

# RECONSTRUCTING FORESEEABILITY

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**Abstract:** This Article is the second of a two-part endeavor assessing the use of foreseeability in negligence law, and arguing against its ever-expanding role in the element of duty. The first article, *Purging Foreseeability*, urged courts to adopt the general duty provisions of the proposed *Restatement (Third) of Torts*—provisions that would purge duty of foreseeability-based considerations. Courts and scholars have resisted the *Restatement's* attempts to rid duty of foreseeability out of a jurisprudential view that foreseeability simply “belongs” there. This Article urges that the conceptual work done by foreseeability also might fit wholly and seamlessly within the elements of breach and proximate cause. In proving that foreseeability’s conceptual fit is thus indeterminate, the Article aims to refocus the debate on whether the court or the jury is the better arbiter of foreseeability—a matter that courts are reluctant to discuss and scholars have largely ignored.

## INTRODUCTION

The concept of foreseeability is fast devouring the negligence cause of action. Foreseeability of a risk of injury has for centuries rested at the heart of court determinations of whether a defendant breached its duty of care.<sup>1</sup> More recently, the foreseeability of a particular plaintiff’s injury has become central to the element of proximate cause.<sup>2</sup> Foreseeability’s most aggressive advance of late, however,

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<sup>1</sup> See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 59–60 (2d ed. 2002) (describing the requirement of foreseeability in decisions of breach); 3 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, *THE LAW OF TORTS* § 16.9, at 466–69 (2d ed. 1986) [hereinafter HARPER ET AL., *THE LAW OF TORTS*] (discussing the history of the tie between breach and foreseeability).

<sup>2</sup> DAN B. DOBBS, *THE LAW OF TORTS* § 180, at 444 (2000); MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 399 (7th ed. 2001). Many identify the emerging importance of foreseeability in proximate cause decisions with the Australian case, *Overseas Tankship (U.K.), Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound)*, [1961] A.C. 388 (P.C.), although foreseeability had almost certainly played a role in proximate cause for some time before that case.

has been into the realm of duty. Emboldened by a series of decisions in the California Supreme Court culminating in *Tarasoff v. Regents of the University of California*,<sup>3</sup> foreseeability now threatens to swallow the duty calculus whole,<sup>4</sup> to become duty's "unified theory."<sup>5</sup>

This Article is the second phase of a two-part endeavor to assess the use of foreseeability in negligence law and to make the case against its expansive role in duty. The first article reviewed foreseeability's various doctrinal incarnations and urged courts to adopt the general duty provisions of the proposed *Restatement (Third) of Torts*<sup>6</sup>—provisions that would largely purge duty of foreseeability-based considerations.<sup>7</sup> As that piece argued, ridding duty of foreseeability would result in a number of significant benefits for negligence law. It would untangle negligence doctrine, which at present is confusingly redundant with regard to foreseeability.<sup>8</sup> It would encourage judges to be overt about the public policy choices that underlie foreseeability-based duty decisions.<sup>9</sup> Finally, and perhaps most importantly, it would place initial authority over the necessarily fact-dependent issue of foreseeability properly in the hands of the jury rather than the judge.<sup>10</sup>

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<sup>3</sup> 551 P.2d 334, 342 (Cal. 1976) (holding that among several factors to be considered in analyzing duty, "[t]he most important of these considerations . . . is foreseeability"). For a discussion of *Tarasoff*, see *infra* notes 271–305 and accompanying text.

<sup>4</sup> See Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 121–23 (1994) (characterizing *Tarasoff* as having strengthened foreseeability's predominance in duty decisions); James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 175–76 (1980) (arguing that beginning with *Heaven v. Pender*, (1883) 11 Q.B.D. 503, and culminating with *Tarasoff*, duty analysis has gradually embraced a duty rule turning primarily on an analysis of foreseeability).

<sup>5</sup> The term "unified theory" is a reference to the search in theoretical physics for a single umbrella theory that explains the properties and relationships of the entire physical world. See BRIAN GREENE, *THE ELEGANT UNIVERSE* 424 (1999) (defining "unified theory" as "[a]ny theory that describes all four forces and all of matter within a single, all-encompassing framework").

<sup>6</sup> The Section reads: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7(a) (Tentative Draft No. 4, 2004).

<sup>7</sup> W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 770, 773–74 (2005). The *Restatement (Third)*'s duty approach will, however, only affect negligence cases that involve physical injury. Negligence cases involving economic or psychic harm are to be governed by another set of Restatement provisions yet to be drafted. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES), at *Introduction* (Tentative Draft No. 2, 2002).

<sup>8</sup> Cardi, *supra* note 7, at 775–88.

<sup>9</sup> *Id.* at 788–91.

<sup>10</sup> *Id.* at 795, 800–05.

The arguments in favor of a foreseeability-free duty standard are largely normative. Despite the merits of such an approach, foreseeability remains a pervasive consideration in many courts' duty analyses. There are several possible explanations for foreseeability's popularity. First, judges sometimes find respite in easily comprehensible, if imperfect, solutions to complex legal dilemmas. Foreseeability provides such a solution to difficult duty questions—one that is not only intuitively sensible, but also safely woven into the historical fabric of common-law negligence. Furthermore, foreseeability has the sound of doctrine and yet is a malleable enough concept to serve as a vessel through which courts might render jurisprudentially palatable many of the policy decisions inherent to tort law.<sup>11</sup> In addition, by infusing foreseeability into the element of duty—the only element of negligence decided by the court without deference to the jury<sup>12</sup>—courts gain a large measure of control over juries. Much of the doctrinal work now accomplished by foreseeability as a part of duty has been traditionally relegated, in the first instance, to the jury in the context of breach and proximate cause.<sup>13</sup> By co-opting as part of duty significant portions of the breach and proximate cause inquiries, courts avoid having to decide such matters pursuant to the “no reasonable jury standard,” thereby tightening their reins on the perceived caprice of juries.<sup>14</sup> A final reason for courts' increasing reliance on foreseeability in deciding duty—and the reason central to this Article—is that many feel that foreseeability simply “belongs there.” That is, courts and scholars often theorize duty such that foreseeability is a natural conceptual fit, and they explain foreseeability in ways that tie it necessarily to duty.<sup>15</sup> This understanding of foreseeability's relationship with duty can be traced in large measure to the decisions of Justice Cardozo in such watershed cases as *MacPherson v. Buick Motor Co.*<sup>16</sup>

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<sup>11</sup> *Id.* at 763–68, 788–91; see also Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (suggesting that “judges should not rely on, or hide behind, words like . . . foreseeable, unforeseeable, . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions”); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (describing foreseeability as “so open-ended [that] [it] can be used to explain any decision”).

<sup>12</sup> RESTATEMENT (SECOND) OF TORTS § 328B (1965); DOBBS, *supra* note 2, § 149, at 355.

<sup>13</sup> Cardi, *supra* note 7, at 744–50.

<sup>14</sup> See *infra* notes 48–76, 98–324, and accompanying text.

<sup>15</sup> Cardi, *supra* note 7, at 752–53, 756–68.

<sup>16</sup> 111 N.E. 1050 (N.Y. 1916).

and *Palsgraf v. Long Island Railroad Co.*,<sup>17</sup> although the movement toward this view has almost certainly been broader.<sup>18</sup>

This Article refutes these conceptualizations of duty and foreseeability, and it questions the assertion that foreseeability necessarily plays a role in duty decisions. The Article urges that instead, the conceptual work done by foreseeability also might fit wholly and seamlessly within the elements of breach and proximate cause. In proving that foreseeability's conceptual fit is thus indeterminate, the Article aims to refocus the debate on the only determinative factor: whether court or jury is the better arbiter of foreseeability—a matter that courts are reluctant to discuss and that scholars, at least since Leon Green,<sup>19</sup> have largely ignored.

The Article proceeds as follows: Part I offers a brief overview of the current doctrinal roles played by foreseeability in negligence cases.<sup>20</sup> Part II examines the nature of a “cause of action” generally and the purpose served by defining a cause of action according to a series of elements.<sup>21</sup> Part III then addresses the various conceptual roles played by foreseeability in negligence cases.<sup>22</sup> With regard to each role save categorical foreseeability (that is, judicial determinations of foreseeability for entire categories of risks or injuries or plaintiffs), the subsections of Part III demonstrate that the conceptual work done by foreseeability might be accomplished equally well in the context of duty or as part of the breach or proximate cause analyses. With respect to categorical foreseeability, Part III.D urges that negligence would simply be better off without it.<sup>23</sup> Finally, Part IV summarizes the primary points of the Article and briefly explores a general statement of duty that might lead courts toward a more lucid understanding of the concepts of foreseeability and duty.<sup>24</sup>

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<sup>17</sup> 162 N.E. 99 (N.Y. 1928).

<sup>18</sup> For a compelling account of this development, see generally John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

<sup>19</sup> See generally LEON GREEN, *JUDGE & JURY* (1930) (discussing at length the judge versus jury question in negligence).

<sup>20</sup> See *infra* notes 25–76 and accompanying text.

<sup>21</sup> See *infra* notes 77–97 and accompanying text.

<sup>22</sup> See *infra* notes 98–324 and accompanying text.

<sup>23</sup> See *infra* notes 271–305 and accompanying text.

<sup>24</sup> See *infra* notes 325–26 and accompanying text.

## I. THE DOCTRINAL ROLES OF FORESEEABILITY

As background to the discussion in Part III of the conceptual work accomplished by foreseeability, the following presents a descriptive overview of foreseeability's current doctrinal roles.<sup>25</sup>

### A. Foreseeability's Role in Breach

Perhaps the most straightforward doctrinal function of foreseeability in negligence law is to aid the factfinder in determining breach. Once the judge has determined that the defendant owed a duty and has delimited that duty in a standard of care, the jury must then decide,<sup>26</sup> in the context of breach, whether the defendant's conduct failed to conform to that standard.<sup>27</sup> The near-universal standard of care in negligence cases is the duty to act as would have a reasonable person under the circumstances.<sup>28</sup> Reasonableness often turns on (1) the degree of foreseeable likelihood that the defendant's actions might result in injury,<sup>29</sup> (2) the range in severity of foreseeable injuries, and (3) the benefits and burdens of available precautions or alternative manners of conduct.<sup>30</sup> Together, the range of likelihood and severity of foreseeable injury constitutes the foreseeable "risk" created by an actor's conduct.<sup>31</sup> As a general matter, the higher the risk—that is, the more foreseeable it was that injury might result from particular behavior and the more severe the range of foreseeable injuries—the more careful the defendant is required to have been.<sup>32</sup>

<sup>25</sup> For a more detailed account, see Cardi, *supra* note 7, at 744–68.

<sup>26</sup> DOBBS, *supra* note 2, § 115, at 270.

<sup>27</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984) [hereinafter PROSSER & KEETON].

<sup>28</sup> RESTATEMENT (SECOND) OF TORTS § 283 (1965).

<sup>29</sup> OLIVER W. HOLMES, JR., THE COMMON LAW 76–77, 86–87 (Mark DeWolfe Howe ed., 1963) (1881).

<sup>30</sup> See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947) (enshrining these factors in the mathematical formula in which liability lies where  $B$  (burden of precautions)  $< P$  (probability of loss)  $\times L$  (magnitude of loss)); DOBBS, *supra* note 2, §§ 143–146, at 334–48 (explaining the interplay of foreseeability and reasonableness); PROSSER & KEETON, *supra* note 27, § 65, at 453–54 (“The unreasonableness of the risk[] which [a reasonable person of ordinary prudence] incurs is judged by the . . . process of weighing the importance of the interest he is seeking to advance, and the burden of taking precautions, against the probability and probable gravity of the anticipated harm . . .”).

<sup>31</sup> See, e.g., *Zettle v. Handy Mfg. Co.*, 998 F.2d 358, 360 (6th Cir. 1993) (“[A] showing of the magnitude of the foreseeable risks includ[es] the likelihood of occurrence of the type of accident . . . and the severity of injuries sustainable from such an accident.”).

<sup>32</sup> See, e.g., *Lollar v. Poe*, 622 So. 2d 902, 905 (Ala. 1993) (“The degree of care required of an animal owner should be commensurate with the propensities of the particular ani-

This form of foreseeability is one of general focus. That is, it examines not the foreseeability of the particular injury suffered by the plaintiff, but the foreseeable likelihood and severity of injuries that might have resulted from the defendant's conduct.<sup>33</sup>

### B. *Foreseeability's Role in Proximate Cause*

Once it has been determined that a defendant owed and breached a duty, and that the breach in fact caused the plaintiff's injury, the jury<sup>34</sup> must decide what is known as "proximate cause,"<sup>35</sup> "legal cause."<sup>36</sup> or, as in the proposed *Restatement (Third)*, the "scope of liability."<sup>37</sup> This element serves as a limitation on the consequences of an actor's conduct.<sup>38</sup> Through proximate cause, courts recognize that although "the consequences of an act go forward to eternity, . . . any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would 'set society on edge and fill the courts with endless litigation.'"<sup>39</sup> Proximate cause thus focuses on the connection between a defendant's unreasonable conduct and the plaintiff's injury,<sup>40</sup> and limits liability after the point at which "the harm that resulted from the defendant's negligence is so clearly out-

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mal and with the place where the animals are kept, including its proximity to high-speed highways."); PROSSER & KEETON, *supra* note 27, § 31, at 170–71 (explaining that although "[n]early all human acts, of course, carry some recognizable but remote possibility of harm to another," precaution is required "if the risk is an appreciable one, and the possible consequences are serious").

<sup>33</sup> See DOBBS, *supra* note 2, § 143, at 335. In the context of a discussion of breach, Dobbs offers the following example:

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

*Id.*

<sup>34</sup> PROSSER & KEETON, *supra* note 27, § 45, at 321.

<sup>35</sup> *Id.* § 41, at 263.

<sup>36</sup> RESTATEMENT (SECOND) OF TORTS § 281(c) (1965).

<sup>37</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29. Special Note on Proximate Cause, at 1 (Tentative Draft No. 3, 2003).

<sup>38</sup> PROSSER & KEETON, *supra* note 27, § 41 at 264.

<sup>39</sup> *Id.* § 41, at 264 (quoting *North v. Johnson*, 59 N.W. 1012, 1012 (Minn. 1894)).

<sup>40</sup> *Id.*; see also Galligan, *supra* note 11, at 1513 (explaining that proximate cause is "really a way of deciding whether society ought to hold this defendant, whose negligent acts were a cause-in-fact of the plaintiff's damages, liable under these circumstances, to this plaintiff . . . [or to] sever the chain of causation").

side the risks created that it would be unjust or at least impractical to impose liability.”<sup>41</sup>

Explanations and tests for proximate cause abound. A common thread among proximate cause cases, however, is that most explicitly<sup>42</sup> or implicitly<sup>43</sup> consider some notion of foreseeability.<sup>44</sup> In contrast to foreseeability’s role in breach, the foreseeability inquiry in the context of proximate cause is not general but specific to the particular injury suffered by the particular plaintiff at hand. Thus, even where injury of some kind to some person was foreseeable, proximate cause may fail where the defendant’s actions resulted in (1) an unforeseeable type of injury,<sup>45</sup> (2) injury occurring in an unforeseeable manner,<sup>46</sup> or (3) injury to an unforeseeable plaintiff.<sup>47</sup> Furthermore, foreseeability in the context of proximate cause does not help to decide whether the defendant acted unreasonably, as in the context of breach; rather, foreseeability here aids in the decision of whether the actual consequences of the defendant’s conduct were so bizarre or far-removed from the risks that made the conduct negligent that the defendant, though blameworthy, should not be held liable for them.

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<sup>41</sup> DOBBS, *supra* note 2, § 180, at 443.

<sup>42</sup> *See, e.g.*, Tetro v. Town of Stratford, 458 A.2d 5, 7–8 (Conn. 1983) (“The test for finding proximate cause ‘is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant’s negligence.’” (quoting Coburn v. Lenox Homes, Inc., 441 A.2d 620, 627 (Conn. 1982))).

<sup>43</sup> For example, the approach of the draft *Restatement (Third) of Torts* might be described as little more than a “foreseeability of type of harm” standard. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29, cmt. j (Tentative Draft No. 3, 2003). *But see* John C. P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1332–43 (2003) (suggesting an alternative view of the *Restatement (Third)* “risk rule”).

<sup>44</sup> DOBBS, *supra* note 2, § 181, at 444; FRANKLIN & RABIN, *supra* note 2, at 399.

<sup>45</sup> *See, e.g.*, Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 74, 79–80 (1883) (holding that it is within the purview of the jury to decide whether it was foreseeable that a speeding driver would hit another car, that the collision would bruise its driver, and that the bruise would later become cancerous); Hines v. Morrow, 236 S.W. 183, 187–88 (Tex. Civ. App. 1921) (holding that it was foreseeable, as a matter of law, that a pothole left by defendant in a highway would stall a car, that a good Samaritan attempting to pull it out would get his wooden leg stuck in the mud, and that a loop in the tow rope would lasso his good leg and break it).

<sup>46</sup> *See, e.g.*, Bunting v. Hogsett, 21 A. 31, 32 (Pa. 1891) (holding that the injury of a railroad passenger was foreseeable, as a matter of law, where a collision threw a railroad engine out of control and the engine then ran around a circular track and struck the passenger in a second collision).

<sup>47</sup> *See, e.g.*, *In re Guardian Cas. Co.*, 2 N.Y.S.2d 232, 234 (N.Y. App. Div. 1938) (holding the plaintiff was foreseeable, as a matter of law, where a collision forced a taxi into a building and loosened a stone, which fell and killed the plaintiff, a bystander, while the taxi was being removed twenty minutes after the initial accident).

### C. Foreseeability's Role in Duty

In contrast to breach and proximate cause, duty is the province of the court.<sup>48</sup> Courts' analysis of duty is a two-step process. First, the court must decide whether to impose a duty on the defendant at all.<sup>49</sup> Second, the court must define the scope of that duty in the form of a standard of care.<sup>50</sup>

Most courts adhere to a general structure for duty in negligence cases. The foundation of this structure is the principle that one generally owes a duty to avoid affirmatively causing physical harm to others.<sup>51</sup> The flip side of this universal duty is that one generally does not owe a duty to warn, protect, or rescue a person from risks created by another source.<sup>52</sup> There are, however, a number of commonly held exceptions to this "no duty to rescue" rule. These "affirmative duties" include, for example, the duty to rescue persons with whom one has a judicially recognized special relationship<sup>53</sup> and the duty to continue, under some circumstances, a rescue effort voluntarily undertaken.<sup>54</sup> Finally, courts have carved out a number of other special duty rules that turn either on the nature of the injury alleged or on certain characteristics of the defendant's identity. For example, a defendant

<sup>48</sup> RESTATEMENT (SECOND) OF TORTS § 328B (1965); DOBBS, *supra* note 2, § 149, at 355.

<sup>49</sup> RESTATEMENT (SECOND) OF TORTS § 328B.

<sup>50</sup> *Id.*; DOBBS, *supra* note 2, § 149, at 355.

<sup>51</sup> *See, e.g.*, Weirum v. RKO Gen., Inc., 539 P.2d 36, 39 (Cal. 1975) ("[E]very case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct."); Heaven v. Pender, (1883) 11 Q.B.D. 503, 509 ("[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."); DOBBS, *supra* note 2, § 227, at 578; 3 HARPER ET AL., THE LAW OF TORTS, *supra* note 1, § 18.2; PROSSER & KEETON, *supra* note 27, § 53, at 356–59; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 37, Reporters' Note to cmt. b (Tentative Draft No. 4, 2004) (citing a string of cases that recognize the general duty not to create a risk of harm).

<sup>52</sup> RESTATEMENT (SECOND) OF TORTS § 314 (1965); DOBBS, *supra* note 2, § 314, at 853.

<sup>53</sup> *See, e.g.*, Methola v. County of Eddy, 629 P.2d 350, 353–54 (N.M. Ct. App. 1981) (holding that jailors have a duty to protect and rescue inmates from other abusive inmates); RESTATEMENT (SECOND) OF TORTS § 314A (explaining that common carriers, innkeepers, land possessors, and those in custodial roles owe to customers, invitees, or those in their custody a duty to protect, warn of dangers, and offer first aid).

<sup>54</sup> Generally, a voluntary rescuer must use reasonable care to continue a rescue effort if failure to do so would leave the rescuee in imminent peril of serious bodily harm. *E.g.*, Atkinson v. Stateline Hotel Casino & Resort, 21 P.3d 667, 672 (Utah Ct. App. 2001).

generally (though with significant exceptions) does not owe a duty to avoid causing purely emotional or economic harm,<sup>55</sup> and where the defendant is a branch of government or a landowner, limited-duty rules may attach.<sup>56</sup>

The conceptual substance of duty is a matter of considerable debate. Generally, duty is seen to be “an obligation, to which the law will give recognition and effect, to conform to some standard of conduct toward another.”<sup>57</sup> Regarding the method by which courts impose and define legal obligations, their analysis appears to focus on five major considerations: community notions of obligation,<sup>58</sup> a broad sense of social policy (including a court’s judgments regarding substantive rights and critical morality),<sup>59</sup> concern for the rule of law,<sup>60</sup> administrative capability and convenience,<sup>61</sup> and, not least of all, foreseeabil-

<sup>55</sup> See, e.g., *Dillon v. Legg*, 441 P.2d 912, 916–20 (Cal. 1968) (analyzing emotional harm rule generally); DOBBS, *supra* note 2, § 452, at 1282 (discussing the general rule that there is no duty for negligent economic harm).

