New Voices

Volume 1 • Number 2 • Autumn 2014

With this, our second issue, we move beyond my own students and my own areas of expertise – exactly the direction in which I hope we will continue.

continued inside . . .

New Voices

Volume 1 • Number 2 • Autumn 2014

Editor-in-Chief
Suzanna Sherry

Senior Editor
Daniel J. Hay

Submission information:

Faculty should submit their students' work, along with their own brief preface, to new.voices@vanderbilt.edu. Please obtain the student's permission before submitting, and include the student's contact information.

New Voices operates on the same terms as the *Journal of Law*. Please write to us at new.voices @vanderbilt.edu. Copyright © 2014 by The Green Bag, Inc., except where otherwise indicated and for U.S. governmental works. ISSN 2157-9067 (print) and 2157-9075 (online).

CONTENTS

From the Editor
by Suzanna Sherry 305

The Duty of Care as a Duty in Rem
by Peter Choi 307
with a preface by Michael I. Krauss 307

Discretion to Tax E-Discovery Costs: A Necessary Reform?
by Corey Patrick Teitz 338
with a preface by Rhonda Wasserman 337

JL

FROM THE EDITOR

Suzanna Sherry[†]

With this, our second issue, we move beyond my own students and my own areas of expertise – exactly the direction in which I hope we will continue.

From a 2014 graduate of George Mason University School of Law comes a sophisticated theoretical paper on the vexing and perennial question of whether the duty of care is owed to the world at large or only to a defined class of individuals. (Think *Palsgraf*, now being refought between proponents and critics of the Third Restatement of Torts.) For those in the thick of it, Peter Choi's paper provides a novel take on the question. For those of us who haven't thought about tort law since the first year of law school, he brings us up to date *and* gives us a way to talk knowledgeably with our torts colleagues.

In an entirely different vein, a 2014 graduate of the University of Pittsburgh School of Law tackles one of the very practical litigation issues caused by the meteoric increase in the amount of electronically stored information. Discovery of that information – e-discovery – is expensive, much more so than discovery of ordinary paper documents. Who should pay, and why? Corey Patrick Teitz explains the problem and offers a solution in the form of a proposed amendment to the federal statute that allows a losing party to be taxed for "costs." Teitz's paper digs into the nitty-gritty of civil procedure and makes it fun and interesting. (And I'm not just saying that because I teach civil procedure – I know how yawn-inducing it is to my colleagues!)

And if your reaction to either paper is "my students produce better work than *that*," put your money where your mouth is: send me your students' work.

• • •

[†] Herman O. Loewenstein Professor of Law, Vanderbilt University.

JL

THE DUTY OF CARE AS A DUTY IN REM

Peter Choi[†]
with a Preface by Michael I. Krauss[*]

PREFACE

Peter Choi wrote this paper for my Torts Theory Seminar. He defends the "duty in the air" theory critical of the *Palsgraf* decision and others of its ilk. But he defends it in a different way than do Heidi Hurd and Michael Moore.[a] Choi's claim is that the duty of care is a duty *in rem*.

• • •

INTRODUCTION

Over the course of the twentieth century, the common law has lessened the duty of care – the threshold element of negligence liability[1] – to a "frustratingly inconsistent, unfocused, and often nonsensical"[2] doctrine that is applied in multiple ways.[3] Underlying this confusion and serving as a topic of extensive

[†] J.D. 2014, George Mason University School of Law. I am grateful to my sister and mother for their love and support throughout the writing of this paper. Nicole and Mom – thank you. I would also like to thank Professor Krauss for his assistance and for teaching a thought-provoking course.
[*] Professor of Law, George Mason University School of Law.
[a] Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002).
[1] The elements of a prima facie claim for negligence are duty, breach, cause in fact, proximate cause, and damages. A duty owed by the defendant must be determined by the court to exist before the other elements of the claim are considered. *See, e.g.*, WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS 217-18 (2d ed. 2009).
[2] W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91B.U. L. REV. 1873, 1875 (2011) [hereinafter Cardi, *Hidden Legacy*].
[3] *See* DAN B. DOBBS, THE LAW OF TORTS § 253 (2000) ("In spite of the fundamental im-

judicial and scholarly debate is the question of how the relational dynamic between the plaintiff and the defendant at the time of the alleged tort bears on the issue of whether the defendant owed the plaintiff a duty of care.[4] This question has dimensions of both scope and measure.[5]

Questions of scope generally concern the broadness of the population and the wideness of the range of harms that come under the duty of care. For example, does everyone owe everyone else an obligation to take care to avoid causing physical harm in general? Or do particular groups of people owe other particular groups of people an obligation to avoid causing particular types of injuries? Intertwined with questions of scope, questions of measure seek to identify the factors that define the scope of duty. In other words, do social expectations, reasonable foreseeability, or some combination of factors delineate the boundaries within which the parties and harms must fall for a duty of care to exist? In tackling these various questions, both scholarship and case law reveal deep conceptual differences about the proper role of duty in the law of negligence.[6]

In recent years, the drafting and publication of the Restatement (Third) of Torts[7] and the surrounding exchange among three groups of tort scholars have generated a renewed interest in the longstand-

---

portance of duty, lawyers and judges have used the term in a variety of different ways, not always with the same meaning."); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 698-723 (2001) [hereinafter Goldberg & Zipursky, *Place of Duty*] (discussing four different ways courts apply the duty element of negligence liability).

