

FORESEEABILITY IN BREACH, DUTY, AND PROXIMATE CAUSE

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Introduction

Future scholars will look back at this Restatement (Third) and ask what it aimed to do. Of course, it aims to restate the law in a manner that is useful to courts, lawyers, scholars, and students. But beyond that, one might fairly ask whether there is a particular perspective or way of understanding the subject matter of torts that the ALI or the Reporters believed it was important to convey, a lesson or set of lessons, a political or normative agenda. The question is difficult to approach, and not only because of its vagueness; we began with Professor Gary Schwartz and Professor Harvey Perlman, and now have a Restatement of Professor Michael Green and Professor William Powers.

I do not know whether there are good answers to this question; I certainly do not claim that the conjectures that follow carry any sort of authority. The first reason I shall be speculating at all on the larger aims of the Restatement (Third) is that I think it may shed light on my topic -- foreseeability in breach, duty, and proximate cause. The second reason is that, while I have been critical of the Restatement in the past,¹ and am again quite critical in this essay, I think this is a good opportunity to make clear both my

* Professor & James H. Quinn '49 Chair in Legal Ethics, Fordham Law School; Visiting Professor, Harvard Law School (Spring 2009). John Goldberg has provided helpful comments on a previous draft, and has been a collaborator on many of the central ideas here; I take full responsibility for whatever has gone wrong in this particular draft, however. I am grateful to Michael Green for his willingness to engage me in person, over the telephone, and through correspondence on many of the central issues discussed in this article over the past several years. Because most of the communication on foreseeability was between Michael Green and myself, and because this article was written to reflect some of that communication, I chose to write this draft individually.

¹ John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (1998).

respect for the project and my admiration for the Reporters' execution of it. Articulating what I understand to be the motivation of the Reporters will be useful in both endeavors.

Tort law was a roller coaster from the 1960s through the 1990s, and legal academia did not help much to stabilize it. Between law and economists and corrective justice theorists, ATLA and ATRA, Yale and Chicago, the common sense center of Prosser and the Restatement (Second) began to seem as distant as Bing Crosby's White Christmas. My conjecture is that figures like Gary Schwartz and Harvey Perlman, Mike Green and Bill Powers, were selected in an effort to articulate a sensible and accurate account that would still work for the 21st Century. Before his sudden and tragic death, Gary Schwartz had already converted his deep historical understanding of tort law into a framework that was both simple and clear, recognizing a version of the fault principle in negligence law as the core of liability for physical harm. If the slight role given to strict liability might have been viewed as a major concession to the pro-defendant side of the legal community, the strong endorsement of the primary role of the jury certainly counterbalanced that. And in any event, the point of the project was precisely not to pick a politically popular place to say that tort law stood; it was to explain that there really is a stable structure there in tort law, and it does not in fact lie as close to the preferred spot of the defense bar or the plaintiff's bar as either had asserted.

The product we now have before us carries through in this mission in any number of ways, but I want to focus preliminarily on two of them: the treatment of the breach/duty distinction, and the treatment of causation. Proper respect for the constitutional foundation of our tort law requires that questions of whether due care was used are normally questions for the jury. Aggressive use of the hazy concept of "duty"

by courts presents a threat to that value. The Restatement (Third) insists time after time that courts refrain from usurping the domain of the jury under the guise of “no duty.” If there really were something conceptually and analytically sharp for courts to work with, that would be one thing. There is not, so they should make a point of staying out, unless the factual foundation is truly too weak, or there is an articulable and defensible policy rationale. Green and Powers took a somewhat different tack on causation. Here, there really are concepts that can do some work. Courts can and should utilize more robust notions both in the domain of cause-in-fact and in the domain of proximate cause (now relabeled “scope-of-liability”). It is not that invading the domain of the jury in this area is good, it is that there is actually law on causation and law on scope-of-liability.

Candidly revealing the weakness of duty concepts and the strength of causation is, as I see it, a part of the Reporters mission of restoring stability and coherence to tort law.

The Reporters have interesting things to say on the role of foreseeability in breach, duty, and proximate cause; that is the topic of this article. At two levels, their comments on foreseeability can be seen as part of the mission I have depicted. At a very general level, foreseeability, with its triple role and its accordion-like meaning, is clearly one of the murky concepts that has led students and scholars to think negligence law lacks conceptual integrity, and the Reporters aim to ameliorate this problem. But getting foreseeability right is also relevant to the agenda of guarding the duty/breach line and of fixing proximate cause. The Reporters applaud the role of foreseeability in breach and undercut it in duty, bolstering their pro-jury stance; they try to replace foreseeability by the scope-of-the-risk standard in proximate cause, offering both a more conceptual and a more operationally incisive standard for courts and juries to use.

If I am correct about these aspects of the goals of the Restatement, then I share those aims. Broadly speaking, I think the Restatement does quite well in pursuing those aims, not only within causation, but also within affirmative duties and several other areas. I also believe that it was wise to scrutinize foreseeability, where much loose thinking is concealed, and I agree with much of what is said. Nevertheless, in breach, duty, and proximate cause, I also find much to disagree with. That, of course, will be the focus of the article.

Part I sets forth the Restatement's treatment of foreseeability in breach, duty, and proximate cause, and indicates how these treatments contribute to a general mission of the Restatement (Third). Part II, while congenial to the general mission, offers critical commentary on the treatment of foreseeability in each of the respective areas. Part III develops a theoretical rationale for the scope-of-the-risk standard in proximate cause, suggesting that the mission of the Restatement might best be achieved within a framework that recognized the relationality of negligence law.

I. Foreseeability in Three Places

A. Foreseeability in Breach

The adjective "foreseeable" occurs twice in § 3 on "Negligence."
"A person acts negligently if the person does not exercise reasonable care under all of the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result

in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”²

This section plainly aims to entrench the Hand formula analysis of negligence (in non-algebraic form)³ into the Restatement (Third), as the Reporters’ note to Comment d indicates.⁴ The Restatement (Second) made extensive use of a balancing approach in defining negligence, and drew connections between the concept of the reasonably prudent person and the balancing approach.⁵ Equally interesting is the way section 3 blends together a Hand-formula balancing approach with an assertion about the importance of “foreseeability” in breach analysis. It does this by building foreseeability into two of Hand’s famous three variables, B, P, and L. P and L are not described as the probability of loss and the magnitude of loss, but as the “foreseeable likelihood” of harm and the “foreseeable severity” of harm, respectively. The treatment connotes the following: while there may in a sense be an objective or hindsight answer to the question of how great a burden of precaution would have been justified, in light of the probability and magnitude of injury, negligence law is not exactly interested in the answer to that question. It is interested in the answer to the question from the point of view of the reasonable person. These two ideas are elegantly combined in the idea that it is not the probability, but the “foreseeable probability” and not the magnitude but the “foreseeable magnitude” that need to be balanced. For the sake of fluidity of language, “foreseeable probability” is rejected in favor the locution “foreseeable likelihood” and “foreseeable

² Restatement of the Law, Torts: Liability for Physical Harm, Proposed Final Draft No. 1 (April 6, 2005) § 3. Where not otherwise indicated, citations to sections are to the April 6, 2005 Proposed Final Draft No. 1.

³ United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

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⁵ Citation to R.2d.

magnitude” for “foreseeable severity.” Later in the Restatement (in Comment j to Section 3), the language is that of “foreseeable risk.”⁶

The comments to section 3 make clear that it need not be the case that the risk was in fact foreseen. What is important is that a reasonable person would have foreseen the risk. Comment k indicates that both advertent and inadvertent negligence count under section 3. Comment j also indicates that sometimes reasonableness requires taking steps to obtain information regarding the probability of injury.

In both § 7 and § 8, the Restatement forcefully asserts that determining breach is the role of the jury. The assertion is most plain in section 8, which is devoted to exactly this point. Section 8 says that the jury has the role of determining both: (a) the underlying facts regarding the actor’s conduct, and (b) whether the underlying facts display negligence as defined by section 3. Of course, if reasonable minds could not differ, then judgment as a matter of law would be required (whether for the defendant or the plaintiff).