<sup>56</sup> See DOBBS, *supra* note 2, §§ 231–237, at 587–620 (discussing duties commonly owed by landowners to those on their land); *id.* § 271, at 723–27 (describing the public duty doctrine and its limitations on governmental liability).

<sup>57</sup> William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12 (1953).

<sup>58</sup> See, e.g., *Davis v. Westwood Group*, 652 N.E.2d 567, 569 (Mass. 1995) (“In determining whether the defendant had a duty to be careful, we look to existing social values and customs, as well as to appropriate social policy.”); John C.P. Goldberg, Note, *Community and the Common Law Judge: Reconstructing Cardozo’s Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1334–35 (1990) (discussing tort law’s incorporation of social norms and expectations); Prosser, *supra* note 57, at 15 (“In the end the court will decide whether there is a duty on the basis of the mores of the community . . .”).

<sup>59</sup> See PROSSER & KEETON, *supra* note 27, § 53, at 358 (stating that duty is “only an expression . . . of policy which lead[s] the law to say that the plaintiff is entitled to protection”); Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466–68 (1897) (discussing the idea generally).

<sup>60</sup> Because duty is the only prima facie element in negligence decided by the court, it provides judges their primary means of ensuring that like cases are decided alike and different cases differently. Because determinations of negligence are overwhelmingly fact-specific, however, duty rules most often set general standards rather than particularized codes of conduct. See DOBBS, *supra* note 2, § 227, at 579 (describing duty decisions as “expressions of ‘global’ policy rather than evaluations of specific facts of the case” and explaining that “no-duty rules should be invoked only when all cases they cover fall substantially within the policy that frees the defendant of liability. . . . [R]ules of law having the quality of generality. . . . should not be merely masks for decisions in particular cases.”).

<sup>61</sup> See Prosser, *supra* note 57, at 15 (“In the decision whether or not there is a duty, many factors interplay . . . [including] the convenience of administration of the rule . . .”). For example, the rules governing claims for emotional distress owe their origin to such concerns. See Galligan, *supra* note 11, at 1511 (noting that in the context of claims for emotional distress, “a court may decide there is no duty owed . . . [for] administrative convenience”). Claims for emotional distress pose several unique administrative challenges: scientific and legal shortcomings in the ability to determine accurately the existence and extent of emotional harm, the problem of approximating emotional harm in

ity. Often, foreseeability is cited as a reason to impose a duty where one otherwise would not exist—for example, due to the rescue rule.<sup>62</sup> Courts also sometimes cite a lack of foreseeability as grounds for denying a duty, even where the defendant's conduct created a risk of harm.<sup>63</sup> Indeed, foreseeability has become so central a concept in many courts' duty analyses that a ruling on foreseeability is outcome-determinative.<sup>64</sup>

In ruling on questions of duty, courts employ each of the doctrinal forms of foreseeability also used in deciding breach and proximate cause.<sup>65</sup> Imposition of a duty often turns upon a court's view of the foreseeability of some risk attendant to the defendant's conduct.<sup>66</sup>

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dollar awards, and the threat of a floodgate of litigation over claims of trivial emotional injury. See *DOBBS*, *supra* note 2, § 302, at 823–24. In response to these challenges, courts have imposed only limited duties on defendants to avoid causing purely emotional harm. See *Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429–36 (1997) (outlining the common law's limited duties to avoid causing emotional distress and explaining the policy reasons for such limitations).

<sup>62</sup> See, e.g., *Tarasoff v. Regents of the Univ. of Calif.*, 551 P.2d 334, 342 (Cal. 1976) (imposing duty on mental health professionals to warn foreseeable third parties of dangers posed by their patients and noting that among several factors to be considered in analyzing duty, “[t]he most important of these considerations . . . is foreseeability”); *Murdock v. City of Keene*, 623 A.2d 755, 757 (N.H. 1993) (explaining that a jailer may be liable for injuries sustained from an inmate's suicide attempt if the attempt was foreseeable).

<sup>63</sup> See, e.g., *Herrera v. Quality Pontiac*, 73 P.3d 181, 187 (N.M. 2003) (“For our duty analysis, ‘it must be determined that the injured party was a foreseeable plaintiff—that he [or she] was within the zone of danger created by [the defendant's] actions . . . .’”) (alteration in original) (quoting *Calkins v. Cox Estates*, 792 P.2d 36, 38 (N.M. 1990)).

<sup>64</sup> See, e.g., *Harper v. Remington Arms Co.*, 280 N.Y.S. 862, 868–69 (Sup. Ct. 1935) (finding that a gun manufacturer had no duty and thus was not liable for injuries resulting from the use of highly charged ammunition, meant only for use in firearms testing and distributed only to testing parties, because the injured party was an unforeseeable user who was given the shells by a third party).

<sup>65</sup> For a description of the roles of foreseeability in breach and proximate cause, see *supra* notes 26–47 and accompanying text.

<sup>66</sup> See, e.g., *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1006 (N.H. 2003) (“All persons have a duty to exercise reasonable care not to subject others to an unreasonable risk of harm. Whether a defendant's conduct creates a risk of harm to others sufficiently foreseeable to charge the defendant with a duty to avoid such conduct is a question of law . . . .”) (citations omitted); *Brennen v. City of Eugene*, 591 P.2d 719, 723 (Or. 1979) (stating that a defendant owes a duty where the defendant “creat[ed] a foreseeable risk of harm to others”); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (“In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Of all these factors, foreseeability of the risk is ‘the foremost and dominant consideration.’”) (citation omitted) (quoting *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)); *Galligan*, *supra* note 11, at 1511 (noting that some courts hold that “a person has a duty to

Where injury was not a sufficiently foreseeable consequence of the defendant's conduct, or where the foreseeable severity of injury was not particularly great, the judge will dismiss the case on the ground that the defendant did not owe a duty of care.<sup>67</sup> The converse is also true.<sup>68</sup> Courts also frequently condition duty on the foreseeability of the type of harm or the manner in which harm occurred. That is, even where a court finds that the defendant's conduct created some risk of harm, the court will decline to impose a duty where the type or manner of harm was unforeseeable.<sup>69</sup> Finally, as demonstrated by the famous case of *Palsgraf v. Long Island Railroad Co.*,<sup>70</sup> courts also consider the foreseeability of a particular plaintiff to be an important factor in deciding whether to impose a duty.<sup>71</sup>

One last introductory observation regarding foreseeability's doctrinal place in courts' duty determinations: some courts and academics explain foreseeability's seemingly redundant roles in duty by urging that courts decide foreseeability in the context of duty categorically, whereas they decide foreseeability as part of breach or proximate cause strictly according to the particular facts of the case. Pursuant to this view, for example, plaintiff-foreseeability in the duty context involves asking whether the class or category of persons of

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protect another whenever the risk to the other was sufficiently foreseeable that a person of ordinary prudence would exercise ordinary care to avoid that risk").

<sup>67</sup> See, e.g., *Albert v. Hsu*, 602 So. 2d 895, 898 (Ala. 1992) (holding that the defendant restaurant owner did not owe a duty to a restaurant patron to protect the patron from the unforeseeable event of a car backing across a parking lot, over a curb, and through the wall of the restaurant); *Washington v. City of Chi.*, 720 N.E.2d 1030, 1033–34 (Ill. 1999) (holding that where the plaintiff was struck by a truck whose driver had decided to skirt traffic by driving onto the shoulder, striking a median and planter box installed by the defendant city, the city had no duty because "the accident . . . was not a reasonably foreseeable consequence of the condition of the median").

<sup>68</sup> See, e.g., *Snyder v. Am. Ass'n of Blood Banks*, 676 A.2d 1036, 1048–49 (N.J. 1996) (holding the severity of harm caused by AIDS to be dire, the possibility that patients might contract AIDS via contaminated transfusions to be foreseeable, and that the defendant blood bank thus owed a duty to use reasonable precautions to avoid causing such infections).

<sup>69</sup> See, e.g., *Bryant v. Glastetter*, 38 Cal Rptr. 2d 291, 295 (Ct. App. 1995) (declining to impose a duty—where the decedent tow truck driver was killed by a third party while impounding the defendant's vehicle after the defendant's arrest for drunk driving—because "[t]he harm suffered by decedent . . . was not a 'harm of a kind normally to be expected' as a consequence of negligent driving") (quoting *George A. Hormel & Co. v. Maez*, 155 Cal. Rptr. 337, 339 (Ct. App. 1979)).

<sup>70</sup> 162 N.E. 99 (N.Y. 1928).

<sup>71</sup> *Id.* (holding that although railroad workers created some risk in dislodging a package from the grip of a boarding passenger, they did not create a risk to the plaintiff, who stood some distance away on the station platform).

which plaintiff is a member was foreseeable to the category of persons of which defendant is a member.<sup>72</sup> To the extent that foreseeability in duty is indeed decided as a categorical matter—and it is certainly not uniformly so decided<sup>73</sup>—such decisions are normatively unwise. As I have elsewhere argued in greater detail, foreseeability of any doctrinal stripe is a particularly fact-dependent question, the answer to which might turn on even slight differences in the facts of a case.<sup>74</sup> Deciding foreseeability as a categorical matter—for a category of defendants, a category of injuries, or in the context of a category of risk-creating activities—is thus nothing more than the announcement of a broad rule that may not make sense under any number of unforeseen future circumstances.<sup>75</sup> A categorical decision of foreseeability thus suffers from the same faults as dictum. There is, however, a different sense in which a form of categorical foreseeability might provide insight into certain foreseeability cases. This conceptual use of categorical foreseeability, and categorical foreseeability in general, is discussed at length in Part III.D below.<sup>76</sup>

## II. THE PURPOSE OF ELEMENTS OF A CAUSE OF ACTION

The foregoing explanation highlights the similar, perhaps overlapping doctrinal appearances of foreseeability in the primary elements of negligence. I have elsewhere argued that the law's redundant use of foreseeability is confusing, illogical, and normatively undesirable.<sup>77</sup> Regardless of one's opinion regarding the proper doctrinal place of foreseeability, however, it is helpful to consider why the question of to which element of negligence foreseeability is best suited is important. More generally, why does it matter that a particular legal concept is associated with one element of a cause of action or another? Indeed, what is the purpose of dividing a cause of action into elements at all?

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<sup>72</sup> See Goldberg & Zipursky, *supra* note 18, at 1818–20, 1828.

<sup>73</sup> See generally *Mussivand v. David*, 544 N.E.2d 265 (Ohio 1989) (in deciding whether an adulterer owed a duty to the spouse of his adulteress not to transmit to him a sexually transmitted disease, the court did not speak in terms of a generalized, class-based foreseeability, but imposed a duty of due care in light of specific foreseeability-related facts).

<sup>74</sup> Cardi, *supra* note 7, at 793–94, 802–04.

<sup>75</sup> *Id.* at 803.

<sup>76</sup> See *infra* notes 271–305 and accompanying text.

<sup>77</sup> See generally Cardi, *supra* note 7.

The cause of action is a descendent of the writ system, imported to colonial America from England.<sup>78</sup> Under the writ system, in order to survive immediate dismissal, a plaintiff had to allege facts that fit one of a limited number of particularized forms of proceeding at law or in equity.<sup>79</sup> Each form of proceeding limited the scope of relief it provided by requiring distinct procedural incidents, limiting its application to a particular type of factual scenario, offering only a specific form of remedy, and setting the means of judgment and execution.<sup>80</sup> If a plaintiff's pleading failed in any one of these departments, it was dismissed without regard to the potential that the plaintiff had indeed been wronged and had suffered injury as a result.<sup>81</sup>

Division of the early forms of proceeding into elements provided a formal means by which to test whether the plaintiff had properly satisfied the requirements for access to the courts and to a particular remedy. The cause of action as we know it today is analogous to its ancestor in the sense that it sets forth the legal requirements according to which a plaintiff's suit is judged. It is different, however, in several important respects. Today's causes of action are of broader applicability than were the early forms of proceeding—the general negligence action, for example, has replaced more specific writs such as trespass on the case.<sup>82</sup> In addition, the chosen cause of action no longer dictates the remedy available.<sup>83</sup> Indeed, a plaintiff who has been wronged is no longer limited to existing causes of action for re-

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<sup>78</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 98 (1973) (detailing the use of English actions by American courts even at the time of the Constitutional Convention); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 4 (1977) (describing the adoption of English law by the States); Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 *IOWA L. REV.* 777, 784–85 (2004) (explaining the manner in which early American courts utilized the English forms of action).

<sup>79</sup> Bellia, *supra* note 78, at 784–85.

<sup>80</sup> See *id.* at 784, 789.

<sup>81</sup> See I JOSEPH CHITTY, *A TREATISE ON THE PARTIES TO ACTIONS, THE FORMS OF ACTION, AND ON PLEADING* 572 (1828) (“When the declaration . . . appears on the face of it, and without reference to extrinsic matter to be defective, either in substance or form, the opposite party may in general demur . . . .”); JOSEPH STORY, *A SELECTION OF PLEADINGS IN CIVIL ACTIONS* 23 (2d ed. 1829) (noting that “[a] mistake of the proper form of action” or “a defect of form in the count or declaration” was grounds for dismissal); Bellia, *supra* note 76, at 789.

<sup>82</sup> See HORWITZ, *supra* note 78, at 89–94 (describing the movement from trespass and trespass on the case to general negligence).

<sup>83</sup> See Bellia, *supra* note 78, at 794–98 (detailing the 1930s debate, culminating in the drafting of the Federal Rules of Civil Procedure, which divorced the concept of a cause of action from the existence of a remedy).

lief at all.<sup>84</sup> At least ostensibly, a plaintiff need only convince a court that she has been wronged, and the court is empowered to grant relief. The cause of action is, in this sense, no longer formalistic: a court is not required to dismiss a plaintiff's claim solely for having failed to plead the elements of a cause of action.<sup>85</sup> Lastly, and most saliently, the elements of a cause of action focus no longer on formalistic hoops through which a plaintiff must leap, but instead describe the conceptual elements of proof of which the plaintiff must convince the judge or jury in order to prevail.<sup>86</sup>

Courts have thus relaxed the formalistic aspects of the forms of proceeding, adopting instead an approach that focuses directly on the plaintiff's rights and the defendant's putative wrong.<sup>87</sup> The modern division of a cause of action into a series of elements serves this approach in at least three important ways. First, a list of elements guides the liability inquiry by providing a structured, ordered method according to which a court or jury may reason through the substantive requirements. Because each court follows the same pattern of elements, such blueprints serve the rule of law by helping to ensure that like cases will be decided alike.<sup>88</sup>

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<sup>84</sup> See *id.* at 799 (“[I]t seems clear that today courts conceive of the concept of the cause of action in more functionally adaptive terms than they did before the merger of law and equity: a plaintiff may be said to have a cause of action notwithstanding the fact that it is uncertain upon what legal grounds the plaintiff ultimately will prevail if successful; . . . and the plaintiff may prevail upon a legal theory without either pleading or proving all of its elements.”).

<sup>85</sup> See *id.* at 792 (“The Federal Rules of Civil Procedure do not require that a complaint set forth in a particular form the facts and events necessary to attain a certain form of relief.”); Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179, 182 (2003) (“At first, the legal question raised was whether, on these real facts, the case was properly brought under the pleaded form of action. Inexorably, however, these procedures invited the litigants to ask the substantive question: on these real facts, should the defendant be held liable?”).

<sup>86</sup> Although many cases are still dismissed for failure to allege facts sufficient to state a claim upon which relief may be granted, courts' focus now is not on searching through a pile of writs for a proper fit, but on determining whether the plaintiffs' facts implicate the concepts on which substantive justice turns.

<sup>87</sup> See JOHN NORTON POMEROY, *CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS* § 347 (4th ed. 1904) (defining a cause of action as “the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong”).

<sup>88</sup> See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1594 (2001) (“Central to the rule of law is the notion that judicial decision making must be marked by reason, integrity, and consistency.”); Neil S. Siegel, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court*, 89 CAL. L. REV. 1165, 1183–84 (2001)

Second, division of a cause of action into elements facilitates decisionmakers' analysis of the legal concepts upon which liability rests. As explained above, the elements of a cause of action typically represent the legal concepts of which the plaintiff must convince the judge or jury in order to obtain relief. By considering such concepts distinctly and in ordered sequence, courts more capably identify the characteristics of each legal concept, isolate the analysis of each concept from that of others, and determine the relationship between concepts. These acts, in turn, coalesce courts' understanding of the prerequisites to liability and lead to a more correct and consistent application thereof. For example, courts' understanding that the element of duty is distinct from and antecedent to the element of breach allows courts to parse more carefully those cases in which a defendant unreasonably failed to rescue another from a risk created by some third source.<sup>89</sup> As another example, consideration of the relationship between the concepts of breach and factual causation is a necessary step in the proper resolution of many toxic tort cases.<sup>90</sup>

Third, setting forth a theory of recovery as a series of elements provides a useful means by which to segregate issues to be decided by the court from those left in the first instance to the jury. It is helpful to consider the proper doctrinal placement of foreseeability in light of the foregoing discussion. What is the proper home (or homes) for foreseeability in light of the first purpose, the provision of a structured analytical blueprint? At one level, the need for an ordered inquiry would seem to be met by virtually any logical placement of foreseeability. So long as courts have a uniform schematic, they will "build the same house." Of course, one might argue that the existing multifaceted, potentially redundant doctrinal role of foreseeability—even if ultimately logical—proves confusing to courts and therefore cannot cultivate the desired methodological consistency.<sup>91</sup> On the other

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("[R]eplicability, stability, and consistency in application are values that the ideal of the rule of law is intended to serve.").

<sup>89</sup> That is, separate consideration of the concepts of duty and breach ensures in such cases that the unreasonableness of the defendant's actions does not necessarily lead to an imposition of legal blame. *See, e.g.,* *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 587–93 (Cal. 1997) (deciding first whether a duty existed pursuant to misfeasance or nonfeasance before turning to the issue of reasonableness).

<sup>90</sup> *See, e.g.,* *Zuchowicz v. United States*, 140 F.3d 381, 390 (2d Cir. 1998) (explaining that it is not enough that the plaintiff prove that the drug called Danocrine caused the plaintiff's injury, but that the plaintiff also must prove that it was the defendant's excessive—and hence, wrongful—prescription of Danocrine that caused the injury).

<sup>91</sup> *See* *Cardi, supra* note 7, at 791–95.

hand, one might counter that courts' confusion about foreseeability need not be linked necessarily to structural defects—it may be that although courts have not yet come around to a consistent understanding of foreseeability's structure, they will eventually. Although I do not concede the point, this Article proceeds on the assumption of a neutral resolution of this first purpose.

Regarding the second purpose, in which element or elements of negligence would foreseeability best aid courts' analysis of the legal concepts on which negligence liability rests? This question is the subject of Part III and the primary focus of this Article. Part III demonstrates that although a compelling case can be made that certain conceptual roles of foreseeability fit nicely within the context of duty, these same concepts fit equally well as part of breach and/or proximate cause.<sup>92</sup> Ultimately, this Article asserts that this second purpose is therefore indeterminate as a means of deciding foreseeability's proper place in negligence doctrine.

Insofar as these are the most important considerations, if the first and second purposes are both indeterminate, resolution of foreseeability's proper home must lie with the third purpose. The debate should therefore be resolved by candid discussion as to whether each of foreseeability's various incarnations would best be decided, in the first instance, by the court or by the jury. I have elsewhere argued in favor of the latter,<sup>93</sup> and portions of Part III below supplement this contention.

Before moving to a discussion of foreseeability's conceptual roles in negligence, I wish to make one aspect of this inquiry transparent. Some scholars and courts speak of duty, breach, and proximate cause as if they exist as a matter of natural law, as if they hang “in the ether” awaiting our discovery.<sup>94</sup> Those who think about the elements of negligence from such a vantage often place considerable importance on the elements' historical development, a development that reflects our gradual honing-in on the concepts' “true nature.”<sup>95</sup> This natural law-

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<sup>92</sup> See *infra* notes 98–324 and accompanying text.

<sup>93</sup> See Card, *supra* note 7, at 795–805.

<sup>94</sup> See generally Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 477–78 (1992) [hereinafter Perry, *Moral Foundations*] (suggesting that Ernest Weinrib views tort law as “having an essence” or “intrinsic ordering,” versus an understanding of tort law as a “conventional ordering, the constituent elements of which reflect ‘the contingencies of social practice and linguistic usage’”) (quoting Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 496 (1989)).

<sup>95</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* 182 (1961) (describing as a core value of natural law that “there are certain principles of human conduct, awaiting discov-

type view of negligence seems also to lead some to wish for robust conceptual meaning on the constituent elements of negligence simply for its own sake. The bias of this Article is rather more pragmatic. The following analysis works from a presumption that the conceptual building blocks of negligence spring from the minds of lawyers, judges, legislators, and academics. They exist simply as a means of embodying and perhaps formalizing courts' normative choices regarding who should be liable to whom and under what circumstances.<sup>96</sup>

This approach does not deny that tort law has, or is capable of having, a coherent structure and meaning; hence, the approach does not embody a form of "reductive instrumentalism."<sup>97</sup> It *is* instrumentalist, however, in the sense that it works from the premise that any feasible structure and meaning of tort law, even if coherent, represents a set of broad policy choices. For example, the general rule that one must not act unreasonably to the detriment of another represents a set of policy choices regarding the circumstances under which we are willing to coerce the payment of damages. This approach demystifies tort doctrine just enough that we might find a structure and meaning that more accurately reflects the policy choices that we have made or wish to make.