[4] *See, e.g.*, W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 710-21 (2008) [hereinafter Cardi & Green, *Duty Wars*]; Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 699-709; *see also* Dilan A. Esper & Gregory C. Keating, *Putting "Duty" in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1241-46 (2008) [hereinafter, Esper & Keating, *A Reply*].

[5] DOBBS, *supra* note 3, § 253.

[6] *Compare* Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928) (Cardozo, J., majority opinion) ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation[.]"), *with id.* at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."); *see also infra* text accompanying notes 8-26 for a description of a more contemporary version of the duty debate on which this paper focuses.

[7] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010) [hereinafter RESTATEMENT 3D].

ing duty debate.[8] On the view of John Goldberg and Benjamin Zipursky, the primary sense in which negligence law conceptualizes the duty of care is as a relational obligation owed by particular persons to other particular persons to avoid causing particular kinds of harm – including non-physical harms such as economic loss and emotional distress.[9] According to Goldberg and Zipursky, only if there is such a circumscribed relation between the defendant and the plaintiff does the law recognize a duty of care.[10] They maintain that discerning whether such a relation is present in a given case involves tracing modern societal notions about the care that people owe to one another.[11] They suggest that in performing this task, the foreseeability to the defendant of the harm suffered by the plaintiff is important, but not the only consideration for courts to take into account.[12]

Like Goldberg and Zipursky, Dilan Esper and Gregory Keating also see the duty of care as a relational obligation running from one defined class of people to another.[13] However, Esper and Keating understand duty as being properly informed solely by the concept of foreseeability.[14] On their understanding, the sole purpose of the duty element is to filter out those exceptional cases in which a duty does not exist because the plaintiff's injury was unforeseeable. In proposing a conception under which an actor owes an obligation of care to a broad class of people, Esper and Keating view duty as only "minimally relational."[15] Injuries are rarely so unforeseeable that no care need be taken to prevent them, and thus almost any prospect of harm is sufficient to trigger a duty of care.[16] Esper and Keating also emphasize that the duty of care encompasses harms only to the phys-

---

[8] *See* Cardi & Green, *Duty Wars*, *supra* note 4, at 682-731.

[9] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 699-709.

[10] John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson 146 U. PA. L. REV. 1733, 1838 (1998) [hereinafter Goldberg & Zipursky, *Moral of* MacPherson]; Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727-28.

[11] Goldberg & Zipursky, *Moral of* MacPherson, *supra* note 10, at 1744.

[12] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 727-28.

[13] Esper & Keating, *A Reply*, *supra* note 4, at 1241.

[14] *Id.* at 1232.

[15] *Id.* at 1242.

[16] *Id.* at 1232.

ical integrity of one's person.[17]

Unlike Goldberg and Zipursky, and Esper and Keating, the Third Restatement and its proponents Jonathan Cardi and Michael Green[18] see the duty of care as an obligation owed to an indefinitely large number of people,[19] or as Judge Andrews put it in his dissent in *Palsgraf v. Long Island Railroad*, "the world at large."[20] Because on this view, the duty is not owed to any confined class of people, large or small, Cardi and Green emphasize that duty is nonrelational.[21] The Third Restatement maintains that the presence of a duty of care to avoid creating an unreasonable risk of physical harm – that is, harm to someone else's person or property[22] – should be presumed in every case as a substantive rule.[23] To the extent that courts render no-duty

---

[17] *Id.* at 1236, 1259.

[18] Professor Green was a co-reporter for the Third Restatement and was instrumental in drafting its provisions on duty. *See* Cardi & Green, *Duty Wars*, *supra* note 4, at 672 n.5.

[19] *See* RESTATEMENT 3D, *supra* note 7, at §7 reporter's note, cmt. a (discussing Justice Holmes's dictum that tort law involves duties "of all the world to all the world" and the "development of a duty of reasonable care owed to all [that] was critical to the emergence of tort as a discrete subject of law in the 19th century"); Cardi & Green, *Duty Wars*, *supra* note 4, at 713 ("Courts properly decide most duty questions – particularly where the defendant created a risk of harm – from a *nonrelational* perspective, leaving questions of relationality for the jury to contend with in the context of cause in fact and proximate cause." (emphasis added)).

[20] Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J. dissenting):

> The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm, might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

[21] *See* Cardi & Green, *Duty Wars*, *supra* note 4, at 712-13.

[22] The term "physical harm," as used throughout this paper, means injuries to one's person or property. *See* RESTATEMENT 3D, *supra* note 7, at § 4 ("'Physical harm' means the physical impairment of the human body ('bodily harm') or of real property or tangible property ('property damage')."); DOBBS, *supra* note 3, § 120 ("[T]he core of negligence law is about injury to persons and to tangible property.").