Section 7 is in large part about duty, but some of it is really about breach. The Restatement Reporters believe – correctly in my view – that courts sometimes usurp the jury’s function of determining breach by mischaracterizing a breach issue as a duty issue, and then claiming the prerogative to decide the duty issue as a matter of law. They do this because duty is an issue for the court, and unforeseeability is sometimes deemed a ground for *no duty*. It is critical, according to the Reporters, to see that when unforeseeability is being deemed a ground for no duty, that is just flipping around the words of “breach” and “duty.” Degree of foreseeability is a breach issue, and therefore

⁶ § 3, Comment j.

one for the jury. The jury, not the judge, is entitled to make a decision as to whether the degree of foreseeability was so low that there is no liability.

By clearly figuring foreseeability into breach (while retaining the Hand formula), the Reporters aim to guide courts away from ruling that an injury is unforeseeable and thereby granting defendant a judgment as a matter of law.⁷

B. Foreseeability in Duty

Section 7(a) makes clear that within the heartland of misfeasance and physical harm, there is a strong default rule that each has a duty to exercise reasonable care not to injure others; the default almost operates as a presumption. Section 7(b) articulates the framework for ascertaining whether this effective presumption is overcome:

“In exceptional cases, when an articulated countervailing 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.”

Comment j to § 7 specifically addresses “[t]he proper role of foreseeability.” It states: “Despite frequent use of foreseeability in no duty determinations, this Restatement disapproves that practice and limits no duty determinations to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.” A parallel comment is contained in comment f to § 37; it states that foreseeability is not a basis for recognizing a duty in the nonfeasance context:

“Section 7, Comment f, rejects the use of unforeseeability as a ground for deciding that no duty exists. Conversely, foreseeable harm, even highly foreseeable

⁷ § 7, comment j.

harm, does not affect the no-duty rule in this Section. Equally important, categorical foreseeability – assessing foreseeability for a *class* of cases – which is rejected in § 7, Comment *j*, as a basis for deciding that no duty exists, is equally unsound as a basis for recognizing an affirmative duty as an exception to this Section.” [emphasis in original]. The Reporters’ Note to § 7, Comment *j*, expressly relies upon an article by Professor Jonathan Cardi.⁸

Comment *i* states that courts should reserve ‘no-negligence-as-a-matter of law’ for cases in which the facts proffered really are too weak to lead a reasonable mind to think there was negligence. The Reporters quite accurately indicate that courts sometimes believe that a jury should not find that there is a breach, because as a categorical matter they think it would be troubling if the system permitted tort law to dictate an obligation of care in certain context. In these cases, the Reporters say that it is preferable to describe these cases as “no duty” rather than “no breach as a matter of law.” In concluding the comment, the Reporters write: “When no such categorical considerations apply and reasonable minds could differ about the competing risks and burdens or the foreseeability of risks in a specific case, however, courts should not use duty and no-duty determinations to substitute their evaluation for that of the factfinder.”

C. Foreseeability in proximate cause.

The Restatement (Third) rejects the phrase “proximate cause” and puts the phrase “scope-of-liability” in its place. Interestingly, the Restatement (Second) also rejected proximate cause and selected its own replacement – “legal cause.” The Restatement

⁸ W. Jonathan Cardi, *Purging Foreseeability: The New Version of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 Vand. L. Rev. 739, 801 (2005).

(Third) plausibly complains that the Restatement (Second)'s effort to switch phraseology never really caught on, and therefore rejects the phrase "legal cause." It is ironic that there seems to be little sensitivity to the risks of repeating the exercise of finding a new phrase for the same idea.

In one respect, the phrase "scope-of-liability" is admirably candid. It does not hide behind a murky qualifier of causation, as does both "proximate cause" and "legal cause." It states just what is at issue: which of the harms that would not have occurred but for defendant's breach are among those for which liability in negligence may be imposed. To put it differently, if one fixes that there was a breach that caused harms, how much of the harm is within the scope of liability?

I fear, however, that one person's candor is another's tautology. The very point of the label "proximate cause" is to suggest that there are factors other than cause-in-fact that will serve to diminish the scope of liability, and that these factors have historically and intuitively been understood to do so because they undermine the claim that the defendant's conduct is plausibly treated as having caused plaintiff's injury. The question is not whether there are scope of liability considerations; of course there are. The question is whether there is a concept guiding those additional scope of liability considerations. The Reporters' choice to use the phrase itself gives room for pause.

The key provision is Section 29 – "Limitations on Liability for Tortious Conduct" – states:

"An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."

This is essentially what Robert Keeton called “the risk rule” in his famous book on proximate cause; the reporters call it the “scope of the risk” test.⁹ The classic example is that of a father who gives his child a loaded gun, which she carelessly drops upon the plaintiff’s foot causing injury.¹⁰ The plaintiff argues that it is negligent to give a child a loaded gun and that such negligence caused the injury, but this argument fails, for the injury did not result from the risk that made the conduct negligent. The risk that made the conduct negligent was the risk of the child accidentally firing the shotgun; the harm suffered could just as easily result from handing the child an unloaded gun.

Comment d gives a clear description of the essence of the test:

“When defendants move for a determination that plaintiff’s harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant’s conduct that the jury *could* find as the basis for determining that conduct tortuous. Then the court can compare the plaintiff’s harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter.”

Notably, the test for scope of liability under the Restatement (Third) is NOT foreseeability, because scope of the risk and foreseeability are not quite the same. They do have a good deal of overlap, and comment j indicates that they are meant to have overlap. It says that foreseeability “in negligence actions ... is essentially consistent with the standard set forth in this Section.” The basis for this claim is that “both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor’s tortious conduct that they were not among the

⁹ Robert Keeton, *Legal Cause in the Law of Torts* (1963).

¹⁰ Cite Restatement (Second) § 281 and R. (Third) § 27.

risks – potential harms – that made the actor negligent.” The Restatement prefers the risk standard, however, because “it provides greater clarity and facilitates analysis by focusing attention on the particular circumstances that existed at the time of the actors conduct and the risks that were posed by that conduct.” By contrast, a “foreseeability test for negligence cases risks being misunderstood because of uncertainty about what must be foreseen, by whom, and at what time.”

The gun example itself shows that the standards may diverge, for it is not unforeseeable that a child might drop a gun on someone’s foot. A foreseeability test succeeds, but a scope-of-risk test fails.

D. Summary

The Restatement (Third) has a great deal to say about foreseeability in each of these three contexts.¹¹ On first blush, it seems to decline to use foreseeability in all three. But that is really not what it means to do. It means to rule out foreseeability in duty, to modify it slightly in breach and then make the modified foreseeability (foreseeable likelihood) central, and to replace it with more carefully crafted, but related, concept of “scope of risk” in proximate cause (now referred to as “scope of liability”). This trio of moves is explicitly intended to correct certain problems that are said to exist currently: a tendency of courts to usurp the jury’s role by treating foreseeability as a duty issue and deciding that unforeseeability entails no duty, and a tendency of courts to give juries inadequate guidance on the proximate cause issue by utilizing a freeform notion of foreseeability. Jury power over breach is restored to its proper place; judicial oversight

¹¹ For an illuminating discussion of these three aspects of foreseeability – one sympathetic with the Restatement Project, see W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 925-32 (2005).

of causation is enhanced in a manner that preserves the form of the law without usurping the jury's role. The larger picture is that physical harm cases involving misfeasance should generally go forward, and the task of weeding out ill-formed cases should be done through proximate cause, not duty. That selection has two advantages; it retains the jury's power to make decisions about what is in and what is out (while conceding the possibility of courts doing so under duty, if they really can articulate categorical reasons), and it offers a concept that really has some content – the risk rule – to guide the job. In this way, the treatment of foreseeability is a substantial component of the mission of the Restatement (Third) under Green and Powers.

II. Some Problems With Foreseeability in the Restatement (Third)

A. Breach

I have elsewhere articulated my view that the Hand formula does not come close to supplying the meaning of “negligence” as a matter of positive law and that it is a tremendous sleight of Hand by Richard Posner (and others)¹² to convince so many torts professors otherwise.¹³ In defense of the Reporters, they deliberately refrain from selecting a version that is algebraic or monetized, and are correct to indicate that probability of injury, severity of injury, and burden of precaution are important factors in thinking about whether the defendant acted negligently.¹⁴ And in defense of them and of Posner, the Restatements (First) and (Second) – following an influential line of thought

¹² Richard A. Posner, *A Theory of Negligence*, 1 J. of Leg. Stud. 29 (1972).