Perhaps for this reason, my argument regarding the proper doctrinal place for foreseeability is not purely descriptive, but largely normative. I concede that the approach of many courts is at odds with my urgings and that the accounts of duty offered by many of my colleagues are descriptively accurate. The exposition below thus offers an alternative approach to duty and to foreseeability.

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ery by human reason, with which man-made law must conform if it is to be valid"); GEORG WILHELM FRIEDRICH HEGEL, *HEGEL'S SCIENCE OF LOGIC* 53–59, 107, 431–43, 830–38 (A.V. Miller trans., 1969) (1812–16) (proposing that laws evolve over time through a dialectic—with each new thesis an antithesis forms, and the resolution of the conflict between the two results in a higher state of knowledge of "legal truth").

<sup>96</sup> See *Tarasoff v. Regents of the Univ. of Calif.*, 551 P.2d 334, 342 (Cal. 1976) ("[B]ear in mind that legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."); Holmes, *supra* note 59, at 458 (explaining that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right").

<sup>97</sup> See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 40–42 (1998) (criticizing reductive instrumentalist theories for their failure to provide complete explanations of tort decisions).

## III. THE CONCEPTUAL ROLES OF FORESEEABILITY

Part I described the doctrinal types of foreseeability as they appear in the elements of the negligence cause of action: foreseeability of risk, foreseeability of type or manner of injury, and foreseeability of plaintiff.<sup>98</sup> Each doctrinal type serves, in its various incarnations, five conceptual purposes. Foreseeability serves as a constituent of moral responsibility<sup>99</sup> and as an instrument of behavioral modification and economic efficiency.<sup>100</sup> Foreseeability also provides a means of limiting the range of consequences for which a defendant will be held liable<sup>101</sup> and of gauging the merit and extent of court action.<sup>102</sup> Finally, foreseeability often operates as a proxy for decisions of policy that have little to do with foreseeability's other conceptual purposes.<sup>103</sup> The following subsections examine foreseeability's various conceptual roles in negligence in an attempt to reveal that foreseeability might serve each of these purposes equally well, whether its doctrinal vessel is duty or the elements of breach or proximate cause.

As an initial matter, it is helpful to consider foreseeability's conceptual purposes in light of the means by which foreseeability generally must be determined. A brief explanation of this process—drawn primarily from the insightful work of Stephen Perry<sup>104</sup>—follows.

“Reasonable foreseeability,” as the term is commonly used, is a function of two separate effects: (1) the objective probability of an event occurring, and (2) a reasonable person's knowledge and beliefs about that probability.<sup>105</sup> The objective probability that an event will occur is best understood as the event's relative frequency within a reference class of events—for example, the relative frequency of a car crashing when one drives thirty miles per hour over the speed limit.<sup>106</sup> Reasonable foreseeability is not simply a reflection of this objective

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<sup>98</sup> See *supra* notes 25–76 and accompanying text.

<sup>99</sup> See *infra* notes 115–86 and accompanying text.

<sup>100</sup> See *infra* notes 187–215 and accompanying text.

<sup>101</sup> See *infra* notes 216–70 and accompanying text.

<sup>102</sup> See *infra* notes 271–305 and accompanying text.

<sup>103</sup> See *infra* notes 306–24 and accompanying text.

<sup>104</sup> The following description is drawn largely from Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72, 97–101 (Gerald Postema ed., 2001) [hereinafter Perry, *Responsibility for Outcomes*]; Stephen R. Perry, *Risk, Harm and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 322–29 (David Owen ed., 1995) [hereinafter Perry, *Risk, Harm and Responsibility*]. Perry's account in turn draws upon the work of Clarence Morris, Michael Moore, H.L.A. Hart, and Tony Honoré.

<sup>105</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 97.

<sup>106</sup> *Id.*

probability, however. Rather, foreseeability measures the fragment of objective probability that a reasonable person could have or should have—depending on the context of the decision—foreseen under the circumstances.<sup>107</sup> Thus, foreseeability is often referred to as epistemic (or knowable) probability.<sup>108</sup>

The determination of foreseeability requires two levels of judgment. First, the relevant decisionmaker must properly describe the subject event and frame that event within its proper reference class of events.<sup>109</sup> Continuing the example from the prior paragraph, an event might be described as “injury,” “injury from a car crash,” “shattered pelvis from a car crash,” or “shattered pelvis from a car crashing into a tree.” The spectrum of possible descriptions, from general to specific, is quite broad. Similarly, the reference class of events might be described as “while driving,” “while speeding,” “while driving thirty miles over the speed limit,” “while driving thirty miles over the speed limit on a rainy day,” or any number of other possible variations. One’s choice of description of the event and of the reference class of events strongly influences the event’s relative frequency (and likely its epistemic probability). For example, the relative frequency of an injury occurring while driving thirty miles over the speed limit on a rainy day is undoubtedly higher than that of suffering a shattered pelvis from crashing one’s car into a tree while driving. Yet the law provides no guide for determining the appropriate breadth of description.<sup>110</sup> H.L.A. Hart and Tony Honoré have proposed that the indeterminacy associated with such decisions is lessened, across a wide range of cases,

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<sup>107</sup> See *id.* Whether “could have” or “should have” is the proper condition depends on the context of the foreseeability inquiry. See *infra* notes 140–45 and accompanying text (distinguishing the two inquiries).

<sup>108</sup> Perry, *Risk, Harm and Responsibility*, *supra* note 104, at 322.

<sup>109</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 98; see also Weinrib, *supra* note 94, at 521 (explaining that creating a link between the defendant’s action and the plaintiff’s suffering requires “viewing the plaintiff’s suffering from the standpoint of an appropriately general description of the risk created by the defendant”).

<sup>110</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 98–99. Indeed, as Ernest Weinrib explains:

The most that the courts can accomplish through abstract prescription is point out that foreseeability of ‘the precise concatenation of events’ is irrelevant, while also cautioning against setting up excessively broad tests of liability. The description of the risk can be formulated only case by case in terms of what is plausible in any given fact situation as compared with analogous fact situations.

Weinrib, *supra* note 94, at 523.

by the “common knowledge of ordinary persons” who make them.<sup>111</sup> Nonetheless, some level of indeterminacy remains.

According to Hart and Honoré, this same “common knowledge of ordinary persons” also shapes the second judgment necessary to determine foreseeability. Once the decisionmaker frames the relevant event within a reference class of events, it must then gauge the event’s epistemic probability.<sup>112</sup> Again, in so doing, the decisionmaker is not attempting to uncover the event’s objective probability (although revelation of such a fact might influence the decisionmaker’s thought process), but rather to decide what an ordinary person could have or should have foreseen under the circumstances.<sup>113</sup> As I explain more thoroughly in Part III.A, this decision is part fact-finding—determining what the ordinary person would foresee under these circumstances—and part philosophical exercise—deciding what level of epistemic probability should open the door to liability.<sup>114</sup>

This two-part reasoning plays some role in decisions regarding foreseeability regardless of the conceptual purpose of such decisions and no matter their doctrinal context. I now turn to an examination of the five primary conceptual purposes served by foreseeability.

#### A. *Foreseeability as a Constituent of Moral Responsibility*

Each element of negligence reflects, in some respect, a dimension of blameworthiness. The element of breach is commonly thought to be the chief instrument in this regard.<sup>115</sup> Even where a defendant acted unreasonably, however, such dangerous conduct is not deemed blameworthy unless the defendant owed a duty to have acted reasonably.<sup>116</sup> Furthermore, even where a defendant unreasonably defaulted on an obligation of care, one cannot blame a plaintiff’s injury on the default without proof of a causal connection between the

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<sup>111</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 100–01 (citing H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (2d ed. 1985); Clarence Morris, *Duty, Negligence, and Causation*, 101 U. PA. L. REV. 189 (1952)).

<sup>112</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 100.

<sup>113</sup> See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 94 (1999) (“[F]oresight is neither a matter of what is in fact foreseen nor of what could ideally be foreseen. Instead, it is a matter of what a reasonable person would foresee.”).

<sup>114</sup> See *infra* notes 155–64 and accompanying text.

<sup>115</sup> See, e.g., PROSSER & KEETON, *supra* note 27, § 85, at 608 (discussing fault as the basis for compensation); Weinrib, *supra* note 94, at 517–19 (analyzing the role of fault in negligence).

<sup>116</sup> RESTATEMENT (SECOND) OF TORTS § 282 (1965); PROSSER & KEETON, *supra* note 27, § 30, at 164.

two.<sup>117</sup> Proximate cause might also be described in terms of blame: although a defendant's unreasonable conduct may have caused the plaintiff's injury, other factors—the passage of time, the conduct of others, serendipity—might play such a significant part in causing the injury that the defendant's role seems insignificant and therefore not blameworthy. Alternatively, proximate cause might stand for the proposition that a defendant may be blamed only for those injuries the risk of which made the defendant's conduct wrongful.<sup>118</sup>

A series of scholars have sought to explain the imposition of blame in tort law in moral terms and to justify the circumstances under which moral responsibility, in the form of legal liability, arises.<sup>119</sup> The most prominent form of this pursuit, known as corrective justice theory, views tort liability solely as a matter of justice between the parties to an action, without regard to law's capacity as a distributive force, maximizer of societal wealth, or other social instrument.<sup>120</sup> Although corrective justice encompasses a variety of approaches, recent scholarship on fault-based tort liability has focused largely on the theory of outcome-responsibility first proposed by Tony Honoré.<sup>121</sup>

Generally, outcome-responsibility proposes a moral link between conduct and the injury caused by it. It describes a set of circumstances under which a defendant can be said to be morally responsible for the consequences of his or her conduct.<sup>122</sup> According to Honoré, this link

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<sup>117</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 56–144 (1995) (explaining that if a defendant's conduct results in harm to another, the defendant owes a moral duty to compensate the plaintiff for such harm). See generally Richard Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973) (proposing the same as a unitary theory of tort liability).

<sup>118</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 (Tentative Draft No. 3, 2003) (“An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious.”); RIPSTEIN, *supra* note 113, at 69 (“Those who fail to exercise appropriate care with respect to particular risks act at their peril *with respect to those risks.*”).

<sup>119</sup> Aristotle is the earliest western philosopher associated with this pursuit. See James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 104, at 131. See generally 5 ARISTOTLE, *THE NICOMACHEAN ETHICS* 142–49 (J.E.C. Welldon trans., 1987).

<sup>120</sup> Stephen R. Perry, *Tort Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 72 (Dennis Patterson ed., 1996) [hereinafter Perry, *Tort Law*].

<sup>121</sup> See generally Tony Honoré, *Responsibility and Luck*, 104 L. Q. REV. 530 (1988). For a revealing discussion of Honoré's theory, see Perry, *Moral Foundations*, *supra* note 94, at 489–96.

<sup>122</sup> Perry, *Tort Law*, *supra* note 120, at 75; see also Stephen R. Perry, *The Distribution Turn: Mischief, Misfortune and Tort Law*, 16 Q.L.R. 315, 326–27 (1996) [hereinafter Perry, *The Distribution Turn*] (arguing that fault without outcome-responsibility does not justify forced compensation, but instead might be satisfied by punishment alone).

is established simply when one person's act causes harm to another.<sup>123</sup> His reasoning is as follows. Each of us has a choice whether or not to act in the world,<sup>124</sup> or at least regarding which of any number of acts we will undertake.<sup>125</sup> This ability to choose is commonly described as one's capacity for "agency."<sup>126</sup> Every act necessarily entails some risk.<sup>127</sup> In freely choosing one act over another, an actor makes an implicit gamble that the payoff of that act will outweigh its potential cost.<sup>128</sup> The outcome of this gamble is thus an expression of the actor's agency,<sup>129</sup> and the gamble's outcome is credited (or discredited) to the agent in a kind of "social ledger."<sup>130</sup> This social ledger serves as the moral basis for legal liability.<sup>131</sup>

As many have pointed out, however, what has come to be known as the libertarian account of outcome-responsibility is wanting in two important respects. First, it fails as a normative matter to distinguish between plaintiff and defendant, each of whose actions necessarily led

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<sup>123</sup> See Perry, *Moral Foundations*, *supra* note 94, at 499 ("[T]he essential characteristic of outcome-responsibility is the fact of having voluntarily performed an action or actions that causally contributed to the outcome in question.").

<sup>124</sup> Perry, *Tort Law*, *supra* note 120, at 76.

<sup>125</sup> One might argue that in fact we do not have a choice but to act in the world. Living *is* acting; even if one chooses to sit unmoving as a Jainist monk, one has chosen that act over other alternatives. See HOLMES, *supra* note 29, at 77 ("A man need not, it is true, do this or that act,—the term *act* implies a choice,—but he must act somehow.").

<sup>126</sup> Perry, *Moral Foundations*, *supra* note 94, at 489–90.

<sup>127</sup> Others have also made this point. See, e.g., PROSSER & KEETON, *supra* note 27, § 31, at 170 ("Nearly all human acts, of course, carry some recognizable but remote possibility of harm to another."); Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1305 (1989) (stating that "risk is an unavoidable concomitant of all action").

<sup>128</sup> Honoré, *supra* note 121, at 539.

<sup>129</sup> RIPSTEIN, *supra* note 113, at 98.

<sup>130</sup> Perry, *Moral Foundations*, *supra* note 94, at 489; see also RIPSTEIN, *supra* note 113, at 97–98 ("Honoré argues that in a world of risk, every action involves an implicit gamble. How those various gambles turn out is constitutive of a person's agency. . . . When things go well, the credit redounds to us. When they turn out badly, we are responsible for the bad results."); Honoré, *supra* note 121, at 539–40 (noting that in deciding to do X instead of Y, "we are choosing to put our money on X and its outcome rather than Y and its outcome" and that although we receive credit if the bet turns out well, "if we botch it, . . . that is chalked up against us"); Perry, *Tort Law*, *supra* note 120, at 76 ("I have a choice about whether to become active in the world, and if I choose activity over passivity then all subsequent consequences, both good and bad, are appropriately chalked up to my moral ledger and no one else's.") (emphasis omitted).

<sup>131</sup> This conclusion rests, in part, on the normative, libertarian claim that forced redistribution is illegitimate and that it is unfair to hold a person responsible for costs imposed by another. Perry, *Tort Law*, *supra* note 120, at 76.

to the relevant injury.<sup>132</sup> For example, where *A* drives into *B*'s parked car, both *A*'s act in driving and *B*'s act in parking the car caused the collision—according to the libertarian view, both *A* and *B* are outcome-responsible for the accident.<sup>133</sup> This approach leaves courts without guidance on how to allocate liability between causal elements. Second, even if courts were to find principled grounds by which to allocate liability, the libertarian view ultimately leads to a system of general strict liability,<sup>134</sup> and thus fails to justify our largely fault-based system. For these two reasons, the concepts of action and causation have proven to be necessary, but not sufficient, preconditions for outcome-responsibility.<sup>135</sup>

Stephen Perry has led the way in developing an account of outcome-responsibility that justifies both strict and fault-based liability. According to Perry, outcome-responsibility depends on the notion of control. Only an agent who is in control of his or her actions and, to a certain degree, of the consequences of those actions, may be said to be outcome-responsible.<sup>136</sup> According to Perry, the necessary degree of control over the outcome is defined by whether the outcome was avoidable, and avoidability exists only in the presence of a “general capacity on the part of an agent to foresee an outcome and to take steps to avoid its occurrence.”<sup>137</sup> Foreseeability, or at least a “general capacity to foresee,” thus enters the outcome-responsibility calculus.<sup>138</sup> Perry explains:

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<sup>132</sup> Perry, *Moral Foundations*, *supra* note 94, at 463; *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–44 (1960) (arguing that tort injury is not caused by one party alone, but rather is caused by the interaction of the acts of both parties to an action).

<sup>133</sup> Perry, *Moral Foundations*, *supra* note 94, at 463.

<sup>134</sup> *Id.*; *see also* Epstein, *supra* note 117, at 157–60 (justifying his proposal for general strict liability on libertarian grounds).

<sup>135</sup> An interesting consequence of this reasoning is that tort liability based upon violation of an affirmative duty would seem not to be an instance of outcome-responsibility. *See* Perry, *Responsibility for Outcomes*, *supra* note 104, at 125 n.34 (“[T]he breach of an affirmative duty typically gives rise to non-causal liability and should not, therefore, be regarded as an instance of outcome-responsibility.”). I discuss the import of this realization in Part III.D below.

<sup>136</sup> *See id.* at 82 (“Outcome-responsibility . . . , like most other responsibility concepts, . . . involves a notion of control. . . . Outcome-responsibility assumes that the agent had control of his action of the kind posited by action-responsibility, but it also assumes that he had control over the outcome itself.”); *see also* RIPSTEIN, *supra* note 113, at 53 (“The idea of responsibility thus carries with it an idea of responsible agency. In order to be a responsible agent, one must be able both to pursue one’s own ends and to moderate one’s claims in light of the legitimate claims of others.”).

<sup>137</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 73.

<sup>138</sup> *See id.*

Suppose *A* engages in an activity that results in foreseeable harm to *B*. Because the harm was foreseeable, *A* had it within his power to avoid causing it; even if there were no precautions he could have taken to reduce the risk, he could have forgone the activity altogether. He thus had a certain measure of control over the situation, and . . . it seems reasonable to ascribe to him a special responsibility for the outcome that, in general, other persons do not have.<sup>139</sup>

Outcome-responsibility, according to Perry, thus consists of (1) an act (2) that caused injury (3) committed by a person who had the general capacity to foresee and avoid causing such injury.<sup>140</sup> Outcome-responsibility alone, however, is an insufficient justification for forcing compensation for an injury, but it serves, rather, as a basis for such an obligation.<sup>141</sup> Even if a defendant *could* have avoided causing an injury, it does not necessarily follow that the defendant *should* have done so.<sup>142</sup> For the final link in the normative connection between an agent's act and the harm it caused, Perry looks to the concept of fault.<sup>143</sup> Only when an avoidable risk should have been avoided—that is, when the agent's conduct was faulty—does outcome-responsibility ripen into an obligation to compensate.<sup>144</sup> Perry suggests that foreseeability plays a role in gauging fault as well, although perhaps foreseeability of a different sort and serving a different purpose than that ascribed to outcome-responsibility. Foreseeability informs outcome-

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<sup>139</sup> Perry, *Tort Law*, *supra* note 120, at 76–77; see also RIPSTEIN, *supra* note 113, at 95 (noting that according to Perry, “foresight is relevant to liability because an agent is only morally responsible for things that he or she can foresee”).

<sup>140</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 92 (“The normative power of this conception of outcome-responsibility resides in the idea that the exercise of a person’s positive agency, under circumstances in which a harmful outcome could have been foreseen and avoided, leads us to regard her as the author of the outcome. . . . The agent acted and caused harm under circumstances in which she had a sufficient degree of control to avoid its occurrence, and for that reason she has a special responsibility for the outcome that other persons do not have.”).

<sup>141</sup> *Id.* at 73.

<sup>142</sup> *Id.* at 91; Perry, *Tort Law*, *supra* note 120, at 77.

<sup>143</sup> See Perry, *The Distribution Turn*, *supra* note 122, at 334 (“[A] moral obligation to compensate, of a kind that was enforceable in tort law, rests on two main foundations: first, a pre-political moral responsibility for those outcomes of our actions that we have the capacity to foresee and avoid; and second, an objective fault standard, shaped by liberal conceptions of fairness and autonomy, that determines which risks may and which may not be imposed on others.”).

<sup>144</sup> See Perry, *Tort Law*, *supra* note 120, at 77 (“If . . . a risk was not only foreseeable but should have been avoided, it seems appropriate to conclude that outcome-responsibility takes the form of an obligation to compensate.”).

responsibility by indicating avoidability—if an actor was generally capable of foreseeing an outcome, the actor *could* have avoided it. Foreseeability informs fault by indicating reasonableness—if the epistemic probability of an outcome was high enough, perhaps the actor *should* have avoided it.<sup>145</sup> I will refer to his latter incarnation of foreseeability as “normative foreseeability.”

Perry is clear that at least as a positive matter, outcome-responsibility is the stuff of duty in negligence, and fault is the essence of breach.<sup>146</sup> This approach makes some intuitive sense. It seems right to say that if one is responsible for an outcome, one therefore owes a duty to have acted reasonably in bringing it about. Stated in terms of foreseeability, when one is capable of foreseeing and avoiding an outcome, one owes a duty to have acted reasonably in foreseeing and avoiding it. Assuming that Perry’s overall justification for negligence liability is correct, however, whether it *commands* a role for foreseeability in duty is another matter. Might outcome-responsibility still accurately describe and justify negligence liability were courts to purge duty of considerations of foreseeability?

An answer to this question begins with the observation—to which Perry concedes—that as a positive account of duty, outcome-responsibility is incomplete. It does not explain courts’ refusal to impose a duty due to any number of consequentialist policy considerations<sup>147</sup>—for example, a concern for sweeping liability<sup>148</sup> or the desire

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<sup>145</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 105 (“[I]t is only by referring to . . . a cost-benefit analysis that we can say whether or not a given type of harm is reasonably foreseeable, i.e., whether or not it *should* be foreseen. Thus the notion of reasonable foreseeability inevitably involves more than the general capacity to foresee that I have been describing. It also involves reference to action-guiding norms of the kind that figure in the Learned Hand Test.”); see also RIPSTEIN, *supra* note 113, at 105 (explaining that in the context of judging fault, “consequences are foreseeable if a person showing appropriate regard for the interests of others would have taken them into account”).

