SOCIAL VALUE AS A POLICY-BASED LIMITATION OF THE ORDINARY DUTY TO EXERCISE REASONABLE CARE

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Introduction

When torts was first formulated as a substantive field of liability in the late nineteenth century, the jurisprudence of the time sought to distill general principles from the mass of common-law cases, and from those principles derive an internally consistent body of laws. By identifying general principles, courts and scholars showed how the various common-law rules of the recently abolished writ system, which were typically defined in terms of status, occupation, and so on, could be reconceptualized in general terms of "a universal duty of care owed by persons to their neighbors" growing out of "the civil obligations of those who lived in society."[1] Courts then limited the universal duty by the requirement of foreseeability, thereby creating the general or ordinary duty that continues to be widely recognized today: One whose affirmative conduct creates a foreseeable risk of physical harm has a duty to exercise reasonable care with respect to those who might be foreseeably harmed by the conduct.[2]

Having adopted the ordinary duty of reasonable care, courts then addressed the various limitations of that duty. Under the writ system, the characteristic legal rule was not one of negligence liability, but rather one of immunity from liability.[3] After the fragmented, individualized rules of the writ system were transformed into a general rule of negligence liability, courts had to confront the issue of whether a particular form of negligent conduct should continue to be immunized from this default standard of tort liability. Insofar as an immunity had been justified by concerns of public

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[1] G. Edward White, *Tort Law in America: An Intellectual History* 38 (1980).

[2] Restatement (Third) of Torts: Liability for Physical Harms § 7(a) & Rptrs' n. cmt. a. For more extended discussion of the historical development of duty, see W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. Cal. L. Rev. 671, 673-678 (2008).

[3] Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925 (1981). Many of these rules were expressly ones of immunity, whereas others operated like an immunity by limiting the duty of the risky actor to exclude the negligently caused harms in question or by otherwise privileging the risky conduct.

policy, that justification became harder to defend throughout much of the twentieth century. Many activities had long been exposed to tort liability without any apparent detrimental effect, making it seem highly dubious that the particular activity protected by an immunity would be unduly restricted by negligence liability. Instead, the salutary features of negligence liability would force the activity to be conducted in a socially reasonable manner—the outcome ordinarily required by public policy. Due to this dynamic, the considerable expansion of tort liability over the course of the twentieth century can be largely explained by the way in which a consolidated negligence rule of general application enabled courts to reject many of the immunities and other limitations of liability that had been recognized by the early common law.[4]

The growth of tort liability ultimately created a backlash that continues to this day. According to critics, the tort system is now out of control, fueling an overly litigious society and crippling the ability of domestic industry to compete in the global economy. Individuals or organizations have ceased to engage in socially valuable forms of risky behavior out of a concern for "being sued."[5] In response to these concerns, the vast majority of state legislatures since the 1980s have enacted tort-reform measures that significantly limit liability.[6]

The concern about excessive tort liability was shared by judges, who in the latter decades of the twentieth century increasingly made rulings that

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[4] *See id.* at 959–961; Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601, 605–606 (1992) (concluding that judicial tort opinions until the 1960s, "for the most part, sharpened and clarified tort doctrines that had been presented somewhat more crudely in nineteenth-century cases," and that the "vitality of negligence" then caused an expansion of tort liability lasting until the 1980s); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 Cal. L. Rev. 2403, 2407 (2000) ("The central change in personal injury law doctrine that has taken place since 1900 is the evolution of a robust law of negligence …. The fault principle itself is increasingly defended on deterrence and risk-spreading grounds, rather than simply on the basis of fairness as between the plaintiff and the defendant.").

[5] See generally Philip K. Howard, The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom (2002) (arguing that the common interest is undermined by the fear of being sued and providing numerous examples in support). But see Carl T. Bogus, Fear-Mongering Torts and the Exaggerated Death of Diving, 28 Harv. J.L. & Pub. Pol'y 17, 19-36 (2004).

[6] For a good overview of the tort-reform movement, see Michael Orey, *How Business Trounced the Trial Lawyers*, Bus. Week 445 (Jan. 8, 2007).

limited the ordinary duty to exercise reasonable care.[7] In doing so, judges relied on a number of factors or policies that had previously been invoked in prior cases to expand duty beyond the limits that had been recognized by the early common law. "[C]ourts saw that the … factors might be the basis not only for the imposition of a previously unrecognized duty, but also for the withdrawal of tort liability through a no-duty determination."[8]

For example, in *Hamilton v. Beretta U.S.A. Corporation*, the New York Court of Appeals held that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of their handguns to persons injured or killed through the use of illegally obtained handguns.[9] The court reached this conclusion "'by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.'"[10] While explaining the point of this inquiry, the court observed that in determining whether a duty exists, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and 'limit the legal consequences of wrongs to a controllable degree.'"[11] For this reason, "any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs."[12]

Based on the case law, the *Restatement (Third) of Torts: Liability for Physical Harms* has adopted the rule that "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct threatens physical harm," but that "[i]n exceptional cases, when an articulated principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."[13] The *Restatement (Third)* then defines these policy factors as involving "conflicts with social norms about responsibility," "conflicts with another domain of law," "relational

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[7] See Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. Cal. L. Rev. 265 (2006) (describing increase of no-duty rulings in California); Schwartz, supra note __, at 659-662 (describing how, "in the post modern era, the duty concept has made a comeback").
[8] Green & Cardi, supra note __, at 676.
[9] 750 N.E.2d 1055, 1059-66 (N.Y. 2001).
[10] Id. at 1060.
[11] Id.
[12] Id.
[13] Restatement (Third) § 7.

