was not "reasonably foreseeable that a child who purchases a toy similitude will (1) perceive the object to be an actual fire producing mechanism, (2) and purchase a flammable liquid with which to operate the mechanism; and yet (3) will obtain some external source of fire which ignites the flammable liquid". *Id.*

of small children.[72] The risk of children setting themselves on fire with real lighters is foreseeable in the way that the risks of children setting themselves on fire with lighter fluid is. On closer inspection, moreover, the details of the jury instruction that the Alabama Supreme Court approved in *Williams* show the case's rationale to be distinguishable from the rationale of the *Van Skike* case. The *Williams* instruction focuses on the parent's failure "to take basic precautions to safeguard her children from an obvious risk that is well known to the parents."[73] The court's objection to holding the lighter manufacturer responsible stems from its reluctance to let the parents recover for a harm their child for which they are more culpably responsible than the lighter manufacturer.[74]

6. Affirmative Duties and Special Relationships

Affirmative duty cases are ones where the risk which 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 bears a morally (and perhaps legally) important relation to the risk only because the defendant is in a position to prevent the risk from issuing in harm to the victim ex ante, or to mitigate the harm to the victim ex post. 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. *Tarasoff v. Regents of the University of California*[75] illustrates the circumstance where a defendant might have prevented the

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[72]It has been estimated that "children under age 5 cause 5,800 residential fires, 170 deaths, and 1,190 injuries each year by playing with lighters". Peters & Carroll, *supra* note 52, at 339. In response, the Consumer Products Safety Commission has promulgated safety standards for the childproofing of cigarette lighters, 16 C.F.R. § 1210.1- 1210.3.

[73]*Williams*, 771 So.2d at 448-50.

[74]*Cf.* Ornelas v. Randolph, 847 P.2d 560 (Cal. 1993) (holding private landowners were immunized from liability for injuries sustained by "recreational users of their property," in a case where a small child was injured while he and other children were playing around abandoned farm equipment on defendant's property).

[75]551 P.2d 334 (Cal. 1976) (holding that a therapist had a duty to warn plaintiffs, parents of a young woman killed by a patient of the therapist, of the fact that patient had expressed a credible intention to kill her).

harm entirely; *Union Pacific Railway v. Cappier*[76] illustrates the circumstance where a defendant might have mitigated the harm.

Because there is no general tort duty to rescue, the imposition of a duty of care is an issue in these cases in a way that it is not in cases where defendants are responsible for creating the risks that imperil plaintiffs.[77] Cases involving affirmative duties to act start from a default rule [78] of "no duty," and seek to identify those "special relationships" which impose some obligation to act— some obligation to rescue a potential victim from a peril which the potential rescuer is not legally responsible for creating, or to protect someone from coming to harm at the hands of a third party.[79] Cases of "negative duty," by contrast, start from a default rule is that a duty of reasonable care is owed. A second feature of affirmative duty cases accentuates the importance of duty analysis in this domain. Courts are prone to settle the scope as well as the existence of duty. *Dudley v. Offender Aid of Richmond*,[80] for example, announces that "[i]n every case it is for the court to determine, as a question of law... whether the plaintiff falls within the class of those to whom the defendant owes a duty."[81]

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[76]72 P. 281, 282 (Kan. 1903) (holding 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.)

[77]Affirmative duties thus appear categorically different from negative ones. Negative duties not to injure others carelessly seem to be matters of right and justice, whereas affirmative duties to rescue others seem to be matters of generosity or beneficence. *See e.g.*, JOHN STUART MILL, UTITILITARIANISM, 49 (George Sher ed., 1979 [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....") 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 paper.

[78]For the proposition that there is always a "default rule" see Duncan Kenney & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

[79]*Tarasoff*, 551 P.2d 334 (Cal. 1976) (holding that a therapist had a duty to warn plaintiffs, parents of a young woman killed by a patient of the therapist, of the fact that the patient had expressed a credible intention to kill her).

[80]401 S.E.2d 878 (Va. 1991). On affirmative duties generally, see the materials in KEETON, TORT AND ACCIDENT LAW, *supra* note 15, at 254-71.

[81]Goldberg & Zipursky, *Place of Duty*, *supra* note 5, at 720, identify another category of "duty" cases which they call "immunity" cases. In these cases, courts use "no duty" rulings to insulate state agencies (e.g., the police) from liability for failure to protect particular individuals from injury. They 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* refuses to allow a women who alleged (on strong facts) that the New York City Police failed to protect her against

C. Primary and Ancillary Roles of "Duty" Doctrine

Cases falling into each of these six categories are easy enough to find. Distinguishing among these six kinds of cases, moreover, initially serves the interests of analytical clarity and comprehensiveness. Upon close examination, however, the six category typology turns out to be too complex. Close examination of each of the first three uses of the doctrine reveals that they each involve variations on the legal norm articulating function that is the primary role of duty doctrine, albeit on a scale less grand than that of *MacPherson* and *Rowland*. The fourth use of "duty" doctrine is, arguably, different: sometimes courts really may be saying "no duty as a matter of law" when they mean "no breach as a matter of law." But caution is in order. The line between duty and breach can be unclear, a point that Atkins itself illustrates. So some cases in the fourth category may be properly viewed as instances of courts articulating the boundaries of tort liability— the point where obligation ends and "no obligation" begins, or, to put it another way, the boundary of jury discretion. Fixing the bounds of tort in this way is precisely the task of traditional duty doctrine. Cases in the fifth category should be classified as "proximate cause" ones. Extent of liability, rather than the existence of an obligation, is at stake in these cases. Affirmative duties— the sixth category— are special in ways which make duty a perennially live issue. Unlike obligations to refrain from harming others, obligations to benefit others threaten to swamp individual liberty unless they are identified and circumscribed with special care.

1. The First Three Uses: Fixing Legal Standards

Special Standards

The first class of cases covers circumstances where courts impose particular duties of care, attached to special statuses or factors— control of a ski lift, expertise in operating one— or retreat to more general ones, as the New York Court of Appeals does when it eliminates the specially stringent duty of care imposed on common carriers.[82] Compared with cases like *MacPherson* and *Rowland,* cases in this first category are

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a stalker, who subsequently blinded her with lye. The court holds 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 it, even provisionally, as a seventh kind of "duty" case.

[82] *See supra* note 38.

comparatively modest exercises in articulating the legal standard applicable to the defendant's conduct. But this is a difference in degree, not a difference in kind. The essential exercise is the same in both cases.

Reasonable Foreseeability

The second category of cases—cases which find "no duty" of reasonable care at all on the ground that the risk at issue is not "reasonably foreseeable"— are, on close inspection, likewise cases which articulate the legal standard applicable to a defendant's conduct. Except here, instead of being subject to heightened responsibility, defendants are relieved of their ordinary responsibilities. When courts use the concept of "no duty" to bar plaintiff's claim on the ground that the risk in question is so remote that reasonable people would disregard it entirely, they are articulating the standard of care that defendants owe those their acts turn out to endanger by holding that no obligation in tort exists to guard against the harm that befell the plaintiff. Some risks are too remote to support any duty of reasonable care. Unless some other body of law applies— and it usually does not— no legal standard controls the imposition of risks so remote they are not "reasonably foreseeable." Just as there is no general duty to take reasonable precautions against pure emotional harm, so too, there is no duty to take reasonable precaution against risks which are not "reasonably foreseeable." In both cases, the realm disclaimed by tort is not claimed by another doctrinal domain. The conduct is left unregulated and the interest in jeopardy is left unprotected.

These kinds of "no duty" decisions are distinguished by two features. First, "no duty" of care exists because one of the central preconditions of duty— arguably, in fact, the central precondition of duty— is missing. That precondition is "foreseeability of harm." Most cases of "no duty" turn not on the unforeseeability of harm but on special reasons of policy or principle which justify not requiring due care even though harm is foreseeable. Second, cases in this class bear a close resemblance to an important class of "proximate cause" cases. Some proximate cause cases also decline to impose liability because they find the risks of injury at issue too remote. The two classes of cases— "duty" ones and "proximate cause" ones— are, however, different. Proximate cause cases require the existence of duty, breach and cause in fact. Unless these elements of the prima facie case are established, the issue of proximate cause cannot arise. When courts rule that, as a matter of proximate cause, some risk is too remote to sustain liability, they are ruling that the defendant's liability does not extend far enough to cover a particular defendant's injury. They are accepting the existence of (1) a duty of care,

(2) plaintiffs who are protected by that duty, (3) breach of that duty, and (4) injury actually caused by that breach. The *Palsgraf* opinion, for example, assumes arguendo that a reasonable jury might find that the employees of the Long Island Railroad who shoved the passenger whose package exploded, causing the scale to topple and injure the plaintiff, breached their duty of care to the passenger they shoved.[83] What the majority opinion in Palsgraf denies is that the breach of that duty of care is sufficient to sustain a recovery by Mrs. Palsgraf, even though she sustained injury as a result of the breach.

Thus, even though "reasonable foreseeability" and the remoteness of the injury inflicted are central to both classes of cases, proximate cause cases like *Palsgraf* are different from duty cases like *Washington v. City of Chicago*.[84] "Proximate cause" cases like *Palsgraf* conclude that the defendant's duty of care does not extend to protecting this plaintiff against

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[83]Cardozo's famous opinion obscures this point, because it casts doubt on the existence of any breach of duty. ("[T]he conduct of the defendant's guards, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff.... If there was a wrong to [the holder of the package] at all, which may very well be doubted...." Palsgraf v. Long Island Railroad, 162 N.E. 99, 99-100 (N.Y. 1928).) The opinion in the Appellate Division gives a more charitable characterization of the jury verdict against the railroad as far as breach of duty is concerned:

> The facts may have warranted the jury in finding the defendant's agents were negligent in assisting a passenger in boarding a moving train in view of the fact that a door of the train should have been closed before the train started, which would have prevented the passenger making the attempt. Instead of aiding or assisting the passenger engaged in such an act, they might better have discouraged and warned him not to board the moving train. It is quite probable that... without the assistance of these employees the passenger might have desisted in his efforts to board the train.... It must be remembered that the plaintiff was... entitled to have the defendant exercise the highest degree of care required of common carriers.

Palsgraf v. Long Island Railroad Co., 225 N.Y.S. 412 (App. Div. 1927), *rev'd*, 162 N.E. 99 (N.Y. 1928).

John Goldberg and Ben Zipursky argue that *Palsgraf*, as Cardozo conceived it, was a duty case. *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 5 at 685-712. We believe that the case is "proximate cause"one because it has to do with *extent of liability* not with the *choice of the legal standard* applicable to the conduct of the defendant's agents. The question before the court is whether the Long Island Railroad's vicarious liability for its servant's carelessness extends to cover the injury to Mrs. Palsgraf. It is settled that those servants breached a duty of care imposed by the law of torts.

The dependency of *Palsgraf* on a proximate cause rationale can be seen by changing the facts a bit. If the explosives were powerful enough to have injured Mrs. Palsgraf, across the platform, directly by the force of the blast, there is no doubt that Mrs. Palsgraf would have recovered for negligence. Thus, a duty was owed, it was breached, and the breach resulted in Mrs. Palsgraf's injury. Cardozo's decision sounds in proximate cause because the intervening causal chain (i.e., blast displaces scales at end of platform which collide with Mrs. Palsgraf) is too remote to permit a finding of liability.

[84]720 N.E.2d 1030 (Ill. 1999).

the harm he or she suffered; "duty" cases like *Washington v. City of Chicago* conclude that no duty of care exists as to any potential plaintiff. When they rely on remoteness of risk, "duty" cases claim that the risk involved is so remote that no duty is owed to any plaintiff, not just the plaintiff before the court. *Washington v. City of Chicago*, for example, concludes that the risks of accidents caused by installing raised planters in road medians are so remote that the City may disregard them entirely. There is no one— no driver, pedestrian or cyclist— for whom that risk is great enough to justify imposing a duty of reasonable care on the *City*. *Van Skike* draws the same kind of conclusion— that the risk of toy lighters inspiring fires is so remote that the operators of gumball machines may disregard it entirely.[85]

Presuming Duty

"Reasonable foreseeability" cases like *Van Skike* and *Washington v. City of Chicago* are important not only because they are examples of duty doctrine performing its traditional role of articulating legal standards, but also because they confirm the thesis that a duty of care generally exists. "Reasonable foreseeability" of physical injury is and has long been especially prominent in duty cases. Indeed, it is fair to say that "reasonable foreseeability" of physical injury is and has long has long been the most important criterion for the imposition of a duty of care. *Blyth v.*

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[85]This is the nerve of our disagreement with John Goldberg and Ben Zipursky's argument that duty is and ought to be "relational." *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 5 at 685-712. (We also wish to emphasize that we *agree* with one of Goldberg & Zipursky's principal theses—that duty can and should be a matter of genuine moral obligation.) So far as risks of physical injury are concerned, we believe that duty is, in general, "relational" only in the minimal sense that putting others at reasonably foreseeable risk of injury is a relationship of sorts. Our disagreement is both descriptive and prescriptive. Descriptively, we believe that the two most fundamental developments in the duty doctrine over the course of the twentieth century— the "fall of the citadel" of privity of contract and the decline in the importance of property relationships in determining the duties owed entrants onto land— have both made duty less relational. At the turn of the twenty-first century, duty is less relational than it was at the turn of the twentieth century.