<sup>146</sup> See Perry, *The Distribution Turn*, *supra* note 122, at 326 (“On its face, however, a fault standard tells us nothing about when, or even whether, misfortune should be shifted from one person to another. What it tells us, rather, is how we should behave towards one another; it tells us to conduct our activities with reasonable care, or to take precautions when  $B < PL$ , or whatever.”) (emphasis omitted); Perry, *Responsibility for Outcomes*, *supra* note 104, at 95 (explaining that outcome-responsibility, and the foreseeability component of that, are questions of duty, for the court to decide); *id.* at 116 (“[I]n the absence of outcome-responsibility, all we have in fault is the violation of a norm. . . . [B]ut if this is not systematically related to and constrained by a requirement of outcome-responsibility (as embodied in the defendant’s duty of care), then there is nothing to distinguish this particular norm of conduct from any other.”).

<sup>147</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 95 n.34.

to protect accepted social institutions.<sup>149</sup> Nor does outcome-responsibility justify or explain either the imposition of a duty in cases of nonfeasance<sup>150</sup> or courts' limitation of one's duty to avoid causing emotional or economic injury<sup>151</sup>—decisions that might turn on concerns other than foreseeability.<sup>152</sup> The fact that duty turns on non-foreseeability-related factors in *some* cases suggests the possibility that duty, at its core, turns on non-foreseeability-related factors in *all* cases.<sup>153</sup> Such an explanation of duty need not rob outcome-responsibility of its justificatory or even its explanatory power, however. Negligence, in relevant part, might be described as follows: if one owed a duty of care (determined solely, for example, by reference to community notions of obligation, policy considerations, a concern for the rule of law, and administrative convenience<sup>154</sup>), then one will have breached that duty if (1) one was generally capable of foreseeing the injury and avoiding it, and (2) one should have foreseen and avoided it. Just as it seems right to say that if one is capable of foreseeing and avoiding an outcome, one owes a duty to have acted reasonably in foreseeing and avoiding it (Perry's approach), it also seems intuitive to say that one who is incapable of foresight generally cannot have acted unreasonably in failing to foresee and avoid causing injury. Neither explanation, at this basic level, is normatively superior. A closer look at foreseeability's part in outcome-responsibility supports this initial conclusion.

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<sup>148</sup> See, e.g., *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985) (limiting the liability of a public utility for gross negligence in causing a power outage because sweeping liability might lead to the utility's insolvency).

<sup>149</sup> See, e.g., *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984) (recognizing that many courts do not impose a duty in cases of social host liability because of the concern that such duties would "interfere with accepted standards of social behavior; [and] . . . intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served"); *Thompson v. McNeill*, 559 N.E.2d 705, 707 (Ohio 1990) (declining to impose a duty where a golfer had been struck in the head by an errant ball because liability "might well stifle the rewards of athletic competition").

<sup>150</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 95 n.34.

<sup>151</sup> See *id.*

<sup>152</sup> That affirmative duty cases turn on factors other than foreseeability is a matter discussed in Part III.D below. See *infra* notes 295–305 and accompanying text. Recitation of some of the policy considerations that underlie economic harm cases may be found *supra* note 318, and emotional harm cases may be found *infra* note 61.

<sup>153</sup> Most existing theories of duty purport to be descriptive and so include foreseeability in some manner. Although it is not the mandate of this Article to propose a foreseeability-free substantive duty theory, Part IV sketches the beginnings of such an approach.

<sup>154</sup> See *supra* notes 58–61 and accompanying text.

Outcome-responsibility is dependent upon an actor's "general capacity to foresee."<sup>155</sup> By this, Perry refers at least in part to the subjective characteristics of the actor—for example, whether the actor has an IQ sufficient to facilitate a general minimum capacity to foresee injury, or whether the actor's age and mental health are similarly sufficient.<sup>156</sup> Were this Perry's only benchmark for judging capacity, this narrow query perhaps would fit best within the concept of duty.<sup>157</sup> As a matter of policy and commonly-held notions of obligation, a court might well wish to set a minimum physical and mental capacity for foresight below which an actor cannot be said to owe a duty of reasonable care at all.<sup>158</sup> The prescription of such bright-line rules seems quintessentially the mandate of duty.<sup>159</sup>

Thus understood, however, judgments regarding an actor's general capacity to foresee would not constitute decisions of "foreseeability" at all, at least not as that term is commonly used in the law of negligence. Inquiries into foreseeability presume an acceptable capacity to foresee and ask whether the relevant risk, injury, or plaintiff was

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<sup>155</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 73.

<sup>156</sup> See *id.* at 103 ("[T]he capacities to foresee and avoid harmful outcomes are appropriately understood as *general* abilities that the individual who caused a given harm ordinarily succeeds in exercising in other, similar situations. . . . It is in this sense that the avoidability-based conception of outcome-responsibility treats the capacities to foresee and avoid harm as subjective."). Perry further notes that "a plausible non-consequentialist theory of tort law must suppose that mental disorders serious enough to undermine the capacity to foresee and avoid harm should excuse the defendant from liability." *Id.* at 106. Perry also cites, for this proposition, H.L.A. Hart's capacity/opportunity principle: "[W]hat is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities." *Id.* at 88 (quoting H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 152 (1968)).

<sup>157</sup> See Perry, *The Distribution Turn*, *supra* note 122, at 320 ("If I were not an agent, I would not be the sort of entity that could even owe a duty.").

<sup>158</sup> Of course, a court might also hold that a person of a certain age or mental ability cannot be deemed to have breached a duty of care.

<sup>159</sup> In fact, courts have generally declined to alter the duty owed by those of impaired mental capacity. Kelley, *supra* note 85, at 231; see RESTATEMENT (SECOND) OF TORTS § 283B (1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."). By contrast, courts often delimit the age at which a person gains meaningful agency; below that age, an actor is held either to owe no duty at all or to owe a duty of care keyed to the reasonable child of the actor's age. See, e.g., *Maskaliunas v. Chi. & W.I.R. Co.*, 149 N.E. 23, 26 (Ill. 1925) (holding that children under the age of seven are presumed to be incapable of negligence); *Cox v. Hugo*, 329 P.2d 467, 469 (Wash. 1958) (holding same for children under the age of six); Kelley, *supra* note 85, at 239–40 (explaining courts' general unwillingness to impose a negligence duty on children under a certain age).

foreseeable by a hypothetical reasonable person in the actor's shoes.<sup>160</sup> The aspect of general capacity described above, by contrast, is divorced from the facts of the case. It does not ask whether the relevant risk, injury, or plaintiff was foreseeable under the circumstances. Nor does it even examine whether a certain category of risk, injury, or plaintiff was foreseeable to a category of actor. Such an analysis instead focuses solely on the physical and mental traits of the actor, on whether the actor possesses some minimum mental ability to foresee the consequences of his or her actions. In this sense, this aspect of the general capacity inquiry is akin to a competency hearing in a criminal case. Thus, even if this aspect of the general capacity to foresee were to fit more comfortably in duty than in breach, such a conclusion would do little to advance analysis of the proper doctrinal home for foreseeability.

Perry's conception of the "general capacity to foresee" cannot possibly stop at an actor's subjective characteristics, however. It would be illogical to refer to an actor as "outcome-responsible"—even when the actor enjoys some minimum general capacity for foresight—if not even a person of ordinary capacity could have foreseen the relevant outcome. Perry's conception of capacity thus includes an objective as well as a subjective component, and it considers not one's capacity to foresee in the abstract, but one's capacity to foresee a category of events that fits the facts of the case. Specifically, Perry's capacity inquiry proceeds as follows. First, the decisionmaker must divine the actor's subjective capacity to foresee outcomes of the same general sort as the outcome at hand.<sup>161</sup> (The proper description of this subject category, as explained in the introduction to this section, is determined according to the "common knowledge of the ordinary person.")<sup>162</sup> Second, the decisionmaker must compare the actor's subjective capacity in this regard to the minimum "degree of capacity regularly exercised by ordinary or average people who strike us as possessing meaningful

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<sup>160</sup> Whether outcome-responsibility depends on the foresight of the actor or a hypothetical reasonable person is a matter discussed below. See *infra* notes 161–64 and accompanying text.

<sup>161</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 103 ("[C]apacities to foresee and avoid harmful outcomes are appropriately understood as *general* abilities that the individual who caused a given harm ordinarily succeeds in exercising in other, similar situations.").

<sup>162</sup> See *supra* notes 109–11 and accompanying text.

agency.”<sup>163</sup> If the actor’s subjective capacity to foresee such outcomes meets (or exceeds) this objective minimum standard, the actor’s general capacity to foresee is sufficient to support a conclusion that the actor is outcome-responsible.<sup>164</sup>

This explanation of the general capacity to foresee brings the concept more squarely in line with courts’ common understanding of foreseeability. Still, Perry’s account does not require that its resolution occur in the context of duty. The closest Perry comes to such an argument is his emphasis on the distinction between foreseeability’s role in outcome-responsibility and its role in reasonableness. There is some aesthetic appeal to the proposition that as a prerequisite to normative foreseeability and breach, one’s general capacity to foresee should be resolved separately, as a part of duty. Aside from aesthetics, however, there is no practical reason that the constituents of outcome-responsibility need remain a unit or that they must remain segregated from other phases of the liability inquiry. The distinction between the general capacity to foresee and normative foreseeability would remain meaningful even if they were to exist as sequential steps in an analysis of breach. In such a case, the breach inquiry would ask (in relevant part) first whether the actor *could* have foreseen and avoided the outcome, and second whether the actor *should* have done so.<sup>165</sup>

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<sup>163</sup> Perry, *Responsibility for Outcomes*, *supra* note 104, at 103–04. A broader quotation might be helpful:

Some people can foresee possible future outcomes more often than others, and some are sufficiently out of touch with reality that they possess only the most minimal capacity to predict the consequences of their actions. A line has to be drawn to determine what degree of the capacity a person must possess before he or she is capable of being outcome-responsible at all. . . . That, in turn, seems inevitably to require looking . . . to the degree of capacity regularly exercised by ordinary or average people who strike us as possessing meaningful agency.

*Id.*

<sup>164</sup> *See id.* at 104 (“The capacity consists in being able to foresee and avoid outcomes in various sorts of circumstances on a sufficiently regular basis, where what counts as a sufficient degree of regular success is determined by the idealized conception of the ordinary person.”). If outcome-responsible, however, an actor is then—for the purpose of determining the reasonableness of her conduct—deemed to have the capacity to foresee enjoyed by the ordinary person. *See id.* (“[A]ll those who meet the minimum standard are treated as having an equal capacity to foresee and avoid outcomes, and hence are subject in an equal degree to being held responsible for the consequences of their actions.”). Thus, although the standard for whether an actor *could* foresee injury is at least partly subjective, the standard for whether an actor *should* foresee injury is completely objective.

<sup>165</sup> Of course, as a practical matter, the question of whether an outcome could have been foreseen might well be subsumed in the decision-making process by the question of

By analogy, consideration of the means available to an actor to avoid an outcome is, in fact, traditionally considered to be a constituent of reasonableness. Suppose that a plaintiff, struck by the defendant's car, were to argue that the collision would have been avoided had the defendant performed a reverse 180° slide (a professional stunt-driving maneuver). The reasonableness of the defendant's failure to perform such a maneuver would depend on (1) whether it is within the capacity of the reasonable person to have done so generally and, if so, (2) whether a reasonable person should have done so under the circumstances. Both considerations are clearly matters within the scope of the jury's resolution of breach. Perry's analysis of an actor's general capacity to foresee is analogous to (1) and therefore similarly might fit within a jury's reasonableness inquiry.<sup>166</sup> Put in terms amenable to Judge Learned Hand (where negligence exists if  $B < P \times L$ ),<sup>167</sup> if an outcome was in no meaningful way foreseeable because the actor was incapable of foresight, then not only would the epistemic probability of the outcome ( $P$ ) be zero, but the actor's burden in preventing it ( $B$ ) would be almost immeasurably great. To hold one responsible for failing to avoid an unforeseeable outcome would be to place one in charge of serendipity. In sum, negligence works properly whether the general capacity to foresee is a part of duty or a part of breach.

Embracing Perry's concept of the general capacity to foresee as a constituent of breach rather than duty would require no sacrifice of outcome-responsibility or of reasonableness. Thus, the more compelling reason to keep the two inquiries doctrinally separate would be a conclusion that the court should decide the former and a jury the latter. At least by implication, Perry sheds some light on this matter as well, although to see this one must understand Perry's answer to the following question: at what level of epistemic probability is an ordinary person deemed minimally capable of foreseeing a type of outcome? It is a tautology to say that if the epistemic probability of an event occurring is greater than zero, the ordinary person is capable of foreseeing

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whether it should have been foreseen. Such a result would not pose a problem, however—the latter finding is outcome-determinative in any case.

<sup>166</sup> One might point out that the capacity to avoid the crash is judged pursuant to a completely objective standard, whereas Perry's capacity to foresee inquiry is in part subjective. This difference is unproblematic, however. There is no reason that a fact-specific subjective inquiry cannot take place within the context of reasonableness. Indeed, a fact-specific inquiry into an actor's subjective characteristics is squarely within the jury's mandate to decide breach.

<sup>167</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173–74 (2d Cir. 1947).

it. Yet if this were the test for judging one's capacity to foresee, the inquiry would lose much of its probative value because almost any outcome is, by some stretch of the imagination, foreseeable.<sup>168</sup> (This is especially true considering that judgments of foreseeability are made ex post the subject event.)<sup>169</sup> Some normative judgment is therefore required in determining how much epistemic probability is sufficient to render an actor outcome-responsible. Perry hints that the requisite degree of epistemic probability is not particularly high<sup>170</sup> and that it is potentially less than the epistemic probability necessary to support a conclusion that the relevant type of outcome was normatively foreseeable—that is, that the actor *should* have foreseen it.<sup>171</sup> Perry also urges that the judgment should be made “with an eye to what constitutes meaningful agency in the world.”<sup>172</sup> Despite such guidance, however, Perry concedes that decisions regarding an ordinary person's “minimum capacity to foresee” remain indeterminate, an indeterminacy curbed only by the extent to which decisionmakers rely on the “common knowledge of the ordinary person.”<sup>173</sup>

Two points may be drawn from Perry's account. First, Perry explains that each constituent judgment of foreseeability—the judgment regarding an actor's general capacity to foresee and the judgment regarding normative foreseeability—exists merely as a point drawn by

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<sup>168</sup> See RIPSTEIN, *supra* note 113, at 105 (“[E]xcept for the most bizarre of coincidences, everything is in principle foreseeable, and everything that has happened as a result of natural forces is in fact foreseeable.”).

<sup>169</sup> The results of social science research suggest that knowledge that an event has occurred influences one's judgment, in hindsight, of its foreseeability. Subjects who are told that an event in fact happened are more likely (than those who are not so told) to report that the event was foreseeable. This effect is known as “hindsight bias.” See, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001) (finding that judges are empirically just as likely as other members of the public to fall prey to hindsight bias).

<sup>170</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 94 (describing Perry's conception as follows: “In general, the epistemic probability that will support a judgment of reasonable foreseeability need not be particularly high. In a case of unintentional harm, it is typically much more likely that the harmful outcome will not materialize than that it will.”).

<sup>171</sup> See *id.* at 104–05 (describing generally the difference in foreseeability requisite to prove outcome-responsibility and the reasonableness of the actor's conduct).

<sup>172</sup> *Id.* at 104. This suggestion, although perhaps helpful at some level, is circular: one must determine outcome-responsibility (and hence agency) by looking to one's understanding of “meaningful agency in the world.”

<sup>173</sup> See *id.* at 103; see also *supra* notes 109–14 and accompanying text (describing the necessary reliance of such normative judgments on the common knowledge of the average person).

the decisionmaker on the spectrum of epistemic probability.<sup>174</sup> Each judgment is also drawn by reference to what is presumably the same event-type and the same reference class of events.<sup>175</sup> Furthermore, with regard to each judgment, both the characterization of the event-type and reference class of events and the ultimate line-drawing regarding epistemic probability are properly made by reference to the common experience of the ordinary person.<sup>176</sup> In light of these commonalities, one might argue that for consistency's sake (and for efficiency's sake) both the general capacity to foresee and normative foreseeability ought to be determined by the same decisionmaker. Second, because both foreseeability-related inquiries turn upon the common knowledge of the ordinary person, what better body to distill and apply such knowledge than the jury, a group of just such people?<sup>177</sup> Perhaps for these reasons, Perry suggests, at least in passing, that it is the factfinder that properly determines an actor's general capacity to foresee.<sup>178</sup>

The foregoing discussion addresses specifically the account of foreseeability advanced by Stephen Perry, but it might similarly apply to other corrective justice theories of negligence.<sup>179</sup> Although this Article cannot accommodate a comprehensive examination of such, Arthur Ripstein's rich description of risk and responsibility, and of foreseeability's role in those concepts, adds an interesting dimension to the discussion. Ripstein's explication of negligence liability differs from Perry's in two important respects. First, rather than grounding his account in outcome-responsibility, Ripstein argues that negligence represents courts' attempts to enforce fair terms of social interaction, a process guided by the need to balance shared interests in liberty and security.<sup>180</sup> Ripstein asserts that the balance courts have generally achieved is best explained by the idea of "risk ownership"—only risks

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<sup>174</sup> See *supra* notes 136–45 and accompanying text.

<sup>175</sup> See *supra* notes 109–11 and accompanying text.

<sup>176</sup> See *supra* notes 109–14 and accompanying text.

<sup>177</sup> See *Cardi*, *supra* note 7, at 795–805 (explaining the historical and institutional reasons mitigating in favor of this proposition); *Weinrib*, *supra* note 94, at 519 (suggesting that the standard for permissible risk imposition "is not susceptible of precise measurement and is applied by the trier of fact on a case by case basis").

<sup>178</sup> See *Perry*, *Responsibility for Outcomes*, *supra* note 104, at 100 (indicating that it is the "trier of fact" that will decide the capacity of the ordinary person to foresee harm).

<sup>179</sup> For example, Jules Coleman offers a "mixed" conception of corrective justice. See generally *JULES L. COLEMAN, RISKS AND WRONGS* (1992).

<sup>180</sup> See *RIPSTEIN*, *supra* note 113, at 49 ("My interpretation of fault liability . . . [embraces] the Kantian idea that the boundaries of individual rights are given by fair terms of social interaction. . . . by a concern for equal liberty and security for all.").

wrongfully imposed are “owned” by the actor in a sense that requires compensation.<sup>181</sup> Second, Ripstein objects to Perry’s conception of outcome-responsibility to the extent that it requires subjective knowledge (or even subjective capacity for knowledge) of a risk.<sup>182</sup> Ripstein urges that instead, negligence embodies a completely objective standard in this regard.<sup>183</sup> Thus, according to Ripstein, “foresight is not required because it is a general condition of agency. . . . [Rather,] it is implicit in the idea of fair terms of interaction.”<sup>184</sup>

Importantly, although Ripstein seems to define duty and breach such that each includes some consideration of foreseeability, he contends that foreseeability generally is an independent doctrinal requirement for liability, separate from and prior to both duty and breach. In Ripstein’s words,

[Foresight is] a preliminary test for liability . . . . On this understanding, if an injury was unforeseeable, there is no further question of liability to ask, because the defendant could not have taken account of the risk that it would happen. Once the test of foreseeability has been passed, the further inquiry is fixed by questions of duty and risk.<sup>185</sup>

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<sup>181</sup> See *id.* (“[T]he boundaries between persons are given by a concern for equal liberty and security for all. . . . [F]or purposes of liability, the distinction between what someone does and what merely happens is a normative distinction. Provided I exercise appropriate care, the consequences of my actions are treated as though they merely happened. If I fail to exercise appropriate care, though, the risks I create are mine to bear, and if they ripen into injuries, I must bear the costs of those injuries.”).

<sup>182</sup> See *id.* at 100 (“[Perry’s account] cannot . . . be combined with the idea that the duty of care is itself objective, in the sense that someone can be responsible for something that he did not himself foresee.”). Perry has responded that Ripstein’s conception of control is too narrow. Perry, *The Distribution Turn*, *supra* note 122, at 332–33; see also Perry, *Responsibility for Outcomes*, *supra* note 104, at 89–90 (suggesting that due to this argument, it is unclear whether Ripstein is a corrective justice theorist at all; and that Ripstein’s argument may ultimately devolve into a distributive account of negligence liability). Perry also promises to respond more extensively to Ripstein’s critique in some future work. See Perry, *Responsibility for Outcomes*, *supra* note 104, at 130 n.80.

<sup>183</sup> See RIPSTEIN, *supra* note 113, at 56 (“To protect all equally requires weighing liberty against security, but any weighing is done within the representative reasonable person, rather than across persons. The point of weighing interests within a representative person is to avoid allowing the particularities of one person’s situation to set the limits of another’s liberty or security.”).

<sup>184</sup> *Id.* at 105.