limitations," "institutional competence and administrative difficulties," or "deference to discretionary decisions of another branch of government."[14] The *Restatement (Third)*, though, does not provide guidance to courts on how to apply these policy factors, nor does it intend to do so. The *Restatement (Third)* instead "exhorts courts to make no-duty rulings on a categorical basis," while further "instruct[ing] courts to articulate the policy or principle on which they are acting."[15]

The *Restatement (Third)*'s treatment of duty has been sharply criticized for adopting a "brand of instrumentalism" that is inconsistent with the substantive nature of the tort duty.[16] According to these critics, tort law is exclusively a matter of private law, and the resolution of the private dispute should exclusively depend on the relevant private interests and not social interests. A different criticism of the *Restatement (Third)* pertains to its requirement that courts must make duty determinations in categorical terms. According to this line of criticism, courts in many cases defensibly limit duty by reference to case-specific factors: "The belief that all cases can be dealt with by a categorical rule, or by fact-sensitive directed verdict practice (based on a finding that reasonable persons could not disagree on either standard of care or proximate cause) is erroneous."[17]

Neither criticism is fully warranted. As Part I explains, in addition to the private interests at stake in the lawsuit, the resolution of a tort claim can affect other interests. Insofar as these social interests have a legally recognized value that is not adequately addressed by the other elements of the tort claim, the court must consider them in its formulation of duty. The fair protection of these social interests can justify limitations of the duty to exercise reasonable care. Such a policy-based limitation of duty does not necessarily entail the type of economic or utilitarian calculus that many find to be controversial. Social value can limit duty within a rights-based system of private law. Part II then illustrates these points with the case law addressing the issue of social-host liability for drunk-driving accidents. Part III concludes by discussing the nature of the social-value inquiry in relation to the appropriate allocation of decision-making between the judge and jury.

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[14] *Id*. cmts. c-g.
[15] Cardi & Green, *supra* note __, at 703 (citing Restatement (Third) § 7 cmts. e & j).
[16] John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. Cal. L. Rev. 265, 333 (2006).
[17] Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the* Restatement (Third) of Torts, 60 Hastings L.J. 1, 4 (2008).

In principle, the social-value inquiry can depend on the facts of the specific case. These duty determinations are nevertheless categorical, because the court is evaluating the particular claim by reference to social values or the entire category of affected interests that are not otherwise addressed by the other elements of the tort claim. Such a resolution of duty issues is entirely consistent with the approach of the *Restatement (Third)*.

I. Social Value In a System of Private Law

The common law has long been sensitive to concerns of public policy. As the influential judge Lemuel Shaw observed in an 1854 opinion:

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules … the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.[18]

The influence of public policy on tort law was famously emphasized by Oliver Wendell Holmes, the intellectual architect of modern tort law: "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy…."[19]

The practice of tort law is dominated by negligence liability, and within the negligence claim, public-policy considerations are relevant to the element of duty. According to William Prosser, the judicial analysis of duty is "only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[20] The significance of this view is hard to overstate. "The caselaw is replete with citations to this statement."[21]

Nevertheless, some scholars have argued that the element of duty should not depend on this type of policy inquiry. To understand why, consider the formulation of duty in *Hamilton v. Beretta U.S.A. Corporation*, which required that "any extension of the scope of duty must be tailored to

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[18] *Norway Plains Co. v. Boston & Main R.R. Co.* 67 Mass. 263, 267 (1854).
[19] Oliver Wendell Holmes, Jr., The Common Law 35 (1881).
[20] William L. Prosser, *Handbook of the Law of Torts* § 31, at 180 (1st ed. 1941). "The caselaw is replete with citations to this statement." Cardi & Green, *supra* note __, at 674 n.18.
[21] Cardi & Green, *supra* note __, at 674 n.18.

reflect accurately the extent that its social benefits outweigh its costs."[22] The court's reliance on a social cost-benefit test appears to invoke a utilitarian conception of tort liability that is most prominently associated with law and economics.[23] An allocatively efficient tort rule creates social costs that are less than the associated social benefits, and so an efficiency-oriented court would limit liability whenever the social costs exceed the social benefits as per the approach enunciated by *Hamilton*. The efficiency rationale for tort liability, however, is controversial. It has been forcefully critiqued by those who maintain that tort law is a system of private law that corrects or redresses the injustices stemming from the defendant's violation of the plaintiff's individual tort right.[24] An individual right cannot be limited on the ground that doing so would enhance social welfare. Limiting the scope of a tort right (and its correlative duty) simply because the total cost of liability exceeds the total benefits, therefore, inappropriately injects concerns of social value into a system of private law.[25]

According to John Goldberg and Benjamin Zipursky, courts have been misled in this regard by tort scholars, beginning with Holmes and culminating with the contemporary economic analysis of tort law: "In place of thinking about duty, scholars have told modern courts they must think about all the different results that may flow from opening and closing the floodgates of litigation in various degrees."[26] This formulation of duty in cost-benefit terms is substantively incompatible with "[r]ights-based reasoning and duty-based reasoning" having "philosophical credentials [that] are at least equal to those of the utilitarian thinking which has dominated tort law for so many decades."[27] By rejecting the utilitarian approach of comparing all social costs and benefits in favor of a private-law conception of tort liability that exclusively focuses on individual rights and their correlative individual duties, courts could "diminish reliance upon multi-factor analyses that are unmanageable, unprincipled, and unpredictable."[28]

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[22] 750 N.E.2d 1055, 1060 (N.Y. 2001).
[23] See, e.g., Mark A. Geistfeld, Efficiency, Fairness, and the Economic Analysis of Tort Law, in Theoretical Foundations of Law and Economics 234 (Mark D. White ed. 2009) (describing the conventional economic analysis of tort law and its relation to utilitarianism).
[24] *See, e.g.,* Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory 1-63 (2001) (arguing that corrective justice can provide an account of tort law whereas economic analysis fails to do so); Ernest Weinrib, The Idea of Private Law (1995) (same).
[25] See infra notes __ and accompanying text.
[26] John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. Pa. L.Rev. 1733, 1846 (1998).
[27] Id.
[28] Id. at 1847.