[23] RESTATEMENT 3D, *supra* note 7, at § 7(a) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 770 (2005) [hereinafter Cardi, *Purging Foreseeability*]:

> [C]ourts have long recognized the general principle that one must avoid causing physical injury to others. What is revolutionary (if subtly so) about Section 7(a) is that it restates this general principle as black letter law. The ALI thereby urges

or modified-duty decisions, including those extending liability for non-physical harm,[24] they should do so only in special circumstances based on categorically applicable principles or policies.[25] The Third Restatement also emphasizes that the concept of foreseeability should play no part in courts' duty determinations.[26]

This paper defends the world-at-large view by proposing a conception of the duty of care as a duty in rem – an obligation owed to people in general (rather than to some defined class) by virtue of every person's ownership of some particular "thing."[27] Part I advances an understanding of the duty of care as a risk-based obligation arising out of the fact that we live in a world in which freedom is scarce. Because any person's free pursuit of his own interests necessarily comes with costs in the form of risks of physical harm to others, negligence law strikes a balance between freedom and security by expecting people to take reasonable care in their actions. This Part also appeals to the works of property scholars James Penner, Thomas Merrill, and Henry Smith to provide an overview of two types of normative systems for facilitating the social interactions in which people take part as they pursue their various ends. An in rem system sets rights and duties through the intermediary of a "thing,"

> courts to embrace the Section 7(a) duty standard not merely as a default inclination, but as a substantive rule from which courts should depart only in exceptional circumstances.

[24] *See* RESTATEMENT 3D, *supra* note 7, at § 7 cmt. m ("Recovery for stand-alone emotional harm is more circumscribed than when physical harm occurs. These limitations are often reflected in no- (or limited-) duty rules that limit liability.").

[25] *See id.* § 7 cmt. j:

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

[26] *See id.* ("These reasons of policy and principle do not depend on the foreseeability of harm based on the specific facts of a case. They should be articulated directly without obscuring references to foreseeability."); Cardi, *Purging Foreseeability*, *supra* note 23, at 774-804 (arguing for the adoption by courts of the duty provisions of the Third Restatement and discussing the benefits of such adoption).

[27] JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 25-31 (2000); *see also* BLACK'S LAW DICTIONARY 864 (9th ed. 2009) (defining "in rem" as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing. – Also termed (archaically) *impersonal*."). The phrase "in rem" is Latin for "against a thing." *Id.*

while an in personam system sets rights and duties directly between defined classes of people.[28]

Part II then explains why the duty of care is best conceived as a duty in rem. Under the conditions of scarcity of freedom in modern society, a person follows his interests within a population comprised of a large number of people who are generally not connected to each other in any socially meaningful way. In such a world – the world of negligence – a duty of care situated within an in rem normative system based on every person's ownership of his "thing" of personal freedom optimizes the information costs associated with establishing rights and duties between private parties so as to best facilitate social interaction. Understood this way, the duty of care is also meaningfully owed to other people as a moral obligation without reference to a defined class.

Finally, Part III returns to the views of Goldberg and Zipursky, and Esper and Keating, for a closer examination. Part III challenges these views by arguing that to different degrees, they conceive the duty of care as an in personam obligation. The essential flaw of an in personam conception of the duty of care is that it tethers its requisite delineation of classes of rightholders and dutyholders to the particular facts of each case. This approach is problematic because it prevents a principled understanding of the duty of care as an issue of law.

I.
NORMATIVE SYSTEMS AND THE SCARCITY OF FREEDOM

A. The Scarcity of Freedom

Tort treatises and casebooks observe that the duty of care is a general obligation to avoid creating a certain degree of risk of physical harm to others.[29] Grounded in the creation of such risk, the

[28] PENNER, *supra* note 27, at 25-31; *see also* BLACK'S LAW DICTIONARY, *supra* note 27, at 862 (defining "in personam" as "1. Involving or determining the personal rights and obligations of the parties. 2. (Of a legal action) brought against a person rather than property. – Also termed *personal*."). The phrase "in personam" is Latin for "against a person." *Id.*

[29] *See, e.g.*, RESTATEMENT 3D, *supra* note 7, § 7(a); DOBBS, *supra* note 3, § 251; FARNS-

duty is understood to be imposed ordinarily by the law on any affirmative actor.[30] However, in a world of two or more people, every person, in engaging in any affirmative act, necessarily creates some risk of physical harm to all of the other people.[31] This risk is costly because it undermines the ability of these other people to act in the pursuit of their own personal ends. Put differently, freedom is scarce because a person's exercise of it is not free.[32] The law of negligence, in recognizing a person's liberty to act and use his property in the pursuit of his interests, does not impose a duty to take all possible care to avoid harm to others.[33] But neither does the law omit all obligation to take care since it recognizes the equal right of others to a certain degree of security in their persons and their property so they, too, may freely pursue their ends.[34] Rather, the law strikes a natural balance between freedom and security by recognizing a duty to take that level of care that is reasonable.[35] Therefore, at its core, the governance of social interactions by the duty of care and the right to security in one's person and property is anchored to the basic problem presented by an infinity of personal pursuits in a world of limited freedom.[36]

WORTH & GRADY, *supra* note 1, at 218; MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 129 (9th ed. 2011).

[30] RESTATEMENT 3D, *supra* note 7, at § 7 cmt. a ("[A]ctors engaging in conduct that creates risks to others have a duty to exercise reasonable care to avoid causing physical harm."); FARNSWORTH & GRADY, *supra* note 1, at 218 ("[T]he law generally imposes duties of care on people when they engage in affirmative acts").

[31] *See* Arthur Ripstein, *Philosophy of Tort Law*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, 656, 662-63 (Jules L. Coleman & Scott Shapiro eds., 2004) ("If a risk is not inappropriate . . . its costs simply lie where they fall; it is one of the risks of ordinary life, as opposed to a risk that one person imposes on another.").

[32] *See* HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS4 (2d ed. 2006) ("Scarcity means that our behavior is constrained because we live in a world of limited resources and unlimited desires.").