¹³ Benjamin C. Zipursky, *Sleight of Hand*, 48 Wm. & Mary L. Rev. 1999 (2007). See also, Richard W. Wright, *Hand, Posner, and the Myth of the “Hand Formula”*, 4 Theoretical Inq. L. 145 (2003).

¹⁴ See Michael D. Green, *Negligence=Economic Efficiency: Doubts >*, 75 Tex. L. Rev. 1605 (1997).

commenced by Henry Terry¹⁵ -- adopted similar balancing approaches in defining “unreasonable risk.”¹⁶ These defenses are not enough to overcome the overwhelming truth that while B, P, and L can help someone who wants not to be negligent to deliberate intelligently about what to do, they do not capture the meaning of “negligence” or “ordinary care” in our negligence law. Ordinary care is what a reasonably prudent person would do under the circumstances; it is more than minimal care and less than extraordinary care; it is geared to what an average person would do, in the normal case, and both its moral significance and its institutional role cannot be understood apart from one another: the jury is supposed to decide what an reasonably prudent person would do under the circumstances.¹⁷ A symptom of the Reporters’ undue enchantment with the Hand formula conceptualization of breach is the startling admission that “the balancing approach to negligence tends to assume that the actor is aware of that risk, but has tolerated the risk on account of the burdens involved in risk-prevention measures.”¹⁸ Contrast this with the Prosser Hornbook, which plausibly asserts that most negligence in tort law is a matter of inadvertence.¹⁹

Having vented that point, I want to leave it alone and simply to attend to the treatment of foreseeability. The classic concept of foreseeability in negligence law is “reasonable foreseeability.” A very common defense argument on no breach is that the failure to taken precautions against a certain injury that was a consequence of the defendant’s conduct was not negligent because the injury was not reasonably foreseeable.

¹⁵ Henry T. Terry, *Negligence*, 29 Harv. L. Rev. 40 (1915).

¹⁶ Cite R. 1st at § 291 (1934) and R. 2nd at § 291 (1965).

¹⁷ Zipursky, *Sleight of Hand*, at 2013-21.

¹⁸ § 3, comment k.

¹⁹ See Prosser and Keeton on Torts (5th ed. 1984) at 169 (negligence in most instances is “caused by heedlessness or inadvertence”).

What is notable here is that reasonable foreseeability is an on/off switch. The jury is invited to think about a sphere or range of reasonably foreseeable results, and they are told by one side that the injury is outside of that sphere and by the other side that it is inside that sphere. Courts are normally supposed to let the jury decide which side is right about that. Once it is decided that it is inside the sphere, the question still remains as to whether ordinary care required constraining one's conduct to forestall this consequence.

The concept of "foreseeable likelihood" is not binary in this way. Moreover, it leaves out what is often an intuitively comfortable normative question for a jury: can someone in the defendant's shoes be expected to anticipate such unfortunate consequences? The modifier "reasonably" in "reasonably foreseeable" is not simply there to ward off the idea that any probability above 0 renders the conduct foreseeable. It is there to press the jury to think about whether it is a reasonable, i.e., fair demand of others to anticipate consequences so far out. Finally, it contemplates a one-step procedure of determining breach ... it is all about the care level chosen; there is no preliminary question about the orbit of injuries.

Of course, what I called the "very common defense argument" is only one way of presenting the issue, and the breach issue is presented in many ways. Often it is presented in one step, as indicated, and often reasonable foreseeability is not really that salient, but probability of injury is. Perhaps the Restatement (Third) model is more in tune with most cases today than "reasonable foreseeability". However, even if this were true, it would not justify their choice. "Foreseeability" and "reasonable foreseeability"

are capacious enough terms to permit both, while “foreseeable likelihood” is incapable of capturing the binary conception.

A more subtle problem is revealed by the odd choice to build foreseeability into two out of three of the primary factors: P and L, but not B. This seems to imply that if there were some easy precaution that would have forestalled a risk that one could foresee was fairly likely and severe, the failure to take that precaution would be negligent, even if it was not foreseeable that the burden of taking the precaution was so low. Imagine a plaintiff arguing that a developer could have rendered the fireplace in the house more heat-resistant cheaply by using a specially engineered, low cost resin. Is it relevant whether the technology for the resin was available or discoverable to a reasonable architect when the house was built? Of course it is. So foreseeability should really be built into the burden primary factor, too. It seems to me a fair objection to this argument is that foreseeability is implicitly built into “Burden”. I find this plausible, but the problem is that it proves too much. Why isn’t foreseeability built into P and L, too? Surely this is how both Hand and Posner have understood it. Combined with the other concerns, this leads me to wonder whether fitting foreseeability into the P of the Hand formula really succeeds in capturing its role in negligence law.

B. Duty

The first two concerns can be expressed in a manner that completely concedes, *arguendo*, that the critique that Professor Goldberg and I have made on the Restatement (Third)’s analysis of the role of duty in negligence law is unsound. The first is a concern is that the Restatement neglects the predominance of the idea that foreseeability is central

to duty in the articulated positive law of the states. The Reporters risk damaging the credibility of the Restatement *as a Restatement* by declining to put foreseeability in the black letter of § 7. The risk is enhanced by the decision not state the significance of foreseeability, according to most courts, in § 7, comment j, and § 37, comment f. All of this might have been tempered in the Reporters' Notes to the comments, by full disclosure of the aggressiveness of their decision to reject foreseeability, but that is not what is found in the Reporters' notes .

It is not what the Reporters say but what they do not say that is the problem. It is perfectly appropriate to cite Professor Jonathan Cardi's Vanderbilt article on foreseeability as making "an attractive case for removing the foreseeability of risk from duty determinations," in the Reporter's Note to § 7, comment j, and it is similarly appropriate to advocate that courts follow that approach (in a comment). Moreover, the Reporters register the basic fact that "[t]he California Supreme Court has been in the vanguard of suggesting that foreseeability has an important role to play in determining whether a duty exists."²⁰ Moreover, they provide a helpful list indicating several respects in which some appellate courts have used foreseeability – low foreseeability leading to a no-duty, foreseeability as a factor in thinking about the existence and scope of affirmative duties, unforeseeability in thinking about "no-duty" where it is a cover for no breach as a matter of law.

The problem is what is missing: the statement that almost every jurisdiction does treat foreseeability as a significant factor (and frequently *the most significant factor*) in

²⁰ § 7, Comment j, Reporters' Note (citing several California Supreme Court decisions, including *Tarasoff*).

analyzing whether the duty element is met in a negligence claim.²¹ Indicating that courts “sometimes” use unforeseeability or foreseeability, and that California gives it a