This critique is at odds with doctrinal history. As illustrated by the earlier quotation from Judge Shaw, courts were discussing the importance of public policy prior to the time when they could have been influenced by Holmes and his successors. Indeed, opinions like those authored by Judge Shaw presumably led Holmes to the conclusion that the common law, at bottom, is based on considerations of public policy. Who was influencing whom?[29]

Moreover, it is doubtful that modern courts have routinely relied on a rationale for tort liability that is fundamentally inconsistent with private law. Tort scholars, for example, invoked a public-law conception of tort liability to justify market-share liability.[30] This conception of tort law, however, was roundly rejected by the courts, with the case law stressing the common theme that such a liability rule is a "radical" departure from tort principles.[31] According to these courts, market-share liability violates the fundamental principle of causation, which requires proof that the defendant's breach of the tort duty caused the plaintiff's injury in violation of her individual tort right. By limiting liability to the right-duty nexus, the causal requirement is essential to a system of private law.[32] These market-share cases, therefore, clearly reflect a private-law conception of tort liability. Indeed, the courts that adopted market-share liability typically believed that the rule is based on established tort principles, and when properly formulated, the liability rule can be squared with rights-based reasoning.[33] The market-share cases provide strong evidence that the courts conceive of tort law as a body of private law.

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[29] Compare Cardi & Green, supra note __, at 707-08 ("In light of the considerable evidence that policy reasoning plays a role in courts' duty decisions, [Goldberg and Zipursky] are left either to claim that courts do not mean what they say or to concede that their critique of … duty is largely normative.")(citations omitted).

[30] See, e.g., David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849 (1984).

[31] Smith v. Elli Lilly & Co., 560 N.E.2d 324, 334-40 (Ill. 1990).

[32] E.g., Weinrib, *supra* note __, at 1-2 ("Doctrinally, requirements such as the causation of harm attest to the dependence of the plaintiff's claim on a wrong suffered at the defendant's hand. In singling out these two parties and bringing them together in this way, private law looks neither to litigants individually nor to the interests of the community as a whole, but to the bipolar relationship of liability.")

[33] See generally Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. Pa. L. Rev. 447 (2006). See also Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in Philosophy and the Law of Torts 214, 235 (Gerald Postema ed., 2001).

In formulating the tort duty as a matter of private law, courts can rely on public-policy factors to limit the tort duty. Consider the following formulation of public policy adopted by the Ohio Supreme Court in the early twentieth century:

> A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts…. In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.[34]

This formulation of public policy does not entail a utilitarian comparison of total social costs and benefits, but instead focuses on *particular* values (of health, safety and on) as they relate to the "plain, palpable duty" owed by one person in the community to another "having due regard to all the circumstances of each particular relation and situation." Individual duties, like their correlative individual rights, can depend on public or social values of the appropriate type.

Rights-based theories of tort law, including those based on the principle of corrective justice, protect morally fundamental individual interests from incurring burdens justified solely on grounds of social expediency, such as the pursuit of social welfare via the minimization of accident costs. In order for individuals to have a right to physical security, their interest in physical security cannot be compromised merely because doing so would confer greater wealth or welfare on others. As Stephen Perry describes the position, "At least within nonconsequentialist moral theory, it makes sense to think of this [security] interest as morally fundamental, and hence as falling outside the purview of distributive justice; our physical persons belong to us from the outset, and are accordingly not subject to a social distribution of any kind."[35]

The security interest can have this moral attribute for reasons of personal autonomy or self-determination. As Perry elaborates: "The main

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[34] Pittsburgh, C, C & St. L.R. Co. v. Kinney, 115 N.E. 505, 506-07 (Oh. 1916).

[35] Stephen R. Perry (2000), "On the Relationship Between Corrective Justice and Distributive Justice," in Jeremy Horder ed., *Oxford Essays on Jurisprudence, Fourth Series*, Oxford: Oxford University Press, pp. 237-263.

reason that personal injury constitutes harm [and is protected by the individual tort right] is that it interferes with personal autonomy. It interferes, that is to say, with the set of opportunities and options from which one is able to choose what to do in one's life."[36]

Such an individual right and its correlative individual duty cannot be formulated by reference to every type of social cost or social benefit. In a system of private law, "the reasons that justify the protection of the plaintiff's right [must be] the same as the reasons that justify the existence of the defendant's duty."[37] For example, under a leading formulation, individual rights are "trumps over some background justification for political decisions that states a goal for the community as a whole."[38] An individual right, more precisely, places limits or constraints on the reasons that can justify governmental actions such the enforcement of tort rules.[39] When formulated in this manner, the autonomy-based individual right excludes any justification for tort liability that is inconsistent with the concern for autonomy, regardless of the social values that would otherwise be implicated by the liability rule.

So too, if social costs and benefits are defined by reference to the normative value of individual autonomy within the community, then courts can consider these social values when formulating individual rights and their correlative duties. A rights-based liability rule must equally respect the autonomy of both the right-holder and duty-holder. The liability rule must also equally respect the autonomy of other individuals in the community who would be affected by it. Consequently, the content of the right and scope of the correlative duty necessarily depend on a social-value factor that addresses the distributive issue of how the liability rule would affect autonomy interests other than those represented by the private parties involved in the lawsuit. In a system of private tort law, courts must consider social values of the appropriate type in order to satisfy the principle of equality.