[33] *See* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 42-43 (1934) ("Before the law every man is entitled to the enjoyment of unfettered freedom so long as his conduct does not interfere with the equal liberty of others." (quoting THOMAS BEVEN, NEGLIGENCE IN LAW 7-8 (4th ed. 1928)).

[34] *See id.*.

[35] *Id.* at 43; Ripstein, *supra* note 31, at 663.

[36] *See* Winfield, *supra* note 3333, at 42-43.

B. Rights and Duties In Rem

James Penner emphasizes that the core feature of a right in rem is that the right is vested in a person by virtue of that person's dominion over some resource, or "thing."[37] In modern society, an in rem right avails against an indefinitely large expanse of people because a person's dominion over a given "thing" communicates to all other people not to interfere with the rightholder's use and control of it.[38] Accordingly, each person also owes a single, reciprocal duty of abstention to an indefinitely large class of rightholders by virtue of their ownership of different resources.[39] An implication of this broad indiscreteness is that rights and duties in rem take on a highly impersonal quality. As Thomas Merrill and Henry Smith illustrate:

> [I]f A sells Blackacre to B, this does not result in any change in the duties of third parties W, X, Y, or Z toward Blackacre. Those duties shift silently from A to B without any requirement that W, X, Y, or Z be aware of the transfer, or even of the identities of A or B.[40]

In other words, any individual characteristic of the in rem rightholder is irrelevant to the dutyholder with regard to the fulfillment of his obligation. As the only connection that the dutyholder has with the rightholder is through the "thing" over which the rightholder has dominion, all that matters to the dutyholder is that the "thing" is owned; who owns it is immaterial.[41] Therefore, while an in rem system lays out rights and duties between separate persons, any individual characteristic of these persons have no bearing on what the right consists of or what the duty requires.[42]

---

[37] PENNER, *supra* note 27, at 25-31; *see also* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 786-87 (2001) [hereinafter Merrill & Smith, *Property/Contract Interface*] (further explicating the qualitative distinction that Professor Penner draws between in rem and in personam relations based on the former's, but not the latter's, dependence on the existence of a "thing").
[38] PENNER, *supra* note 27, at 29-30.
[39] *Id.* at 27; Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 788.
[40] Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 787.
[41] PENNER, *supra* note 27, at 27.
[42] *Id.* at 26.

The impersonal nature of an in rem system arises from the exclusionary method of resource allocation that the system applies. An exclusion strategy first identifies a resource, and then specifies a person as the resource's owner.[43] As rightholder and manager of the whole resource, the owner enjoys the authority to use, divide, or distribute it at his discretion.[44] This authority also means that by default, the owner may forbid any person from any use of the resource.[45] Since the right thereby avails against all people, the boundaries of the right and the corresponding duty must be simply and generally defined.[46] The upshot of this exclusionary strategy is a normative system that centers on the total "thingness" of a resource rather than the individual ways a resource can be utilized.[47]

C. Rights and Duties In Personam

Qualitatively distinct from rights and duties in rem are rights and duties in personam.[48] While a right in rem attaches to a large and indefinite class of people through an intermediate "thing," a right in personam attaches directly to a particular person or class of persons.[49] Correspondingly, the obligation of an in personam dutyholder runs only to the particular person or class who holds the in personam right.[50] Furthermore, while the directness of in personam relations does not mean that right and duties cannot involve a "thing," it does mean that the existence of these rights and duties is

---

[43] Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 790-91 (contrasting usage-based in personam rights with exclusion-based in rem rights).
[44] *Id.*
[45] *Id.*
[46] *Id.* at 791; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 24-42 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*] (proposing that the in rem nature of property rights underlies why *numerus clausus* – the principle that rights must conform to a closed number of forms – applies to property law, but not contract law).
[47] Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 787.
[48] *Id.* at 784-87; PENNER, *supra* note 27, at 25-31.
[49] PENNER, *supra* note 27, at 25-31; Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 784-87.
[50] PENNER, *supra* note 27, at 27.

not contingent on any "thing."[51] This is because a right in personam specifies the persons against whom the right avails rather than identifying the "thing" that is involved.[52] It is for this reason that a borrower's loss of the book that he owes back to the owner who lent it to him does not extinguish the owner's right against the borrower to have the book returned.[53] Since the measure of in personam rights and duties singles out the rightholder and dutyholder from the rest of the world,[54] identity beyond basic personhood is essential. When a person borrows a book from another person, a unique duty arises in the former, *as borrower*, to return the book to the latter, *as lender*.

Under an in personam normative system, the resource to which the system is applied is viewed in terms of its different uses rather than its unitary "thingness." This is because an in personam system is employed not through the exclusion strategy of an in rem system, but through a governance strategy under which the whole of a resource is sliced into narrower use rights.[55] Accordingly, this strategy entitles a defined class of people to engage with a resource in some particular way and also defines the class against whom this right avails.[56] Thus, the nuances of a particular use, rather than a general rule, define the boundaries of the right-duty relation.[57] Consequently, an in personam system gives rise to a relatively detailed description of what a specific use of the resource entails, as well as of the identities of the rightholders and dutyholders whose relation to each other is predicated on this use.[58]

---

[51] *Id.* at 26-27.
[52] *Id.* at 30.
[53] *Cf. id.* at 30 (quoting P.B.H. BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 49-50 (1985):

> If you come under the obligation to give me the cow Daisy . . . it will be impossible to infer from the nature of the right . . . that Daisy's disappearance . . . will discharge my claim. After all I can still find you and it is still not nonsense for me to maintain that you ought to give me Daisy . . . .