Prescriptively, we applaud this development. Bodily integrity is an urgent and universal human interest whose protection should, in general, take priority over the competing claims of contract and property, which are generally both less urgent and more particular. The existence of a negative duty not to endanger others' lives and limbs ought to turn primarily on whether or not a prospective injurer is imposing a "reasonably foreseeable" risk of physical injury on an identifiable class of persons, not on whether those endangered have preexisting contractual relationships, or beneficial property relationships, with those doing the endangering. We therefore believe that, when a reasonably foreseeable risk of injury is imposed, a duty of care should presumptively exist to protect all of those who are put at reasonably foreseeable risk of physical injury. No further relationship between potential injurers and potential victims is, *in general*, desirable. Imposing a strong relational test for duty will, moreover, simply impinge on the function of the jury by permitting trial and appellate judges to impose their own conceptions of reasonableness in the guise of determining (relational) duty.

Birmingham Waterworks,[86] an early English negligence case involving damage to a waterworks occasioned by an unusually severe frost, for example, makes reasonable foreseeability in the form of "the average circumstances of the temperature in ordinary years" the touchstone of duty. In this it is hardly atypical: The duty of care is more limited in the nineteenth century primarily because the principle that reasonable foreseeability of harm establishes duty was hemmed in by doctrines like privity of contract and the categories applicable to owners and occupiers of land.[87]

Many contemporary American jurisdictions assert that reasonable foreseeability of physical injury is the key to the obligation to exercise reasonable care. Illinois, as *Van Skike* and *Washington v. City of Chicago* show, is one such jurisdiction. Wisconsin is another:

> [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...."[88]

Not all American jurisdictions place this much weight on foreseeability.

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[86]156 Eng. Rep. 1047, 1049 (1856).

[87]To be sure, there are other differences as well. For one thing, the conception of foreseeability espoused in *Blyth*— call it "average foreseeability"— is more restrictive than the more probabilistic ideas expressed in modern doctrines such as the Hand Formula. But the differences do not undermine the point that "reasonable foreseeability" of physical injury has long been uniquely important to the recognition of a duty of care.

[88]Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 238 (Wis. 1998) (citation omitted). A number of other jurisdictions are in accord. Thompson v. Mindis Metals, 692 So.2d 805, 807-08 (Ala. 1997); Rudolph v. Arizona B.A.S.S. Federation, 898 P.2d 1000, 1003 (Ariz. App. 1995) Munson v. Otis, 396 A.2d 994, 996 (D.C. 1979); Delmarva Power & Light Co. v. Burrows, 435 A.2d 716, 718 (Del. 1981); Florida Specialty v. H2 Ology, 742 So.2d 523, 526 (Fla. App. 1999); Bradley Center, Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982); Bain v. Gillispie, 357 N.W.2d 47, 49 (Iowa App. 1984) Melchers v. Total Electric Construction, 723 N.E.2d 815 (Ill. App. 1999); Seigle v. Jasper, 867 S.W.2d 476, 483 (Ky. App. 1993); Glick v. Prince Italian Foods of Saugus, 514 N.E.2d 100, 101-02 (Mass. App. 1987); Colvin v. AR Cable Services-Me, 697 A.2d 1289, 1290 (Maine 1997); Baltimore Gas & Elec. Co. v. Flippo, 705 A.2d 1144, 1154 (Md. 1998); Horner v. Spalitto, 1 S.W.3d 519, 522 (Mo. App. 1999); Donald v. Amoco Production Co., 735 So.2d 161, 175 (Miss. 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); Mulvey v. Cuviello, 687 N.Y.S.2d 584, 588 (N.Y. Supr. 1999); D'Amico v. Delliquadri, 683 N.E.2d 814 (Ohio App. 1996); Smith v. Speligene, 990 P.2d 312, 315 (Okla. App. 1999); Roberts v. Fearey, 986 P.2d 690, 692 (Or. App. 1998); Hicks v. Metropolitan Edison Co., 665 A.2d 529, 533 (Penn. Cmwlth.), *appeal denied*, 675 A.2d 1253 (Penn. 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, 156 (Tenn. 1995); Trail v. White, 275 S.E.2d 617, 619 (Va. 1981).

Some, following California's approach in *Rowland v. Christian*, adopt a multifactor test. Even jurisdictions which espouse *Rowland's* multi-factor tests, however, treat "reasonable foreseeability" of harm as the most important of the factors:

> As we have observed, *Rowland* enumerates a number of considerations . . . that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate: the major [considerations] are 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.... The foreseeability of a particular kind of harm plays a very significant role in this calculus....[89]

Reasonable foreseeability of harm is a fairly minimal test for the existence of duty. Risks which are beyond reasonable foresight are rare. The prominence of reasonable foreseeability of harm as a test of duty in modern tort law is, thus, itself confirmation of duty's status as something whose existence can generally be presumed.

Coordination

The third category of cases— ones where courts coordinate the responsibilities of various parties jointly responsible for guarding against a single class of harms—is much like the first category. When a case falls into this category, courts are charged with articulating particular legal standards ("warn the doctor, but not the ultimate user," "warn the ultimate user") applicable to certain roles and undertakings. These doctrines allocate responsibilities among those involved in the imposition of a given class of risks. Learned intermediary doctrine, for example, allocates responsibility

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[89]Randi. v. Muroc Joint Unified School Dist., 929 P.2d 582, 588 (Cal. 1997) (internal quotations and citation omitted). Connecticut is explicit in enumerating foreseeability as the most important of the factors, Jaworski v. Kiernan, 696 A.2d 332, 336-38 (Conn. 1997). Some other jurisdictions list foreseeability as the first of a list of factors. 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. 1998).

for controlling the risks of prescription drugs among those involved in the enterprise of producing and distributing such drugs Ordinarily, the manufacturer's duty to warn extends to anyone who might foreseeably be injured by a product's dangers; learned intermediary doctrine holds that prescription drug manufacturers duties usually come to an end when they have warned the physicians who prescribe their drugs. These cases, therefore, can reasonably be viewed as simply a special instance of duty doctrine performing its core function. Reasons of "policy" call for articulating more precise standards of conduct.

2. "No Duty" as "No Breach"

On its face, the fourth use of the doctrine is different. Courts are exercising the power assigned to them by the fact that questions of duty are a matter of law to take cases from juries not on the ground that the defendant was not under a tort duty of care, but on the ground that no reasonable jury could conclude that the defendant has failed to discharge that duty. This power can be abused, but— misdescription as a "duty" determination aside— it is not necessarily objectionable. The fact that this use of duty exploits a power of law articulation to perform a function of policing the boundaries of the jury's law application is cause for concern, but not in itself sufficient cause for condemnation. When reasonable jurors could not find, on the facts before them, that a defendant breached its duty of care, there is reason not to send the case to them. Clarity would, of course, be served by making this ground of decision explicit. It would therefore be better, if possible, to separate this use of duty doctrine from the law articulation which is the primary function of the doctrine.[90]

The line between "no duty" and "no breach," however, is not always clear, a point that *Atkins* illustrates nicely, and which augments the case for the fourth use of the doctrine. The case for not imposing liability in *Atkins* rests on general, normative grounds. As Robert Rabin has observed, the case for not screening baseball fields as extensively as one might rests on the intangible cost of so doing, on the loss of the "intangible

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[90]In this we are in agreement with the tentative draft of the Third Restatement:

> *Duty and negligence.* In cases in which reasonable minds cannot differ,... courts take negligence claims away from the jury and determine that the party was, or was not, negligent as a matter of law. Having done so, the court may express its result in terms of whether there is a duty to behave in a certain way. These expressions inaccurately convey the idea of a duty issue that is separate from and antecedent to the negligence issue. In fact, these are merely cases in which the one-sidedness of the evidence permits the court itself to specify the content of the negligence standard.

Restatement Draft, supra note 2, § 7 cmt. f.

social good" realized when spectators are not cut off from the game by an all encompassing web of wire fencing.[91] The case for limiting the city's duty of care thus has a "primary assumption of risk" flavor. In sports, for both participants and spectators (though less so for spectators) there is a realm of "no duty" carved out to prevent the demands of ordinary care from trampling the goods which give sports their point.[92] Requiring football players, on pain of liability, to exercise reasonable care to avoid harmful physical contact with each other would cripple the play of the game.

Atkins has aspects of a "duty" decision by virtue of its connections to the "no duty" doctrine of primary assumption of the risk.[93] The *Atkins* court is engaged in the kind of categorical enterprise characteristic of "duty" cases insofar as it identifies the general point at which the risks of spectator injury are outweighed by the loss of spectator enjoyment— the point at which "duty" ends and "no duty" begins. On the other hand, the *Atkins* court is engaged in the kind of application of law to facts characteristic of breach cases insofar as it holds that the defendant has a duty of care, but that duty was not breached by the failure to take a precaution which would have prevented the plaintiff's injury. Put this way, the decision looks like one which asserts as a matter of law that the defendant has not breached its duty of care.[94] This may be the better

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[91]Robert Rabin, *The Duty Concept in Negligence Law: A Comment,* 54 VAND. L. REV. 787, 791 ("[I]t may be that the annual injury cost in monetary terms exceeds the annualized cost of some sort of some sort of screening. But the trump card— the critical variable in this situation— is an intangible social good: the open-air nature of the game and the pleasure traditionally derived by fans from this ambience, including a sense of connectedness with the players on the field.").

[92]*See e.g*., Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) (explaining "primary" assumption of the risk and applying it to ski racing); Crawn v. Campo, 643 A.2d 600 (N.J. 1994) (explaining why there is no duty to exercise ordinary care to avoid injuring co-participants in sports). The suspension of ordinarily applicable tort duties in this context extends even to intentional wrongdoing, circumscribing the domain of battery. *See, e.g.*, Gauvin v. Clark, 537 N.E.2d 94, 96 (Mass. 1989) ("Players, when they engage in sport, agree to undergo some physical contacts which could amount to assault and battery absent the players' consent."); *cf.* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979) (holding that some injuries inflicted in the course of a football game by intentional acts which violate the rules of the game give rise to battery claims).

[93]The three dissenters highlight and complain about just this feature of *Atkins*. The doctrine of "primary assumption of risk" is itself a leading example of courts imposing a particular rule of no responsibility on the grounds that special reasons of policy and principle so counsel. But it seems well enough understood to be this kind of doctrine not to require much comment from us.

[94]Another "no breach" case mistakenly analyzed as no duty is *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516 (Cal. Ct. App. 1997), where 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. The court holds that the transit agency owes a duty only to those embarking and disembarking from trains; it owes no duty to persons on the platform. This is incorrect; the transit authority should owe a

characterization. *Atkins*, and cases like it, may be cases where courts are trying to specify particular standards of due care for relatively stable classes of cases. A portion of the Tentative Draft of the *Third Restatement* 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

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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 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, not that the transit authority has no duty not to negligently endanger the safety of persons on the platform. *See also* Calhoon v. Lewis, 96 Cal. Rptr. 2d 394 (App. 2000) (property owner has no duty to remove planter from driveway that injured skateboarder); Domenghini v. Evans, 70 Cal. Rptr. 2d 917 (App. 1998) (holding ranch owner owes no duty to hold more safe (and less challenging) cattle roundup using mechanical devices-- 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); Estes v. Tripson, 932 P.2d 1364 (Ariz.Ct. App. 1997) (holding accidental injury in company softball game did not present jury question).

There are numerous other examples of duty cases which really hold no breach as a matter of law. For instance, In *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 190 (App. 2001), the court held there was no duty based on primary assumption of risk where a snowboarder collided with a skier while the two of them were descending the same slope. The facts are presented in a very summary fashion, but it appears to be the type of ordinary, unavoidable collision of the type that inevitably occurs on ski runs– in other words, a collision between two actors both using reasonable care.

Another example of such a case is *Lindstrom v. Hertz Corp.*, 96 Cal. Rptr. 2d 874 (App. 2000), where the claimed breach was the rental car agency's renting a car to a foreign driver without ascertaining whether that driver knew the rules of the road. The driver injured the plaintiff while making an allegedly illegal U-turn. (In fact, the U-turn was made through a designed break in the center divider on Pacific Coast Highway and may not have been illegal.) The entire argument of the plaintiff was premised on the contention that foreign drivers are more likely to get into accidents than American drivers are. However, while the court finds no duty based on unforeseeability, 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 justify negligence liability.)

For a good discussion of these kinds of cases, see John C.P. Goldberg & Benjamin C. Zipursky, *supra* note 5, at 712-17.