For example, when the Ohio Supreme Court defined "public policy" by reference "to matters of public morals, public health, public safety, public

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[36] *Id*. at 256.
[37] Ernest J. Weinrib, *The Passing of* Palsgraf, 54 Vand. L. Rev. 803, 805-06 (2001).
[38] Ronald N. Dworkin, Rights as Trumps, in *Theories of Rights* 153-168 (Jeremy Waldron ed. 1984).
[39] *See* Jeremy Waldron, Pildes on Dworkin's Theory of Rights, 29 J. Legal Stud. 301 (2004) (explaining why this interpretation of Dworkin's formulation of rights as "trumps" is appropriate).

welfare, and the like,"[40] it identified concerns that can be readily understood in relation to their importance for the exercise of autonomy or self-determination within the community. So conceptualized, these policy-factors are of integral importance for determining "man's plain, palpable duty to his fellow men"[41] within a system of private law.

Courts, therefore, can rely on public-policy factors in order to limit duty without necessarily committing themselves to a utilitarian or efficiency rationale for liability. Similarly, the *Restatement (Third)* can incorporate social-value factors into its rules governing duty while being "quietly agnostic as to whether the source of the obligation in tort law is some brand of instrumentalism, moral-justice concerns, other justifications, or a combination of some or all of these reasons."[42] The mere invocation of social value as a reason for limiting liability says nothing about the underlying rationale for liability. The issue instead turns on the types of social values that courts rely on to reach such a conclusion.

II. The Example of Social-Host Liability

Courts across the country have relied on public-policy factors to determine the liability of social hosts for drunk-driving accidents caused by their guests after leaving the event. While divided over the issue of whether a social host owes a duty to the third-party accident victim, courts nevertheless address a common set of social values in evaluating the duty. Consequently, this case law makes it possible to identify the way in which social values provide a policy-based limitation of the ordinary duty to exercise reasonable care.

In the seminal case adopting social-host liability as a matter of common law, the New Jersey Supreme Court held "that a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the guest."[43] According to the court, "'whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed

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[40] Pittsburgh, C, C & St. L.R. Co. v. Kinney, 115 N.E. 505, 506-07 (Oh. 1916).
[41] Id.
[42] Green & Cardi, supra note __, at 673 n.6.
[43] Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984).

solution.'"[44] The fairness inquiry "depends 'ultimately' on balancing [the] conflicting interests involved."[45]

The private interests that were at stake in the lawsuit involved the plaintiff's interest in physical security and the liberty interests of the defendants as social hosts. The plaintiff was seriously injured in a head-on collision with an automobile driven by a friend of the defendants who had been drinking alcohol at their home prior to departing in his car. Defendants claimed that they had served the guest "two or three drinks of scotch on the rocks," but plaintiff's expert demonstrated that the guest "had consumed not two or three scotches but the equivalent of thirteen drinks; that while at [defendant's] home [the guest] must have been showing unmistakable signs of intoxication; and that in fact he was severely intoxicated while at [defendants'] residence and at the time of the accident."[46] In light of these facts, the court observed that the ordinary question of liability was easily answered. "The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable."[47] Nevertheless, the court determined that it had to decide whether a duty existed by making a "value judgment, based on an analysis of public policy, that the actor owed the injured part a duty of reasonable care."[48] Unlike the other elements of the negligence claim that were undoubtedly satisfied in this case, the court recognized that the imposition of liability on these facts implicated social interests that could only be addressed by duty analysis.

Assuming that a duty otherwise existed, the liability question turned entirely on whether the burden that the defendants would have incurred to prevent their guest from driving while intoxicated was reasonable in light of the foreseeable risk of physical harm that would otherwise be faced by those on the public roads, including the plaintiff. The liability inquiry, in other words, was limited to the particular burden that would be incurred by the defendants in relation to the threat that would otherwise be posed to the security interests of others who were traveling on public roads. As is ordinarily true in a negligence case, the liability inquiry accounted for at least

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[44] Id. at 1222 (quoting Goldberg v. Housing Auth. of Newark, 186 A.2d 291 (N.J. 1962)).
[45] Id. (citing and quoting from Portee v. Jaffee, 417 A.2d 521 (N.J. 1980)).
[46] Id. at 1220.
[47] Id. at 1222.
[48] Id.

some social interests, namely, the interests of similarly situated right holders other than the plaintiff who could be foreseeably harmed by the conduct in question. Notably, however, the liability inquiry would not account for the burden that would incurred by other duty holders in future cases. If the defendants in this particular case were to incur negligence liability, how would the ensuing duty burden the liberty interests of others in the community? Individuals who serve drinks to their social guests would incur at least a limited responsibility for their guests' behavior while driving home. How would that duty affect behavior in the community? That issue would not be considered by the jury in its evaluation of the other elements of liability, explaining why the court had to consider these social interests before it could conclude that the defendants owed a duty to the plaintiff:

> While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.[49]

Lest there be any doubt that the court's "value" judgment was one of fairness and not social efficiency writ large, it concluded by observing that "[t]he goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving."[50]

By recognizing that the "fair compensation" of accident victims depends on the issue of whether any "loss" that would be suffered by others in society is "worth the gain," the court engaged in the type of duty analysis that is appropriate within a rights-based tort system. Consider a tort right that is justified by a principle of equality that values individual autonomy or self-determination. This general principle holds that each person has an equal right to freedom (or autonomy or self-determination), and it then gives different values to the individual interests in physical security and liberty,

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[49] Id. at 1224.
[50] Id. at 1226.