²¹ DiBiasi v. Joe Wheeler Elec. Membership Corp., 988 So.2d 454, 461 (Ala. 2008) (foreseeability is “[t]he key factor” in duty determination”); Winschel v. Brown, 171 P.2d 142, 146 (Alaska 2007) (foreseeability central to duty inquiry, but broad conception of foreseeability is to be used); Coca-Cola Bottling Co. of Memphis, Tennessee v. Gill, 100 S.W.3d 715, 724 (Ark 2003) (duty requires only that “defendant be able to reasonable foresee an appreciable risk of harm to others”); Castaneda v. Olsher, 162 P.3d 610, 615 (foreseeability of harm listed first among factors in determining duty’s existence); Keller v. Koca, 111 P.3d 445, 448 (Colo. 2005) (foreseeability part of duty analysis); Pelletier v. Sordoni/Skanska Const. Co., 945 A.2d 388, 408 (Conn. 2008) (“no duty” inferred from lack of foreseeability); Kuczynski v. McLaughlin, 835 A.2d 150, 154 (Del. Super. 2003) (citing Prosser and Keeton conception of duty that “incorporates the notion of “foreseeability” as comporting with Delaware tort law); U.S. v. Stevens, 994 So.2d 1062, 1067 (Fla. 2008) (“foreseeable zone of risk test” determines “whether a duty exists under our negligence law”); Days Inns of America, Inc. v. Matt, 545 S.E.2d 507, 508 (Ga. 1995) (no duty without foreseeability); Pulawa v. GTE Hawaiian Tel., 143 P.3d 1205, 1214 (Haw. 2006) (foreseeability important factor in duty analysis); Baccus v. Ameripride Serv.’s, Inc., 179 P.3d 309, 312 (Idaho 2008) (foreseeability first factor in duty analysis); Forsyth v. Clark USA, Inc., 864 N.E.2d 227, 232 (Ill. 2007) (foreseeability part of duty inquiry); Estate of Heck ex rel. Heck v. Stoffer, 786 N.E.2d 265, 268 (Ind. 2003) (analysis of duty involves three factors: relationship between parties; foreseeability of harm to injured person; public policy concerns); Raas v. State, 729 N.W.2d 444, 448 (Iowa 2007) (same); Gragg v. Wichita State Univ., 934 P.2d 121, 135 (Kan. 1997) (lack of foreseeability therefore lack of duty); T&M Jewelry, Inc. v. Hicks ex rel. Hicks, 189 S.W.3d 526, 531 (Ky. 2006) (in deciding duty, general foreseeability of harm relevant); Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762, 768 (La. 1999) (foreseeability of crime determines existence and extent of defendant’s duty); Alexander v. Mitchell, 930 A.2d 1016, 1020 (Maine 2007) (foreseeability “foundational consideration” with regard to duty, but not sole consideration); Pendleton v. State, 921 A.2d 196, 205 (Md. 2007) (foreseeability listed as first factor in duty analysis); Afarian v. Mass. Elec. Co., 866 N.E.2d 901, 906 (Mass. 2007) (foreseeability essential to duty); In re Certified Question from the Fourteenth District Court of Appeals of Texas, 740 N.W.2d 206, 211 (Mich. 2007) (foreseeability factor in duty analysis); Bjerke v. Johnson, 742 N.W.2d 660, 667 (Minn. 2007) (foreseeability necessary to duty); Patterson v. Liberty Associates, L.P., 910 So.2d 1014, 1019 (Miss. 2004) (foreseeability essential to duty and causation); L.A.C. ex rel. D.C. v. Ward Parkway Shopping Center Co., L.P., 35 S.W.3d 247, 257 (Mo. 2002) (en banc) (foreseeability “touchstone for the creation of a duty”); Fisher v. Swift Transp. Co., Inc., 181 P.d 601, 607 (2008) (“In analyzing whether a duty exists, we consider whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff”); Fickle v. State, 735 N.W.2d 754, 766 (Neb. 2007) (foreseeability a factor in duty analysis); Ashwood v. Clark County, 930 P.2d 740, (Nev. 1997) (foreseeability of harm a predicate to duty analysis); Cui v. Chief, Barrington Police Dept., 924 A.2d 397, 400 (N.H. 2007) (existence of duty depends on reasonably foreseeable risks); Jerkins ex rel. Jerkins v. Anderson, 922 A.2d 1279, 1284 (N.J. 2007) (in determining whether a duty of care exists, “the court must first consider the foreseeability of harm to the potential plaintiff”); Herrera v. Quality Pontiac, 73 P.3d 181, 190 (N.M. 2003) (foreseeability “critical and essential component of New Mexico’s duty analysis”); Stein v. Asheville City Bd. Of Educ., 626 S.E.2d 263, 267 (N.C. 2006) (no legal duty without foreseeability of injury to plaintiff); Nelson v. Gillette, 571 N.W.2d 332, 340 (N.D. 1997) (foreseeability is determinant of persons to whom duty is owed); Estates of Morgan v. Fairfield Family Counseling Ctr., 673 N.E.2d 1311, 1319 (Ohio 1997) (duty depends upon foreseeability, but foreseeability not sufficient to establish duty); Lowery v. Echostar Satellite Corp., 160 P.3d 959, 964 (Okla. 2007) (partially superseded on other grounds) (“[t]he most important consideration in determining the existence of a duty of care is foreseeability of harm to the plaintiff”); Boothby v. D.R. Johnson Lumber Co., 137 P.3d 699, 704 (Or. 2006) (foreseeability’s analytical role in defining duty in negligence exists diminished where relationship, status, or particular standard of conduct is applicable) (citing Fazzolari v. Portland School Dist. No. 1, 734 P.2d 1236 (1987)); R.W. v. Manzek, 888 A.2d 740, 747 (Pa. 2005) (five-factor framework for duty includes foreseeability factor); Ouch v. Khea, 963 A.2d 630, 633 (R.I. 2009) (foreseeability factor in analyzing whether a duty

prominent role is not enough to disclose this basic fact, *especially* because the Reporters are trying to be revisionist, it is critical that they be fulsome in their disclosure about what the leading courts actually say. The reality, as the prior footnote indicates, is that forty-seven states plainly do give foreseeability a significant role in duty analysis. This includes Wyoming, the one top court the Reporters do cite as rejecting foreseeability.²² Not all of these jurisdictions use foreseeability in duty in the same manner; not all of them use it in an internally consistent manner; and many of them utilize in ways that the Reporters powerfully criticize. But in all of them, it is a firm statement of the negligence law in their jurisdiction that foreseeability is part of duty analysis.

exists); *Dorrell v. South Carolina Dep't of Transp.*, 605 S.E.2d 12, 15 (S.C. 2004) (foreseeability, not privity, central to duty question in common law negligence); *Kirlin v. Halverson*, 758 N.W.2d 436, 450-51 (S.D. 2008) (recognizing important role of foreseeability – at proper level of generality – in duty analysis); *Giggers v. Memphis Housing Authority*, --- S.W.3d ---, 2009 WL 249742 (Tenn. 2009) (“In order to determine whether a duty is owed in a particular circumstances, courts must first establish that the risk is foreseeable, and, if so, must then apply a balancing test [which itself includes foreseeability] based upon principles of fairness to identify whether the risk was unreasonable” (citing *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008)).); *Trammell Crow Cent. Texas, Ltd., v. Gutierrez*, 267 S.W. 2d 9, 12 (Tex. 2008) (foreseeability essential to ascertaining whether there is exception to no-duty rule regarding landowners who allegedly fail to protect against violent crimes by third parties); *Savage v. Utah Youth Village*, 104 P.3d 1242, 1246-47 (Utah 2004) (inferring duty, in part, from reasonable foreseeability of risk to persons situated as plaintiff, while recognizing that foreseeability is not only factor determining duty); *Hamill v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226, 228 (Vt. 2005) (“[g]enerally, whether there is a cognizable legal duty that supports a tort action depends on a variety of public policy considerations and relevant factors, only one of which is foreseeability”) (citations omitted); *Thompson ex rel. Thompson v. Skate America, Inc.*, 540 S.E.2d 123, 128 (Va. 2001) (recognizing duty to protect invitee against harm inflicted by third party in light of “heightened degree of the ‘foreseeability’ of that harm”); *Smoot ex rel. Smoot v. American Elec. Power*, 671 S.E.2d 740, 743-44 (W.Va. 2008) (existence of duty grounded in foreseeability); *Hornback v. Archdiocese of Milwaukee*, 752 N.W.2d 862, 869 (Wis. 2008) (duty depends on foreseeability); *Black v. William Insulation Co., Inc.*, 141 P.3d 123, 128 (Wyo. 2006) (foreseeability first factor in duty).

²² § 7, Comment j, Reporters’ Notes (citing *Gates v. Richardson*, 719 P.3d 193 (Wyo. 1986)). Justice Cardine, writing for the Court in *Gates*, does indeed manifest the view that it tends to obfuscate rather than clarify for a court to pack its policy reasons under the label “reasonable foreseeability.” However, he did so in the process of applying the *Tarasoff* factors, the first of which is foreseeability. Recent decisions by the Wyoming Supreme Court suggest that the *Tarasoff* framework continues to apply, and that Wyoming courts – high and low – do utilize the foreseeability factor notwithstanding Justice Cardine’s caustic realist quip in that particular case. See, e.g., *Black v. William Insulation Co., Inc.*, 141 P.3d 123, 128 (Wyo. 2006) (foreseeability first factor in duty).