> 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.[95]

However one thinks these cases are best understood— as duty cases or as breach ones— they are problematic because they usurp the role of the jury, and on an undeveloped factual record. Questions of breach are typically fact intensive, best decided on fully developed factual records, and best left to juries. It is:

> 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 of view as to whether [the defendant's] conduct in the particular circumstances of this case did or did not evidence a lack of due care, but, perhaps above all, because in the determination of issues revolving about the reasonableness of conduct, the values inherent in the jury system are rightfully believed an important instrument in the adjudicative process . . .[96]

3. Existence and Extent of Obligation: "Duty" and "Proximate

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[95]*Restatement Draft*, *supra* note 3, at § 7 cmt. f. These cases seem to be all that has come of Oliver Wendell Holmes' hope and prophecy that courts ought to fix precise standards of conduct for the sake of certainty. *See*, *e.g.*, Lorenzo v. Wirth, 49 N.E. 1010, 1011 (Mass. 1898) (Holmes, J.); Baltimore & Ohio R.R. Co. 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 and for all by the Courts."); Pokora v. Wabash Ry. Co., 292 U.S. 98, 102-03 (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 (2nd Cir. 1995) (Calabresi, J.) (noting that Holmes'view that courts ought over time to specify precise rules of conduct has been mostly rejected). As Justice Kennard of the California Supreme Court has noted, quoting Prosser and Keeton, the Holmes approach fails to work in practice because standards of reasonable conduct must be based on "the particular circumstances, the apparent risk, and the actor's opportunity to deal with it". Kentucky Fried Chicken v. Superior Court, 927 P.2d 1260, 1272 (Cal. (1997) (Kennard, J., dissenting) (quoting PROSSER & KEETON, *supra* note 2, § 35 at 218).

[96]Havas v. Victory Paper Stock Co., 402 N.E.2d 1136, 1139 (N.Y. 1980) (citations 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 Stagl v. Delta Airlines, 52 F.3d 463 (2nd Cir. 1995) (Calabresi, J.). *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. For examples of how recent California caselaw usurps the role of the jury, *see infra* §§ I.D.3 & II.A.1.

Cause"

The fifth use of the doctrine might itself be viewed as an instance of courts deciding that there is no breach as a matter of law. *Williams v. Bic*[97] not only accepts that product liability law puts the manufacturers of lighters under a duty to not to market defective products, it also 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 cigarette lighters.[98] 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 that delimits this class of decisions. The duty language used to reach this result serves the function of attributing sole responsibility for the injury to the "intervening" actions of third parties.[99]

The use of "unforeseeable" in *Williams* does not deny that tort law governs the conduct of the parties before the court, it merely asserts that liability does not extend far enough to cover the conduct before the court. Although this is conceptually coherent, there is still reason to regard this kind of case warily. The risk is that courts will use proximate cause doctrine to subvert the aims of comparative negligence doctrine or, in the case of *Williams*, to subvert the doctrine that the contributory negligence of a parent should not be imputed to the child.[100] This "all or nothing" use of proximate cause doctrine is inconsistent with the logic of comparative negligence. In fact, that seems to be the point of these cases: Courts are using the term "duty" to reach a proximate cause conclusion on the ground that full responsibility should lie on some party other than the defendant. Using "duty" to effect this result is only justifiable when it would both be inequitable, on the facts, to apply comparative negligence principles, and there is some good reason why courts rather than legislatures or juries

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[97]771 So.2d 441 (Ala. 2000).

[98]See the discussion in the text accompanying notes 50-56, *supra*.

[99]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.*, where 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. Guido Calabresi, *supra* note 33, at 103-04.

[100]*Williams*, 771 So.2d 441 at 448-49 (Ala. 2000).

should make this judgment. Even then, it is important to recognize that "duty" is being used here to do work that should be done under the rubric of proximate cause. Cases like *Williams* do not set the legal standard governing the defendant's conduct, they determine that the defendant has been relieved of whatever obligation it may have been under by the superseding negligence of someone else. Put differently, these cases do not determine the existence of the defendant's obligation, they fix the extent of the defendant's liability for breach of that obligation.[101]

4. The Special Features of Affirmative Duties

The sixth use of the doctrine is defined, first and foremost, by the kind of fact pattern to which it applies, and by the special considerations of principle and policy made relevant by that fact pattern. These "affirmative duty" cases are ones where the risk which endangers the victim does not arise out of a course of conduct initiated by the defendant whose responsibility for avoiding or mitigating the harm is at issue.[102] "Duty" discussions are a prominent feature of these cases, more prominent than they are in cases traditionally characterized as cases of "negative duty" (cases where the defendant's responsibility is to refrain from endangering someone else). The relevant legal standards are not as well settled as they usually are in "negative duty" cases; they are more actively articulated by

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[101] *See supra* note 52, and accompanying text.

One reason that courts may desire to subvert comparative fault is that, while the doctrine addresses the serious problems with the "all or nothing" approach of classic contributory negligence, some have argued that comparative fault does not present enough of a deterrent to victim negligence, and/or allows some undeserving victims to still recover relatively large awards (substantial economic and noneconomic damages, reduced by some percentage based on the jury's apportionment of fault) for accidents that were caused to a significant extent by the victim's own conduct. *See, e.g.*, Jordan H. Leibman, et al., *The Effect of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Emperical Study of the Alternatives*, 35 AM. BUS. L.J. 349, 396 (1998); Stuart Low & Janet Kinolm Smith, *Decisions to Retain Attorneys and File Lawsuits: An Examination of the Comparative Negligence Rule in Accident Law*, 24 J. LEGAL STUD. 535, 557 (1995). Whatever the ultimate merit of this critique of comparative fault, its existence would provide some explanation for why in some cases where the victim's own conduct was a significant causal factor in the accident, a trial court might utilize a "no duty" doctrine to preclude the jury from apportioning fault and awarding damages to the plaintiff.

[102] *See* KEETON, TORT & ACCIDENT LAW, *supra* note 15 at 254-71. Late nineteenth century and early twentieth century tort doctrine assimilated those who entered onto land without the permission of the landowner (trespassers) to this category; harms that befell trespassers were not attributed to the affirmative failures of landowners to keep their property safe. Harms induced by speech—by taunts, for example—were treated in the same way. *See, e.g.*, Union Railway v. Cappier, 72 P. 281 (Kan. 1903); Buch v. Armory Manufacturing Co., 69 N.H. 257 (N.H. 1897); Hurley v. Eddingfield, 59 N.E. 1058 (Ind. 1901). Cases where the plaintiff claims that the defendant owed a duty to protect or rescue the plaintiff from a predicament not of the defendant's making form the core of the affirmative duty category. We do not take the trespasser duty cases and the speech cases to be such cases.

courts.

The comparative prominence of "duty" doctrine in this class of cases is largely attributable to three factors. First, failures to act are regarded as categorically different from failures to act carefully. Just why this is thought to be so, and how far that claim is correct, are matters too deep and complex for us to pursue here. For our purposes, the point is that, because the defendant has not acted to put the plaintiff in peril in these cases, they are taken to be categorically different from run of the mill duty cases and that categorical difference is taken to justify a general rule of "no duty," the exact opposite of the general rule of "duty" which applies to "negative duty" cases. Second, when affirmative duties do exist they are attached to "special relationships." The identification of appropriate relationships is central to this body of cases, and part of what it is that courts do under the rubric of "duty." The standing need to identify and then deploy those "special relationships" that will sustain affirmative duties is one feature of such cases which makes "duty" analysis more prominent in affirmative than negative duty cases.

Third, a great practical difficulty— perhaps even the great practical difficulty— in this corner of the law is to carve out a manageable sphere of affirmative responsibility. Imposing an affirmative duty to rescue whenever the benefits of rescue to an imperiled victim outweighs the burden of rescue to the party charged with the duty to rescue, threatens to burden individual freedom of action with an indefinite and excessive responsibility. Meeting this threat to individual liberty requires courts to keep a tighter rein over the scope of affirmative responsibilities than they do over the scope of negative ones. The "reasonable foreseeability of physical injury" test which fixes the boundaries of negative duties can be unacceptably expansive in the context of affirmative duties.

Dudley v. Offender Aid and Restoration of Richmond, Inc.[103] illustrates the difficulty. The victim in *Dudley* had been raped and murdered by a convicted felon who had escaped from the "halfway house" operated by the defendant. The court recognized an affirmative duty to take precautions against such escapes and held that the victim was within the class of those protected by that duty. But the court was also careful to announce that "[i]n every case it is for the court to determine, as a question of law. . . whether the plaintiff falls within the class of those to whom the

[103]401 S.E.2d 878 (Va. 1991).

defendant owes a duty." Because it would hardly be "unforeseeable" for an escapee to hop a bus to California or Maine, or even to travel to a foreign country and to commit a crime years later, the defendant could owe a duty to all of the residents of the United States as well as to residents of foreign countries. To put manageable limits on the potential scope of tort liability, the court makes the scope of this affirmative duty a matter of law for courts to decide. Special reasons thus explain the special prominence of duty doctrine in affirmative duty cases.

The six category typology of duty cases is thus needlessly complex. The first three kinds of cases involve the use of duty in its primary role; they articulate the legal standards which govern defendants' conduct— either specifying more stringent responsibilities or specifying more relaxed ones. The fifth use of duty is better classified as a form of "proximate cause" doctrine; cases in this category count the conduct of the plaintiff or some third party as a superseding cause which cuts off the defendant's liability. They determine the extent of liability, not the existence of duty. Affirmative duty cases— the sixth category— are marked out as special by their subject matter. They are concerned with the contours of the responsibility to benefit others; this responsibility is fundamentally different from the responsibility not to harm others. "Duty" is therefore a live issue in affirmative duty cases in a way in which it is not in negative duty ones. Because the default rule is no duty rather than a universal duty of due care, courts must both identify those special relationships which will sustain affirmative duties of care and then delineate the scope of those duties.

Only the fourth use of "duty" doctrine, then, is difficult to classify. We believe that these cases are best understood to be using "duty" to grant defendants the practical equivalent of summary judgment on questions of breach. Because this use of the doctrine invites conceptual confusion, we think it should be reconceptualized as a "breach" doctrine, one concerned with specifying what precautions due care requires in certain kinds of recurring circumstances, and specifying the reasonable bounds of jury discretion. But our position is contestable. Arguably, anyway, some cases in this fourth category— including *Atkins*,[104] the case of the "duty" to screen baseball fields so as to protect spectators from injury at the hands of stray balls, which the Draft *Restatement (Third)* uses as an illustration— straddle the line between "duty" and "breach." *Atkins* is a "duty" case if it

[104]424 N.E.2d 531.

is understood to articulate the joint between a zone of conduct regulated by negligence law and a zone of conduct left legally unregulated; it is a "breach" case if it is understood to assert that the defendant discharged its duty of reasonable precaution as a matter of law.

The upshot of all this is that the primary task of "duty" doctrine is to fix the legal standard that governs the defendant's conduct. Other uses of "duty" doctrine are rare and more fruitfully conceptualized in other terms— as "proximate cause" or "breach" cases, for example. Because the primary task of "duty"doctrine is to specify the legal standard which governs the defendant's conduct, "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 is the heir to both the *MacPherson* and *Rowlands* revolutions. Those revolutions dislodged contract and property from their respective citadels and left tort holding most of the terrain it once ceded to them. Modern tort law therefore imposes a broad duty on potential injurers to guard against the reasonably foreseeable risks of physical injury created by their conduct.

Equally important—and perhaps less obvious—even if modern tort law did not impose a broad duty of due care, "duty" doctrine would still be highly general and categorical doctrine. In the nineteenth century, when the domain of the duty of reasonable care was far more restricted, the doctrines defining the relevant standards— articulating the domains of tort, contract and property— were equally general. Legal standards cannot be up for grabs on a case by case basis.[105]

D. "No Duty" Doctrine in Contemporary California Law

Recent developments in California appear to constitute a challenge to this modern regime. California courts— intermediate appellate ones especially— 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*— the California Supreme Court decision reviving "primary" assumption of the 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

[105]For a powerful case making this point see Stagl v. Delta Airlines, 52 F.3d 463 (2d Cir. 1995) (Calabresi, J.).

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; with the practical effect of customary practices and legislative enactments on tort duties; and with the implicit division of authority between judge and jury in tort cases.