depending on their relative importance for the exercise of this general right. The physical harms suffered by the victims of drunk-driving accidents severely compromise their autonomy, with premature death being the extreme outcome, and yet tort law cannot exclusively focus on the security interest of these right holders in formulating liability rules. To exercise autonomy, individuals must have both security and liberty, making the issue of "fair compensation" dependent on the way in which the liability rule fairly balances the right holder's interest in physical security with the liberty interests of duty holders. If the imposition of duty would curtail the exercise of liberty within the community, then these social interests are relevant to the determination of "fair compensation."[51]

Consistent with this reasoning, the dissent in the case focused on the social interests implicated by the finding of liability that were not otherwise relevant to the issue of liability in the case at hand. The dissent began by quoting from a number of decisions made by courts in other jurisdictions that had relied on this public-policy concern in concluding that no duty exists. As one of these courts had observed,

> How is a host at a social gathering to know when the tolerance of one of his guests has been reached? To what extent should a host refuse to serve drinks to those nearing the point of intoxication? Further, how is a host to supervise his guests' social activities? The implications are almost limitless as to situations that might arise when liquor is dispensed at a social gathering, holiday parties, family celebrations, outdoor barbecues and picnics, to cite a few examples.[52]

The dissent then elaborated on this concern:

> Whether a guest is or is not intoxicated is not a simple issue. Alcohol affects everyone differently…. One individual can consume many drinks without exhibiting any signs of intoxication. Alcohol also takes some time to get into the bloodstream and show its outward effects. Experts estimate that it takes alcohol twenty to thirty minutes to reach its highest level in the bloodstream. Thus, a blood alcohol concentration test demonstrating an elevated blood alcohol level after an accident may not mean that the subject was obviously intoxicated when he left the party some time earlier.

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[51] See Mark A. Geistfeld, Tort Law: The Essentials 81-100, 174-79 (2008) (developing the concept of fair compensation in a rights-based tort system and illustrating its application in the context of policy-based limitations of the ordinary duty to exercise reasonable care).

[52] Kelly v. Gwinnell, 476 A.2d at 1231-32 (Garibaldi, J., dissenting) (quoting Edgar v. Kajet, 375 N.Y.S.2d, 548, 552(Sup. Ct. 1975)).

> Moreover, a state of obvious intoxication is a condition that is very susceptible to after the fact interpretations, i.e., objective review of a subjective decision. These factors combine to make the determination that an individual is obviously intoxicated not so obvious after all. Accordingly, to impose on average citizens a duty to comprehend a person's level of intoxication and the effect another drink would ultimately have on such person is to place a very heavy burden on them.
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> The nature of home entertaining compounds the social host's difficulty in determining whether a guest is obviously intoxicated before serving the next drink. In a commercial establishment, there is greater control over the liquor; a bartender or waitress must serve the patron a drink. Not so in a home when entertaining a guest. At a social gathering, for example, guests frequently serve themselves or guests may serve other guests. Normally, the host is so busy entertaining he does not have time to analyze the state of intoxication of the guests. Without constant face-to-face contact it is difficult for a social host to avoid serving alcohol to a person on the brink of intoxication. Furthermore, the commercial bartender usually does not drink on the job. The social host often drinks with the guest, as the [defendants] did here. The more the host drinks, the less able he will be to determine when a guest is intoxicated. It would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves.
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> The majority suggests that my fears about imposition of liability on social hosts who are not in a position to monitor the alcohol consumption of their guests are "purely hypothetical" in that the present case involves a host and guest in a one-to-one situation. It is unrealistic to assume that the standards set down by the Court today will not be applied to hosts in other social situations. Today's holding leaves the door open for all of the speculative and subjective impositions of liability that I fear.[53]

This reasoning is based on the way in which the duty could have a deeply unsettling effect on social gatherings. Not only would the duty burden the liberty interests of those individuals who clearly would be subject to the duty, but it would also burden the liberty interests of those individuals who might be unsure of whether they, too, are subject to the duty. Insofar as the duty is uncertain or subject to "speculative and subjective impositions of liability," anyone who is responsible for a social event that includes the consumption of alcohol could potentially be governed by the duty. What exactly must one do in such a situation to avoid being sued in the event that a

[53] Id. at 1233-34 (citations and internal quotation omitted).

guest is subsequently involved in a drunk-driving accident? Even if such a lawsuit would not lead to liability, perhaps because of a legal ruling by the court that there is no duty in such a case, is the associated cost and hassle of defending oneself against such a claim worth it? Might it not be easier to forego the social event and do something else instead? Any such restriction of social activity is a burden that is relevant to the duty question. By relying on these concerns, the dissent, like the majority, engaged in the type of duty analysis that is appropriate within a rights-based tort system.

The social concerns identified by the dissent are widely shared, as illustrated by another case in which the Texas Supreme Court rejected the identical duty that had been previously adopted by the New Jersey Supreme Court:

> [S]hould the host venture to make alcohol available to adult guests, the [duty] would allow the host to avoid liability by cutting off the guest's access to alcohol at some point before the guest becomes intoxicated. Implicit in that standard is the assumption that the reasonably careful host can accurately determine how much alcohol guests have consumed and when they have approached their limit. We believe, though, that it is far from clear that a social host can reliably recognize a guest's level of intoxication. First, it is unlikely that a host can be expected to know how much alcohol, if any, a guest has consumed before the guest arrives on the host's premises. Second, in many social settings, the total number of guests present may practically inhibit the host from discovering a guest's approaching intoxication. Third, the condition may be apparent in some people but certainly not in all. The point at which intoxication is reached varies from person to person, as do the signs of intoxication. One national study, for instance, found that of the drivers with a blood alcohol concentration above 0.10%, the legal limit for driving in many states, only one half actually exhibited signs of intoxication. The guest, on the other hand, is in a far better position to know the amount of alcohol he has consumed, his state of sobriety, and the consequential risk he poses to the public.
>
> This brings us to the second aspect of the duty…: that should the guest become intoxicated, the host must prevent the guest from driving. [W]e cannot assume that guests will respond to a host's attempts, verbal or physical, to prevent the guests from driving. Nor is it clear to us precisely what affirmative actions would discharge the host's duty…. Would a simple request not to drive suffice? Or is more required? Is the host required to physically restrain the guests, take their car keys, or disable their vehicles? The problems inherent in this aspect of the [proposed duty] are obvious. The