[54] *Id.* at 29.
[55] Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 790-91.
[56] *Id.*
[57] *Id.* at 791.
[58] *Id.*

D. Information Costs

Merrill and Smith have written extensively on how the law tends towards either an in rem or in personam system depending on which best minimizes the information costs that certain rights and duties produce.[59] From the perspective of a rightholder, these costs entail the burdens of delineating and communicating the right so that it may be heeded by the relevant dutyholders.[60] From the perspective of a dutyholder, the costs are comprised of the expenditures borne in identifying and understanding the relevant right.[61] Merrill and Smith observe that when the number of people are few and confined, efficiency allows for greater complexity in the specification of rights and duties since the burden of exercising them is borne only by a small and determinate group of people.[62] Under such circumstances, an in personam system that allows rightholders and dutyholders to divvy up a resource into particular uses helps to optimize the resource's utility by fostering a variety of customized pursuits at a minimal cost.[63] However, as the population increases in number, diversity, and anonymity, the information costs people must bear become better controlled by a simpler and more general delineation of rights and duties that is easily understandable to a vast array of people.[64] In these situations, cost-effective resource allocation tends to shift towards an in rem system in which the limits of right and duty conform to the boundaries of the entire resource.[65]

---

[59] *See id.* at 790-99; Merrill & Smith, *Numerus Clausus*, *supra* note 46, at 24-34; Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849,1853-57 (2007) [hereinafter Merrill & Smith, *Morality of Property*].

[60] Merrill & Smith, *Numerus Clausus*, *supra* note 46, at 26-28.

[61] *Id.*

[62] Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 797-99.

[63] *Id.*

[64] *Id.* at 792-97.

[65] *Id.*

II.
THE DUTY OF CARE AS A DUTY IN REM

A. Moral and Functional Dimensions

In light of the foregoing comparisons, the duty of care in negligence law is properly conceived as a duty in rem. The world of negligence is a large and impersonal one, comprised of accidents arising out of a vast network of transient interactions that have little to do with any distinctive qualities of the parties involved.[66] Imagine how an in personam system would operate in such a world. Each person, as part of a specific class of dutyholders, would owe an obligation of care tailored to a specific class of rightholders. The measure by which these classes are defined would have to be based on circumstantial facts since the interaction between the rightholder and dutyholder is otherwise nondescript. Such a system would designate to each person moving about in the world the impossible task of recognizing the fleeting presence of an endless number of specific groups of people, defined in an infinite variety of ways, in order to observe his duty. In other words, the informational burden of adhering to the duty of care while also pursing one's own interests would be prohibitively high.[67] As a result, the duty of care would be stripped of its functional value as a norm for the ordering of a society in which a vast array of people pursue a vast array of ends.[68]

---

[66] *See* Vernon Palmer, *Why Privity Entered Tort – An Historical Reexamination of* Winterbottom v. Wright, 27 AM. J. LEGAL HIST. 85, 87-88 n.9 (1983) (observing that the origins of negligence in tort can be traced back to the mid-17th century when "the action on the case started to shed an old privity restriction . . . and was thereby enabled to become a nonrelational remedy for accidents between strangers.").

[67] *See* Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 795 ("[I]n a world that lack[s] such [a simple and universal] organizing idea, [a] citizen [ ] would have great difficulty following the rules . . . . He would have to acquire a detailed knowledge of the rules for each resource and of his rights, powers, liberties, and duties in relation to it.").

[68] *See id.* ("[E]xclusion rules, and in particular in rem legal rights, are a critical part of the 'social glue' that allows any group of individuals of any size and complexity to function on a day-to-day basis." (citing BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116 (1977)); PENNER, *supra* note 27, at 30 ("Norms in rem establish the general, impersonal practices upon which modern societies largely depend. They allow strangers to interact with each other in a rule-governed way, though their dealings are not personal in any sig-

That functional value demands foundations in a common moral understanding that guides, and therefore *precedes*, the actions of all people in society.[69] Because the cost of legal enforcement is high in such a large and diverse world, a legal regime not rooted in the strength of shared and internalized fundamental values that exist at the outset of social engagement is bound to disintegrate.[70] An in personam duty of care suffers from exactly that problem. There may be certain incidental circumstances that are sufficiently compelling to justify an assumption of social consensus about the concrete actions that morality demands or prohibits in those particular circumstances.[71] But those circumstances arise spontaneously *during the course* of social interaction. In other words, the ad hoc nature of determining whether a duty of care exists based on moral assumptions rooted in the facts of specific informal situations fails to reflect the simple and general morality on which viable norms in an impersonal world must be based.[72] In an in rem system, on the other hand, the duty of care is supported by a common moral value in the form of the "thing" of personal freedom to which every person is equally and exclusively entitled at the outset of his pursuits.[73] By basing the duty

nificant respect.").

[69] *See* Merrill & Smith, *Morality of Property*, *supra* note 59, at 1854 (explaining that a legal system of rights and duties in rem must align with common moral values to be sustainable).