Three states – Arizona, New York, and Washington – present what appear to be a more equivocal pictures. Taking them in reverse order, the Supreme Court of Washington, in its most recent statement about foreseeability and duty, appears to reject its role; the appearance, in a footnote quoting a lower court opinion, is not nearly substantial enough to outweigh decades of substantive invocations of foreseeability in duty.²³ Far more serious evidence of rejection of foreseeability comes from New York. New York courts have pulled back – in varying degrees – from utilizing foreseeability in duty analysis. A recent case indicating a long line of precedent behind it uses quite strong language to warn lower courts against relying on foreseeability to ascertain the existence of duty. The New York Court of Appeals, in *In re New York City Asbestos Litigation*, cautioned that “foreseeability bears on the scope of duty, not on whether a duty exists in the first place,”²⁴ and numerous New York Court of Appeals decisions have reiterated and applied the same language. If one puts to one side the undeniable significance of foreseeability in New York duty law during Cardozo’s years and decades following, contemporary New York negligence law – as a whole – displays a more mixed

²³ The Supreme Court of Washington, in *Simonetta v. Viad Corp.*, 197 P.3d 127, 131 n.4 (Wash. 2008) (En Banc) agreed with a footnote of the state Court of Appeals, in which the latter stated “Foreseeability does not create a duty but sets limits once a duty is established.” (quoting *Simonetta v. Viad Corp.*, 151 P.3d 1019, 1023 n.2). The footnote gives the back of the hand to an aggressive argument by the plaintiff in *Simonetta* that the manufacturer of a product can be held liable for failure to warn of hazards of another manufacturer’s product. It is true that foreseeability sets a limit once a duty is established; the whole question of foreseeability in duty is whether it *also* plays a rule in determining whether a duty exists. Courts overwhelmingly recognize that foreseeability is not itself sufficient to create a duty, and that a variety of other considerations come into play. The Washington Supreme Court’s footnote should not be understood to undermine what is plainly well established within Washington negligence law. See, e.g., *Osborn v. Mason County*, 134 P.3d 197, 200-01 (Wash. 2006) (public entity’s duty to control persons it has authority over runs to foreseeable victims); *Colbert v. Moomba Sports, Inc.*, 176 P.3d 497, 504 (Wash. 2008) (foreseeability applies at duty level, in emotional distress case).

²⁴ 840 N.E.2d 115, 120 (N.Y. 2005) (citing *Pulka v. Edelman*, 358 N.E.2d 1019 (N.Y. 1976)).

approach,²⁵ but the Court of Appeals does seem to have been pushing against foreseeability at least since the mid-1970s.

The most striking rejection of foreseeability in duty is by the Supreme Court of Arizona. In the 2007 case *Gipson v. Kasey*, a majority of the members of that Court were persuaded to follow the Professor Cardi's and the Restatement (Third)'s approach to foreseeability in duty, stating: "we now hold that foreseeability is not a factor to be considered by courts when making determinations of duty, and we reject any contrary suggestion in prior opinions."²⁶ While *Gipson* of course vindicates the Reporters view to some extent, it is unhelpful in justifying the Reporters' positive account of the law, because it was a direct and explicit product of their *advocacy* for the rejection of foreseeability in duty (and that of Cardi).²⁷ In any event, the rejection of foreseeability in Arizona is hardly something to cheer about; a recent intermediate appellate decision in Arizona utilized the rejection of foreseeability as a ground for distinguishing Arizona's

²⁵ Thus, *Cohen v. Cabrini Medical Center* (as the Reporters note) cautions against inferring duty from foreseeability and comments that "[c]ourts resolve legal duty questions by resort to common concepts of morality, logic, and considerations of the social consequences of imposing the duty," 730 N.E.2d 949, 951 (N.Y. 2000) (quoting *Tenuto v. Lederle Labs.*, 687 N.E.2d 1300, 1302 (N.Y. 1997)). But it does so in the context of commenting that "the imposition of a legal duty of care does not turn *merely* on the foreseeability of the harm resulting from the actor's conduct," *Cohen*, 730 N.E.2d at 951 (citing *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969)) (emphasis added), which entails that foreseeability is at least *part* of what duty turns on.

²⁶ 150 P.3d 228, 231 (Ariz. 2007) (rejecting foreseeability as part of duty analysis and rejecting prior case law treating foreseeability as part of duty analysis) (rejecting *Donnelly Const. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1295 (foreseeability necessary to duty; broad view of what is foreseeable is required)). Contrary to plaintiff's assertion in *Gipson*, there is nothing undercutting the significance of foreseeability for duty in the Arizona Supreme Court's 1997 decision *Martinez v. Woodmar IV Condominium Homeowners Ass's, Inc.*, 941 P.2d 218, 223 (Ariz. 1997) (landowner owes tenant duty to protect against assailants in common areas; whether assailant was foreseeable in particular case was issue for jury).

²⁷ *Gipson*, 150 P.3d at 231 (citing W. Jonathan Cardi, *Purging Foreseeability: The New Version of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 Vand. L. Rev. 739, 801 (2005), and Restatement (Third) of Torts: Liability for Physical Harm § cmt. j).

duty law from that of another, more flexible court and far more plausible approach to the question before it.²⁸

To reiterate, the larger picture is that foreseeability is overwhelmingly embraced by American courts as a vitally important part of duty analysis. The Restatement can only be strengthened by greater openness about this aspect of the positive law of duty.

The second problem is that the rejection of foreseeability in duty is unnecessary to the Reporters' mission and, in some ways, even in conflict with their mission. Recall that comment j states: "Despite frequent use of foreseeability in no duty determinations, this Restatement disapproves that practice and limits no duty determinations to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder." The problem with this statement is that it falsely presupposes that articulated policy and principle concerns would not themselves involve considerations of foreseeability. Thus, when courts decline to recognize a duty of care from manufacturers of guns to victims of gun violence on "no duty" grounds, part of their concern is the limited capacity of gun manufacturers, as a categorical matter, to anticipate how their products will be used. Conversely, when the California Supreme Court, in *Tarasoff*,

²⁸ Notably, the Arizona's Supreme Court's approach was turned against the plaintiff in *Vasquez v. State*, -- P.3d --, 2008 WL 4402922 (Ariz. App. Div. 2008), in which the appellate court rejected a mother's negligence claim for emotional distress against the state, whose traffic officers chased the plaintiff's 15-year old runaway son, who was killed during the chase. There was little effort to identify the boy so that his family could be notified of his death and, as a result, he was buried with no notice to the family (who learned two months later of his death). In response to the state's "no duty" argument, the plaintiff argued that distress to the next of kin was foreseeable, and cited a similar argument from another jurisdiction. The plaintiff argued that "in view of the importance of the 'cherished, respected, [and] sacred . . . right to bury our dead,' 'mental distress [wa]s both foreseeable and likely to occur,'" *Vasquez*, quoting *Vogelaar v. United States*, 665 F. Supp. 1295, 1301 (E.D.Mich. 1987). Citing *Gipson*, the appellate court reasoned, "that type of foreseeability analysis in determining the threshold legal issue of duty has no place in Arizona law." *Vasquez*.

decided to recognize a duty to potential victims, it did so for reasons of policy and principle (just as those who would reject liability for psychiatrists would reject it for reasons of policy and principle). Nevertheless, the capacity of psychotherapists to foresee injury to third party victims is part of the policy decision. There is a category-wise determination of the degree of foreseeability by persons situated as defendants of harm to persons situated as plaintiffs, that typically is a significant part of any “no duty” decision *when that decision is conceived, as the Restatement Reporters suggest, as a decision of policy or principle.* Hence, it would have been more coherent, and more advantageous in harmonizing what courts do with what the Restatement recommend they do, to treat foreseeability as a permissible consideration in no-duty determinations *only to the extent that categorical foreseeability considerations (as opposed to ones involving the particular plaintiff and defendant) are a component of the analysis of the principles or policy underlying the no duty determination.*

The real hazard on duty and foreseeability is that a good unforeseeability argument at the individual level, that a jury might decide undercuts breach, will be morphed into a good unforeseeability argument on the no-duty issue, which illegitimately stops the case from ever getting to the jury. The best way to combat this is not to deny the role of foreseeability in duty, but to recognize that duty happens at a category level and an individual case of low foreseeability cannot generate a category level argument of principle or policy based on foreseeability.