> implications of these unaddressed questions demonstrate the frail foundation [of] social host liability.[54]

Cases like this reveal the extent to which courts have relied on a public-policy concern of legal uncertainty as a reason for limiting the ordinary duty to exercise reasonable care. Other than the element of duty, no other element of tort liability considers how the liability rule is likely to be administered across cases and whether any resultant problems will have adverse social impacts.

The issue of legal uncertainty is particularly worrisome in the context of social-host liability, explaining why it can be a factor that otherwise overrides the ordinary duty to exercise reasonable care. The behavior induced by the tort duty depends on the ability of duty holders to identify their behavioral obligations and to act accordingly. Unable to figure out what the law requires of them in particular contexts, individuals presumably recognize that they will face some chance of being sued and perhaps of incurring liability as well. That assessment obviously depends on how these individuals evaluate the risk of liability, which turns out to be a particularly difficult with respect to social-host liability for reasons identified by the courts that have issued no-duty rulings in these cases.

Moreover, the manner in which individuals consider the risk of liability is likely to depend on public portrayals of the tort system in the media. Two scholars, for example,

> identified and analyzed 3,300 litigation-related articles, editorials, and commentaries in five major newspapers over the 1980-1999 period. Their content analysis concluded that readers of those newspapers (and probably millions of viewers of TV news shows, which often take up stories reported in the major newspapers) would have been given the impression that litigation rates were rising much more rapidly than is the case, and also that plaintiffs win more often and win (and receive) much larger jury awards than actually is the case.[55]

Insofar as media reports give individuals an exaggerated sense of their vulnerability to being sued, that misimpression may then be reinforced

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[54] Graff v. Beard, 858 S.W.2d 918, 921(Tex. 1993) (citations omitted).
[55] Robert A. Kagan, How Much Do Conservative Tort Tales Matter?, 31 Law & Soc. Inq. 711, 714-15 (2006) (discussing William Haltom & Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis (2004)).

by the nature of the liability rule. Those who strongly believe in individual responsibility, for example, are likely to be upset by "the extension of tort liability beyond those who, in traditional terms, are *primarily* responsible for an accident … to individuals and organizations who, at some prior time, had failed to take steps that could have reduced the risk of the accident."[56] The drunken guest who decides to drive home is the party who is primarily responsible for any ensuing accidents, not the social host. By subjecting the social host to liability in these cases, the tort system may seem as if it does not adequately respect individual responsibility. That impression, though ultimately mistaken, quite plausibly could then make individuals feel as if they are largely powerless to protect themselves from liability. If someone believes that the tort rules themselves do not adequately respect individual responsibility, then that person could readily doubt the degree to which she can limit her exposure to liability. Insofar as the extent of that liability exposure is also overestimated (due to media reports), many individuals could then conclude that the only way they can protect themselves from social-host liability is to avoid subjecting themselves to any risk of liability in the first instance. The chilling effect on social relationships turns out to be much more onerous than what might otherwise be suggested by a simple duty not to serve alcohol to an obviously intoxicated guest who is about to drive an automobile.

To be sure, individuals can protect themselves from tort liability by purchasing insurance, and the "firm belief that insurance is available" was relied on by the New Jersey Supreme Court to justify the duty.[57] "Homeowners who are social hosts may desire to increase their policy limits; apartment dwellers may want to obtain liability insurance of this kind where perhaps they now have none."[58]

The availability of insurance obviously reduces the problem of legal uncertainty faced by duty holders, but they still face substantial costs. Even if the insurance company provides full indemnification for legal representation and adverse judgments, the individual duty holder as defendant in the tort suit must still participate and incur the associated costs of time, anxiety, and so on. Moreover, the relationship between the insurance company and

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[56] Id. at 720.
[57] Kelly v. Gwinnell, 96 N.J. at 555. Compare Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 (2008) (describing the interrelationships between the growth of tort liability and the availability of liability insurance).
[58] Id. at 551.

policyholder is rife with conflicts that can leave the policyholder vulnerable to incurring at least part of the financial cost of an adverse tort judgment.[59] Simply increasing the policy limits is also no panacea for the individual duty holder. In addition to the added cost of paying higher premiums, there remains the problem of figuring out how much insurance is enough. What if the guest is involved in a multi-car accident, subjecting the social host to millions of dollars of liability? Perhaps the ordinary individual can readily afford a multi-million dollar liability insurance policy, but that conclusion is contentious. The availability of liability insurance does not mean that courts can ignore the financial burden that is borne by individuals subject to an uncertain duty.[60]

Nevertheless, courts that have adopted social-host liability are confident that the problem of legal uncertainty is not sufficiently difficult to merit a limitation of the ordinary duty to exercise reasonable care. As the New Jersey Supreme Court explained:

> Given the facts before us, we decide only that where the social host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving. We are not faced with a party where many guests congregate, nor with guests serving each other, nor with a host busily occupied with other responsibilities and therefore unable to attend to the matter of serving liquor, nor with a drunken host. ... We will face those situations when and if

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[59] E.g., Crisci v. Security Ins. Co., 426 P.2d 173 (Cal. 1967) (recognizing the conflict of interest that exists with respect to the insurer's decision of whether to accept a settlement offer in a negligence action that is below the limits of an insurance policy held by a property owner).