[70] *See id.*

[71] *See, e.g.*, Lauer v. city of New York, 733 N.E.2d 184 (N.Y. 2000). The facts of *Lauer* involved a father who was mistakenly identified as the chief suspect in an investigation of his son's death because of a report by the city's medical examiner erroneously concluding that his death was a homicide – an error which the examiner failed to disclose when he became aware of his mistake. 733 N.E.2d at 186. The duty issue was whether the examiner owed a duty to the father to disclose the error to city authorities. *Id.* at 188. Mainly for policy reasons, the court held he did not. *Id.* The court noted, however, that "[w]ere the issue solely one of 'humanistic intuition' or 'moral duty,' the result might well be otherwise." *Id.*. at 190. *See also infra* Part III.B for an analysis of Goldberg and Zipursky's take on this case.

[72] *See* Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 250-51 (2012):

> For the moral particularist, the moral relevance of any feature depends on the context of the one case, features thereby have variable relevance, and "a feature that is a reason in one case may be no reason at all, or an opposite reason, in another." By this view, moral considerations are decided "on a case by case basis."

[73] *See* Merrill & Smith, *Property/Contract Interface*, *supra* note 37, at 795.

of care on the total "thingness" of personal freedom, duty's normative force becomes tied to the moral deference to be accorded by every person to every other person's exclusive dominion over the free pursuit of his ends, irrespective of circumstance.[74] The duty of care is thereby instilled with the broad and robust normative force it needs to function amidst the vast impersonality of the world of negligence.[75]

B. Delineating the "Thing" of Personal Freedom

Inasmuch as negligence law expects people to take a level of care in their actions that is reasonable,[76] delineating the "thing" of personal freedom entails defining its boundaries with a shared notion of reasonable care. Defining the boundary of personal freedom this way precludes an account of duty that is based on a precise formula to determine if an action will create an unacceptable risk of harm.[77] For in a large and varied society, it is impossible to reduce a norm to an exact calculus so as to guide people in a rigorous, mechanistic way.[78] As such, the boundary of reasonable care that delineates the

---

[74] PENNER, *supra* note 27, at 26.

[75] Merrill & Smith, *Morality of Property*, *supra* note 59, at 1850-51.

[76] *See supra* Part I.A.

[77] *See* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, 201, 219-20 (David G. Owen ed., 1997):

> Actors must make thousands of choices every day, in which numerous potential abstract interests of known and unknown persons too numerous to count must be identified, valued (in terms of worth and risk), and balanced against a similarly vast set of outcomes desired . . . . There can be no safety absolutes in such a rugged, real-world context . . . .

Stephen R. Perry, *Risk, Harm, and Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra*, at 321, 325-26 (contrasting probability judgments "employing sophisticated statistical techniques, [which] might be particularly appropriate for scientific inquiry" with "the intuitive probability judgments of a reasonable person, [which] might be more suitable for determining moral responsibility" and which is "not coincidentally, reminiscent of the understanding of risk to be found in tort law"); Esper & Keating, *A Reply*, *supra* note 4, at 1229 (acknowledging that the notion of reasonable care at the heart of duty in negligence law "is an extension and special application of the 'intuitive moral idea' of reasonableness").

[78] *See supra* note 77; *see also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) ("[L]egal duties are not discoverable facts of nature . . . ."); William L.

resource of personal freedom is not a hard line, but a broad territory paved with a general layer of knowledge about how a person should behave across a range of situations. This means that the specific actions that do or do not constitute reasonable care will vary according to the circumstances.

However, this relativity does not mean that the boundary lacks the clarity it needs to effectuate an in rem system. It may be futile to try to concretely describe a concept of reasonable care that is applicable to all people in all possible instances of negligence. But from a broader perspective, engagement with society equips people with an intuitive gauge of risk calibrated by "[socially] accepted standards of inductive reasoning and rational belief."[79] Different individuals may take different actions even when presented with similar situations. But these actions may all coherently fall within the proper exercise of personal freedom because there is an intelligible way to navigate the rough-and-tumble of day-to-day life, even if that way is not an exact science. Experientially rooted, an intuitive knowledge of reasonable behavior gives the duty of care meaningful content by simply and generally defining the "thing" of personal freedom. The resistance to substantive particularity of an inherently general concept such as the duty of care[80] does not render the concept vacuous.[81]

Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 13-15 (1953) (examining various judicial attempts to reduce duty to a formula and concluding that such attempts have amounted to "shifting sands and no fit foundation").

[79] Perry, *supra* note 77, at 343; *see also* Cardi, *Purging Foreseeability*, *supra* note 23, at 752-53 ("Most agree, however, that community consensus regarding day-to-day obligations is an important consideration in the duty analysis.").

[80] *See* Dobbs, *supra* note 3, § 253 ("Because [duty rulings] are rules of law having the quality of generality, they should not be merely masks for decisions in particular cases . . . ."); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 282 (2006) ("Duty doctrine, properly deployed, assigns to judges the decidedly legal task of articulating the law – of stating general norms for the guidance of conduct." (citing, *inter alia*, LON L. FULLER, THE MORALITY OF LAW 33-62, 46 (rev. ed. 1969) ("The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality."))).

[81] *Contra* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 708, 730, 736 (arguing that a nonrelational, world-at-large view of the duty of care is "trivial" and "empty").