The third concern pertains more specifically to affirmative duties, and it is not quite right to say that it concedes the general views of the Restatement (Third) as against Goldberg and myself for the purposes of argument. Section 37, comment f, asserts the

absence of foreseeability at the class-wide level in thinking about the proper boundaries of the rule that there are no affirmative duties in misfeasance cases, and the exceptions to that rule. This assertion is not just untenable at the level of expressly articulated law in nearly every jurisdiction and not just strategically unsound with respect to their mission. The omission of foreseeability here is unsound at the most basic level in capturing the way courts in the United States and across the common law world have thought about important issues regarding whether to expand the domain of duty. The core argument for understanding the common law to contain an affirmative duty in *Tarasoff* or *Kline* or is an argument from *MacPherson* and *Heaven v. Pender*: that defendant should be viewed as duty-bound to take steps to protect against this harm to the plaintiff because it is in the domain that a reasonable person would anticipate and because one ought to be vigilant of protecting others against harm. The foreseeability question in affirmative duty cases recognizes that, given that courts need to take the first shot at the question of whether it really makes sense to have an enforceable, rule-bound system of holding people to legal obligations to take care to stop that category of harm from happening, it makes sense to inquire how foreseeable that type of harm is to actors so situated. To the extent that it typically quite foreseeable, there is a deontic argument and a utilitarian harm-reduction argument that individuals ought to be reasonably vigilant in their conduct to prevent it from occurring; to the extent that it is typically quite unforeseeable, not only are those arguments weaker, but there are countervailing arguments of unfairness, liberty-incursion, and wastefulness in the legal system against recognizing such a duty. Prosser, the California Supreme Court, and the Restatement (Third) reporters are to be credited with recognizing that this does not really get us very far on affirmative duties or on any

real-life duty question that courts face. But to say it does not get us very far is not to say that it is irrelevant. To the contrary, it lies at the core.

There is an apparent asymmetry between my critique on misfeasance and on the affirmative duty front for a simple reason. Goldberg and I took an across-the-board version of this critique ten years ago, and it was rejected. But the core of the rejection was on Section 7 and it was a very subtle debate, from which we withdrew while respectfully disagreeing. The debate was subtle because both sides agreed that there was a default in misfeasance/physical harm cases according to which there was always a duty, and the question was whether in the “no-duty” arguments courts offered as to such cases, how to characterize the *Heaven v. Pender/MacPherson* principle that the foreseeability of harm to another flowing from one’s conduct is a ground for taking reasonable care as to the potential harmful effects of one’s conduct upon others. On our view, it was the core, and all of the principle and policy arguments for “no-duty” within § 7 could not really be understood except against the backdrop of that core. On the Reporters’ view, this is duplicative or at least superfluous; that there is a strong default of “duty” within this domain is enough of a core, and the risks of leading judges to believe they can attack the breach question as a matter of law are too great. We still disagree with that decision, and as the discussion above indicates, we think that in any event it fails to justify the treatment of “foreseeability” in § 7 cases. But it is plain what the argument is; it is plain why it has some force; and it is plain that it is meant to cut off what the Reporters’ view as the regressive, jury-invasive tendency of courts deploying the “duty” concept.

I hope it is clear that none of these rationales apply when we turn to § 37. If the default is no-duty, then to leave out foreseeability in the discussion of whether there is a duty is to leave out the very core of the reason to begin thinking of expanding the range. To put it differently, it is one thing for the Reporters to give up the core notion for progressively recognizing a broader range of duties to one another, if it is within the context of an area where duty has already been expanded to its limit, at least as a matter of principle. That is (on their view) a matter of downgrading the role of “unforeseeability” as a shield at the judge-level and the jury-level, to simply a shield at the jury-level. It is an entirely different thing when foreseeability is a sword at both levels, and the rules we start with are quite constrictive. In that context, if foreseeability is removed as a sword at the level of the judge, then one never even gets to the jury.

There is, of course, a *prima facie* argument of symmetry for the Reporters to treat §§ 37 et seq. in roughly the same manner as §§ 6-7 et seq. That has been one of the main arguments that Goldberg and I have run all along; the powerful argument for our view of duty on the affirmative duty front and the value of symmetry call for our view across the board. Having chosen a different approach on misfeasance, it is particularly imperative that there is sensitivity to the risks of that view when it comes to affirmative duties. Because there are numerous other reasons for giving foreseeability in duty a more evenhanded treatment even looked at entirely from the Reporters’ point of view, the need for such a treatment does not turn on which view one accepts.

C. Proximate Cause

The largest problem with scope of the risk (rather than foreseeability) is that the Reporters are unable to state any explanation of the justifiability of the scope-of-the-risk test. Section 37, comment e, on the rationale for the rule states that it is to be preferred because of its "... relative simplicity." Continuing, the comment states: "It provides a more refined analytical standard than a foreseeability standard or an amorphous direct consequences test. Furthermore, the standard adopted in this Section imposes limits on liability by reference to the reasons for holding the actor liable for tortious conduct in the first place. The risk standard appeals to intuitive notions of fairness and proportionality by limiting liability to the harm that results from risks created by the actor's wrongful conduct, but for no others."²⁹

The alleged simplicity is not plausible, particularly compared with foreseeability or directness. However, it is plausible that it provides a more nuanced and helpful analytical standard. That point must be secondary, however, to a more fundamental question: why is it plausible that the scope of liability would be limited by the risks that made the conduct negligent? After all, the need for compensation does not disappear. Nor does the fault of the defendant, nor does the fact that the injury would not have happened without the defendant's negligent conduct. What we need is not simply a description of the preferability of the scope of risk standard from an operational point of view. We need some sense of why it is plausible as a matter of principle to limit the scope of liability by reference to the scope of the risk, rather than by reference to foreseeability.

²⁹ § 29, Comment e.

The trouble of justifying the risk standard is particularly acute when the risk standard is set out as an alternative to the foreseeability standard, because there are really are reasons of principle justifying the foreseeability standard. From Holmes³⁰ through the *Wagon Mound* court to work by Stephen Perry, there are powerful arguments for a proximate cause notion rooted in foreseeability.³¹ The basic idea is that it is unfair to impose liability for an injury unless the defendant may cogently be said to be responsible for bringing about the injury. D's conduct being a cause in fact of Y's injury is not sufficient for saying that D is responsible for bringing about Y's injury; D cannot be said to be responsible for Y's injury if the action of D that caused Y's injury is one with respect to which Y's injury was an unforeseeable consequence. These propositions, put together, yield the conclusion that it is unfair to impose liability on D for Y's injury if that injury was merely an unforeseeable consequence of D's action. That is one of the most basic arguments underlying the foreseeability criterion for proximate cause.

Interestingly, this argument may even bear further pressure.³² The reason that unforeseeability of harm undermines responsibility is that being held responsible for some injury because one's act brought about the injury entails that one could have avoided causing the injury by choosing not to perform the act. Of course, that is true in one sense regardless of whether the injury was foreseeable. But what is critical is that responsibility can be imposed because one chose to act (or refrain from acting) under circumstances in which one knew or could have known that the opposite choice would

³⁰ Oliver Wendell Holmes, Jr., *The Common Law* (48th prt. 1923).

³¹ See esp. Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449, 503-12 (1992) (explaining role of foreseeability in responsibility); Stephen R. Perry, *The Distribution Turn*, 16 *Q.L.R.* 315, 330-33 (1996) (explaining role of foreseeability in responsibility).

³² Stephen R. Perry, [Postema volume?].

have ruled out or diminished the risk of the injury. There is a linkage between choice, avoidability, and responsibility that makes foreseeability a necessary condition.

So what is the rationale for advocating the scope-of-risk standard?