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 activities as a matter of law, the primary assumption of risk cases appear to be expanding a domain that the courts take to be implicitly contractual— a domain where "the parties" allocate risks among themselves by entering into activities whose self-understandings are not consistent with the existence of a duty of care among their participants. 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 where the free use of property trumps tort duties of reasonable care. These are significant, and mistaken, developments. The "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 out by an old Jack Benny joke: Faced with the offer "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," its two most fundamental and disturbing effects do not have to do with the contours of substantive law. These effects are, if anything, more radical. First, by proliferating highly particular "no duty" exceptions to California's general duty of reasonable care, these developments abuse the concept of "duty." "Duty" is about articulating the legal standard applicable to the conduct before the court. "Duty" cannot be a live issue in every case because the legal standard applicable to conduct cannot be up for grabs in every case. 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.[106] The more uncertain legal norms are the less effectively they guide conduct. To make "duty" a live issue in every case is to make the standard governing legal conduct perpetually uncertain. This undermines the very enterprise of governing conduct by preexisting norms, prevents potential injurers from identifying the standard to which they must conform their conduct—and by which that conduct will be measured should something go awry—and prevents potential victims from determining what kind of protection the law affords them. Because such radical uncertainty is intolerable, judgements 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 developments on tort law's institutional division of labor— its allocation of decisional authority among judges, juries and legislatures— is to shrink the domains of jury authority 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 on summary judgment only cases devoid of material factual disputes. These same principles and settled practice authorize juries to apply the law to the facts within the domain where people might reasonably disagree about how the law applies; and acknowledge the superior lawmaking power of the legislature. Legislatures, unlike courts, are backed by the democratic principle of legislative supremacy. California's emerging "no duty" jurisprudence rides roughshod over this division of labor. Courts are usurping both the traditional role of the jury and the traditional role of the legislature, aggrandizing their own power at the expense of these more democratic institutions. California's emerging "no duty" doctrine is a threat to two principles— the right to a jury trial and the separation of legislative and judicial power— that are central to our constitutional democracy.

To make out these emerging figures in the carpet of California's tort law, we need to examine the disparate doctrinal developments which weave together to form these patterns. These developments are concentrated in the doctrinal 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

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[106] *See supra* note 10.

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 which privilege the free use of property over personal and public safety. And in both domains courts have devised rules which undermine the authority of the legislature as well as the jury, and even the understandings of the parties themselves.

II. Recent California Case Law

A. Assumption of Risk

Assumption of risk is an expression of contractual ideas within the law of torts. In all of its various forms— express and implied, primary and secondary— it holds that injurers should be relieved from liability for otherwise tortious conduct because of choices their victims have made. Negligence law is concerned with carefulness, 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, judgments about the amount of risk that a potential victim of is prepared to accept without either the protections of others' reasonable care or compensation in the event of injury.[107] 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.[108] It is, therefore, telling that assumption of risk has undergone a pronounced expansion in California over the course of the past decade.[109]

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[107]Particularly in its nineteenth century incarnation, the doctrine of assumption of risk supposes that each person both has an interest in tailoring her level of protection against injury to match her 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 8, at 41.

[108]To characterize the same point slightly differently, assumption of risk law, like contract law, generally assumes the citizen can choose his or her level of protection from accidents, while negligence law imposes that responsibility on others.

[109]Express assumption of risk, i.e., where a person contracts away his or her right to sue for a specific risk, is a recognized defense that has 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 forced to waive their right to sue for negligence. It is *implied* assumption of risk, which barred recovery on the ground that, although no express *agreement* to consent to the risk occurred, the victim's conduct manifested consent to incur the risk, which has been subjected to

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,[110] 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. The doctrine relieved employers of their ordinary duties of care towards employees because it held that continued employment in the face of a known or obvious risk was enough to trigger the application of the defense.[111] 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 construed that duty to warn as 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.

Over the course of the 20th century the classical doctrine underwent a slow, and conceptually elaborate, decline.[112] First, implied assumption of risk was divided into "primary" and "secondary" forms. The "primary" form of the doctrine holds that in some circumstances— almost

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sustained attack. So long as the contractual consent is real and fairly obtained, express assumption of risk does not raise the difficult issues that implied assumption of risk does, and is thus outside the scope of this paper.

[110]Assumption of risk never had much application to accidents among strangers. *See* Clayards v. Dethick, 116 Eng. Rep. 932, 934 (Q.B. 1848). 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.

[111]*Lamson v. American Axe & Tool Co.*, 177 Mass. 144,58 N.E. 585 (Mass. 1900) (Holmes, C.J.), is a classic example of this. The plaintiff had complained about the dangerous conditions of the new racks on which hatchets were left to dry after being painted in his workplace and was told that he could quit if he didn't wish to run the risk that those racks presented. He stayed, was injured, and was held to have assumed the risk. By recognizing assumption of the risk as a defense the court reduced the employer's duty from the duty to provide a (reasonably) safe workplace to the duty to make the unsafe features of its workplace obvious. By breaching its duty of care, the employer procured the benefit of a lesser standard, and forced the employee into a Hobson's choice between losing employment and subjecting himself to an unreasonably-imposed risk.

[112]Knight v. Jewett, 834 P.2d 696, 703-04 (Cal. 1992); 2 HARPER AND JAMES, THE LAW OF TORTS (1st ed. 1956) §21.1 at 1162; Li v. Yellow Cab Co., 532 P.2d 1226, 1240-41 (Cal. 1975); KEETON, *supra* note 15, at 330; DOBBS, *supra* note 1, at 535.

always recreational ones— no duty of ordinary care ever arises.[113] "Primary" assumption of risk is thus a true "no duty" doctrine, but one whose significance and scope are modest at best. 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 classical doctrine its importance. The practical effect of classical assumption of risk was to replace the employer's duty of reasonable care with a lesser duty to warn of unsafe conditions and not to engage in reckless or intentional wrongdoing. Contemporary primary assumption of risk has these effects only in the domain of certain recreational activities. Engaging in those activities is not necessary in the 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 plaintiffs sometimes implicitly consent to the defendant's negligent conduct. The doctrine is, therefore, concerned not with the reasonableness or unreasonableness of plaintiff's encounter with defendant's breach of its duty of care, but with the voluntariness of that encounter. Knowing, voluntary encounters with negligently created risks operate to bar all recovery on the part of the person encountering the risk.

Classical assumption of the 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 reduced to a duty to warn of unsafe conditions by construing the requirements of "knowingness" and "voluntariness" broadly. 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 Ax & Tool Co.*,[114] a leading case and a Holmes opinion, illustrates the operation of the doctrine. Lamson was injured when a hatchet fell from a rack in front of the spot where he worked painting hatchets, "and upon which the hatchets were to be placed to dry when painted."[115] Lamson had worked for the

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[113]Knight v. Jewett, 834 P.2d 696, 703-04 (Cal. 1992)

[114]58 N.E. 585 (Mass 1900) (Holmes, C.J.).

[115]*Id.*

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 to his employer 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."[116] 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."[117] Nothing more was needed. By flagrantly and blatantly refusing to provide a reasonably safe workplace, American Ax & Tool had relieved itself of any duty to do so. And therein lies both the sweep and the notoriety of the doctrine. Classical assumption of risk doctrine enabled employers to relieve themselves of their obligations of reasonable care simply by violating those obligations in an open and obvious way.

The claim that people implicitly "consent" to waive their right to be free of others' negligence came under sustained attack during the first half of the twentieth century.[118] 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.[119] This conceptual splitting of the doctrine, along with the drastically different treatment of its two newly recognized branches, was of the utmost importance. It 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 splitting of "secondary" implied assumption of risk into "reasonable" and "unreasonable" branches thus resulted in the absorption of the defense by the doctrine of contributory negligence.

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[116] *Id.*

[117] *Id.*

[118] *See Knight*, 834 P.2d at 699 (citing authorities).

[119] Scott v. Pacific West Mountain Resort, 834 P.2d 6, 13 (Wash. 1992); PROSSER & KEETON, *supra* note 2, at 496 (W. Page Keeton, ed., 1984); Koutoufaris v. Dick, 604 A.2d 390 (Del. 1992).

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. That feature of classical doctrine had survived even its absorption by contributory negligence. With the rise of comparative negligence, however, unreasonable encounters with other persons' breaches of their duties of care no longer automatically barred plaintiffs from recovering. Plaintiff's failure to exercise due care for her own protection was now compared with defendant's failure to exercise due care to protect others from the reasonably foreseeable risks of her actions, and plaintiff's recovery reduced in proportion to her relative culpability.[120]

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;"[121] every other part of the defense was absorbed into comparative negligence. Implied "primary" assumption of risk emerged, Phoenix-like, from the ashes of the old doctrine, but it was confined to a limited domain of cases, far removed from the realm where the classical defense assumed its importance and earned its notoriety. In most American jurisdictions, implied assumption of risk now takes this shrunken and relatively unimportant form. Until the early 1990's implied assumption of risk took this vestigial form in California as well. Since that time, however, implied assumption of risk has undergone a dramatic expansion in California.

At the beginning of the 1990's, implied assumption of risk doctrine in California was in dormant, if not quite dead. *Li v. Yellow Cab Company of California*,[122] 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." Assumption of risk, the court explained was now "to be subsumed under the general

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[120]Lipson v. Sup. Ct., 644 P.2d 822 (Cal. 1982); Kendrick v. Ed's Beach Service, Inc., 577 So.2d 936 (Fla. 1991); Jacobsen Constr. Co., v. StructopLite Engineering Inc., 619 P.2d 306 (Utah 1980).

[121]Santangelo v. State of N.Y., 521 N.E.2d 770 (N.Y. 1988); Walters v. Sloan, 571 P.2d 609, 614 (Cal. 1977); Terhell v. Commonwealth Assoc. 218 Cal. Rptr. 256 (App. 1st Dist.1985).

[122]532 P.2d 1226 (Cal. 1975).

process of assessing liability in proportion to negligence."[123] 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.[124]

The doctrine's renaissance began in 1992, with the Court's decisions in *Knight v. Jewett*,[125] and its companion case, *Ford v. Gouin*.[126] On its face, *Knight* appears fairly innocuous. Defendant crushed and broke plaintiff's finger in the course of a casual, coed, touch football game, conducted during the halftime intermission of the 1987 Super Bowl. The injury had proved irreparable and the finger had been amputated. Just before her finger was broken, the plaintiff had complained about defendant's play, asking him "not to play so rough,"[127] and threatening to quit the game if he didn't tone down the tenor of his play. On the very next play, the defendant leaped to intercept a pass and came down colliding with plaintiff, and eventually stepping backward on her hand and breaking her finger. The majority opinion in *Knight* acknowledges that secondary assumption of risk was abolished by *Li*.[128] 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.[129]

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[123] *Id.* at 1243.

[124] Von Beltz v. Stuntman, 255 Cal. Rptr. 755, 759-61 (App. 1989) (discussing approaches of various courts).

[125] 834 P.2d 696 (Cal. 1992).

[126] 834 P.2d 724 (Cal. 1992).

[127] *Id.* at 697 (plurality opinion).

[128] 834 P.2d 696, 703 (Cal. 1992) ("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. at 704 ("For these reasons, use of the 'reasonable implied assumption of risk'/'unreasonable implied assumption of risk' terminology, 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.").

[129] 834 P.2d 696, 707-08 (Cal. 1992) ("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.").

Knight's basic holding does no more than align California with the growing number of jurisdictions that have recognized the doctrine of "primary" assumption of risk, and have applied it to recreational activities.[130] 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— does not merely decide that parties to recreational activities like touch football do not owe each other duties of ordinary care and owe each other only duties to refrain from intentional or reckless wrongdoing. The opinion also applies that legal standard to the facts of the case, holding that plaintiff's claim fails as a matter of law. 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. Third, *Ford*, *Knight's* companion case 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. An unusually expansive and important doctrine of primary assumption of risk has sprung from these three seeds.

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 in California. Nor did it hold merely that primary assumption of risk, having survived the adoption of comparative negligence, governs many (perhaps most) recreational activities. *Knight* decided these things and also affirmed a summary judgment for the defendant— a judgment that the crushing of plaintiff's hand in a touch football game was covered by the doctrine of primary assumption of risk. In order to affirm this lower court ruling, the *Knight* Court held 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

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[130]Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992); Crawn v. Campo, 643 A.2d 600 (N.J. 1994); Gauvin v. Clark, 537 N.E.2d 94, 96 (Mass. 1989).

determine and for appellate courts to review de novo.[131] Thus, trial and appellate courts are asked to make independent judgments as to what risks are inherent in common activities.[132] 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.[133] 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.[134]

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[131]It is only accurate to say that the holding in *Knight* was one of "*no* duty" if we mean by that (or add to that) the phrase "to use ordinary care". *Knight* held that even where primary assumption of risk would otherwise apply, the plaintiff could still recover if the defendant's conduct was reckless or intentional. 834 P.2d 696, 711 (Cal. 1992). It would be more accurate to say that *Knight* relaxed the duty owed, *see Kahn v. East Side Union High School Dist.*, 75 P.3d 30, 33 (Cal. 2003) (holding that even though *Knight* "no duty" standard applied to swimming, plaintiff showed triable issue of fact as to recklessness of defendant swimming instructor). However, because the cases speak in terms of "no" duty when they mean "no duty to use ordinary care" we shall do so as well.

[132]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 (App. 2003).

[133]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 in 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 is a perfect one for the jury to answer.

Under California law, as elsewhere, a 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 Civ. Proc Code §437c(c). 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.