<sup>185</sup> *Id.* at 104. In this way, Ripstein’s approach is analogous to the provocative suggestion of Ben Zipursky that foreseeability is in fact a constituent of substantive standing. See generally Zipursky, *supra* note 97, at 27–40 (proposing his substantive standing theory in light of several aspects of negligence).

Unfortunately, Ripstein does little to expound on this suggestion. The implication, however, is that duty and foreseeability are not co-dependent concepts. Ripstein thus appears to believe that the essence of duty is something other than foreseeability. Perhaps duty is simply the step in liability analysis at which courts create categorical guidelines with regard to society's competing interests in liberty and security.<sup>186</sup> By this reasoning, duty determinations might not involve forays into foreseeability at all.

### B. *Foreseeability as Instrument*

A second theoretical approach explains and justifies negligence liability, and the doctrinal elements on which liability turns, solely according to the goals to be achieved by such a system. From this perspective, negligence is merely an instrument; even if negligence doctrine exists in some coherent form, it is only meaningful and valid to the extent that it serves the law's ultimate goals.<sup>187</sup> Possible goals of negligence include providing compensation for injured persons, loss spreading, wealth redistribution, deterrence, punishment, social and personal retribution, efficiency, the maximization of wealth or utility, and perhaps others.<sup>188</sup> A particular instrumentalist approach might focus on one goal or serve some combination of goals. Although the reasoning in this section would apply to any instrumentalist approach, I will focus on the most comprehensive instrumentalist approach existing: the economic theory of negligence.

The most prominent economic account of tort law is that of William Landes and Richard Posner.<sup>189</sup> For Landes and Posner, the goal of tort law is to promote the efficient allocation of resources<sup>190</sup> or as Posner has separately proposed, to maximize societal wealth.<sup>191</sup> According to this view, negligence law should create incentives for actors to take into account the potential costs of their actions. Where the cost of avoiding a risk of injury would be less than the cost of the risk

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<sup>186</sup> See RIPSTEIN, *supra* note 113, at 92 ("In cases of misfeasance, the existence of duty of care does not depend on the ease with which it can be discharged in the particular instance. Instead, it depends on the significance of the relevant interests in liberty and security.")

<sup>187</sup> Weinrib, *supra* note 94, at 487-88 (describing the instrumentalist position).

<sup>188</sup> *Id.* at 487.

<sup>189</sup> See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

<sup>190</sup> *Id.* at 1.

<sup>191</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 147-51 (3d ed. 1986).

itself, the threat of negligence liability should encourage one to avoid taking the risk.<sup>192</sup> Conversely, where the cost of prevention is greater than the cost of the risk, liability should not ensue. The imposition of liability in such case would have no appreciable deterrent effect<sup>193</sup> and would punish the defendant for having acted rationally.<sup>194</sup> In this sense, according to Landes and Posner, negligence should seek to create an efficient level of deterrence, but no more.

The economic theory of negligence relies on foreseeability in two ways. First, foreseeability plays a role in the determination of the reasonableness (in economic terms) of a defendant's conduct. In Landes and Posner's view, foreseeability aids in calibrating the proper level of deterrence. Only an injury that is foreseeable is capable of being deterred.<sup>195</sup> Moreover, in determining the reasonableness of the defendant's conduct, the foreseeable probability of injury,<sup>196</sup> combined with its foreseeable range of costs, is to be weighed against the cost of avoiding them.<sup>197</sup> Where the cost of avoiding injury is less than the cost of the risk, the defendant is deemed to have acted unreasonably

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<sup>192</sup> *Id.*; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972).

<sup>193</sup> Because the cost of avoidance would exceed the benefit of doing so, the defendant (and similarly situated future actors) will not take preventive measures despite the threat of legal liability. This reasoning is, of course, subject to an assumption that the level of risk of the activity is appropriate—if it is not, then a court might impose strict liability rather than negligence.

<sup>194</sup> See Weinrib, *supra* note 94, at 504 (explaining that “spending more money to prevent an injury than the injury itself costs would be wasteful”).

<sup>195</sup> See LANDES & POSNER, *supra* note 189, at 247 (“[T]he [one-bite] rule is that the owner is liable only if he has reason to suspect the dog's vicious disposition; and ordinarily there is no reason to suspect it until the dog has bitten someone. Even if the probability of the dog's biting someone is very high, the owner will not be liable unless he has reason to know it is high. Otherwise, as we have said, liability will have no allocative effect.”).

<sup>196</sup> Professor Mark Grady has made two important clarifications of Landes and Posner's theory. First, there is some question whether Landes and Posner condition breach upon *reasonable* foreseeability or upon simple objective probability. Professor Grady has sufficiently demonstrated that it must be the former. See Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 364 (1984) (“The theory to be explained here demonstrates that the breach-of-duty question depends on the amount of information concerning the risk that it was reasonable for the injurer to have had.”); *id.* at 385–391 (demonstrating the same). Second, Landes and Posner apparently believed that for practical purposes the breach determination should be made only by reference to the risk of the particular injury suffered by the plaintiff. *Id.* at 382–83. Professor Grady has demonstrated that this is not and cannot be the case and that instead, breach must be determined with regard to the entire range of foreseeable risks created by a defendant's conduct. *Id.* at 383–85.

<sup>197</sup> The cost of foreseeing injury—for example, the cost of investigating the various societal effects of a pesticide that one plans to use on one's garden—is included as part of the defendant's burden under the Learned Hand formula.

in failing to avoid causing injury. The higher the risk, the more careful the defendant is required to have been.<sup>198</sup> This, of course, is the “Learned Hand test” first proposed by Judge Learned Hand in the case of *United States v. Carroll Towing Co.*<sup>199</sup>

Even if  $B < P \times L$ , however, a defendant should be liable only for harms with regard to which liability will have some allocative effect. The second way in which economic theory relies on foreseeability is in deciding which of the various risks created by negligent conduct an actor should internalize.<sup>200</sup> At one level, it may seem harmless to hold a defendant liable for all of the consequences of his or her negligent actions. As Landes and Posner explain, “[i]t may indeed be harmless, because if the accident is unforeseeable then so is the imposition of liability for its consequences. Hence there is no danger . . . of inducing too much care.”<sup>201</sup> Assuming perfect enforcement, however, unforeseeable injuries are unnecessary and ineffective in producing the efficient level of deterrence. From the perspective of the individual actor, the threat of liability for unforeseeable risks will not deter the relevant conduct because the cost of foreseeing the risk exceeds the benefit of avoiding that particular risk.<sup>202</sup> Thus, according to Landes & Posner, courts should not force a defendant to internalize a risk that is not reasonably foreseeable because such liability would confer no economic benefit.<sup>203</sup> To impose liability nonetheless would be to “merely require a costly transfer payment.”<sup>204</sup>

Landes and Posner offer, by example, the case of *Watson v. Kentucky & Indiana Bridge & Railroad Co.*,<sup>205</sup> in which the defendant negligently caused a railroad tank car to be derailed and leak fuel, which

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<sup>198</sup> See, e.g., *Lollar v. Poe*, 622 So. 2d 902, 905 (Ala. 1993) (“The degree of care required of an animal owner should be commensurate with the propensities of the particular animal and with the place where the animals are kept, including its proximity to high-speed highways.”); *Indus. Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 831 (Ala. 1988) (“[T]hose who deal with dangerous instrumentalities, such as explosives or chemicals, must exercise a great amount of care because the risk is great.”).

<sup>199</sup> 159 F.2d at 173–74 (enshrining these factors in the mathematical formula in which liability lies where  $B$  (burden of precautions)  $< P$  (probability of loss)  $\times L$  (magnitude of loss)); see also *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 369 (Ariz. 1985) (recognizing that foreseeability of risk and the burden of precautions are “factors which determine the reasonableness of the defendant’s conduct”); DOBBS, *supra* note 2, §§ 143–146, at 334–48 (explaining in detail the interplay of foreseeability and reasonableness here summarized).

<sup>200</sup> Zipursky, *supra* note 97, at 46.

<sup>201</sup> LANDES & POSNER, *supra* note 189, at 247.

<sup>202</sup> *Id.* at 246.

<sup>203</sup> *Id.* at 247.

<sup>204</sup> *Id.*

<sup>205</sup> 126 S.W. 146 (Ky. 1910).

subsequently exploded when the plaintiff deliberately set fire to it.<sup>206</sup> Although the defendant's conduct in *Watson* was unreasonable in economic terms (because the cost of avoiding the derailment was less than the resulting risk of injury),<sup>207</sup> Landes and Posner concur with the court's finding for the defendant on a foreseeability analysis:

[T]he possibility of arson was so slight (it was an act of pure malice, with no possibility of pecuniary or any other benefit—except the delights of pyromania) that . . . the defendant would not have taken account of it in deciding how much care to use; so imposing liability would have had no allocative effect.<sup>208</sup>

According to Landes and Posner, foreseeability's part in reasonableness serves the negligence element of breach, whereas the foreseeability judgment described above falls under the doctrinal umbrella of proximate cause.<sup>209</sup> Indeed, in their discussion of *Watson*, Landes and Posner implicitly justify the "risk rule," a theory of proximate cause discussed at length in the following section.<sup>210</sup> In theory, however, so long as negligence liability is conditioned on foreseeability in the right ways, an economic approach to negligence is indifferent to whether such is accomplished by means of duty or breach and proximate cause. By definition, an instrumentalist approach cares only about the outcomes generated by the system and little about the system's intrinsic ordering or conceptual coherence.<sup>211</sup> Economic theory is thus indeterminate as to foreseeability's proper doctrinal fit.<sup>212</sup>

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<sup>206</sup> *Id.* at 147.

<sup>207</sup> See LANDES & POSNER, *supra* note 189, at 247 (explaining that in *Watson*, "the defendant was negligent with respect to the accident probability that was known").

<sup>208</sup> *Id.* Interestingly, the Kentucky Supreme Court later overruled *Watson*, rejecting the reasoning cited by Landes and Posner. See *Britton v. Wooten*, 817 S.W.2d 443, 449–52 (Ky. 1991).

<sup>209</sup> See LANDES & POSNER, *supra* note 189, at 243–51 (discussing the foregoing matters within the chapter entitled "Causation").

<sup>210</sup> See *infra* notes 265–69 and accompanying text.

<sup>211</sup> See Weinrib, *supra* note 94, at 487–88.

<sup>212</sup> This conclusion must be hedged in the following way. In a phone conversation regarding this Article, Professor Ken Kress pointed out that foreseeability's doctrinal placement might result in a shift in its substance due to the "gravitational effect" of surrounding doctrine. For example, as the duty question mulls through the brain of the judge, the judge's consideration of other duty norms might "attract" foreseeability, causing it to become more akin to those norms, or it might repel foreseeability, having the opposite effect. The jury's consideration of foreseeability in the context of breach or proximate cause would take place in the presence of a different set of norms, with correspondingly different results. Professor Kress's hypothesis is intriguing, although difficult to study. Thus,

This is not to say, however, that the field of law and economics has nothing to add to the ultimate debate. To the contrary, economic theory might lend considerable insight into whether court or jury is the better arbiter of foreseeability. One might argue, for example, that court-rendered, categorical foreseeability determinations induce greater efficiency by providing clearer rules for market actors. In addition, early dismissal of a class of cases almost certainly saves in the administrative costs of trials.<sup>213</sup> On the other hand, jury decisions are more precisely calibrated (because they are fact-specific) and may therefore result in a more accurate efficiency determination in any particular case and perhaps even over time.<sup>214</sup>

Finally, it is perhaps significant that the distinction between foreseeability's place in determining economic reasonableness and its role in deciding which risks a negligent actor should internalize is not so much a distinction in kind as it is in focus. Consider how the latter judgment of "reasonable foreseeability" is made. The marginal cost to the defendant of foreseeing and preventing the particular class of injuries suffered by the plaintiff is weighed against the risk of that class of injuries occurring. If the marginal cost of foresight is less than the risk of such injury, then the plaintiff's harm was reasonably foreseeable, and liability ensues. If, on the other hand, the marginal cost of foresight is greater than the relevant risk, liability would have no allocative effect—the defendant would not have been deterred even in the face of certain liability. This foreseeability calculus is similar to the economic determination of reasonableness, except that it focuses on a particular set of costs and injuries rather than on the entire universe of the same. In light of this similarity, one might argue that efficiency

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although there is a theoretical possibility that foreseeability is instrumentally better in duty than breach or proximate cause along these lines, this possibility has not yet been demonstrated.

<sup>213</sup> See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 250–51, 255–56 (1970) (arguing that the largest administrative cost of the tort system is the case-by-case determination of accidents by juries).

<sup>214</sup> *Cf. id.* at 256–57 (“[C]ategory-by-category allocation makes the introduction of individualized moral judgments into the allocation decision harder. This explains why category allocation cannot be used in the fault system.”). Calabresi also suggests that because court determinations of foreseeability are less flexible than fact-specific allocations, they may therefore suffer lags in recognizing changes in who is the cheapest cost-avoider. *Id.* at 257. Finally, he points out that although categorical, duty-based decisions concentrate on “general or recurring causes of accidents,” they might overlook “some very cheaply avoided particular causes of very high accident costs.” *Id.*

is best served if the same decisionmaker—the jury—is entrusted with both decisions.<sup>215</sup>

### C. *Foreseeability as a Constituent of Relation and Limitation*

Negligence liability is, at least in some sense, relational. Ours is not a New Zealand-style social compensation system pursuant to which everyone pays into a central fund and from which tort victims collect.<sup>216</sup> Rather, American courts coerce compensation directly from tortfeasor to victim. Negligence doctrine must tie the defendant's wrongful acts to the victim's injuries in a way that justifies coerced repayment.<sup>217</sup> Although the link between the defendant's wrong and the plaintiff's right to compensation might serve various instrumental goals,<sup>218</sup> it also has moral underpinnings rooted in our desire to effect recourse and correct moral imbalance.<sup>219</sup> The tails-side of this relational concept is that negligence liability must typically be limited to those plaintiffs or injuries for which coerced compensation is morally justified.<sup>220</sup> Coerced transfer that is not so justified offends our general commitment to freedom and to property rights, values inexorably part of the American landscape.<sup>221</sup>

A debate roils in the courts and within the academy regarding the proper doctrinal means for effectuating the concepts of relation and limitation. According to one view—which I will call the “non-relational” approach—the concept of duty or obligation is largely actor-centered. Pursuant to this view, one owes to society in general an

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<sup>215</sup> I leave more extensive economic evaluation of the court-jury debate to others. Again, however, I urge that this is the important question to be answered.

<sup>216</sup> See Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 4 (1989) (describing the compensation scheme in New Zealand).

<sup>217</sup> See Weinrib, *supra* note 94, at 520 (“The concepts of proximate cause and duty normatively link the wrongfulness of the defendant's unreasonable risk-creation with the wrongfulness of the plaintiff's suffering.”).

<sup>218</sup> See, e.g., *supra* notes 200–04 and accompanying text (describing relevant economic goals).

<sup>219</sup> See generally Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (describing the limits of corrective justice theory and exploring a positive theory of tort based on the idea of “rights, wrongs, and recourse”).

<sup>220</sup> There may be a number of bases for limiting negligence liability other than for lack of a moral justification for coerced transfer of resources. This Section, however, only focuses on this particular concept of limitation.

<sup>221</sup> Indeed, these are the pillars of classic liberalism. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 5, 9 (1990); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918–19 (1993).

obligation to exercise care in one's actions.<sup>222</sup> Courts thus impose a duty of care solely on the basis of public policy and community standards of obligation, without regard to the question of to whom such duty is owed. From this non-relational perspective, both the relational aspect of negligence liability and the requisite limitations on liability are to be resolved primarily via the elements of factual and proximate causation.<sup>223</sup>

According to the "relational" conception, by contrast, the doctrinal means for deciding relation and limitation are splintered. Although proximate cause is seen to be the element best suited for imposing limits on the scope of liability, duty is the vessel through which courts establish the proper relation between defendant and plaintiff.<sup>224</sup> To a relationalist, the concept of duty or obligation is incomplete without some connection between the actor and a person or class of persons.<sup>225</sup> The relational approach thus requires a two-step duty query: (1) did the defendant owe a duty *to the plaintiff* or to a class of people of which plaintiff is a member, and (2) was it *this duty*

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<sup>222</sup> See, e.g., PROSSER & KEETON, *supra* note 27, § 53, at 357 ("Certainly [in the early common law] there is little trace of any notion of a relation between the parties, or an obligation to any one individual, as essential to the tort. The defendant's obligation to behave properly apparently was owed to all the world . . ."); Oliver W. Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 661 (1873) (describing the universal tort duty as "a duty imposed on all the world, in favor of all").

<sup>223</sup> Goldberg & Zipursky, *supra* note 18, at 1817–18. Of course, even from a generally non-relational view of duty, many affirmative duties depend upon the relationship between the plaintiff and the defendant—for example, the affirmative duties owed by doctor to patient or innkeeper to guest.

<sup>224</sup> See Weinrib, *supra* note 94, at 521 ("Duty focuses on the class of persons affected by the defendant's negligence, proximate cause on the kind of accident or injury generated by that negligence. The two concepts cover, respectively, the questions of risk to whom and risk of what.").

<sup>225</sup> John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 707 (2001) ("[D]uty in its primary sense is an analytically relational concept: It concerns obligations of care that are owed by certain persons to certain other persons.") (emphasis omitted). To illustrate, assume that I am the last living human on earth. In such case, intuition suggests that I cannot possibly owe any duty of care. According to the relationalist, this intuition stems from the fact that the concept of duty is incomprehensible without considering to whom duty is owed.

that the defendant allegedly breached?<sup>226</sup> The latter aspect of this inquiry is sometimes called the “duty-breach nexus.”<sup>227</sup>

At the center of the debate between the relational and non-relational views of duty lies the concept of foreseeability. According to the non-relational account, foreseeability of the plaintiff and foreseeability of the type of the plaintiff’s injury operate to limit the consequences of a defendant’s negligent act. Although the defendant may have wrongfully created *some* risk of injury to *some* category of people, the consequences of that wrong must be limited to people and injuries that were reasonably foreseeable. These limitations might be justified on instrumental grounds—for example, liability for harm to an unforeseeable plaintiff or injury cannot serve as a deterrent<sup>228</sup>—or on moral grounds—for example, one cannot be responsible for an injury or plaintiff that could not have been foreseen and thus could not have influenced one’s choice in acting.<sup>229</sup> Because proximate cause is generally seen to be the seat of such “limitation” decisions, the non-relationalist believes that foreseeability of plaintiff and of the type or manner of injury fit seamlessly in that element.

From a relational view, by contrast, although foreseeability of the type or manner of injury serves to limit liability in a non-relational way and therefore fits within the element of proximate cause, plaintiff-foreseeability is a necessary constituent of relation.<sup>230</sup> Only if some harm *to the plaintiff* was foreseeable might a defendant’s relationship

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<sup>226</sup> See Goldberg, *supra* note 43, at 1336–39 (explaining this concept in relation to the idea that the defendant’s unreasonable conduct subjected the plaintiff to a “wronging”); Weinrib, *supra* note 94, at 520 (“[These concepts] exclude[] liability when the plaintiff is injured by the defendant’s wrongful act without being wrongfully injured.”); Zipursky, *supra* note 97, at 7–15 (explaining the concept generally).

<sup>227</sup> See Goldberg & Zipursky, *supra* note 225, at 709–12 (explaining the duty-breach nexus requirement). Separately, Professor Zipursky makes the provocative suggestion that this duty-breach nexus foreseeability is so important and omni-present that it constitutes a substantive standing requirement for all negligence claims. See Zipursky, *supra* note 97, at 27–40 (proposing his substantive standing theory in light of several aspects of negligence).

<sup>228</sup> See *supra* notes 200–04 and accompanying text.

<sup>229</sup> See *supra* notes 136–40 and accompanying text.

<sup>230</sup> See Goldberg, *supra* note 43, at 1337–39 (distinguishing a hypothetical that turns on the foreseeability of the type of injury—to be handled by proximate cause—from *Palsgraf*, which turned on the foreseeability of the plaintiff and is a matter of duty); Perry, *Responsibility for Outcomes*, *supra* note 104, at 95 (noting that although foreseeability of the plaintiff is a matter of duty, foreseeability of the type of harm is “the basic principle of proximate cause”).

with the plaintiff give rise to an obligation of care.<sup>231</sup> Because relation-based obligation is the essence of duty, plaintiff-foreseeability must, to a relationalist, constitute a part of the duty calculus.

This divide over the proper doctrinal scheme for the relational and limiting uses of foreseeability was brought into the spotlight by the contrasting opinions of Judge Cardozo and Judge Andrews in *Palsgraf v. Long Island Railroad Co.*<sup>232</sup> *Palsgraf* involved the claim of a railroad passenger who was injured by a falling set of scales while standing on the station platform.<sup>233</sup> The injury resulted when railroad employees, standing at the opposite end of the platform from the plaintiff, negligently dislodged a package from the hands of a passenger while helping him board a departing train.<sup>234</sup> Unbeknownst to the employees, the package contained fireworks, which exploded upon impact.<sup>235</sup> The force of the explosion toppled the scales, which in turn harmed the plaintiff, Mrs. Palsgraf.<sup>236</sup> Writing for the dissent, Judge Andrews held that the railroad owed a “duty of refraining from those acts that may unreasonably threaten the safety of others.”<sup>237</sup> According to Judge Andrews, this duty was not relational but a duty to the world. In his words, “[d]ue care is a duty imposed on each one of us to protect society, . . . not to protect A, B, or C alone.”<sup>238</sup> With the elements of duty, breach, and factual causation satisfied in Mrs. Palsgraf’s case, Judge Andrews opined that any limitation on the railroad’s liability must therefore be effected by proximate causation, in which foreseeability plays an important role.<sup>239</sup>

Writing for the majority, Judge Cardozo approached the case from a relational perspective. Although Judge Cardozo held that the railroad indeed owed a duty to its passengers and that it had breached that duty with respect to the man carrying the package (and perhaps to others nearby), the railroad had nevertheless breached no duty

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<sup>231</sup> See, e.g., RIPSTEIN, *supra* note 113, at 52 (“Parties engaging in potentially risky activities must show reasonable care for those who might be injured by those activities, not simply for the persons who turn out to be so injured.”).