The Reporters' notes reiterate a suggestive idea mentioned in the comments: "the standard adopted in this Section imposes limits on liability by reference to the reasons for holding the actor liable for tortious conduct in the first place."³³ Is this theoretically elegant or simply vacuous (or both)? It depends on what is denoted by the phrase "the reasons for holding the actor liable for tortious conduct in the first place." If the Reporters are referring to the reasons for having negligence liability at all, then perhaps there would be a synthetic argument to offer; Section 6, comment d indicates corrective justice, an ethical norm of equal consideration, and a deterrence rationale.³⁴ The mention of these ideas is so abbreviated and the Reporters' notes so spare that it seems unlikely that this is what they have in mind. In any event, if it were what they have in mind, it seems distinctly unpromising. Professors Heidi Hurd and Michael Moore have forcefully argued that the risk rule is normatively unjustifiable from a corrective justice point of view, essentially adopting a version of Judge Friendly's argument in *Kinsman*:

"We see no reason why an actor engaging in conduct which entails a large of risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk

³³ § 29, Comment e.

³⁴ § 6, Comment e.

of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated *should inculcate him further* rather than limit his liability.”³⁵

Following Friendly, Hurd and Moore assert essentially that it is more fair to require the negligent defendant than the blameless plaintiff to bear the cost of the injury defendant caused to plaintiff, even if it was not within the scope of the risk, because the defendant by definition acted culpably. To be sure, there are duty-right based corrective justice theorists in favor of the scope of risk test – such as Ernest Weinrib (cited with approval in the Reporters’ Note to comment § 37, Comment e) – it is puzzling that the Reporters’ would want to rely on their approach, given that they are deeply critical of the Restatement approach to duty, and given that their methodological norms are utterly unlike those of the Reporters.³⁶

Compensation, deterrence, and equality rationales seem to cut against the scope of risk standard, too. Permitting victims of foreseeable injuries outside the risk rule is obviously preferable with regard to the goal of compensating injured parties. And the Reporters assert that the risk rule in negligence law is not justifiable from a deterrence point of view except to the degree that an justification based on administrative costs can be rendered plausible³⁷ – which I have elsewhere argued it cannot.³⁸ Moreover, the

³⁵ Petition of Kinsman Transit Co., 338 F.2d 708, 724-25 (2d Cir. 1964) (Friendly, J.) (quoted in Hurd & Moore, supra note __, at 383 (emphasis in Hurd & Moore).

³⁶ Indeed, the article that the Reporters cite with approval is Ernest J. Weinrib, *The Disintegration of Duty*, in Exploring Tort Law 143-86 (M. Stuart Madden, ed. 2005), which discusses proximate cause only briefly and largely focus on the thesis that treating duty into a policy question undercuts the coherence of negligence law. In large part, the account sketched in Part III of this article agrees with Weinrib’s at 153-54.

³⁷ § 29 Comment e, Reporters’ Note (citing William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 246-48 (1987)). The Reporters plausibly credit Guido Calabresi’s defense of the

failure to weigh others' interests equally is evident from the failure of the breach standard, so the equality rationale also seems to point to foreseeability over the risk rule. We have a principled explanation for foreseeability. And, of course, it is far better entrenched as the black letter law. Finally, serious questions exist regarding not only whether the scope-of-risk standard is justifiable but whether it is coherent.³⁹

Perhaps what the Reporters mean by the phrase “the reasons for holding the actor liable for tortious consequences in the first place” is the reason for regarding the defendant as having been negligent, for that is what the scope of risk standard asks. It contemplates that defendant's having acted negligently is what renders him vulnerable to liability imposition, and asks what are the reasons that the defendant should be regarded as having acted negligently. To answer this question, one must specify a risk or risks against which defendant took inadequate precautions. His having taken inadequate precaution against that risk is the reason for holding him liable. The scope-of-risk standard is justifiable, according to the Reporters, because it limits liability to the realization of *that risk*.

This account helps to show that the scope of risk standard is theoretically elegant, and it helps us escape from the problem of really needing to supply a normative framework. But it does not really explain anything; as the Reporters commendably concede, “[t]here is a mildly uncomfortable conclusory aspect to it.”⁴⁰ What we need is an account of why the criterion for *how much liability there is* should match the criterion

risk rule for strict liability in *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. Chi. L. Rev. 69 (1975). Because they do not take a deterrence view generally and because strict liability is such a small part of the Restatement (Third) project, the Calabresi support does not go far.

³⁸ Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998).

³⁹ Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 Theoretical Inq. L. 333 (2002).

⁴⁰ § 37, Comment e, Reporters' Note.

for *whether there should be liability at all*. The concept of “proportionality” mentioned by the Reporters is suggestive. Certainly, that is part of what the *Wagon Mound* court had in mind: “. . . it does not seem consonant with current ideas of justice or morality that, for an act of negligence, however slight or venial, which results in some foreseeable trivial damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be “direct.” The problem is that *Wagon Mound* seemed – even in that passage – more interested in “foreseeability” than in the risk standard. Its subsequent passage indicates that impression is correct:

“It is a principle of civil liability, subject only to the qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behavior.”

This looks much more like the Holmes/Perry conception of proximate cause, founding the limitation in the notion of foreseeability because of its connection to the concept of responsibility.

Above all, where foreseeability and scope-of-risk criterion separate, there seem to be strong reasons of principle and policy to go with the former over the latter. The Restatement (Third)’s choice to invert this treatment, concededly lacking in an articulated rationale, is particularly puzzling because foreseeability is what the courts more frequently use today.

III. Revisiting Scope of Liability

The scope-of-risk test traces back through Robert Keeton's book, *Legal Cause in the Law of Torts*⁴¹ to much earlier work by Leon Green – *The Rationale of Proximate Cause*⁴² and an even earlier pair of articles by Joseph Bingham.⁴³ Seavey famously analyzed the fact pattern of *Palsgraf* as case that would have been most perspicuously decided as proximate cause case in which defendant prevailed because defendant could not satisfy the scope of risk test.⁴⁴ Unfortunately, all of these scholars offer what is largely a doctrinalist's account which demonstrates the capacity of scope-of-the-risk standard to capture courts' intuitions about where a case is in some sense malformed and therefore may not proceed; all are capable of characterizing the test clearly enough, and showing that it captures a range of cases. But (with the possible exception of Leon Green) none succeeds in explaining why the scope-of-risk standard is justifiable.

What all of these early scholars agreed upon is what the Reporters themselves highlight: the plaintiff's injury must correlate with that aspect of defendant's conduct that was negligent. Indeed, Green is particularly helpful in drawing the parallel between scope-of-risk analysis and negligence per se analysis in cases involving statutes.⁴⁵ The plaintiff cannot win unless the injury was a realization of a risk that captures the relevant aspect of the statutory duty imposed upon the defendant. Just as courts doing negligence per se analysis must scrutinize the statutory duty-imposing norm to establish the fit with the injury in the case before it, so courts doing scope-of-risk analysis in

⁴¹ Robert Keeton, *Legal Cause in the Law of Torts* (1963).

⁴² Leon Green, *The Rationale of Proximate Cause* (1927).

⁴³ Joseph Bingham, *Some Suggestions Concerning 'Legal Cause' at Common Law* (Pt. 1), 9 Colum. L. Rev. 16 (1909); Joseph Bingham, *Some Suggestions Concerning 'Legal Cause' at Common Law* (Pt. 2), 9 Colum. L. Rev. 16 (1909).

⁴⁴ Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 54 Harv. L. Rev. 372 (1939).

⁴⁵ Green, *supra* note 37, at ___.

common law negligence claims must scrutinize the common law duty imposing norm to ascertain whether the injury was properly correlated with the imposition of the duty. This still pushed the inquiry further back. When one asks what the purpose of the statutory duty-imposing norm is one is trying to remain faithful to the legislature. There is no other body of legal authority with respect to whom to be faithful in the scope-of-risk analysis in proximate cause; it is reflexive.

And so, it seems, we return to the question: why is it not enough to show that it was negligent and that this negligence was a cause in fact of injury that was foreseeable? Why not accept Friendly's *Kinsman* argument – embraced by Hurd and Moore -- and treat the culpability of the negligent defendant as a retributive basis for imposing liability flowing from the culpable conduct? Is it not a symmetrical-sounding, but ultimately indefensible floodgates device?