[134]*E.g.*, Crawn v. Campo, 643 A.2d 600 (N.J. 1994) (adopting recklessness standard as scope of duty for recreational sports activities, and remanding for a new jury trial under the recklessness standard– trial court's only role is to determine whether activity is a sport); Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1044 (Nev. 1994) (rejecting relaxed duty in sports cases and leaving negligence question to jury); Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) (adopting primary assumption of risk doctrine for recreational activities but ruling that factual issue of whether risk is "inherent" in activity and thus assumed by the participant is to be decided by the jury, not the judge); Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989) (adopting recklessness standard as scope of duty for recreational sports activities and leaving question of recklessness to jury– trial court's only role is to determine whether activity is a sport); Sheppard v. Midway R-I Sch. Dist., 904 S.W.2d 257, 259-60 (Mo. App. W. Dist. 1995); Martin v. Buzan, 857 S.W.2d 366, 370 (Mo. App. E. Dist. 1993); *see also* Becksfort v. Jackson, 1996 Tenn. App. LEXIS 257 at **11-12 (W. Sec. Apr. 30) (rejecting relaxed duty in sports cases); Jaworski v. Kiernan, 1996 Conn. Super. LEXIS 2023 at *7 (Aug. 1) (rejecting relaxed duty in sports activities and leaving negligence question to jury).

Just how far the California Supreme Court is willing to go in taking jury questions away from the jury is made clear in *Saelzer v. Advanced Group 400*, 23 P.3d 1143, 1145 (Cal. 2001), where the Court reinstated a summary judgment in a case where the existence of duty was conceded. The Supreme Court held that a plaintiff could never show that the defendant's failure to take adequate security precautions on its premises caused her injury, absent evidence establishing that the *specific* security precaution would have prevented the plaintiff's injury— in other words, that the specific

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.[135] In close cases, moreover, the concept of an "inherent" risk has been interpreted in ways which favor defendants. Thus, in *Record v. Reason*,[136] 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. Even on these facts, the court found the risks imposed by the boat's excessive speed inherent in the activity at issue.[137] Reasonable jurors might well conclude that violations of express instructions which substantially increase an activity's risks are not among the inherent risks of the activity, voluntarily undertaken.[138]

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assailants would have been thwarted the untaken security precautions. Thus, the plaintiff could not recover because she could not show that the security guard would have caught the specific people who attacked her. While this is an "affirmative duty to take precautions" case, the test is formulated to ensure that plaintiffs will almost never be able to produce evidence sufficient to survive summary judgment and get their cases to the jury.

[135]Kane v. National Ski Patrol Sys., Inc., 105 Cal. Rptr. 2d 600, 606 (App. 2001) (holding being advised to ski down dangerous, icy slopes is inherent risk of taking skiing classes); Dilger v. Moyles, 63 Cal. Rptr. 2d 591 (App. 1997) (risk of errant golf shot where defendant fails to yell "fore" is inherent in sport of golf); Harrold v. Rolling J Ranch, 23 Cal. Rptr. 2d 671 (App. 1993) (being given an unruly horse is an inherent risk of participating in equestrian activities); Stimson v. Carlson, 14 Cal. Rptr. 2d 670 (App. 1993) (risk of captain of boat intentionally swinging the boom without warning the crew in inherent in the activity of sailing).

[136]86 Cal. Rptr. 2d 547, 556 (App. 1999).

[137]*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. 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.

[138]In *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801, 804-05 (App. 2001), the court rejected the contention that a homeowner assumed a duty to supervise children when she told the 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. 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. 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.

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. However, the manner in which the issue was resolved by the *Romero* court 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 (App. 2000) (applying an express waiver that a gym

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 characteristic which makes expert runs more challenging and demanding than intermediate ones. In a world where negligence liability is the default rule, it is entirely appropriate, absent a statutory duty, to let the loss lie where it falls when someone waterskiing barefoot and backwards collides with an overhanging branch,[139] 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 which are essential to the challenge and pleasure of the activities which 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,[140] the failure of golfers to yell "fore" on errant shots an inherent risk of golfing,[141] and a ski instructors' bad advice to novice skiers to try expert runs an inherent risk of learning to ski.[142]

None of these risks are "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

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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).

[139]Ford v. Gouin, 834 P.2d 724 (Cal. 1992). The introductory clause qualifying the scope of the assertion is intended to avoid the implication that other kinds of accident law schemes (e.g., the New Zealand scheme) would have to let the loss in this kind of case lie where it falls.

[140]Stimson v. Carlson, 14 Cal. Rptr. 2d 670 (App. 1993).

[141]Dilger v. Moyles, 63 Cal. Rptr. 2d 591 (App. 1997).

[142]Allan v. Snow Summit Co., 59 Cal. Rptr. 2d 813 (App. 1996).

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.[143] Through such expansions, a doctrine which is reasonable in its core form has been twisted into an all-purpose tool for exculpating wrongdoers from responsibility for the consequences of their carelessness.[144]

Finally, under recent California caselaw, even if a risk is found not to be "inherent" in an activity by the court, 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.[145] 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*–

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[143]While a case such as *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 535-36 (App. 2002) (holding that risk of baseball player being hit with super-fast batted ball due to use of unsafe bat that increased the ball's velocity was not inherent in the sport of collegiate baseball), may get the result right, it nonetheless demonstrates how the jury function is being usurped. Rather than juries determining what risks are inherent in sports based on their common-sense knowledge, appellate judges, who are hardly expert in this area, make 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 Sch. Dist.*, 75 P.3d 30 (Cal. 2003), may get the result right, by allowing a plaintiff bring her case before a jury on a theory of recklessness where she 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.

[144]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) ("Inherent risks fall into two general categories: 1) those risks that are essential characteristics of a recreational activities and those 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.").

[145]Vine v. Bear Valley Ski Co., 13 Cal. Rptr. 3d 370, 384 (App. 2004).

nothing more than a formula to contain juries seen as too favorable to plaintiffs.[146]

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

The firefighter's rule prevents firefighters from recovering for injuries the sustain in the course of fighting fires from people negligently responsible for starting those fires.[147] 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. That duty runs to everyone that our fires might injure including, generally speaking, those who might be injured in the course of rescuing others from the fire. Tort law has long recognized that people owe duties to potential rescuers not to engage in negligent conduct that results in the need for a risky rescue. This is the lesson of Cardozo's famous doctrine that "danger invites rescue,"[148] and that doctrine preexisted Cardozo's naming of it.[149] 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 the doctrine had disappeared. In most American jurisdictions, the firefighter's rule is both all that remains of the once robust doctrine of secondary assumption of risk and a relatively robust remnant.[150] Special circumstances account for its survival. First, the risks of fires— often negligently started ones— are the

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[146]441 P.2d 912, 916 (Cal. 1968).

[147]Krauth v. Geller, 157 A.2d 129, 130-31 (N.J. 1960).

[148]Wagner v. International Ry., 133 N.E. 437, 437 (N.Y. 1921) (Cardozo, J.); *see* Solgaard v. Guy F. Atkinson Co., 491 P.2d 821, 824-25 (Cal. 1971) ("danger invites rescue" rule applies in California).

[149]*See, e.g.*, Eckert v. Long Island Railroad, 43 N.Y. 502 (1871).

[150]Thomas v. Pang, 811 P.2d 821, 823 n. 1 (Hawaii 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 (A.D. 3d Dept. 1994) (holding firefighter's rule bars cause of action based on inhalation of pesticide fumes at site of fire); *but see* Minnich v. Med-Waste, Inc., 564 S.E.2d 98, 103 (S.C. 2002) (declining to recognize rule in South Carolina because policy rationales for it are jumbled and rule has been persuasively criticized).

primary risks of the occupation. The risks of fires 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 ex post compensation 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.[151]

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 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.[152] Permitting that recovery might, moreover, discourage people from calling firefighters promptly, allowing the fire to spread and thereby further imperiling the public's safety.[153]

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[151]Moody v. Delta Western, 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."); Day v. Caslowitz, 713 A.2d 758, 760 (R.I. 1998) ("[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.").

[152]*See* Moody, 38 P.3d at 1141-42.

[153]Steelman v. Lind, 634 P.2d 666, 667 (Nev. 1981). While this rationale for the firefighter's rule gets repeated often enough, it is not particularly convincing. The first reaction of a person to a fire that looks like it can be extinguished is to try and extinguish it, while once it becomes clear that the fire

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 which is true of very few jobs. Most occupational risks are not a comparably prominent aspect of the occupation. As a result, most occupational risks are less likely to be reflected in wage premiums.[154] The specific risks of being a prominent academic— more travel, say, and therefore more risk of dying in transit— probably don't figure in academic pay packages. The prominence of the occupational hazards of firefighting strengthens the argument from consent as well as the argument from ex ante compensation. The risks of slightly elevated levels of travel probably don't affect most decisions to enter academia or to pursue academic prominence. But express appreciation of the risks of the job, and express consent to running those risks, almost surely is a central part of the decision to become a firefighter. Indeed, the risks of firefighting may well be the principal attraction of the occupation, affording as they do the opportunity —missing from most occupations— to perform acts of heroism at great risks to oneself. To an unusual degree, then, firefighters knowingly consent to run the specific risks of their trade and receive heightened compensation for doing so.[155]

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. However, *Knight* 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. 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

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cannot be put out without the help of the Fire Department, it is highly doubtful that the calculation of the possibility of tort liability is a serious consideration.

[154]Sidney A. Shapiro, Economic Analysis of State Employment Law Issues Symposium: The necessity of OSHA, 8 Kan. J. L. & Pub. Pol'y 22, 24 (Spring 1999); Guido Calebresi and Douglas Melamed, Property Rules, Liability and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972); 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 these injuries cause").

[155]Indeed, some firefighters might even be *risk-preferring* individuals who choose the job in part because it affords them the chance, not available in many other occupations, to perform acts of heroism at great risks to themselves.

where the special circumstances that justify the firefighter's rule are wholly absent.

For instance, in *Herrle v. Estate of Marshall*,[156] the court utilized the firefighter's rule and held that a convalescent home aide, paid $6.75 an hour,[157] assumed the risk of a patient's violence. In *Nelson v. Hall*,[158] decided before *Knight*, the court held that primary assumption of risk barred recovery by a veterinarian's assistant who was attacked by an animal in her care, and stated this was a proper application of the firefighter's rule.[159] In *Cohen v. McIntyre*,[160] decided after *Knight*, the court reaffirmed the *Nelson* rule and held that the pet owner owes no duty to a treating veterinarian, based on the firefighter's rule.[161] In *Dyer v. Superior Court*,[162] the court held that a motorist who negligently maintains a car in breach of his or her duty to other motorists[163] owes no duty to a tow

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[156]53 Cal. Rptr. 2d 713 (App. 1996).

[157]53 Cal. Rptr. 2d at 724 n. 4 (Wallin, J., dissenting).

[158]211 Cal. Rptr. 668 (App. 1985).

[159]211 Cal. Rptr. at 672.

It is notable that Cal. Civ. Code § 3342 prescribes a *strict liability* standard for dog bites such as the one in *Nelson*; i.e., 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. 211 Cal. Rptr. at 671 (citing *Smythe v. Schacht*, 209 P.2d 114 (Cal. App. 1949); *Gomes v. Byrne*, 333 P.2d 754 (Cal. 1959); *Burden v. Globerson*, 60 Cal. Rptr. 632 (App. 1967); *Greene v. Watts*, 26 Cal. Rptr. 334 (App. 1962)). However, these pre-*Li* cases are applying *secondary* assumption of risk, i.e., even though the statutory duty is owed (in fact, the duty is absolute, not simply ordinary care), assumption of risk precludes liability. *Nelson* simply applies these cases to say that *primary* assumption of risk applies, i.e., there is no duty (despite the statute). 211 Cal. Rptr. at 672. The court does not explain why making this leap is permissible.

[160]20 Cal. Rptr. 2d 143 (App. 1993).

[161]*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. However, *Cohen* 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 (N.Y. Supr. 1998) (holding that horse identifier employed to protect racetrack bettors by ensuring that horses entered in race are the same as those that actually run was barred by primary assumption of risk from pursuing claim based on injury caused by unruly horse).

[162]65 Cal. Rptr. 2d 85 (App. 1997).

[163]In some cases, a *nondelegable* duty. *See* Cal. Veh. Code § 26453.

truck driver who is injured while assisting the motorist.[164] In *Hamilton v. Martinelli & Associates*,[165] the firefighter's rule was held to bar an action by a police officer against a service that provides in-house training for police departments because she was allegedly injured due to negligent instruction. One commentator suggests that the California courts will continue to expand the firefighter's rule to various forms of private employment.[166]

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 doctrine justified by unique circumstances rarely present in other settings. As the firefighter's rule expands, it undergoes a profound transformation. It begins as a rule barring highly compensated professional rescue workers from recovering for injuries the risk of which they well foresee and for which they are well compensated and metamorphoses 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, which denied recovery to workers for workplace accidents, seems to be returning in California. Just as the ax shop employee "assumed" the risk of the falling hatchet in *Lamson v. American Ax & Tool*,[167] convalescent home workers

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[164]*Dyer*, 65 Cal. Rptr. 2d at 92. *Dyer* features a particularly weak rationale— that the imposition of liability might chill the motorist from seeking assistance from towing services. The argument that liability will discourage the purchase of a good or service only applies 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 their 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. However, the notion that a motorist who cannot get his or her car to start to take it to the mechanic him- or herself (and who faces an *involuntary* tow at the owner's expense if the car is abandoned on the road) is going to forego 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.