<sup>232</sup> 162 N.E. 99 (N.Y. 1928).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

<sup>238</sup> *Id.* at 102.

<sup>239</sup> *Id.* at 103–04. Although Judge Andrews wrote that foreseeability plays a central role in proximate cause determinations, he felt that the decision was largely a matter of “practical politics.” *Id.* at 103.

owed to the plaintiff.<sup>240</sup> In reaching this conclusion, Judge Cardozo reasoned that “[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation.”<sup>241</sup> In other words, because it was not reasonably foreseeable that the defendant’s actions would injure Mrs. Palsgraf, the requisite relation between the defendant’s wrong and the plaintiff’s injury was missing. Without relation there can be no duty, or at least the duty alleged to have been breached was not a duty owed to the plaintiff.<sup>242</sup>

The central difference between the majority and the dissent in *Palsgraf* is whether the requisite relational link between defendant’s wrong and plaintiff’s injury should be decided in the context of duty or proximate cause. As mentioned above, the argument most frequently made in favor of Judge Cardozo’s approach is that the “duty-breach nexus” is a question of relation, not a policy-driven limitation on liability.<sup>243</sup> It therefore fits best in, and indeed is necessary to, the element of duty. Foreseeability of the type of injury, on the other hand, limits liability in a non-relational way and therefore fits within the element of proximate cause. Professor John Goldberg illustrates this distinction with the following pair of hypotheticals:

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<sup>240</sup> See *id.* at 100 (“What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.”); see also Goldberg, *supra* note 43, at 1336 (“[T]he conduct in question—although perhaps antisocial, as well as wrongful to persons standing near the conductors—could not have amounted to a wronging of [Mrs. Palsgraf]; it did not constitute a harm flowing from a breach of any of the duties that were owed to her.”); Zipursky, *supra* note 97, at 7–15 (explaining the duty-breach nexus as the core of Judge Cardozo’s opinion).

<sup>241</sup> *Palsgraf*, 162 N.E. at 100.

<sup>242</sup> Professor Perry offers another interesting hypothetical scenario involving the duty-risk nexus:

The defendant kidnaps someone, and in the course of his felonious activity quite unforeseeably and non-negligently injures a third party. Does the injured third party have a morally justified claim in tort against the defendant, just because her injury would not have occurred but for the defendant’s violation of the moral and legal norm against kidnapping?

Perry, *Responsibility for Outcomes*, *supra* note 104, at 116. As Perry explains, “the element of fault [in this hypo] is not related in the right way to the antecedent element of outcome-responsibility.” *Id.* at 118.

<sup>243</sup> See Goldberg & Zipursky, *supra* note 18, at 1820 (“[F]oreseeability is not intended as a policy-driven or fairness-based limitation on the harms for which a wrongdoer may be held liable. To read the opinion this way is to convert what Cardozo regarded as a duty question concerning conduct and obligation into a proximate cause question concerning the extent of liability. For Cardozo, the foreseeability of harm to a class of persons goes to the question of whether certain conduct is owed to those persons, not to whether certain liabilities are appropriately borne by defendant[.]”).

First, imagine a person who, while driving his car on a street in a moderately busy part of town, carelessly throws a half-filled paper coffee cup out of the driver's side front window. The coffee proceeds to splatter on the windshield of a car coming in the opposite direction, temporarily blocking the vision of the driver of that car, who swerves, strikes, and seriously injures a pedestrian standing on the far sidewalk.

Now imagine the same careless act—the throwing of the half-filled coffee cup by the driver—except that, instead of hitting another car's windshield, the cup lands harmlessly in the road. However, a pedestrian walking along the far curb sees the tossing of the coffee, stops in his tracks, and raises his arms in indignation over the driver's act of littering. Only because the pedestrian happens to stop at that precise point and gesticulate, he makes contact with a tree limb, which in turn disturbs a hidden nest of bees, many of which sting him, causing him to suffer disfiguring welts and considerable pain.<sup>244</sup>

According to Professor Goldberg (and presumably to other relationalists), the difference in likely outcomes of the first and second hypotheticals turns on proximate cause rather than on duty.<sup>245</sup> Unlike Mrs. Palsgraf, the pedestrian in Professor Goldberg's hypothetical was a foreseeable plaintiff—thus, the relation between driver and pedestrian was sufficient to establish the existence of a duty.<sup>246</sup> Rather, it was the pedestrian's type of injury that was unforeseeable. Presumably stemming from the view that this brand of foreseeability has little to do with the relation between plaintiff and defendant, Professor Goldberg maintains that although duty is the proper forum for cases such as *Palsgraf*, “the notion of proximate cause better explains cases such as the bee-sting hypothetical.”<sup>247</sup>

The relational account of plaintiff-foreseeability is, in large part, accurate as a positive description of courts' behavior. Despite what

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<sup>244</sup> Goldberg, *supra* note 43, at 1337.

<sup>245</sup> *Id.* at 1338.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 1338 n.64. I say “presumably” because Professor Goldberg does not explain the reasons underlying this statement—perhaps in light of his more extensive discussion of this topic in works that he has co-authored with Professor Zipursky, which are cited throughout this Article.

some scholars have posited,<sup>248</sup> many courts seem to view plaintiff-foreseeability as a duty question.<sup>249</sup> Such an approach, however, is in my view conceptually flawed, and one need not adopt a non-relational view of duty to expose these flaws. One might simultaneously maintain the views that duty generally (or at least often) is relational *and* that foreseeability's function as a constituent of relation and limitation is best instantiated by the element of proximate cause. Three false dichotomies weaken the relational approach: (1) the dichotomy between plaintiff-foreseeability and foreseeability of the type of injury; (2) the dichotomy between relation and limitation; and (3) the dichotomy between the relational nature of duty and the non-relational nature of proximate cause. I discuss each in turn.

### 1. The Dichotomy Between Plaintiff-Foreseeability and Foreseeability of the Type of Injury

A conclusion that plaintiff-foreseeability must exist as a constituent of duty but that injury-foreseeability is a matter of proximate cause rests in part on the presupposition that there exists some meaningful distinction between the two concepts. It is this distinction that Professor Goldberg seeks to illustrate by comparing *Palsgraf* with the bee-sting hypothetical.<sup>250</sup> The most that Professor Goldberg's comparison reveals, however, is that fact patterns which, from a relational view, present an issue of plaintiff-foreseeability are merely a subset of cases that call for a determination of the foreseeability of a particular

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<sup>248</sup> As Professor Zipursky points out, the predominant approach in torts casebooks is to discuss *Palsgraf* in the section detailing proximate cause. See Zipursky, *supra* note 97, at 3 & n.4 (citing the relevant casebooks).

<sup>249</sup> A recent canvass of state court decisions revealed only two jurisdictions that clearly favor an Andrews-like approach to plaintiff-foreseeability. See *Wintersteen v. Nat'l Cooperage & Woodenware Co.*, 197 N.E. 578, 582 (Ill. 1935) ("It is axiomatic that every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act . . . . This duty . . . extends to remote and unknown persons."); *Alvarado v. Sersch*, 662 N.W.2d 350, 353 (Wis. 2003) ("Wisconsin has long followed the minority view of duty set forth in the dissent of *Palsgraf v. Long Island Railroad*. . . . '[E]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.") (citation omitted) (quoting *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting)). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29, Reporter's Note to cmt. f, at 45–49 (Tentative Draft No. 3, 2003) (citing cases that purportedly consider plaintiff-foreseeability to be a matter of proximate cause). Interestingly, a growing number of courts also sweep foreseeability of the type and manner of injury into the penumbra of duty. See *Cardi*, *supra* note 7, at 756–61 (describing this phenomenon and citing examples).

<sup>250</sup> See Goldberg, *supra* note 43, at 1337.

risk or a particular type of injury. One might, for example, describe the issue in *Palsgraf* to be not whether Mrs. Palsgraf was foreseeably harmed by the act of dislodging a package out of a distant passenger's hands, but whether it was foreseeable that such act could result in harm due to an explosion.<sup>251</sup> Of course, a relationalist might suggest that even so, the question remains whether Mrs. Palsgraf was foreseeably injured by such an explosion. This too, however, is unproblematically characterized in terms of injury rather than plaintiff: if an explosion was foreseeable, was it also foreseeable that injury would result both of the type Mrs. Palsgraf received and in the manner in which she received it? Similar reasoning might apply to many cases that courts currently deem to involve plaintiff-foreseeability.<sup>252</sup>

In light of this alternative perspective on plaintiff-foreseeability, the distinction between *Palsgraf* and Professor Goldberg's bee-sting hypothetical is rendered at least potentially meaningless. That is, the relational distinction between plaintiff-foreseeability and injury-foreseeability becomes unnecessary absent some practical or meta-conceptual reason to keep it.<sup>253</sup> A desire that courts rather than juries decide such questions might supply such a reason. The more common justification, however, is that duty, not proximate cause, is relational, and that a relational understanding of duty requires the dis-

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<sup>251</sup> Judge Andrews approximated this reasoning in applying his "hindsight" test, a peculiar variant of foreseeability. See *Palsgraf*, 162 N.E. at 105 (Andrews, J., dissenting) ("[G]iven such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff."). Professor Grady also proposes a risk-oriented interpretation of *Palsgraf*. See Grady, *supra* note 196, at 414 (explaining *Palsgraf* as having applied the "reasonable-foresight doctrine" where "the same set of precautions reduces two different expected harms or risks," one foreseeable and one not).

<sup>252</sup> For example, Professor Perry's kidnapping hypothetical, for instance, described *supra* note 242, is equally susceptible to such an analysis. Rather than presenting the question of whether kidnapping posed a foreseeable risk to the injured driver, the issue might instead be described as whether injury by car crash is a foreseeable risk of kidnapping. See also *Fawley v. Martin's Supermarkets, Inc.*, 618 N.E.2d 10, 12-14 (Ind. Ct. App. 1993) (analyzing plaintiff-foreseeability when plaintiffs sued a supermarket for negligent failure to protect them from a drunk driver outside the defendant's business); *Valentine v. On Target, Inc.*, 727 A.2d 947, 949-50 (Md. 1999) (same when a plaintiff sued the defendant gun dealer for the murder of the plaintiff's decedent, committed by a third party with a gun stolen from the defendant's store).

<sup>253</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29, Reporter's Note to cmt. m (Tentative Draft No. 3, 2003) (suggesting that *Palsgraf* and similar cases do not necessarily turn on plaintiff-foreseeability, but might just as easily be characterized as foreseeability of harm cases); William Powers, Jr., *Reputology*, 12 CARDOZO L. REV. 1941, 1949 (1991) (same).

inction and separation of plaintiff-foreseeability from injury-foreseeability. It is to this assertion that I now turn.

## 2. The Dichotomy Between Relation and Limitation

As described above, the primary justification for assigning plaintiff-foreseeability to duty and foreseeability of type of injury to proximate cause is the distinction between relation and limitation: the essence of duty is a relation-based obligation of which plaintiff-foreseeability is a necessary constituent, and the essence of proximate cause is to serve as a tool for limiting liability with regard to which injury-foreseeability is relevant. The basic dichotomy on which this justification rests, however, is flawed. Relation and limitation are not distinct concepts, at least not in the context of foreseeability determinations. Rather, they are merely two possible conclusions to the following question: is the link between defendant's wrong and plaintiff's injury of a kind for which community notions of obligation and policy suggest that a defendant be held liable? A finding that the plaintiff and the plaintiff's injury were foreseeable provides a basis for finding such a link and therefore justifies coerced compensation; a finding that the plaintiff or injury was unforeseeable means that such a link is absent and therefore serves to "limit" the reach of coerced compensation even in the face of wrongful conduct.<sup>254</sup>

This is not to say that the relation and limitation inquiries completely overlap. Indeed, as relationalists point out, plaintiff-foreseeability is merely a necessary, but not a sufficient condition for a finding of the requisite relation.<sup>255</sup> Similarly, limitations on the extent of liability also might stem from other sources<sup>256</sup>—for example, due to the lapse of time between the negligent act and injury.<sup>257</sup> The fore-

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<sup>254</sup> Although Professor Perry considers, at least as a normative matter, plaintiff foreseeability to be a matter of duty and injury-foreseeability to be a matter of proximate cause, Perry seems to recognize that relation and limitation are inexorably tied: "Some [facets of proximate cause] . . . seem to be built into the concept of outcome-responsibility itself. . . . If a foreseeable type of harm occurs in too freakish or improbable a manner, there is insufficient control over the outcome to support a judgment of outcome-responsibility . . ." See Perry, *Responsibility for Outcomes*, *supra* note 104, at 95.

<sup>255</sup> *E.g.* Goldberg & Zipursky, *supra* note 18, 1818–19.

<sup>256</sup> See Perry, *Responsibility for Outcomes*, *supra* note 104, at 95 ("There are many facets to the law of proximate cause in addition to the basic foreseeability principle.").

<sup>257</sup> See, *e.g.*, *Martinez v. California*, 444 U.S. 277, 285 (1980) (holding that the defendant state could not be held liable for the murder of a girl by a parolee five months following the parolee's release from prison, in part because of the significant lapse in time between the parole release and the murder).

seeability aspect of relation and limitation, however, simply combines two opposing forces of the same inquiry—the desire for relation and the preservation of residual freedoms. Division of the concept between separate elements of negligence is therefore misleading and redundant.

Such an argument is, of course, indeterminate as to whether duty or proximate cause is the better home for the combined inquiry. In fact, this is precisely the point. If the distinction between relation and limitation is indeterminate as to the proper doctrinal home for foreseeability, perhaps the only determinative factor is whether court or jury is the preferable primary decisionmaker.

### 3. The Dichotomy Between the Relational Nature of Duty and the Non-Relational Nature of Proximate Cause

Even if one disagrees with the assertion that relation and limitation are opposing aspects of the same inquiry, the common charge that relation is exclusive to duty and that limitation is exclusive to proximate cause is, in my view, not accurate. Rather, duty and proximate cause are both relational in some respect, and both also limit liability.<sup>258</sup> The charge is therefore indeterminate as grounds for conditioning duty on plaintiff-foreseeability.

Despite Judge Andrews's protests that each of us owes to the world a duty to avoid causing harm,<sup>259</sup> it is difficult to deny that duty is at least sometimes relational. Many of our daily obligations, both legal and pre-legal, exist only in relation to a limited group of people. For example, the duty to clothe and feed others extends only to our dependent children, the duty to warn or rescue others extends only to those with whom we have some "special relationship,"<sup>260</sup> and the duty

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<sup>258</sup> The view that duty often serves to limit negligence liability is relatively uncontroversial. See, e.g., FRIEDMAN, *supra* note 78, at 470, 474 (explaining that judges have used duty to keep negligence decisions out of the hands of the jury in order to limit the liability of burgeoning enterprise); Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1525 (1997) (explaining the expanded reach of duty as a means of effecting a "conservative" vision of the proper extent of liability). I therefore focus on the claim that proximate cause, as well as duty, is relational.

<sup>259</sup> See *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

<sup>260</sup> See, e.g., *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993) (holding that a boat owner did not have a duty to warn a guest against diving into shallow water); *Methola v. County of Eddy*, 629 P.2d 350, 353–54 (N.M. Ct. App. 1981) (holding that jailors have a duty to protect and rescue inmates from other abusive inmates); RESTATEMENT (SECOND) OF TORTS § 314A (1965) (explaining that common carriers, innkeepers, land possessors,

to protect those on our property depends upon the status of our relationship with them.<sup>261</sup> Other obligations we owe to all others. As a general matter, for instance, we must not intentionally punch anyone in the nose or drive a car so unreasonably that we crash into another. These “universal duties” might also be described as relational in the sense that they too are owed to a defined class of persons, albeit an inclusive one.<sup>262</sup>

Even conceding that duty is relational, however, one need not conclude that the relational aspect of negligence liability rests exclusively with duty. Nor is it self-evident that duty is the most effective tool for linking the defendant’s wrong with the plaintiff’s injury. Proximate cause also plays a role in establishing relation—a role that neatly overlaps the work performed by duty and by plaintiff-foreseeability in *Palsgraf*.<sup>263</sup> A comparison of *Palsgraf*’s relational duty analysis with the “risk rule” for proximate cause illustrates the point.

Recall that a relational duty inquiry consists of two steps: (1) whether the defendant owed a duty *to the plaintiff* or to a class of people of which plaintiff is a member, and (2) whether it was *this duty* that the defendant allegedly breached.<sup>264</sup> Proximate cause, as defined by the risk rule, asks whether the plaintiff’s injury was “different from the harms whose risks made the actor’s conduct tortious.”<sup>265</sup> At least with regard to plaintiff-foreseeability, these duty and proximate cause inquiries pose the very same question: was the defendant’s act wrong-

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and those in custodial roles owe to customers, invitees, or those in their custody a duty to protect, warn of dangers, and offer first aid). The duty to aid also extends to those with respect to whom the defendant has created a continuing risk of harm. DOBBS, *supra* note 2, § 316, at 856–57.

<sup>261</sup> See *supra* note 56 and *infra* note 308 (citing sources that explain the distinction in many jurisdictions between duties owed to licensees, invitees, and trespassers).

<sup>262</sup> Goldberg & Zipursky, *supra* note 225, at 707.

<sup>263</sup> Factual causation also requires a relational link (in the form of causation) between the defendant’s wrong and the plaintiff’s injury.

<sup>264</sup> See *supra* note 226 and accompanying text. Actually, the duty inquiry requires a third step as well—the question of if a duty was owed, what is the general scope of that duty? Was it a general duty to use reasonable care, or some more specific duty?

<sup>265</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 (Tentative Draft No. 3, 2003); see also ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORT 10 (1963) (“A negligent actor is legally responsible for the harm, and only the harm, that . . . is a result within the scope of the risks by reason of which the actor is found to be negligent.”); RIPSTEIN, *supra* note 113, at 65 (“[L]iability is limited to the risks that make the conduct wrongful.”).

ful in relation to the plaintiff's injury?<sup>266</sup> Consider the following explanation of the reasoning involved in each. In acting, a defendant created a range of potential risks—picture this range as a circle, within which any given point represents a potential risk. In deciding that the defendant's act was wrongful, the jury draws a smaller circle within this range. The smaller circle represents the jury's normative judgment regarding which of the potential risks were reasonably foreseeable and avoidable. Every point within the smaller circle represents a risk that the defendant ought to have taken into account when acting.<sup>267</sup> Every point outside of the smaller circle represents a risk that the reasonable person would not have taken action to avoid. In the context of *Palsgraf*, for example, the railroad employees ought to have considered that in helping the man onto the train they might bruise him or cause him to fall. This risk of injury is therefore within the circle of risk that made the employees' conduct wrongful. Similarly, the employees ought to have considered that they might cause his package to drop and its contents to break. Perhaps they should even have considered the risk of jostling nearby passengers. The risk of explo-

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<sup>266</sup> At least one relationalist appears to admit as much. In a provocative article in which he ascribes to *Palsgraf's* duty-risk rule the weight of a substantive standing requirement, Professor Zipursky states that:

[I]t appears that the risk rule can be understood as a conflation of the substantive standing rule with some form of causation requirement. The risk rule presupposes that the conduct must have involved the wrongful taking of a risk of certain injuries to the plaintiff—in other words, negligence in relation to the plaintiff.

Zipursky, *supra* note 97, at 35. I disagree, however, with Professor Zipursky's explanation that the risk rule "presupposes" that the defendant's act created some risk "to the plaintiff." To the contrary, such is precisely part of the relation that the risk rule seeks to establish. See RIPSTEIN, *supra* note 113, at 65, 67–68 (explaining the relationality of negligence liability, and more specifically the "ownership" of risk, in terms of the risk rule: "[I]f we understand the boundaries between persons as existing in moral rather than geometric space, we see that the fault system can coherently hold someone liable only for the losses that are within the risk implicit in the violated standard of care."); Perry, *Moral Foundations*, *supra* note 94, at 484 ("Risk is the relational concept that connects the active and passive aspect of injurious conduct, so that what the defendant did and what the plaintiff suffered are not regarded as two discrete happenings.") (quoting Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1304–05 (1989)); Weinrib, *supra* note 94, at 521 ("The concepts of proximate cause and duty connect wrongful doing to wrongful suffering by requiring the plaintiff's injury to be the fruition of the unreasonable risk that renders the defendant's action wrongful.").