As an interpretive matter, I would propose to rethink the problem as follows: tort law does not purport to be deterrent or retributive or fairness-based in quite the sense that Hurd and Moore seem to imagine. Rather, it empowers individuals to exact damages for various kinds of injurings that others have done to them, on the ground that such injurings are wrongs and are the responsibility of the one who did the wrong. If an injury was not among those which it was negligent for the defendant to fail to guard against, then its occurring was not a wrongful injury by the defendant, under negligence law. That is why our negligence law is unwilling to hold a defendant liable for an injury outside of the scope of the risk the defendant negligently took.

Negligence law, on this view, aims to permit plaintiffs to use courts so that those who negligently injured them can be held responsible for doing so. No doubt, having a

law that does this is valuable for many reasons: it has the effect of compensating, it has the effect of deterring, it has the effect making real and communicating the idea that each of us has obligations to others, and that we will be held accountable for breaching those obligations. Its main structural idea, however, is not really about generating these salutary social consequences. Its main idea is about permitting people an avenue of civil recourse through which to redress the wrongful injuries done to them.⁴⁶ The legal wrong in negligence is the negligent injuring of the plaintiff, not the failure of the defendant to conform his conduct to a standard of reasonable risk-taking. Negligence law, like tort law more generally, predicates liability on a defendant's breach of *a duty not to injure others by acting in a certain manner*; not on a defendant's breach of *a duty not to act in a potentially injurious manner*. Torts is about qualified duties of non-injury, not about duties of non-injuriousness, in the first instance.⁴⁷

While the foregoing account carries more than a whiff of the philosopher's stuffy den, it does not actually differ too much from that of Leon Green, arch critic of haughty tort theory. In his classic *The Rationale for Proximate Cause*, Green argued that the predicate of a tort claim was the invasion of the plaintiff's protected interest. A tort just is an invasion of a legally protected interest in violation of some legal rules of conduct whose point is to enjoin actors *against such invasions*.⁴⁸ The scope-of-the-risk test is there to stop a certain kind of plaintiff's argument from running in negligence law; a plaintiff is injured because some tort duty of care is violated and she suffers injury as a

⁴⁶ Zipursky, *Civil Recourse, not Corrective Justice*, 91 Geo. L. Rev. 695 (2003); Zipursky, *supra* note __; Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L. J. 524 (2005).

⁴⁷ See, e.g., Goldberg & Zipursky, *Tort Law and Moral Luck*, 92 Cornell L. Rev. 1123 (2007); Goldberg & Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625 (2002).

⁴⁸ *Id.*

consequence. The defendant must have failed to take care not to visit *this sort of injury* upon the plaintiff. Proximate cause, in this respect, is a constraint on breach that is generated from the nature of the injury that the plaintiff is claiming was negligently visited upon her. A plaintiff claiming to have been negligently injured must show that the failure to take precautions *against the invasion of interests she suffered* was negligent. The scope-of-risk-rule identifies the aspect of the action that plaintiff must show was negligent.⁴⁹

What I am calling a duty not to injure the plaintiff in certain ways by failing to take due care not to cause such injuries, Green called a violation of a rule protecting certain of plaintiff's interests against certain hazards presented by others' conduct. When I say that the duties in negligence law are duties not to injure, not simply duties not to act injuriously, I am saying roughly the same thing as Green does in asserting that negligence law is not about wrongful conduct, per se, but about the wrongful invasion of certain interests. The wrong is the interest invasion or the wrongful injury, not the defendant's conduct taken apart from its impact upon plaintiff.

The framework I have very briefly sketched, assuming it can be rendered more comprehensively and clearly, has one potential drawback for the Reporters; beyond that, I believe it is all upside. The drawback is that, although I do not have the space to run the argument here, it probably cannot be maintained in conjunction with the most straightforward, non-relational, interpretation of the interest-balancing framework offered in § 3 for understanding the content of breach.⁵⁰ Since I believe that there are

⁴⁹ Id. See also Bingham, *supra* note 38.

⁵⁰ The most powerful response to Hurd and Moore's critique of the scope-of-risk test is that the entire critique falsely assumes that a non-relational version of the Hand formula captures the meaning of "negligence." Hurd & Moore, *supra* note __.

insuperable problems with that account quite independently of concerns about scope-of-liability, I do not find this result surprising or disarming. More relevantly to the Reporters, it may well be possible and independently attractive to rethink the Hand formula factors from within a relational framework, as Professor Mark Geistfeld has done.⁵¹ Although Geistfeld's engagement with the duty element is plainly (and deliberately) more substantive than the Reporters' wish, his methodological orientation would appear to present fewer tensions than that which Professors Goldberg and I have put forth.⁵²

The advantages of the account, from an interpretive point of view, are plentiful. First and foremost, it more confidently embraces both the authorities and the language the Reporters are striving to capture: "the standard adopted in this Section imposes limits on liability by reference to the reasons for holding the actor liable for tortious conduct in the first place."⁵³ By recognizing that the wrong is the negligent bringing about of the injury – and not simply the careless conduct 'in the air' – the account explains why the foreseeability of the injury (in proximate cause) and the foreseeability of injury like this (in breach) are really one and the same, as the leading authorities cited by the Reporters have said all along. By recognizing that the question is really about the character of the nexus between the careless conduct of the defendant and the injury suffered by the plaintiff, the account explains why it is in *some* sense about a causal connection, even where cause-in-fact is uncontroversial. Third, by recognizing that the scope of liability in negligence is in some sense about the relationality of the tort of negligence, the

⁵¹ Mark Geistfeld, *The Analytics of Duty: Medical Monitoring and Related Forms of Economic Loss*, 88 Va. L. Rev. 1921, 1923-29 (2002).

⁵² Goldberg & Zipursky, *supra* note 1.

⁵³ § 29, Comment e.

Reporters may be able to concede some relationality – as even Cardi does⁵⁴ – while resisting the more duty-centered model that Goldberg and I have supported,⁵⁵ thus carrying further the stated goal, ably articulated by Professor Stapleton, of handling through proximate cause what others handle through duty.⁵⁶ Fourth, by reproducing the very test for scope-of-liability they have articulated, it will permit a refined account of the sort of judicial gatekeeping should and should not do on the proximate cause question.⁵⁷ Finally, this account of scope-of-liability translates well into the range of tort law beyond negligence.⁵⁸

Conclusion

In today's courts, foreseeability plays a role in breach, duty, and proximate cause. The Reporters are eager to maintain the role in breach, albeit reshaped by the Hand formula. They want to eliminate foreseeability in duty, so that judges do not invade the jury. And they want to refocus a foreseeability-like inquiry in proximate cause by renaming proximate cause “scope of liability” and by reformulating the “foreseeability” test as a “scope-of-the-risk” test. All of these objectives are in pursuit of a broader goal, I believe: to render today's negligence law coherent, to preserve the role of the jury from unjustifiable invasions by judges, and to bring into rational and controllable form the domains of causation and scope-of-liability.

In this essay, which continues a long conversation with the Reporters, I have predominantly aimed to provide medium-sized criticisms and constructive suggestions

⁵⁴ W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. Rev. 921, 968-72 (2005).

⁵⁵ But see .

⁵⁶ Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941 (2001).

⁵⁷ § 29, comment , Reporters Notes.

⁵⁸ Goldberg & Zipursky, *Tort Law and Moral Luck*.

aimed at supporting the underlying goals I have identified. As to breach, foreseeability needs to be taken more seriously apart from its role in the Hand formula. As to duty, greater candor with regard to the current perspective of high courts on foreseeability and duty is needed. And it is possible to recognize the role of foreseeability *as part of articulated policy and principle rationales*, which will help to secure the goal of identifying when a breach issue is being smuggled in, while nevertheless permitting courts to remain in step with the precedents in their jurisdiction. On proximate cause, I have argued that the embrace of relational conception of wrongs in negligence law will facilitate exactly the scope-of-the-risk framework the Reporters are aiming to secure. A relational conception of negligence law is advanced not in spite of, but because of, the desire for an articulation of the conceptual framework of tort law that will advance clarity, understanding, and the preservation of appropriate allocations of authority in the courts.