[165]2 Cal. Rptr. 3d 168, 176-77 (App. 2003).

[166]Mitchell Ehrlich, *Backdraft: The Fireman's Rule is Not Just Limited to Firefighters and Police*, L.A. DAILY JOURNAL at 7 (Jun. 2, 2000).

[167]58 N.E. 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 the risk as a defense the court reduced the employer's duty from the duty to provide a (reasonably) safe 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 two 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*.

and veterinary assistants now shoulder 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.[168] 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.[169]

3. The Disregard of Pre-Existing Duties

In most cases involving accidental physical injury, the duty of care owed by the parties is the common law's default duty of reasonable care, acknowledged and applied by common law courts and juries. 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. The principle of legislative supremacy supports such deference and so too does the special expertise of legislative bodies. Through their staffs and committees, legislatures have access both to facts and to knowledge beyond the reach of courts adjudicating individual disputes.

The customary conduct of injurers is likewise given deference,

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[168]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; Garry Abrams, *Mom's 'Noble Quest' Changes Firefighter's Rule to Ensure Fairness*, LOS ANGELES DAILY JOURNAL at 1 (Oct. 11, 2001). 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.

[169]In *Berberian v. Lynn*, 2004 N.J. Lexis 175 (2004), the Supreme Court of New Jersey found that a mentally disabled patient owed no duty of care to his caregivers. However, while *Berberian* analogized to the firefighter's rule, the decision was mainly based on the sui generis policy consideration that the defendant had no ability to control his conduct. We do not believe that *Berberian* should be read as endorsing an expansion of the firefighter's rule to caregivers in health care facilities.

albeit less deference than statutes are. Customary conduct is treated as evidence of due care, whereas statutes are usually treated as either conclusive or presumptive proof of due care.[170] Customary conduct is given some 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 are because the customary conduct of injurers lacks the legitimacy conferred by popular election, and may tend to express judgment tinted by self-interest. The standing possibility that injurers will gain by pitching the standard of care below its justified level casts some suspicion on their chosen level of precaution. Nonetheless, the failure to follow a customary norm is certainly strong evidence of lack of reasonable care.

Special relationships are fertile sources of affirmative duties; they can overcome negligence law's general rule that there is "no duty to act"—no general duty to protect others from coming to peril at the hands of someone else's wrongdoing and no general duty to rescue someone imperiled through no fault of one's own.[171] Special relationships can also increase the stringency of the otherwise applicable general duty of reasonable care.[172] 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.[173] 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.[174]

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[170]*Compare* The T.J. Hooper, 60 F.2d 737 (2nd Cir. 1932) *with* Cal. Evid. Code § 669 (West 2002).

[171]*Tarasoff*, 551 P.2d at 343; *see also* Mata v. Mata, 130 Cal. Rptr. 141, 146-47 (App. 2003) (holding bar proprietor who hires security guard not entitled to protection of California's general "no duty to protect" rule; finding triable issue of fact on issues of negligent hiring and training of guard). The California Supreme Court has granted review in a case that raises the same issue decided in *Mata*. *Delgado v. Trax Bar & Grill*, 134 Cal. Rptr. 2d 548 (App.), *review granted*, 75 P.3d 29 (Cal. 2003).

[172]*Restatement (Second) of Torts* § 402A cmt c.

[173]Bayer v. Crested Butte Mt. Resort, 153 F.3d 726 (10th Cir. 1998).

[174]*See, e.g.*, Tidmore v. Automobile Club of So. Cal., 78 Cal. Rptr. 2d 836, 838 (App. 1998) (holding that contract can create special relationship that gives rise to tort duties), *ordered not published* 1999 Cal. LEXIS 376 (Jan. 20, 1999).

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 judge-made rules that exonerate defendants in situations where the Legislature, industry, or even the parties themselves have imposed duties.

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. 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.[175] 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 overhanging tree limbs.[176] 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 just say that the driver breached his duty but the skier, by skiing barefoot and backwards, assumed the risk.[177]

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 it 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.[178] This was too much for all but one of the justices in the Knight majority. The votes of those who dissented in *Knight* were necessary to obtain the votes to deny recovery.[179]

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[175]Cal. Harb. & Nav. Code § 658(d).

[176]834 P.2d 724, 726-27 (Cal. 1992) (plurality).

[177]*See Ford*, 834 P.2d at 740 (Kennard, J., concurring).

[178]834 P.2d at 728-32 (plurality).

[179]834 P.2d at 732 (Kennard, J., concurring)

The *Knight* majority understood assumption of risk to be a true affirmative defense to a breach of duty, a defense based on the plaintiff's consent to the defendant's negligence towards her. This is secondary assumption of risk in its classic form, and it can be used to deny recovery in Ford without denying the existence of a duty. Because the *Knight* majority had rejected the doctrine of "secondary" assumption of the risk, however, the inclination of these judges to deny recovery in *Ford* had to be shoehorned into the language of primary assumption of the risk. That could only be done by torturing the statute at issue.

If Ford were an isolated case, it might be dismissed as an embarrassment to the Court, but nothing more. In *Cheong v. Antablin*,[180] however, the Court hinted at its approval of a far more revolutionary step. In *Cheong*, two skiers collided with each other on the slopes; one sued the other for the ensuing injuries. A county ordinance provided that "it 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,"[181] 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."[182]

The Court interprets the statute not to impose the duty of care urged by the plaintiff.[183] This analysis is at least colorable.[184] However, 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

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[180]946 P.2d 817 (Cal. 1997).

[181]Placer County, Cal., Skier Responsibility Code of Placer County § 12.134(1).

[182]*Id.* § 12.135(3).

[183]*Cheong*, 946 P.2d at 821. 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 Harbors and Navigations Code in *Ford*) to not create tort duties because of its broad statement about risks assumed.

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

> statute. [citations] 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.[185]

This assumption arguendo is a clear invitation for the lower courts to start disregarding statutorily imposed duties wholesale. The Court is correct that Knight is a common law doctrine– but it purports to state when a duty is owed. According to the doctrine of negligence per se, a statute can articulate a duty of care that the courts must acknowledge, even if they otherwise would find no duty.[186] If that is the case, the operation of that statute is by no means a "modification of the common law." Rather, a well-established common law principle allows that statute to be enforced through a private tort action. This common law doctrine applies equally whether the source of the duty is a state law, an administrative regulation, or a local ordinance.[187] It is at best extremely clumsy and at worst downright misleading to refer to this process as a "modification" of the common law of torts—no law is being modified. Rather, the common law looks to statutes, in the same way 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. A local ordinance, like an industry custom, is one source of such precision.[188] If the Court's assumption arguendo in *Cheong* is followed, it will have an impact far beyond assumption of risk. A court could preclude any claim that conduct was negligent because it violated a local ordinance, as such an ordinance could not "modify" the common law.

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[185]946 P.2d at 821 (citations omitted).

[186]Cal. Evid. Code § 669(a).

[187]Cal. Evid. Code § 669(a)(1) 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. Moreover, Section 669.1 of the Evidence Codes 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. 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.

[188]See e.g., Delfino v.Sloan, 25 Cal. Rptr. 2d 265, 270 (App. 1993) (violation of local dog leash ordinance give rise to claim of negligence per se); Garson v. Jacque, 160 Cal. Rptr. 461 (App. 1979) (same).

Shipman v. Boething Treeland Farms, Inc.[189] is another example of the disregard of a statutory duty. In *Shipman*, the plaintiff was injured while driving his all-terrain vehicle in an accident that was allegedly due to the negligence of defendant's employee, driving another vehicle. Under California Vehicle Code § 17150, "[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". Despite the broad wording of that statute, the Court of Appeal affirmed a summary judgment based on the *Ornelas v. Randolph*[190] doctrine that bars liability arising out of the recreational use of property.

In *City of South Lake Tahoe v. Superior Court*,[191] a city was held to have no duty to replace a stop sign knocked down in a prior accident based on a statute that exonerates cities for the "failure to provide... stop signs," despite the fact that the statute clearly was intended to immunize the policy decision of a city not to post a stop sign at a given intersection and not a city's carelessness in not replacing a stop sign it clearly chose to post. In *Moser v. Ratinoff*, Justice Richard Mosk of the California Court of Appeal concludes flatly after surveying the cases that "statutory violations do not displace the Knight rule."[192]

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 determinations of what duties a party should and should not owe to other persons. 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

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[189]92 Cal. Rptr. 2d 566 (App. 2000).

[190]847 P.2d 560 (1993).

[191]73 Cal. Rptr. 2d 146 (App. 1998).

[192]130 Cal. Rptr. 2d 198, 207 (App. 2003) (holding violations of Vehicle Code by bicyclists are not actionable because long-distance bicycling is a recreational activity). Other cases in accord with *Moser* include *Peart v. Ferro*, 13 Cal. Rptr. 3d 885, 900-01 (App. 2004) (holding statutes regulating personal watercraft do not displace primary assumption of risk); *Whelihan v. Espinoza*, 2 Cal. Rptr. 3d 883, 889 (App. 2003) (same); *Distefano v. Forester*, 102 Cal. Rptr. 2d 813, 826 (App. 2001) (holding statutes regulating off road vehicle use do not displace primary assumption of risk).

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.[193] California caselaw has departed from that sensible principle.

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.[194] 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, they are ignored.[195]

Customs, Special Relationships and Private Agreements

In addition to disregarding statutorily-imposed duties, California courts also find no duty even in circumstances where defendants disregard established customs designed to protect those in the plaintiff's position. Thus, in *Stimson v. Carlson*,[196] a skipper of a boat was held to have no duty to warn the crew to duck before intentionally swinging the boom, even

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[193]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. Cal. Evid. Code § 669(b)(1) (West 1995).

However, while these doctrines allow some latitude to constrict statutory 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.

[194]Cal. Civ. Code § 4 ("The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code.") (West 1982).

[195]The California Supreme Court has also disregarded statutory language in the firefighter's rule context. In *Calatayud v. State*, 959 P.2d 360 (Cal. 1998), the Court ignored the language of Cal. Civ. Code § 1714.9(a)(1), 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". Just as the Court does with statutes imposing tort duties when the Court 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.

[196]14 Cal. Rptr. 2d 670 (App. 1993).

though such warnings are customary. In *Dilger v. Moyles*,[197] a golfer was held to have no duty to yell "fore" after an errant golf shot, despite the well-known custom to the contrary.[198]

California appellate courts have also found no duty to exist in cases where a defendant has a special relationship with a defendant, even though special relationships are a fertile source of unusually stringent tort duties. In *Ford*, for example, the fact that the plaintiff water skier entrusted his safety to the pilot of the boat towing him— and could not but entrust his safety to that pilot— was entirely ignored by the Court. In *Stimson*, the skipper had two special relationships with his crew. First, he was in charge of the boat and so responsible for the crew's safety in general.[199] 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*,[200] 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. 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.

These are not isolated examples. In *Allan v. Snow Summit Co.*,[201] 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

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[197]63 Cal. Rptr. 2d 591 (App. 1997).

[198]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 further 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).

[199]Naglieri v. Bay, 93 F. Supp. 2d 170, 175 (D. Conn. 1999); In re Gulf Pride Marine Serv., 1997 U.S. Dist. LEXIS 3210 at *24 (E.D. La Mar. 14); Smith v. United States, 943 F. Supp. 159, 163 (D.R.I. 1996).

[200]107 Cal. Rptr. 2d 801, 804-05 (App. 2001).

[201]59 Cal. Rptr. 2d 813 (App. 1996).

the novice. 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*,[202] extended this indifference to the special responsibilities inherent in the teacher-pupil relationship. 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.[203] And in *Harrold v. Rolling J Ranch*,[204] the court found a resort has no duty to utilize reasonable care where it provided an unruly horse to its guests, even though the resort, rather than the guests, were in the best position to determine the proclivities of the horse, and despite the resort-guest relationship. In *Lupash v. City of Seal Beach*,[205] the court found a swimming instructor had no duty to determine the depth of the ocean before encouraging students to swim there. *Hamilton v. Martinelli & Associates*[206] held a firm that provided in-house training to police officers had no duty to protect its students from injury during its training seminars.[207]

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[202]87 Cal. Rptr. 2d 588 (App. 1999).

[203]87 Cal. Rptr. 2d at 590.

[204]23 Cal. Rptr. 2d 671 (App. 1993).