[60] A similar observation was made by Gary Schwartz in 1992:

> We are … left with a tort system that entails financial consequences that were very poorly anticipated 30 years ago. To gain a sense of the significance of the increased cost of liability, assume that you are a judge who is asked to rule on the extent of liability of a community health center serving a low-income community. In 1970, your understanding might well have been that the price of liability insurance is typically low, and this understanding would have enabled you to establish liability at the broad level that you deemed otherwise appropriate. Assume now, however, that you today read in a reliable journal that the high cost of liability insurance is requiring these centers to give up on certain medical services that the centers themselves regard as quite important to patients' welfare. You may well suspect that these cost increases are due to some malfunction in the liability insurance mechanism. Even so, faced with the reality of the clinics' new situation, you would be inhibited from issuing a ruling that might broadly define these clinics' tort liability.

Schwartz, supra note __, at 691 (citations omitted).

> they come before us, we hope with sufficient reason and perception so as to balance, if necessary and if legitimate, the societal interests alleged to be inconsistent with the public policy considerations that are at the heart of today's decision. The fears expressed by the dissent concerning the vast impact of the decision on the "average citizen's" life are reminiscent of those asserted in opposition to our decisions abolishing husband-wife, parent-child, and generally family immunity in *France v. A.P.A. Transport Corp.*, [56 N.J. 500, 500 (1970),] and *Immer v. Risko*, [56 N.J. 482, 482 (1970)]. In *Immer*, proponents of interspousal immunity claimed that abandoning it would disrupt domestic harmony and encourage possible fraud and collusion against insurance companies. ... In *France*, it was predicted that refusal to apply the parent-child immunity would lead to depletion of the family exchequer and interfere with parental care, discipline and control. As we noted there, "[w]e cannot decide today any more than what is before us, and the question of what other claims should be entertained by our courts must be left to future decisions." *Immer*, 56 N.J. at 495. Some fifteen years have gone by and, as far as we can tell, nothing but good has come as a result of those decisions.[61]

Perhaps social-host liability would not result in a "revision of cocktail-party customs [that constitutes] a sufficient threat to social well-being to warrant staying our hand" as the New Jersey Supreme court concluded,[62] or perhaps the duty rests on a "frail foundation" as the Texas Supreme Court concluded.[63] The important point for present purposes is that the issue turns on social values that are not addressed by the other elements of the tort claim, requiring consideration of that issue with respect to the element of duty.

The issue of social-host liability also shows how the problem of uncertain liability rules can disrupt social relationships in a manner that is detrimental to the exercise of autonomy or self-determination in the community. That loss of social value must be accounted for as a matter of equality in a rights-based tort system that grounds that individual tort right and its correlative duty in the value of individual autonomy or equal freedom. Social values of this type are necessarily relevant to the appropriate formulation of duty in a rights-based system of private law.

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[61] Kelly v. Gwinnell, 96 N.J. at 556-57.
[62] Id. at 555.
[63] Graff v. Beard, 858 S.W.2d at 921.

III. The Judge-Jury Issue

In a negligence case, the element of duty is a matter of law to be determined by the judge, and the remaining elements are all decided by the jury, involving either so-called mixed questions of law and fact (the issues of breach and proximate cause) or more purely factual questions (like cause-in-fact and damages).[64] The decision-making role of the jury is defined by the case-specific nature of its determinations, whereas the judge's role is defined by reference to issues that have implications beyond the case at hand.

According to the *Restatement (Third)*:

> Tort law has … accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation. Tort law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury.[65]

The jury's decision-making role is based on the premise that a group of individuals—the jury—ordinarily holds a decisive comparative advantage for resolving case-specific issues over a single decisionmaker—the trial judge. For categorical issues, by contrast, the judge holds a decisive comparative advantage. Unlike a jury, the judge has experience with a broader range of cases, giving the judge greater capacity to account for these considerations when deciding a matter having categorical importance.

Consequently, judges appropriately issue a no-duty ruling as a matter of law whenever that decision depends on categorical considerations that are not specific to the individual case. As the *Restatement (Third)* explains:

> For example, a number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests. A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.[66]

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[64] *See* Dan B. Dobbs, The Law of Torts § 18 (2000). Some aspects of the elements other than duty are determined by the judge as a matter of law, such as the characteristics of the reasonable person. The jury, though, still decides whether the element has been proven.

[65] Restatement (Third) of Torts: Liability for Physical Harm § 8 cmt. c.

[66] Restatement (Third) of Torts: Liability for Physical Harm § 7 cmt. a.