C. Special Cases: From In Rem to In Personam in Settled and Confined Relationships

Certainly as particular interactions become more recurrent in society, it may grow easier to implement duties requiring care of a more tailored and formulaic quality. With the number of people smaller and individual identity easier to discern, the cost of delineating rights and duties is reduced, making it more feasible to customize them based on the higher quality of information available for exchange between the parties to the interaction.[82] The "principle or policy" exception that the Third Restatement carves out of the general duty of care is consistent with this reasoning to the extent that it recognizes that sometimes, "because of [liability's] impact on a substantial slice of social relations[,] [c]ourts appropriately address whether such liability should be permitted as a matter of duty."[83] Accordingly, the Third Restatement acknowledges, for example, the imposition on certain sports competitors only the limited duty to refrain from engaging in recklessly dangerous conduct,[84] or on common carriers the expanded duty of "the utmost" or "highest" care for the safety of its passengers.[85] In addition to these relations, tort law is replete with other formal relationships to which special rights and duties are ascribed based on firmly entrenched norms of social responsibility.[86] For example, the law has traditionally im-

---

[82] *See supra* Part I.D.

[83] RESTATEMENT 3D, *supra* note 7, at § 7 cmt. a.

[84] *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 712 (Cal. 1992) (holding that a participant in a social game of touch football, who may have been reckless or over-exuberant, did not breach any legal duty); Feld v. Borkowski, 790 N.W.2d 72, 78 (Iowa 2010) (holding that liability of the batter in a softball game requires reckless conduct rather than ordinary negligence).

[85] *See, e.g.*, Markwell v. Whinery's Real Estate, Inc., 869 P.2d 840, 845 (Okla. 1994) (quoting state statutory provision that "[a] carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill" (citation omitted)); Bridges v. Parrish 742 S.E.2d 794, 797 (N.C. 2013) ("[C]ommon carriers owe a duty 'to provide for the safe conveyance of their passengers as far as human care and foresight can go.' " (citation omitted)).

[86] *See, e.g.,* RESTATEMENT 3D, *supra* note 7, at § 7 cmt. c ("In deciding whether to adopt a no-duty rule, courts often rely on general social norms of responsibility."). Some examples of other special relationships that prompt modifications of the general duty of care include doctor-patient, carrier-passenger, innkeeper-guest, and social-host-guest. *See* DOBBS, *supra*

posed on landowners specialized duties towards persons who come onto their property, duties that also vary depending on whether that person is a trespasser, licensee, or invitee.[87] Similarly, in a relationship between custodian and ward, the custodian's duty of care can assume such great particularity that the duty may be codified by statute to require specific acts such as supplying the ward with food, clothing, shelter, and medical arrangements.[88]

The foregoing kinds of relations, unlike the circumstantial interactions with which negligence is primarily concerned, are sufficiently settled and confined in society to justify their formalization in law with usage-based duties carved out of the "thing" of personal freedom. The low-cost, high-level information exchange that gives rise to the unique mutual understandings on which these special relations are built – understandings about how each party is expected to tailor the use of his personal freedom in these distinct contexts – take the relations out of the realm of fact and put them into the realm of form, thereby supporting the relations' legal status.

D. From Special Cases to "Gross Fictions": In Personam in an Impersonal World

In contrast to these specialized cases, in a network of interactions between myriad informally connected strangers, rightholder A is just as anonymous to the dutyholder as is rightholder B or C. In other words, any socially meaningful distinctiveness of a particular interaction fades as the interaction become more impersonal. As this occurs, rights and duties in personam grow normatively tenuous because any measure of distinguishing certain interactions from others becomes increasingly fact-specific. In effect, personal freedom is severed into multiple usage-based rights that differ from each other

note 3, §§ 258-270.

[87] *See* Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1049 (2009) (describing the delineation, and critique, of common law duties to invitees, licensees, and trespassers). *But see* Rowland v. Christian, 443 P.2d 561 (Cal. 1968) (eliminating the different duties of care owed by landowners to trespassers, licensees, and invitees, and replacing with a general duty of care).

[88] *See, e.g.*, OR. REV. STAT. § 419B.373 (2011).

depending on incidental circumstances. It is morphed into a patchwork of relationships, each resting on nothing more than a fleeting encounter.[89] This belies the very foundation of the duty of care as an element of liability originating in law as opposed to privity.[90] By suggesting that specialized rights and duties between a plaintiff and a defendant can be discovered in the incidental circumstances surrounding the harm at issue, efforts to apply an in personam system in the world of negligence manipulates torts between strangers into "contracts" by using "gross fictions to make it seem that there was a meeting of minds between [the parties]."[91]

In sum, a meaningful notion of the duty of care is best captured by an in rem normative system.[92] Negligence in modern society arises out of a large network of freely moving actors who are not familiar with each other in any socially meaningful way. As such, a normative system that seeks to protect a person's ability to act in the pursuit of his ends while ensuring the ability of all other persons to do the same, solidifies when built on a simple and general conception of personal freedom as an exclusively managed, holistic "thing." Taking personal freedom as the measure of the duty of care, it follows that the duty is owed to people in general or "the world at large."

III.
RELATIONAL DUTY AS A DUTY IN PERSONAM

A. Departing from the General Duty of Reasonable Care

While Goldberg and Zipursky, and Esper and Keating, see duty as a relational concept concerning obligations owed by one discrete class of people to another,[93] they also acknowledge the

---

[89] *Cf.* Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) (tracing the intellectual shift from a conception of property as a single, distinct in rem right, to that of a cluster of in personam rights or a "bundle of rights").

[90] *See supra* note 66.

[91] *Id.* at 90.