[205]89 Cal. Rptr. 2d 920, 922 (App. 1999).

[206]2 Cal. Rptr. 3d 168 (App. 2003).

[207]The folly of these cases' holdings can be seen from the fact that the seminal California case on *express* (i.e., 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 University 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*.

Indeed, there is some indication that the expansive attitude of the California courts towards implied assumption of risk is leaching into express assumption of risk cases as well. In *Lund v. Bally's Aerobic Plus, Inc*., 93 Cal. Rptr. 2d 169 (App. 2000), 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

Last, California courts have also disregarded the parties' own agreements regarding the duties owed. In *Record v. Reason*,[208] 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. And in *Lund v. Bally's Aerobic Plus, Inc.*,[209] 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.

B. Duty and Real Property Law

1. *Rowland v. Christian* and 20th Century Landowner Duties

Rowland v. Christian[210] 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.[211] Business invitees— people whose presence on the property conferred an economic benefit on its owner— were owed the

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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*. Surely the issues of whether (a) the contract for personal training services incorporated the earlier waiver or was separate and (b) the advice of the personal trainer was "supervision" or "instruction" covered by the waiver was a jury question.

Interestingly, in *Kahn v. East Side Union High School Dist.*, 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) where a swimming coach directed a swimmer to perform a shallow water dive that she was not trained to perform and threatened to remove her from the team if she did not do it. It remains to be seen whether the Courts 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.

[208]86 Cal. Rptr. 2d 547, 556 (App. 1999).

[209]93 Cal. Rptr. 2d 169 (App. 2000).

[210]443 P.2d 561 (Cal. 1968).

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

ordinary duty of reasonable care.[212] 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. Landowners owed licensees only duties of warning. 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." They were not required to correct dangerous conditions so as to make the property "reasonably safe."[213] Finally, trespassers— persons who enter property without the express or implied permission of its owner— were owed no duty of care at all.[214]

During the latter half of the 20th 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.[215] In *Rowland*, the California Supreme Court acknowledged this and abolished the distinction between the various categories, imposing a unitary standard of reasonable care on all landowners.[216] 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.[217] The *Rowland* Court listed several factors that should be taken into account in deciding whether

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[212]*Id.* at 21.

[213]*See, e.g.*, *Rowland*, 443 P.2d at 556 (discussing cases where landowners held liable for "traps", i.e, for dangers known to the landowners which were not made obvious to entrants onto the property).

[214]*See* Fernandez v. Consolidated Fisheries, Inc., 219 P.2d 73, 77 (Cal. 1944).

[215]Indeed, even where the categorical approach to landowner liability was not discarded, jurisdictions have streched the concept of "invitee" to include social guests and thereby eviscerated the distinction between an invitee and a licensee. 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. These policies certainly could support precluding trespassers from recovering for accidents that would not have occurred had they not been trespassing.

[216]Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968).

[217]*Rowland*, 443 P.2d at 564 (holding "[a] departure from this fundamental principle [i.e., that persons are always owed a duty of care] involves the balancing of a number of considerations").

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[.][218]

In recent years, *Rowland* has been significantly undermined by California courts. The categorical approach to questions of duties owed 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.*[219] to *Dillon v. Legg*,[220] 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 21st century, California's courts are restoring the legal regime of the late 19th century.

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[218]*Rowland*, 443 P.2d at 564. One of the themes of this paper is that the *Rowland* balancing test, originally intended as a framework to find "no duty" in the rare case where policy or principle should override the general rule imposing a duty of reasonable care, has been distorted into an excuse for judges, rather than juries, to strike the balance as to whether liability should be imposed on particular facts. To this extent, we reject the view of Goldberg and Zipursky, who downplay the importance of the *Rowland* test because judges still apply a rubric of whether the defendant was obligated to use reasonable care towards the plaintiff. Goldberg & Zipursky, *supra* note 5, at 695. The manner in which *Rowland*'s balancing test is being applied in fact fundamentally changes duty analysis, because rather than either the special policy or principle test for duty advocated by this paper, or the relational approach that Goldberg and Zipursky prefer, the courts simply determine whether liability should be imposed on a given set of facts. In that framework, a court is doing nothing other than functioning as a second jury.

[219]111 N.E. 1050 (N.Y. 1916).

[220]441 P.2d 912 (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. *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.[221] *Rowland*, of course, went further by extending the same duty of reasonable care to trespassers. The California Legislature soon passed a statute which largely reinstated the pre-*Rowland* rules with respect to various felony trespassers, including murderers, rapists, burglars, and other enumerated serious felonies.[222] However, the statute preserved *Rowland's* duty of ordinary care for other classes of trespassers (such as innocent adult trespassers, child trespassers, or trespassers committing misdemeanors).

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.[223] In *Ornelas v. Randolph*,[224] however, the California Supreme Court interpreted a statute, Cal. Civ. Code § 846, which immunized landowners from liability for injuries sustained in the recreational use of their property.[225] The Court held that the statute not only immunized the owners

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[221]*See supra* note 22.

[222]Cal. Civ. Code § 847(b).

[223]O'Keefe v. South End Rowing Club, 64 Cal. 2d 729 (1966); Barrett v. Southern Pac. Co., 91 Cal. 296 (1891).

[224]847 P.2d 560 (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*, unpublished paper on file with authors.

[225] 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 vehicle 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.

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.

Ornelas involved a landowner, Randolph, whose farm abutted a residential subdivision.[226] He stored old farm equipment, machinery, and irrigation pipes on a portion of his property.[227] The plaintiff, an eight year old who lived in the adjacent residential subdivision, disobeyed his parents' instructions and trespassed onto Randolph's property with five other children.[228] While the other children played on the machinery, plaintiff was playing with a hand-held toy, and was injured when a pipe was dislodged and fell on him.[229]

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.[230] In repudiating these opinions, the court argued that the Legislature intended Section 846 to encourage

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> 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 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 2002).

[226]847 P.2d 560, 561 (Cal. 1993).

[227]*Id.* at 561.

[228]*Id.* at 561-62.

[229]*Id.* at 561-62.

[230]Paige v. North Oaks Partners, 184 Cal.Rptr. 867 (App. 1982); Potts v. Halsted, 191 Cal.Rptr. 160 (App. 1983); Domingue v. Presley, 243 Cal.Rptr. 312 (App. 1988).

landowners to afford access to their property for recreational purposes.[231] 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[232] 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 Cal. Edison*,[233] vividly illustrates this perversity. In Bacon, the Court of Appeal held that Section 846's recreational immunity applied where a child was shocked and knocked to the ground after climbing defendant's electrical transmission tower. (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.) 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 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 a landowner can foresee that children might enter her land and be injured by a dangerous condition whose dangerousness they might reasonably fail to appreciate, the landowner is under a duty to protect the child against the dangerous condition.[234] The Court's interpretation of Section 846 holds, essentially, that the Legislature impliedly repealed "attractive nuisance" doctrine when it enacted the statute.[235] More generally— and perhaps more importantly—

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[231]847 P.2d 560, 565 (Cal. 1993).

[232]847 P.2d 560, 565-69 (Cal. 1993).

[233]62 Cal.Rptr.2d 16, (App. 1997).

[234]For the general doctrine, *see* DOBBS, *supra* note 1, at 609 (2000). For California see *Domingue v. Presley*, 243 Cal.Rptr. 312, 313 (App. 1988).

[235]It is extremely questionable that the Legislature intended to do this. Section 846 was passed along with Cal. Civ. Code § 831.8, 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 12 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. Cal. Sen. Comm. on Judiciary, Bill No. AB 2023 (June 30,1998) (*citing* Cardenas v. Turlock Irrig. Dist. 267 Cal. 2d 352 (1968)).

The Legislative Comment would not make sense if, at the same time it was passing Section 831.8, the Legislature was intending to repeal the attractive nuisance doctrine by way of Section 846.

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.[236]

Ornelas thus resurrects a portion of the categorical scheme that Rowland rejected. 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 (i.e., the "licensees" and "trespassers" of the old categorical system). This partial resurrection of the categories twists the history and logic of the recreational use statute to achieve a perverse end. Landowners are "encouraged" to make unsuitable, dangerous property available for recreational use, even by children. Under *Ornelas*, the landowner's interest in maximal freedom from interference with her use of her property trumps the interest in physical integrity with which it competes. 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 her 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 property rights priority over physical integrity.

3. Using Foreseeability Rules to Constrict Premises Liability

Foreseeability has long been a key part of the calculus of duty. In many jurisdictions, foreseeability is the main determinant of whether a duty is owed.[237] In California, under *Rowland*, foreseeability is one factor, and sometimes the main factor, in the determinations of duty.[238] When negligence law adopted the idea that people owe each other a general duty

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See Fleck, *supra* note 178, at 24-25; *see also Delta Farms Reclamation Dist. v. Fernandez*, 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) (statutes passed together should be construed harmoniously).

[236]847 P.2d 560, 561 (Cal. 1993).

[237]*See supra* notes 69-70 and accompanying text.

[238]Talbott v. Csakany, 245 Cal. Rptr. 136, 139 (App. 1988); O'Hara v. Western Seven Trees Corp., 142 Cal. Rptr. 487, 490 (App. 1977).

of reasonable care, it also loosened the concept of foreseeability so that only the most unlikely of injuries were said to be unforeseeable.[239]

The critical distinction here is between an average conception of foreseeability and a probabilistic one. Average foreseeability, a doctrine warmly embraced by some 19th Century cases,[240] held that defendants only needed to ponder taking precautions against harms whose occurrence was usual or normal. The more modern idea of probabilistic foreseeability recognizes that some harms— once every fifty 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 defendant's conduct may fairly be said to be essentially coincidental— in the way that a child's purchase of a toy lighter and his decision to play with fire are coincidental— are held to be "unforeseeable." Only the extraordinarily rare— not the simply unusual— is classified as unforeseeable.

Recent California premises liability cases are expanding the domain of "no duty" by constricting the concept of foreseeability. In *Sharon P. v. Arman*,[241] 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. 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. Under a more relaxed conception of foreseeability, the possibility of rape is plainly foreseeable when robbery has already occurred. *Nicole M. v. Sears, Roebuck & Co.*[242] is similarly restrictive: 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.[243] In

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[239]DOBBS, *supra* note 1, at 336.

[240]E.g., Blyth v. Birmingham Waterworks Co., 159 Eng. Rep. 1047 (Exch. 1856).

[241]989 P.2d 121 (Cal. 1999).

[242]90 Cal. Rptr. 2d 922 (App. 1999).

[243]The limitations on foreseeability are also imposed by California courts through the doctrine of proximate cause. In *Saelzer 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

fact, if not in name, these cases move us back towards average foreseeability analysis. Indeed, the question that these cases ask— "Has this happened before?"— may be more than just a marked retreat from the question asked by the probabilistic approach to foreseeability anaylsis — "Is there a reasonable chance of this happening?" The question— "Has this happened before?" may be even more restrictive than, the question asked in the nineteenth century 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

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been 41 reports of trespass, along with various prior crimes committed on the defendants' premises). However, 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 1161. *Saelzer* 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 evidence 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 is, to say the least, highly unsatisfying, because it adds insult to the injuries of the victim of a crime where the perpetrators are never brought to justice by denying recovery as a matter of law. Further, it treats causation as a *legal issue* that is properly resolved on summary judgment, rather than the jury question that it surely is, once duty is found to exist. This is especially outrageous given the fact that, as Justice Werdegar noted in 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 FedEx employees as well. *Id.* at 1155. (Werdegar, J., dissenting). There is no doubt that *that* precaution would have protected the deliveryperson from the assault, and yet a majority of the Court nonetheless held that plaintiff had presented *no* evidence that raised a triable issue of fact as to whether the precautions would have prevented the incident.

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.

The proposition that landowners have "no duty" to take reasonable precautions to protect those on their premises against perfectly foreseeable assaults merely because a particular act has never happened before makes neither moral nor economic sense. It makes no moral sense because it is unfair to the victims of those acts; it makes no economic sense because it discourages landowners from taking cost-justified precautions. These cases get matters wrong morally in just the way that *Ornelas* does: they define a realm of "no duty" which gives property rights priority over physical safety. The landowner's interest in unfettered use of her property categorically trumps the patron's interest in bodily integrity.

4. No Duty to Your Customers

Kentucky Fried Chicken of Cal., Inc. v. Superior Court,[244] continues this theme. The plaintiff was seized at gunpoint at a KFC, and her assailant threatened to kill her unless the store's employee gave him all the money in the cash register. The employee failed to comply promptly, causing the plaintiff severe emotional distress. KFC moved for summary judgment on the ground of no duty. The California Supreme Court upheld KFC's claim, ruling that there was "no duty" to comply with an armed robber's demand that property be surrendered.[245] The Court based its holding on the privilege to defend property with reasonable force, claiming that it would be inconsistent with that privilege to impose liability here.[246] This extension of "no duty" law is extremely troubling. The Court not only held that the store's property rights outweighed the lives of those in the store, it also held that the property interest in the small amount of money in the cash register (perhaps $150) outweighed the lives of even a large

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[244]927 P.2d 1260 (Cal. 1997) (hereinafter "*KFC*").