Simply put, "[a] no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases."[67]

For these reasons, a ruling of no-duty that is not categorical in nature inappropriately invades the jury's province of decision-making. Many believe that this problem has been occurring with increased regularity. According to Jonathan Cardi and Michael Green,

> As observers of tort law appreciate, the gatekeeping function of the court is a pervasive matter, and one that is intimately tied up with the generality of duty rules. Duty—or more precisely, no duty—is often employed to remove a case from the jury, and too frequently is based on the specific facts of the case. Like … numerous … modern commentators, the Third Restatement shares concerns about this practice because it usurps the jury function. Duty should not be narrowed to the point that it becomes a ticket for a single ride on the tort railroad; when it does, the court has cut the jury out of its historical and proper role in the system. The Third Restatement therefore seeks to quell this practice.[68]

Despite the apparent logic of the *Restatement (Third)*'s position on this issue, it has been forcefully criticized. At the foundational level, one can criticize the formulation of no-duty rules in categorical terms as being "severely underspecified" when not accompanied by "reasons favoring one level of categorization over another."[69] Lacking reasons for deciding upon the appropriate level of categorization, one can rightly question whether the element of duty necessarily requires categorical determinations. As Aaron Twerski has argued, the "insistence that no-duty rules are limited to bright-line categories of cases is not warranted. Duty is more robust…. Frequently, no-duty rulings will find expression in broad categorical rules, but in many instances, they will not. The *Restatement* should reflect this reality."[70]

The logic of the *Restatement (Third)*'s position on duty becomes more clear when considered in relation to the way in which social value can appropriately limit the ordinary duty to exercise reasonable care. In these cases, the judge is evaluating duty by reference to social values that are not

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[67] Id. cmt. j.
[68] Cardi & Green, supra note __, at 728-29 (citations omitted).
[69] Goldberg & Zipursky, supra note __, at 335-36
[70] Twerski, supra note __, at 25.

otherwise implicated by the other elements of the tort claim. These social values are clearly categorical in nature; they pertain to the impact of the proposed duty on the relevant interests of others who could be subject to the duty. The categorical nature of the determination, therefore, is defined by reference to the relevant social interests that are not otherwise adequately addressed by the other elements of liability, explaining why the issue is a matter of law to be determined by the judge.

In resolving this issue, the judge is also relying on a rule applicable to such a category of cases: Do the social benefits of the duty outweigh the social costs?[71] The way in which the judge balances these conflicting interests is normatively equivalent to the balancing of interests that is made by the jury when evaluating the requirements of reasonable care. Each inquiry must mediate or balance the interests of duty holders with those of right holders.[72] Unlike the jury's determination of reasonable care, however, the judge's determination of duty accounts for the relevant social interests that are not adequately addressed by the other elements of the tort claim.

This type of no-duty determination can depend on case-specific facts. After all, a rule of general application can be applied on a case-by-case basis, as fully illustrated by the way in which the jury applies the rule of negligence liability on a case-by-case basis. No-duty rulings of this type supply the force of Professor Twerski's argument.[73] But even though these rulings rely on case-specific facts, the determination is nevertheless categorical in nature, making it appropriate for resolution by the judge as per the approach in the *Restatement (Third)*.

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[71] E.g., Hamilton v. Berretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001) (requiring that "any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs"); Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984) (requiring that the "fair compensation" of accident victims depends on the issue of whether the "loss" that would be suffered by others in society is "worth the gain").

[72] *Compare* Restatement (Second) of Torts § 283 cmt. e (defining reasonable care in terms of a reasonable person who gives "impartial consideration to the harm likely to be done to the interests of the other as compared to the advantages likely to accrue to [the actor's] own interests"), *with* Kelly v. Gwinnell, 476 A.2d at 1222 (stating that "whether a duty exists is ultimately a question of fairness," in which the fairness inquiry "depends ultimately on balancing [the] conflicting interests involved").

[73] See Twerski, supra note __, at 7-21 (providing numerous examples in which the duty determination is closely tied to the particular facts of the case at hand).

Conclusion

The limitation of liability for reasons of public policy is both well established and controversial. Some view the reliance on "public policy" as an economic exercise of cost-benefit analysis that has no place in a rights-based system of private law.[74] Others attribute the increased number of no-duty rulings to the political motivations of a more conservative judiciary that seeks to unduly limit tort liability under the guise of public policy.[75] Either reason could explain why courts have issued no-duty rulings. Duty depends on various factors that have been identified by the courts, but these "factors are so numerous and so broadly stated that they can lead to almost any conclusion."[76] To compound this problem, "[t]here is little analysis of duty in the courts."[77] In light of this case law, one can rightly question the validity of no-duty rulings based on public policy.

When defined in the appropriate manner, social value provides a defensible policy-based reason for limiting the ordinary duty to exercise reasonable care. This formulation of the duty inquiry can also explain the increased number of no-duty rulings. Insofar as tort liability has become increasingly uncertain, it has increasingly produced collateral social consequences that can justify a limitation of the duty as a matter of public policy.[78] A good example is provided by the issue of social-host liability.

The problem of legal uncertainty, however, is exacerbated by judicial rulings that do not clearly articulate the policy rationales for limiting duty. To address this problem, the *Restatement (Third)* calls for greater clarity in this regard:

> A no-duty ruling represents a determination, a purely legal question, that no liability should be imposed on actors in a category of cases. Such a ruling should be explained and justified based on articulated policies or principles

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[74] See supra notes __ and accompanying text.
[75] See Esper & Keating, supra note ___; Schwartz, supra note __, at 685-686 (concluding that the "altered composition of the judiciary is … clearly relevant in explaining the recent change in tort directions. Still, its relevance should not be overstated.").
[76] Dan B. Dobbs, The Law of Torts § 229, at 583 (2000).
[77] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 358 (5th ed. 1984).
[78] Compare Mark A. Geistfeld, Constitutional Tort Reform, 38 Loyola L.A. Law Rev. 1093, 1116-1120 (2005) (describing the increased legal uncertainty generated by the development of strict products liability and discussing the problem of legal uncertainty in relation to the tort-reform movement).

> that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.[79]

By adopting the *Restatement (Third)*'s approach to duty, courts could both limit duty for defensible reasons while simultaneously helping to remedy the underlying problem of legal uncertainty that can justify these extraordinary departures from the ordinary duty to exercise reasonable care.

[79] Restatement (Third) § 7 cmt. j.