<sup>267</sup> In terms of foreseeability, there are perhaps two smaller circles within the range of risks created by the railroad employees' action. There is a smaller circle representing the foreseeable risks and an even smaller circle still representing the reasonably foreseeable risks. See *supra* notes 105–08 and accompanying text.

sion, on the other hand, or the risk that their act might topple distant scales, or the risk that they might hurt a passenger as far away as Mrs. Palsgraf all are risks that would not have been considered by the ordinary person. In the language of the risk rule, such risks were not what made the employees' act wrongful. In the language of Judge Cardozo, the defendant breached no duty with respect to such risks.<sup>268</sup> In either case, such risks were not reasonably foreseeable.<sup>269</sup>

Each of the false dichotomies described above indicates that proximate cause standing alone might fulfill the component of relationality often currently decided in the context of duty by plaintiff-foreseeability. This is not, of course, to say that the elements of duty and proximate cause are redundant. The question central to duty remains whether the defendant owed some obligation of care. The essence of proximate cause remains whether the plaintiff's injury exceeds the scope of the risk that the defendant created in breaching a duty. Furthermore, although both elements involve some aspect of the relation between the defendant's wrong and the plaintiff's injury, there is a fundamental difference in the level of generality from which each element approaches the question. The existence of a duty is a threshold question. It is the gatekeeper for negligence liability, including or excluding potential liability with regard to broad groupings of fact patterns. Duty questions and the relational inquiries relevant to them are therefore, to the extent possible, acontextual. Proximate cause, on the other hand, serves as the final and finest sieve. Whereas duty examines the relation between broad categories of defendants and plaintiffs, wrongs and injuries, proximate cause considers relation in the full dress of context.

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<sup>268</sup> *Palsgraf*, 162 N.E. at 100.

<sup>269</sup> I offer this discussion of the similarity between the duty-risk nexus and the risk rule for the purpose of showing that proximate cause is equally as capable of establishing this aspect of relation as is duty. I would contend that the risk rule is virtually identical in effect as a generalized foreseeability inquiry properly formulated, although a full discussion of the point exceeds the scope of this Article. For a rigorous, if ultimately flawed, critique of the risk rule, see Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES IN LAW 333, 365–411 (2002) (criticizing the risk rule on grounds that (1) because there is no "correct" description of a risk, the risk rule is arbitrary; (2) because every risk is considered in determining fault, the risk rule leads to liability for all resulting harms; and (3) the risk rule is incompatible with other rules such as superseding cause, the thin-skull rule, and the denial of recovery for harms that are remote in spatio-temporal terms). For a compelling response to these arguments, see Israel Gilead, *Harm Screening Under Negligence Law 14–17* (Sept. 26, 2005) (unpublished manuscript, on file with the author).

The foregoing account admittedly leaves two pieces of the foreseeability puzzle unanswered. First, if the only meaningful distinction between the relational inquiries of duty and proximate cause is the level of generality at which they are made, then why not a scheme in which foreseeability plays a role in both elements, differing only in the generality of its approach? It is to this question that I turn in Part III.D, immediately below.<sup>270</sup> Second, even if proximate cause can accommodate the relational determinations often currently rendered in the context of duty, can a relational view of duty exist without the looking glass of foreseeability? Although a complete examination of this question must be left to future work, my intuition is that the answer is yes. In an every-day sense, the essence of an affirmative care-taking relationship between two people is not that one of them might become injured. Rather, such a relationship is the result of a voluntary commitment from one to the other, an inclusion of the other within one's sphere of influence—the mother's exercise of her parental rights, the innkeeper's invitation to stay the night, the doctor's promise to treat, the police officer's promise to guard, the driver's non-negligent creation of a driving hazard, or the rescuer's attempt to rescue. In each of these situations, the actor's conduct is a self-initiated curtailment of her own liberty, a commitment—whether actual or implied—to a relationship with another. It is this commitment, and not foreseeability, that provides the foundation for a court's examination of relation and obligation.

#### D. *Categorical Foreseeability*

What about a theory of duty and proximate cause according to which foreseeability plays a role in both elements, differing only in the generality of its approach? Such an understanding is not uncommon. In duty, so the theory goes, courts determine whether the alleged class of plaintiff, risk, or type of injury is generally foreseeable to the class of people of which the defendant is a member.<sup>271</sup> If not,

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<sup>270</sup> See *infra* notes 271–305 and accompanying text.

<sup>271</sup> Such a theory is often limited to the context of plaintiff-foreseeability, leaving injury-foreseeability to proximate cause. DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 199–200 n.9 (3d ed. 2004); see Goldberg & Zipursky, *supra* note 18, at 1818–20, 1828 (explaining that the duty inquiry focuses on whether the relevant class of defendants owes a duty to the relevant class of plaintiffs to act in accordance with a certain standard of care). Courts frequently, however, decline to impose a duty after concluding that a class of risk or injury is not generally foreseeable to a particular class of defendants. See, e.g., *Ballard v. Uribe*, 715 P.2d 624, 628 n.6 (Cal. 1986) (“The foreseeability of a particular kind of

the court must dismiss the case for lack of duty.<sup>272</sup> If so—and if other duty-relevant factors mitigate in favor—then the defendant will be deemed to have owed the alleged duty. The only question remaining for proximate cause, under such an approach, is whether the particular plaintiff, risk, or injury was sufficiently unforeseeable within the factual context of the case as to preclude liability. In other words, foreseeability in the context of duty is categorical, whereas foreseeability in proximate cause is individualized and context-dependent. Although such an approach addresses the conceptual requirements of negligence in some workable fashion, I urge in this section that it should be abandoned nonetheless.

In considering the validity of this or any other conception of duty in which categorical foreseeability plays a starring role, three aspects of categorical foreseeability require separate attention: (1) the categorical incapacity to foresee, (2) categorical unforeseeability as grounds not to impose a duty, and (3) the imposition of an affirmative obligation due to categorical higher-than-average foreseeability. I discuss each in turn.

### 1. Categorical Incapacity to Foresee

In certain limited circumstances, courts have held that a class of defendants' mental or physical capacity to foresee is so undeveloped or diminished that a defendant within such a class cannot be said to owe a duty of care at all. Thus, most courts hold that defendants below a certain age presumptively are not liable in negligence.<sup>273</sup> Similarly, a driver who unexpectedly is rendered unconscious is not held liable for the resulting damages.<sup>274</sup> One might characterize such

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harm plays a very significant role in this calculus, but a court's task—in determining 'duty'—is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.") (citation omitted).

<sup>272</sup> Determining the relevant class presents the same potential for indeterminacy as does the characterization of the relevant reference class of events for purposes of deciding foreseeability generally. *See supra* notes 109–11 and accompanying text (explaining this indeterminacy).

<sup>273</sup> *See supra* note 159 and accompanying text.

<sup>274</sup> *See Bashir v. Wodarz*, 53 Cal. Rptr. 2d 635, 638 (Ct. App. 1996) (citing a line of cases holding as much). In addition, some forms of incapacity lead courts to impose a lesser standard of care, rather than to deny duty altogether. For example, a blind defendant is generally held to an obligation to use only the care of a reasonable blind person. *E.g. Roberts v. Louisiana*, 396 So. 2d 566, 568 (La. Ct. App. 1981).

bright-line rules as judgments regarding the categorical unforeseeability of injury or plaintiff to such classes of defendants. Because any risk, injury, or potential plaintiff is categorically unforeseeable to a four year-old, for example, the child cannot owe a duty of care.

As explained in Part III.A above, however, such rules are not best described as foreseeability determinations at all, even categorical ones.<sup>275</sup> The rules limiting the negligence liability of children or unconscious drivers are not conditioned upon any category of risk, injury, or plaintiff, but rather depend solely on the physical and mental characteristics of the class of defendant.<sup>276</sup> Unlike even categorical foreseeability determinations, incapacity decisions are completely divorced from any other factual context.<sup>277</sup>

Furthermore, an explanation of incapacity rules that turns on foreseeability faces a serious descriptive anomaly. Courts generally impose an ordinary duty of care upon mentally incapacitated but not upon physically incapacitated defendants, although the potential consequences of their acts may be equally unforeseeable to members of either class.<sup>278</sup> In light of this inconsistency, perhaps the justification behind incapacity rules is not categorical unforeseeability, but rather the determination that unlike the mentally incapacitated, neither the physically incapacitated nor the very young can be deemed to have acted at all.<sup>279</sup>

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<sup>275</sup> See *supra* note 160 and the text of the surrounding paragraph.

<sup>276</sup> One might, of course, characterize such determinations as relational in a way that is similar to a relational description of the general duty of care to avoid causing harm to another. Such decisions embody the judgment that a class of risk, injury, or plaintiffs described as “any” is unforeseeable to a class of defendants. Even so, however, the distinction between a class defined as “all the world” and some more contextually limited class is an important one in sorting out the proper doctrinal home for foreseeability.

<sup>277</sup> This distinction is not only descriptively accurate, but it also supports the argument that categorical incapacity, but not categorical unforeseeability, is properly decided as a matter of duty. The more context-independent a decision, the better the case for leaving it in the hands of the court; the more context-dependent, the more reason to send it, in the first instance, to the jury. See *Cardi, supra* note 7, at 802–04 (explaining why juries are the better entity for deciding fact-dependent inquiries).

<sup>278</sup> *Kelley, supra* note 85, at 237. One possible explanation for this seeming discrepancy is society’s general apathy toward the mentally ill. See *id.* at 205 (“The generic law review article often goes on to suggest that the different treatment of the mentally ill reflects outmoded and unjustified prejudice against them.”). This fails to explain why negligence liability for the mentally ill has become stricter since the 1800s, see *id.* at 183–203 (describing the law’s historical development), while society’s understanding and tolerance of mental illness has presumably increased.

<sup>279</sup> See *id.* at 238 (“When the defendant driver faints without forewarning and his unguided car drifts into the left lane the driver has not acted in violation of the safety convention because at the time his car crossed into the left lane he was not acting at all.”).

In short, although it is practical and conceptually proper that courts set specialized duty rules based on categorical judgments of incapacity, such judgments are not dependent upon foreseeability. Hence, the existence of categorical incapacity rules does not afford foreseeability a foothold in duty.

## 2. Categorical Unforeseeability as Grounds Not to Impose a Duty

In most jurisdictions, the host of a non-commercial social event may serve alcohol without fear of liability for injuries caused by a drunken guest.<sup>280</sup> Typically, courts have barred social host liability on the grounds that a host owes no duty to an intoxicated guest or to third parties injured thereby, either because social hosts as a class cannot foresee how much alcohol a guest will consume and cannot know when a guest has become intoxicated, or because a host cannot foresee or control an intoxicated guest's conduct.<sup>281</sup> Such reasoning seems disingenuous, however, in light of the fact that a social host often *does* know that a guest has imbibed excessively and *is* able to foresee, for example, that the guest might harm herself or others while driving home. This seeming contradiction might be generalized as follows. The denial of a duty due to categorical unforeseeability is tantamount to holding that even if the defendant was not vigilant, the defendant's lack of vigilance would not be blameworthy because the class of risk, injury, or plaintiff is generally unforeseeable to the defendant-class. If the risk, injury, or plaintiff *was* in fact foreseeable to the particular defendant, however, the stated reason for refusing to impose a duty is gone. The categorical no-duty rule thus stands on quicksand, and some unstated justification must therefore underlie these rulings.

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Similarly, as anyone with experience with young children can attest, it is sometimes difficult to say whether any particular movement of limb is deliberate or the result of some random firing of maturing neurons. At any rate, even if many of a child's actions do seem deliberate, a court might yet wish to steer clear of the thicket of determining which are which.

<sup>280</sup> See, e.g., *McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 142 (Mass. 1986) ("Under traditional common law tort analysis, our inquiry is whether a social host violated a duty to an injured third person by serving an alcoholic beverage to a guest . . . [which] require[s] . . . consider[ation of] whether the social host unreasonably created a risk of injury . . ."); *Gilger v. Hernandez*, 997 P.2d 305, 310–12 (Utah 2000) (considering whether the social host-guest relationship gives rise to a special relationship that imposes on the social host an affirmative duty either to control or protect her guests).

<sup>281</sup> E.g. *Graff v. Beard*, 858 S.W.2d 918, 921–22 (Tex. 1993).

One possibility is that categorical unforeseeability serves as a vessel for hidden decisions of policy; in the social host context, for example, courts may simply wish to protect the institution of social gatherings at which alcohol is served.<sup>282</sup> Another possibility is that in deciding such cases based on duty, courts unwittingly engage in what is commonly understood to constitute breach or proximate cause analysis without the requisite deference to the jury.<sup>283</sup> I have discussed the hazards of each of these possibilities elsewhere.<sup>284</sup>

Two further potential justifications exist, however. First, categorical unforeseeability rulings might serve as a tool to control transaction costs. A court might reason, for example, that because the incidence of social host cases in which a risk, injury, or plaintiff is foreseeable is extraordinarily low, identifying such cases is not worth the requisite expenditure of judicial resources. This reasoning is, of course, not limited to social host cases; any case in which the court declines to impose a duty on grounds of categorical unforeseeability might thus be justified. By dismissing such cases based on categorical unforeseeability, courts arguably avoid a likely unfruitful context-specific foreseeability inquiry and discourage future analogous suits. A court is, of course, empowered to make such a decision, although it is unclear just how much cost is saved thereby.<sup>285</sup> More important, however, is the gravity of a decision to sacrifice the interests of a plaintiff (and of future plaintiffs) whom another's wrong has foreseeably injured simply because it would be too costly over time to sort the wheat from the chaff. At the very least, courts should be clear that such is the basis for their rulings—that they are denying liability in a class of cases not because the defendant was not blameworthy, but be-

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<sup>282</sup> See *Kelly*, 476 A.2d at 1227–29 (discussing the opposing policy interests in social host cases); *Cardi*, *supra* note 7, at 764–66, 788–91 (same); Linda E. Fisher, *Alcohol, Tobacco, and Firearms: Autonomy, the Common Good, and the Courts*, 18 YALE L. & POL'Y REV. 351, 370–73 (2000) (same).

<sup>283</sup> *Cardi*, *supra* note 7, at 775–82.

<sup>284</sup> See *id.* at 791–805 (arguing that the former is improper to the extent that foreseeability obscures the underlying policy decision and that the latter is improper because it robs the jury of its rightful role in deciding negligence and proximate cause).

<sup>285</sup> For example, a court must still determine whether a particular case fits within an established no-duty category—an inquiry that may yet require fact-finding by the jury. Furthermore, it is uncertain to what extent no-duty decisions discourage future lawsuits; attorneys are trained to distinguish their cases from potentially controlling precedent, a task made especially inviting by the particularly fact-specific nature of negligence cases.

cause they have decided not to consider the question for administrative convenience.<sup>286</sup>

As a final potential justification for categorical unforeseeability, Professors Goldberg and Zipursky suggest that by excluding liability categorically, courts prioritize certain obligations over others and provide clearer rules for actors.<sup>287</sup> Although Professors Goldberg and Zipursky do not explicitly state as much, I understand their point to be that categorical foreseeability is useful insofar as it encourages actors to prioritize their efforts to take care where doing so will have some reasonable chance of avoiding injury. Only classes of scenarios in which the risk, injury, and plaintiff are “foreseeable enough” are worthy of a “prioritized” duty of care. Professor Goldberg and Zipursky’s account represents a plausible but exceedingly strong view of the judge’s role in negligence cases—a view of the judge as frequent rule-maker, as micro-manager. This was the view of Justice Holmes as he imposed specific rules for railroad-crossings in *Baltimore & Ohio Railroad Co. v. Goodman*,<sup>288</sup> an approach resoundingly (if respectfully) rejected seven years later by Justice Cardozo in *Pokora v. Wabash Railway Co.*<sup>289</sup> I concede that in the decades since *Pokora* (and especially since the early 1980s), courts seem to be sliding back to the idea that they must keep a tighter

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<sup>286</sup> See CALABRESI, *supra* note 213, at 250–51, 255–56 (arguing that the largest administrative cost of the tort system is the case-by-case determination of accidents by juries).

<sup>287</sup> See Goldberg & Zipursky, *supra* note 18, at 1831–32 (articulating the value of the prioritizing effect of categorical duties). As they explain:

If one has a duty of care to another, that other person figures (or should figure) in one’s deliberation in a certain way. Because the possibility of duty serving a prioritizing role is compromised by casting the duty net too wide, the question arises as to which types of persons are obligated to be vigilant to avoid causing certain types of harm to certain others.

*Id.* at 1838.

<sup>288</sup> 275 U.S. 66, 70 (1927) (holding categorically that “if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle”). In so holding, Justice Holmes acted upon his longstanding view that judges should more actively apply their cumulative wisdom to prescribe specific duties in categories of cases. See *id.* (“It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.”) (citation omitted); Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1485 (1992) (noting that Justice Holmes’s *Goodman* opinion was an attempt to implement the theories he had propounded in *The Common Law*).

<sup>289</sup> 292 U.S. 98, 106 (1934) (holding that it was for the jury to decide whether the defendant’s conduct was unreasonable, where the layout of a grade crossing was such that to exit one’s car to check for oncoming trains—as was one’s duty pursuant to *Goodman*—would be to increase, rather than to reduce, the risk of catastrophe).

rein on duty and hence on the jury's power to decide negligence. In doing so, however, courts sacrifice justice in the individual case in which risk, injury, or plaintiff in fact was foreseeable.<sup>290</sup>

Furthermore, it has not been demonstrated that the particularized guidance of court-made rules is necessary or effective in prioritizing people's efforts at care. Nor is there any evidence that particularized duties are normatively superior in this respect to the generalized duties to avoid unreasonably causing harm to another or to take reasonable precautions to protect another with whom one has a special relationship.<sup>291</sup> Scant sociological research exists to support such a hypothesis,<sup>292</sup> and the comparative merit of rules to standards generally is a matter of perpetual jurisprudential debate.<sup>293</sup> Without evidence that particularized rule-guidance is preferable, the long-deliberated policy judgments embodied by the general duties of care should stand.

Finally, one might question the institutional ability of courts to render categorical unforeseeability determinations. The categorical unforeseeability inquiry consists of three steps: (1) a description of the relevant categories of defendant and risk, injury, or plaintiff, (2) a finding that the incidence of foreseeability is lower for the applicable pair of categories than it is for society generally, and (3) a normative judgment that the incidence is sufficiently low to justify the denial of liability. Although the last of these determinations is arguably within the court's bailiwick, the second entails a factual investigation perhaps best accomplished by a legislature or an administrative agency, and a

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<sup>290</sup> Cardi, *supra* note 7, at 799–805.

<sup>291</sup> Cf. RIPSTEIN, *supra* note 113, at 105 (“[A]gents need to be able to know which actions can be performed without fear of legal sanction, and, more to the point, the interests of others of which they must take account. The limitation of liability to foreseeable injuries is an expression of the idea that people must be in a position to know their rights and the rights of others. Reasonable foreseeability is required . . . because it is public in the right way, that is, accessible in principle both to those who might injure others and those who might be injured by them.”) (emphasis omitted).

<sup>292</sup> This conclusion is based upon conversations with two sociology professors at the University of Kentucky. As of publication, no specific sources for this conclusion could be identified.

<sup>293</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 138–41 (1994) (discussing generally the relative value of rules versus standards). See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (challenging the primacy of rules over principles and proposing a structure for their co-existence); FREDERICK SCHAUER, *PLAYING BY THE RULES* (1992) (advocating the law's reliance on specific rules rather than on generalized standards).

description of the relevant categories is rendered less indeterminate, if at all, only by reliance on the jury.<sup>294</sup>

In sum, there are no dispositive conceptual justifications for courts' use of categorical unforeseeability as a reason to deny the existence of a duty. The justifications offered by courts and scholars turn out to be merely instrumental—that categorical unforeseeability serves administrative convenience or better guides actors' behavior. Furthermore, the objects of such instrumentalism appear to be normatively irresolute. Without good reasons to embrace categorical unforeseeability, it therefore should be abandoned.

### 3. Imposition of an Affirmative Duty Due to Categorical Higher-Than-Average Foreseeability

As many courts look to categorical unforeseeability as a reason to deny duty, courts also treat the particular ability of a class of defendants to foresee a class of risk, injury, or plaintiff as a reason to impose an affirmative duty. The quintessential example of this affirmative use of categorical foreseeability is the California Supreme Court's decision in *Tarasoff v. Regents of the University of California*.<sup>295</sup> In that case, the court imposed on the defendant psychologist a duty to take reasonable care on behalf of the decedent Tatiana Tarasoff, a non-patient, with regard to the threats on her life made by one of the psychologist's patients.<sup>296</sup> The court's duty analysis did not turn on the particular context of the case. Rather, the court imposed a duty in part due to the special relationship between psychologist and patient, but also because psychologists as a class are often privy to their patients' potentially injurious intentions toward third parties.<sup>297</sup>

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<sup>294</sup> See *supra* notes 109–111 and accompanying text. It is interesting that although Professors Goldberg and Zipursky explicitly endorse categorical foreseeability decisions, they decry intrusions into the realm of the legislature when discussing the duty-as-policy approach of Justice Holmes and Dean Prosser. See Goldberg & Zipursky, *supra* note 18, at 1739–44 (assessing the multi-factored “policy-driven” approach to duty as “arbitrary, indeterminate, and doctrinally unstable” and concluding that “[o]ur understanding of the relative strengths and weaknesses of political institutions often leads to the conclusion that the legislative and executive branches are more capable, or at least more appropriate, institutions for making such decisions”). I would contend that categorical foreseeability decisions are similarly suspect.

<sup>295</sup> 551 P.2d 334 (Cal. 1976).

<sup>296</sup> *Id.* at 340.