[245]927 P.2d at 1266-70.

[246]927 P.2d 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 doesn't 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. 927 P.2d at 1270.

number of customers.[247]

Kentucky Fried Chicken lays bare the absurdity of the moral logic at work in the 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 than your property, then my life is also more important than your property.

5. No Duty to Your Neighbors

While not strictly speaking a landowner liability case, *Parsons v. Crown Disposal Co.*[248] stands for a proposition that represents a further extension of the doctrine of "no duty." In *Parsons*, the plaintiff was thrown by a horse after the horse was scared by noise from the defendant's garbage truck. There were factual disputes as to whether the driver of the truck saw the horse and had time to react.[249] However, the Court 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.[250]

Parsons represents 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

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[247]927 P.2d at 1270-71 (Mosk, J., dissenting).

[248]936 P.2d 70 (Cal. 1997).

[249]The Court stated that the defendant was not liable because (1) the driver didn't operate the machinery in a careless or imprudent manner before the horse showed up, and (2) the driver didn't know the horse was there and thus was not required to take precautions. 936 P.2d at 83. However, the plaintiff's deposition testimony was that he saw the driver in the driver's side view mirror when the horse began to spin and bolt. 936 P.2d at 73 n. 2. This should have created a triable issue of fact, because either (1) defendan''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) 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 they were on the ground. 936 P.2d at 101 n. 2 (Kennard, J. dissenting).

[250]936 P.2d at 89.

activity liability, which exonerates, for example, those who operating blasting equipment for the cannibalistic behavior of minks in the wake of nearby explosions.[251] 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 are engaging lawful activities.[252] Parsons overturns that principle, imposing a special rule for the operation of machinery that might scare nearby horses in the face of factual disputes as to the negligence of the machine operator.[253]

III. Abusing "Duty"

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.[254] The *Rowland* test of duty is a legal standard. To decide if duty should be recognized courts must balance a set of factors, and the list of factors they must

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[251]Madsen v. East Jordan Irrigation Co., 125 P.2d 794 (Utah 1942).

[252]Vaughan v. Menlove, 3 Bing., N.C., 468 (Common Pleas 1837); Cal. Civ. Code § 1714(a).

[253]936 P.2d at 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 are 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. 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 there really is no per se rule of nonliability. (Exception (1), carelessness, sounds just like a reasonable care standard. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, "careless" at 173 (10th Ed. 1996) ("careless" defined 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., 536 P.2d 1226, 1230 (Cal. 1975) *citing* Rest. 2d Torts, § 467. 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, 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. 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. According to the *Parsons* Court, the social value of defendant's activity is the primary consideration in determining whether a duty of care is owed. This factor was not even directly mentioned in *Rowland* and is instead taken from Prosser and Keeton.

[254]Parsons v. Crown Disposal 936 P.2d 70, 101 (Cal. 1997) (Kennard, J. dissenting). Kentucky Fried Chicken v. Sup. Ct., 927 P.2d 1260, 1275 (Cal. 1997) (Kennard, J., dissenting); Knight v. Jewett, 834 P.2d 696, 714 (Cal. 1992) (Kennard, J., dissenting).

balance (list) bears a close resemblance to those that juries must balance 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 applying the law to the facts in this way is a mistake, and a glaring one. On summary judgment, without having developed the facts, a court is in a poor position to determine that no duty of care was owed on a set of particular facts. Yet that is exactly how current California practice proceeds.

Kennard's criticism is well-taken, and accurate as far as it goes, but it fails to capture the radical character and untenable implications of emerging California practice. Inviting courts to revisit the existence of "duty" in each and every case creates enormous uncertainty. 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.

Deciding "duty" on a case by case basis therefore makes the contours of tort duties of care enormously uncertain. The disadvantages of such uncertainty are great: The more uncertain the law is, the more difficult

it is to apply and follow it faithfully, even with the best of intentions. Although such uncertainty may permit individual judges to reach the results they like in particular cases, the advantages of such uncertainty for a legal system are difficult to discern. A legal system, after all, is a set of public norms— rules, principles and standards— designed to guide conduct. The more uncertain the rules are the less effectively they guide conduct. And the uncertainty engendered by emerging California practice is a radical one. Putting the legal standard governing risky conduct up for grabs in every case prevents potential injurers from identifying the norm to which they must conform their conduct (and by which that conduct will be measured should something go awry) and prevents potential victims from determining what kind of protection the law affords them. Putting the legal standard governing risky conduct up for grabs in every case works to the disadvantage of potential injurers and potential victims alike. Radical uncertainty regarding "duty" undermines both freedom (to impose risk) and security (against risk). Because such radical uncertainty is intolerable, judgements of "duty" must generally be made on a categorical basis and "duty" must be a "nonissue" in most litigated cases.[255]

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 which invites present practice. Three features of *Rowland's* doctrine might be thought to invite the expansive use of "duty" that we are now witnessing. First, *Rowland* adopts a multi-factor test for the existence of "duty" and the elements of its test for "duty" overlap substantially with the elements of the test for breach of duty. The similarity among the factors common to both duty and breach decisions, coupled with the assignment of

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[255]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 which is inherent in the activity. Vine v. Bear Valley Ski Co., 13 Cal. Rptr. 3d 370, 382-88 (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.)

Thus, injurers might decide to take the chance and not take justified precautions that are necessary to protect the safety of others. It should be noted as well that making "duty" a live issue in a large number of cases could also render negligence law less economically efficient, by reducing the expected damages payouts to an amount less than the economic value of the untaken precautions and thus causing less than economically optimal care to be taken.

the former to judges and the latter, by and large, to juries, invites the blurring of the roles of judge and jury and the doctrines of "duty" and breach. Second, the *Rowland* test is a standard, not a rule. The application of a standard turns on the weight assigned its various factors— a weight not fixed by the standard itself— as well as on the facts at hand. The practical effect of this complexity and indeterminacy is to place considerable leeway in the hands of those charged with applying standards. Standards can be applied in a wide variety of different ways, and fairly so.

Third, by making questions of "duty" matters of social policy— of what is best for the common good— the *Rowland* test, as interpreted by Parsons, 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 she counted on for protection as she went about her 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.[256] 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 have a moral claim to the security of their persons and their property.[257] That claim stands on par with the claim

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[256]*Cf.* Goldberg & Zipursky, *Place of Duty supra* note 5, at 694-95 (arguing that the instrumentalism of *Rowland* is a condition which enables the undermining of the sense of duty as obligation and tracing that instrumentalism to Leon Green's view of duty). In *Judge and Jury in the Texas Supreme Court*, *supra* note 9,at 1701-03 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.

[257]*See* Gregory C, Keating, *Reasonableness and Rationality in Negligence Theory* , 48 STAN., L. REV. 311, 321-325 (1996) (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); George Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, (1971) (suggesting that one tradition of tort thought conceives of accident law in terms of an equal right to maximal security); 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 upon others in pursuit of our ends, so long as others may impose equivalent risks on us).

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 social policy— of what would be best for society as a whole— are at best grounds on which this right of victims to have their property and physical integrity respected might be justified.[258] *Rowland's* recognition of the link between "duty" and respect for the security of others is inadequate.[259]

There may well be much to all three of 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.

The remedy for 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 (e.g., by ski lift operators); or incurred by certain undertakings (e.g., by entering into various "special relationships"). In those broad areas where the legal standard governing the defendant's conduct is well-settled— when contract and property are out of the picture and tort is firmly in control of the terrain— the only recurring responsibility of duty

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[258]This is the view of rights expressed by Mill when he writes "[t]o 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.... 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." JOHN STUART MILL, UTILITARIANISM at 52-53 (George Sher ed., 1979[1861]).

[259]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).

doctrine is to identify those cases where 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. 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. When accidental injury is "reasonably foreseeable" the equality of the persons and interests at stake requires potential injurers to take into account the perils to which their conduct exposes others and to proceed with due regard for the physical integrity and property of others. 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.

There is, to be sure, a tension between taking "reasonable foreseeability" as the touchstone of tort duty and taking a *Rowlands* type of balancing test as the touchstone. In the broad sweep of the Anglo-American common law of torts, "reasonable forseeability" competes with the kind of balancing test found in *Rowland* as the key to the existence of duty. A long and influential line of cases, reaching back to famous nineteenth century cases like *Blyth v. Birmingham Waterworks*[260] and *Heaven v. Pender*[261] and including famous twentieth century cases as *MacPherson v. Buick Motor Co.*[262] and *Dillon v. Legg*,[263] takes reasonable foreseeability of harm to be *prima facie* sufficient to trigger a duty of care. Taking reasonable foreseeability of harm as the touchstone of "duty" roots

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[260]Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (1856)

[261]Heaven v. Pender, 11 Q.B.D. 503, 509 (C.A. 1883).

[262]MacPherson v. Buick Motor Co., 111 N.E. 1050 (1916).

[263]Dillon v. Legg, 441 P.2d 912 (1968). *Dilan* is, strictly speaking, a proximate cause decision: It takes "foreseeability of harm" to be *prima facie* sufficient to fix the extent of liability.

the obligation to take care to prevent injury to others directly in their standing as equal beings whose lives and property must be respected. By contrast, Rowland's balancing test makes the general good, not individual right, the key to duty.

The conflict between *Rowland's* commitment to grounding duty on the general good and the "reasonable foreseeability" test's commitment to grounding duty on equal right largely bypasses the corner of the law of torts that is our present concern, however. Our present concern is with the role of "duty" doctrine with respect to remote risks of physical harm, in the legal domain where tort holds sway. Even if one prefers the *Rowland* test, and the commitment to making duty depend on the general good that it embodies, to the "reasonable foreseeability" test and the commitment to equal right that it embodies, it is a mistake to deploy *Rowland* in this setting. The *Rowland* test is designed to choose between competing legal regimes, to guide us in choosing among tort, property and contract, not to settle the question of when a risk is too remote to warrant any precaution at all. Even when tort is the relevant regime, risks which are too remote should not be guarded against, simply because some risk is the price of activity.[264] The only way to eliminate all risk is to cease all activity, and that is a game not worth its candle. The role of the "reasonable foreseeability" criterion within duty doctrine is to identify the threshold where risk reduction becomes something worth considering. Identifying that threshold does not require an elaborate balancing of *Rowland's* factors. What it requires is an educated sensibility capable of distinguishing those "background risks" that are the price of social life from those activity-specific risks whose reduction must be pondered.

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. Using duty liberally takes cases out of the hands of juries and usurps power away from the Legislature. Proper regard for the provinces of those two bodies requires courts to confine the use of duty to special circumstances. Duty serves as a vessel for the uniquely judicial function of articulating the law, and it should be reserved for that role. For instance, duty may be used (assuming the Legislature hasn't spoken) to assign responsibilities among suppliers and intermediaries, to impose affirmative

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[264]For a more detailed discussion of this and the points in the rest of the paragraph, see Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN L. REV. 311, 350-52 (1996).

obligations on those who have special relationships with the victim, and to determine what experts have to take extra precautions on account of their skill. These issues are truly legal; they are questions that arise in setting a standard of care, as opposed to determine whether the facts of the case state a cause of action for negligence.

Similarly, there are some situations where the presumption against invoking duty should be all but indefeasible. Where the Legislature has recognized a duty, courts should defer to that determination. Where the reasonableness of the defendant's conduct cannot be determined without finding and evaluating facts, the issue should not be decided as a matter of law by the court under the doctrine of duty but as a matter of breach by the jury. Thus, even if one might categorize the issue of whether a particular risk is inherent in a recreational activity as an issue of "duty," that question is a factual one that only a jury should decide. And courts should not engage in applying multiple factors to determine a particular duty is owed under a particular set of facts– questions this particular must be left for the jury.

Furthermore, the issue of what questions are appropriately determined under the rubric of duty is only half the battle. Duty questions must be resolved by courts correctly, in light of the underlying policies of tort law. Property rights are not unimportant, but public safety— especially the safety of innocents such as children and customers of a fast food restaurant taken hostage by robbers— is more important. Statutes are to be given their reasonable and natural interpretation, and parties who are protected by the Legislature are also entitled to the protection of tort law.

Even with a minimalist conception of duty, there will still be room for limitations on liability in the proper case. Summary judgment will still be available when there is no dispute on the facts, or to cabin the jury's discretion when no reasonable juror could find that reasonable care was not taken. The foreseeability and directness limitations of proximate cause doctrine will still be applicable, thereby barring liability that might crush a defendant and thus be counterproductive.

But what is clear is that the scope of duty has to be sharply limited lest it morph into what it is already becoming in California– a source of uncertainty and incoherence in negligence doctrine, and, more gravely, a threat to two constitutional principles, the right to a jury trial and the separation of legislative and judicial power, that are central to our constitutional democracy.