<sup>297</sup> *Id.* at 343–45. Although the court stated that it was not necessary to “decide whether foreseeability alone is sufficient to create a duty to exercise reasonable care to protect a potential victim of another’s conduct,” *id.* at 343, the court’s analysis of the special relationship between psychologist and patient turned in part on the fact that psy-

In other words, just as a low incidence of class-foreseeability might lead a court to deny the existence of a duty, a higher-than-ordinary incidence of class-based foreseeability might be reason to impose a duty of care where otherwise none would exist.<sup>298</sup> This conclusion implicitly stems from the following reasoning. In the ordinary case, courts refuse to impose an affirmative duty to warn or protect another from danger posed by a third source<sup>299</sup>—a rule generally understood to arise from courts' concern for individual liberty.<sup>300</sup> Where a particular class of defendant has a higher-than-ordinary likelihood of foreseeing a class of risk, injury, or plaintiff, the proportionately greater opportunity for accident-prevention afforded by imposing an affirmative duty may outweigh the countervailing liberty interests of the defendant class.<sup>301</sup>

Furthermore, unlike no-duty holdings based on categorical unforeseeability, the affirmative use of categorical foreseeability does not forgo a context-specific foreseeability inquiry. Consider, for example, if the *Tarasoff* court had held that a psychologist owes no duty because

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chologists are uniquely privy to knowledge of dangers posed by their clients. Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J.L. & PUB. POL'Y 156, 157–58 (2000).

<sup>298</sup> See Goldberg & Zipursky, *supra* note 18, at 1838–39 (“The ease or difficulty for persons in the defendant’s category to anticipate those harms is relevant to whether it makes sense for such persons to be said to have a duty to be vigilant against causing them. Hence, . . . the decision that certain defendants are particularly well-situated to foresee the sort of harm that befell the plaintiff is not only relevant to whether there was a breach. It is also relevant to whether a category of defendant may properly be declared to owe a duty of due care to a category of plaintiff.”).

<sup>299</sup> RESTATEMENT (SECOND) OF TORTS § 314 (1965); DOBBS, *supra* note 2, § 314, at 853.

<sup>300</sup> E.g., Epstein, *supra* note 117, at 197–98; see also RIPSTEIN, *supra* note 113, at 91 (“The fact that you are in peril, and I know of your peril, does not make that risk mine. . . . To shift risk in this way would be unduly burdensome to liberty . . .”); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1840 (2004) (explaining that defendants’ nonfeasance does not typically generate a duty because “[a]s private parties, they cannot be under any corresponding obligation to confer any benefit on me, no matter how significant the benefit, and no matter how easy it is to confer. Such an obligation would undermine the sense in which what they have is their own”). See generally Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (offering a range of possible justifications).

<sup>301</sup> In economic terms, suppose that courts would prevent 100,000 injuries a year, valued at \$100,000 each, by imposing on society generally a duty to protect, warn, or rescue. By the absence of such a general affirmative duty, we might presume the conclusion that society’s combined interest in liberty is worth more than the combined value of 100,000 yearly injuries: (300,000,000 people × \$100 yearly liberty interest per person = \$30,000,000,000) > (100,000 yearly injuries × \$100,000 per injury = \$10,000,000,000). Suppose now that imposing an affirmative duty on 10,000 psychologists would prevent 100 injuries per year. The value of these 100 yearly injuries may well outweigh the combined liberty interest of the psychologist class: (10,000 psychologists × \$100 yearly liberty interest per person = \$1,000,000) < (100 yearly injuries × \$100,000 per injury = \$10,000,000).

generally it is not foreseeable that a psychologist's patient may pose a risk to a third party. In such a case, psychologists would escape liability even where a jury might have found that the risk was indeed foreseeable (or, as in *Tarasoff*, actually foreseen). As noted above, such a result would be nonsensical. A court's affirmative use of class-based foreseeability does not elicit this problem, however. Although the *Tarasoff* court imposed a duty based in part on the relatively high incidence of psychologists' foresight, the jury remained free to deny liability in the context of breach or proximate cause because the risk, injury, or plaintiff was not foreseeable under the circumstances.

Despite the promise of categorical foreseeability, however, it proves conceptually unstable. Specifically, the affirmative use of categorical foreseeability is at odds with the canonical distinction between misfeasance and nonfeasance. In deciding that a psychologist's special ability to foresee is enough to override the general no-duty-to-rescue rule (and its underlying principles), it is difficult to argue that the ability of others to foresee injury should not also be sufficient. For example, suppose that a small stretch of public street outside a haberdashery becomes icy due to a combination of inclement weather and a peculiar dip in the road. Suppose also that the haberdasher witnesses several accidents throughout the day and does nothing to prevent them. The haberdasher is surely more likely than the ordinary person to foresee the risk that passing cars might slide on the ice—and yet the haberdasher will not owe a legal duty to warn those in danger. The difference between the psychologist and the haberdasher is not the incidence with which each might foresee the relevant class of harms. Psychologists are surely no more privy to impending doom than is a class defined as "people who work in proximity to an observed potential road hazard." With no greater potential for accident-prevention, the categorical foreseeability of psychologists provides no greater ballast against a countervailing liberty interest than does the categorical foreseeability of the haberdasher. Indeed, along this line, a few scholars have urged that the logical extension of *Tarasoff* leads to abrogation of the traditional distinction between misfeasance and nonfeasance in favor of an approach to duty based almost entirely on foreseeability.<sup>302</sup>

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<sup>302</sup> John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 911–14 (1991) (proposing the abandonment of the misfeasance/nonfeasance distinction and suggesting that such a change is necessitated by the same forces that led to California duty cases such as *Tarasoff*); Lake, *supra* note 4, at 121–23 (characterizing *Tarasoff* as having

One might attempt to distinguish *Tarasoff* from the case of the apathetic haberdasher according to the ease with which a court can identify the psychologist class in advance. Such an assertion is not necessarily accurate, however. Although it might be a relatively straightforward inquiry for a court to evaluate psychologists' ability as a class to discern a patient's potential for violence, the foreseeability-related attributes of "business owners in proximity to potential road hazards" or even more generally, "people who are witness to an obvious risk" seem at least as readily apparent. In addition, although administrative inefficiency often rightly serves as a reason *not* to impose a duty,<sup>303</sup> the ease with which a court might identify a class is not so clear a justification on its own to impose a duty. A court cannot nullify the liberty interests of an entire class of defendants simply because it is easier to identify those defendants than others—there must be some underlying substantive reason to do so.<sup>304</sup> Administrative ease in such a case only has substantive content as compared to administrative difficulty.

All of this is not, of course, to say that the *Tarasoff* court was wrong to impose an affirmative duty on psychologists to warn third parties of risks posed by patients. The court's decision might, for example, be justified by a perceived need to stem a growing tide of injuries caused by psychological patients. Or, as the *Tarasoff* court reasoned, the therapist-patient relationship might be sufficiently custodial that the therapist must protect the patient not only from harm but also from harming others.<sup>305</sup> The imposition of an affirmative duty cannot, however, be justified by categorical foreseeability.

The conclusion to be drawn from the foregoing analysis of the three subspecies of categorical foreseeability—the capacity to foresee,

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strengthened the prominence of foreseeability in duty decisions); Murphy, *supra* note 4, at 175–76 (arguing that the duty analysis has gradually embraced a duty rule turning primarily on an analysis of foreseeability, an evolution culminating in *Tarasoff*). Indeed, there can be no doubt that *Tarasoff* has extended its influence beyond the realm of affirmative duties. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588–91 (Cal. 1997) (applying *Tarasoff* factors, chief among which is foreseeability, to an action for negligent misrepresentation—a misfeasance claim—in which a school recommended an ex-teacher for hire despite its knowledge of past complaints of sexual misconduct).

<sup>303</sup> See *supra* note 61 and accompanying text.

<sup>304</sup> Such would be functionally equivalent to making theft a crime only for those with a low IO because such people are easier than others to catch.

<sup>305</sup> See 551 P.2d at 344 (“[B]y entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient.”).

categorical unforeseeability, and categorical increased foreseeability—is obviously unique among the subsections of Part III of this article. Rather than an argument that categorical foreseeability might fit within breach or proximate cause instead of duty, I have urged that categorical foreseeability is (1) normatively deficient, and/or (2) a façade for some other duty-relevant determination. I now turn to a more robust discussion of the latter as a distinct conceptual use for foreseeability.

#### E. *Foreseeability as Proxy*

In a variety of types of cases, courts use foreseeability as a convenient tool by which to limit liability in order to reflect community notions of obligation or for reasons of policy. Properly understood, this use of foreseeability is unproblematic. To the extent that a court imposes atypical boundaries on a jury's determination of foreseeability in order to effect a policy-based limitation on liability, such a determination lies squarely within the province of the court to delineate the standard of care or to define the legal standard for proximate cause. It would be a mistake, however, to characterize such holdings as "foreseeability decisions." Courts in such cases do not decide foreseeability at all, but leave (or at least properly leave) the actual foreseeability determination to the jury. Instances of this conceptual use of foreseeability may be found in cases alleging emotional harm,<sup>306</sup> economic harm,<sup>307</sup> landowner-liability,<sup>308</sup> and other scenarios with regard

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<sup>306</sup> See, e.g., *Portee v. Jaffee*, 417 A.2d 521, 526 (N.J. 1980) (limiting claims for bystander emotional distress, in relevant part, to cases in which the "plaintiff was located near the scene of the accident" as least partly because "as physical proximity between plaintiff and the scene of the accident becomes closer, the foreseeable likelihood that plaintiff will suffer emotional distress from apprehending the physical harm of another increases"). At least one court has gotten it right, however. See *Gates v. Richardson*, 719 P.2d 193, 196 (Wyo. 1986) (deciding to impose a duty to avoid negligent infliction of emotional distress and recognizing that foreseeability plays no role in such determination while noting that "[i]nstead of perpetuating the illusion, we prefer to set forth the legal duty and outline the policy principles which persuade us to recognize the legal duty and its limitations").

<sup>307</sup> See, e.g., *Citizens State Bank v. Timm, Schmidt & Co.*, 335 N.W.2d 361, 366 (Wis. 1983) (explaining that, in a suit for economic harm, "[i]t is enough [to permit liability] that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it") (quoting RESTATEMENT (SECOND) OF TORTS § 552, cmt. h (1965)).

to which a court wishes to limit liability in some at least ostensibly principled way.<sup>309</sup> Consider the following representative case.

In *Posecai v. Wal-Mart Stores, Inc.*,<sup>310</sup> the plaintiff sued Wal-Mart after having been robbed in a Sam's Club parking lot. Mrs. Posecai alleged that Wal-Mart was negligent for having failed to post a security guard outside of its store.<sup>311</sup> Characterizing Mrs. Posecai's case as alleging violation of an affirmative duty,<sup>312</sup> the court summarized the various approaches of state courts in analyzing the existence of a duty on the part of a business owner to protect patrons from the crimes of third parties.<sup>313</sup> As the court explained, many courts have imposed such a duty, limited in a variety of ways by foreseeability.<sup>314</sup> In some jurisdictions, for example, a business owner owes a duty to protect patrons only if "he is aware of specific, imminent harm about to befall them."<sup>315</sup> In others, a duty exists only in light of "evidence of previous crimes on or near the premises."<sup>316</sup> In still others, the owner owes a duty to protect customers against any harm that is foreseeable under a "totality of the circumstances."<sup>317</sup> Each test represents a balance between the security interest of customers and the liberty interest of owners.<sup>318</sup> Foreseeability is the means by which a court manifests the balance chosen. If a court decides that the balance should favor the business owner, it might impose liability only where crime is actually

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<sup>308</sup> See, e.g., *Carter v. Kinney*, 896 S.W.2d 926, 928 (Mo. 1995) (describing the common-law duty standard owed by landowners to invitees to protect against foreseeable conditions and the duty to protect licensees only from conditions actually foreseen).

<sup>309</sup> See, e.g., *Langle v. Kurkul*, 510 A.2d 1301, 1306 (Vt. 1986) (holding that a social host has a duty of care only in situations in which the host "furnishes alcoholic beverages to one who is visibly intoxicated and it is foreseeable to the host that the guest will thereafter drive an automobile").

<sup>310</sup> 752 So. 2d 762, 764 (La. 1999).

<sup>311</sup> *Id.* at 765.

<sup>312</sup> *Id.* at 766. Such a conclusion is not foregone, however. By choosing to run a business in a potentially criminal neighborhood, perhaps Wal-Mart in fact created the risk of harm and therefore owed a general duty to run its business reasonably safely—a standard that might necessitate the posting of security guards.

<sup>313</sup> *Id.* at 766–68.

<sup>314</sup> *Id.* at 766.

<sup>315</sup> *Posecai*, 752 So. 2d at 767.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> Cf. RIPSTEIN, *supra* note 113, at 50 (explaining the limited duty not to cause purely economic harm—a duty which often turns on foreseeability—as follows: "Only some forms of attachment to particular goods are protected; protecting all economic interests would place too great a burden on the liberty of others. If I could not act unless I was sure that your financial position would not be adversely affected, I could not act at all.") (footnote omitted).

foreseen. If a court is more sympathetic to the interests of customers, the court may define foreseeability according to a totality of the circumstances. The test restricting foreseeability to evidence of prior similar crimes represents a choice somewhere in between.<sup>319</sup>

Defining the parameters of the foreseeability inquiry does not, however, constitute the inquiry itself. Rather, it is a means of delineating the scope of a business owner's duty. Pursuant to the typical negligence standard of care—the duty to use reasonable care under the circumstances—a judgment regarding a business owner's reasonableness would depend (in part) upon the degree to which crime on the premises of the business was foreseeable. The more foreseeable the risk of crime, the more likely the conclusion that the defendant's failure to account for it was wrongful. In cases like *Posecai*, courts have altered this standard of care, conditioning it on a particularized notion of foreseeability. In such cases, the defendant's reasonableness does not turn on foreseeability unmodified but instead on whether the owner was actually aware of the crime or whether crime was foreseeable in the cramped light of previous similar crimes. Delineating the standard of care thus is undoubtedly a task for the court within the context of duty.<sup>320</sup> The decision whether a defendant's conduct met that standard, however—including the judgment regarding to what degree risk was foreseeable, however foreseeability is defined—is the essence of the jury's determination of breach.<sup>321</sup> Hence, the actual foreseeability determination in cases such as *Posecai* properly is left to the jury.

Unfortunately, courts in such cases often adopt a different view of foreseeability's role. Even if such courts agree that their various calibrations of foreseeability represent an attempt to strike an appropriate balance between the relative interests of the parties, they often view this exercise as part of their inquiry into duty's *existence*, not as part of a delineation of the *standard of care*.<sup>322</sup> The import of this perhaps subtle distinction is clear. If narrowing the definition of foreseeability is a matter of setting the appropriate standard of care, then the actual foreseeability determination is left to the jury. If, on the other

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<sup>319</sup> One might also conceptualize these duty decisions in terms of a court's appropriate recognition of community-based notions of obligation between business owners and their patrons. The variety of tests would embody courts' sundry impressions of such notions.

<sup>320</sup> RESTATEMENT (SECOND) OF TORTS § 328B (1965).

<sup>321</sup> *See id.* § 328C.

<sup>322</sup> *See, e.g., Posecai*, 752, So. 2d. at 765 ("The sole issue presented for our review is whether Sam's owed a duty to protect Mrs. Posecai from the criminal acts of third parties under the facts and circumstances of this case.").

hand, the court conditions the very existence of a duty on foreseeability, then the court has co-opted the foreseeability determination from the jury. The court in *Posecai* took the latter approach.<sup>323</sup> although there is not uniformity among the courts in this regard.<sup>324</sup>

In sum, *Posecai* and cases like it represent courts' attempt to limit the liability of a class of defendants for a class of risk or injury not based on categorical foreseeability (as described in the previous subsection), but due to a non-foreseeability-related policy reason. Although a court might—as did the court in *Posecai*—thus choose to limit liability by conditioning the existence of a duty on a limited form of foreseeability, a court might also do so by redefining the standard of care or the legal standard for proximate cause. The only practical difference between the two approaches lies in whether the court or the jury renders the ultimate foreseeability determination. The effectiveness of foreseeability's use as a proxy thus need not depend on a court's determination of foreseeability within the confines of duty.

#### IV. DUTY WITHOUT FORESEEABILITY: A CONCLUSION AND A BEGINNING

In this Article, I have highlighted the shortcomings of an account of duty that hinges upon determinations of foreseeability. I have also attempted to show that each of foreseeability's conceptual functions might instead operate wholly and seamlessly within the element of breach or proximate cause or both (or, in the case of categorical foreseeability, that negligence law would benefit from its disavowal alto-

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<sup>323</sup> See *id.* at 769 (concluding in light of all the evidence that “Sam’s did not possess the requisite degree of foreseeability for the imposition of a duty to provide security patrols in its parking lot”).

<sup>324</sup> See, e.g., *Nycal Corp. v. KPMG Peat Marwick LLP*, 688 N.E.2d 1368, 1370 (Mass. 1998). In *Nycal Corp. v. KPMG Peat Marwick LLP*, the Massachusetts Supreme Judicial Court considered the viability of a third-party claim for pure economic loss resulting from alleged auditor malpractice. *Id.* at 1369. The court viewed the issue not as whether a duty existed, but rather as what was “the scope of liability of an accountant to persons with whom the accountant is not in privity.” *Id.* at 1370. The court reviewed the various approaches taken by other courts, which ranged from allowing such claims pursuant to the typical reasonableness standard to limiting claims, at least in part, by narrowly defining the conditions under which injury to another might be found foreseeable. *Id.* at 1370–72. After picking a test, the court upheld summary judgment for the defendants with apparent deference to the jury’s right, in the first instance, to determine foreseeability. *Id.* at 1373. Although *Nycal* represents the intersection of a number of knotty negligence issues—including a *Palsgraf*-like duty/proximate cause issue and the always puzzling intersection of tort and contract law—it is safe to say that the various approaches were necessitated by the fact that courts are more hesitant to extend liability for purely economic loss.

gether). It is my hope that the foregoing discussion will rekindle debate regarding the more important question—whether the court or the jury is the better institutional arbiter of foreseeability. This debate might rage on many fronts—whether judge or jury is more accurate, more just, more lawful, or more consistent, and perhaps at the center of it all, whether the benefits of clear, *ex ante* rules outweigh the concern for individualized justice.

Still, one question yet nags at my conscience—after all the dust of my reconstruction of foreseeability settles, what is left of duty? One might argue that even a flawed conception of duty is preferable to one gutted of foreseeability, an empty shell of the element of duty as many now understand it.

The basis for a foreseeability-free conception of duty is far from revolutionary, however. It stems from the proposition that at its core, duty consists of the following inquiry:

Assuming that the defendant's actions were unreasonable and assuming that the plaintiff's injury was within the scope of the risk that made the actor's conduct unreasonable, should the court give legal force to an obligation on the part of the defendant to have acted reasonably?

With regard to foreseeability specifically, this initial duty inquiry might be translated, in relevant part, as follows:

Assuming that some risk of injury was reasonably foreseeable and assuming that the plaintiff's injury in particular was reasonably foreseeable, should the court give legal force to an obligation on the part of the defendant reasonably to have foreseen it?

Understood pursuant to the reasoning set forth in Part III above, this general duty provision serves as a lens, filtering out questions that the law has decided to leave to the jury, unless incontestable, and focusing the duty inquiry instead on two prime considerations: (1) whether an obligation exists within the broadly generalized class of circumstances at issue and (2) whether courts should give legal cognizance to that obligation.

Of course, this duty standard leaves the ultimate question unanswered—it offers little guidance to courts regarding how to recognize an obligation or whether to gird an obligation with the force of law. It is not within the purview of this Article to set forth a comprehensive theory of how this ought to be done. My instinct is that duty is a complex organism, which necessarily consists of a mix of the considera-

tions listed in Part I.C above: community notions of obligation, a broad sense of social policy, concern for the rule of law, and administrative capability and convenience.<sup>325</sup> Furthermore, I resist the view that duty must exist either as a system of pure rule and principle or as an ad hoc balancing of instrumental policy goals.<sup>326</sup> In my view, it is both.

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<sup>325</sup> See *supra* notes 58–61 and accompanying text.

<sup>326</sup> See, e.g., GREEN, *supra* note 19, at 76–77 (proposing that duty decisions are the result of courts' balancing of the following "factors": administrative, ethical or moral, economic, prophylactic or preventative, and justice); Goldberg & Zipursky, *supra* note 18, at 1739–43, 1819 (characterizing the view of Justice Holmes and Prosser to be that duty amounts to little more than a multi-factored "policy-driven check on liability" and criticizing such an approach because it (1) is unprincipled, (2) usurps the power of the legislature, (3) obscures the rationale for judicial decisions, and (4) fails to provide clear rules for society); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976) (urging that "under all the circumstances" tests for liability are potentially devoid of meaning and incapable of supplying guidance). *But see* George C. Christie, *The Uneasy Place of Principle in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 104, at 129 (suggesting, in the context of a discussion of the role of foreseeability in economic harm cases, that "we have asked too much of principles. For the appeal of principles to be useful, we must not only have more modest expectations of their role in the decision of tort cases but also perhaps a more expansive notion of what comes within the ambit of a principle"). See generally Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (offering a reconciliation of the leading instrumentalist and non-instrumentalist understandings of tort law).