[92] *Contra* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 678 (arguing that the Third Restatement fails to provide a meaningful conception of duty).

[93] *See supra* INTRODUCTION.

presence, at a basic level, of a general duty of care owed by everyone to everyone else.[94] But despite sharing this conceptual starting point, these two pairs of scholars quickly diverge from each other and from the Third Restatement.

Goldberg and Zipursky claim that it is a mistake to think about the general duty of care as a "duty to the world" because such a notion suggests "an obligation to behave reasonably, period – an obligation owed to no particular persons or class of persons."[95] They argue that it may "be appropriate to describe the class as in some sense including each person in the world – but that fact does not render the concept analytically nonrelational [because][t]he defendant still owes a duty to some defined class of plaintiffs.[96]

Similarly, Esper and Keating assert that duty is "relational in the sense that it is owed . . . by each of us to everyone else," but that within this sphere, "duty in negligence law is only minimally relational"[97] since it exists so long as "one person's actions put another person at reasonably foreseeable risk of physical injury."[98] According to Esper and Keating, "[w]e cannot reasonably be asked to guard against harms that we cannot reasonably be expected to foresee."[99]

On this point, however, Esper and Keating also part ways with Goldberg and Zipursky by claiming that while duty in negligence law "is relational in the sense that it is owed to others and not to some impersonal value,"[100] this relationality neither "requires [n]or entails inquiry into the details of the relations between plaintiff and defendant."[101] Unlike Goldberg and Zipursky, Esper and Keating maintain that duty in negligence law is preoccupied with physical injury to one's person (not emotional distress or economic harm) and that foreseeability is duty's only legitimate substantive qualification (not

[94] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 705; Esper & Keating, *A Reply*, *supra* note 4, at 1242.
[95] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.
[96] *Id.* at 707.
[97] Esper & Keating, *A Reply*, *supra* note 4, at 1242.
[98] *Id.*
[99] *Id.* at 1233-34.
[100] *Id.*
[101] *Id.* at 1242.

one of many).[102] In short, Esper and Keating take issue with the strong particularity of Goldberg and Zipursky's notion of relationality. But their differences notwithstanding, both pairs of scholars fail to persuade because of the in personam character of their theories.

B. Goldberg and Zipursky

Goldberg and Zipursky acknowledge that duty law is "something of a mess."[103] They claim, however, that the case law reveals an enduring, primary concern for a relational duty of care that the world-at-large view fails to capture.[104] They argue that a duty to the world represents nothing more than the idea that a defendant's acts will be judged against a legal standard of conduct without regard to any defined class of people,[105] and serves as a mere stand-in for policy decisions with "no real conceptual space to occupy within the tort."[106] These arguments, however, are unconvincing for several reasons.

First, the strongly relational, primary sense of duty that Goldberg and Zipursky argue the language of the case law reflects fails to convey any real law that a jurisprudential account of duty can capture. As generality and normativity are definitional components of law,[107] duty's disintegration appears to be the result of over a century of particularized decisions purporting to provide guidance to a sea of strangers by issuing categorical rulings of "law" that are actually confined to specific incidental circumstances. Because in a world of strangers, high information costs prevent fact-specific rulings from being instilled with any normative quality, efforts to extract from these rulings a coherent, restatable jurisprudence appears to be a fruitless exercise. For example, a person is provided little guidance in being told that when he is driving, he "owe[s] [a] general dut[y] of care to other drivers but 'no duty' to change lanes when traveling at a legal speed in either the No. 2 or No. 3 lane of a four-

[102] Esper & Keating, *A Reply*, *supra* note 4, at 1242

[103] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 736.

[104] *Id.* at 707.

[105] *Id.* at 706.

[106] *Id.* at 708-09.

[107] *See supra* note 80.

lane freeway at night, on dry pavement, in light traffic and clear weather."[108] Where such opacity characterizes the state of the law, it is well within the province of a restatement to do "no more than [what] every jurist of the past has individually done" by recommending the adoption of one of multiple competing rules or theories.[109]

Moreover, a duty to "the world," conceived as a duty in rem, does not entail "negligence in the air"[110] as Goldberg and Zipursky suggest.[111] Of course,"[i]n an empty world negligence would not exist."[112] But acknowledgement of this fact concedes the relationality of negligence *liability*, not *duty*.[113] As Judge Andrews argued in his *Palsgraf* dissent, duty and breach may exist absent any damage:

> "Should we drive down Broadway at a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. . . . It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there – a wrong to the public at large."[114]

---

[108] Esper & Keating, *A Reply*, *supra* note 4, at 1226-27 (citing Monreal v. Tobin, 72 Cal. Rptr. 2d 168, 176 (Ct. App. 1998)). Esper & Keating also cite other similar examples of highly particularized duty decisions including *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 518 (Ct. App. 1997), which held that mass transit agencies owe a general duty of care to passengers exiting and entering trains, but "no duty" to an inebriated passenger whom it has escorted off the train once he is on the platform; and *Ky. Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1262 (Cal. 1997), which held that businesses owe general duties of care to protect customers on their premises from assault at the hands of third parties but "no duty" to protect a customer's life by "comply[ing] with the unlawful demand of an armed robber that property be surrendered." *Id.*

[109] *See* Arthur Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 27 (1929).

[110] Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928).

[111] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 706.

[112] *Palsgraf*, 162 N.E. at 102 (Andrews, J. dissenting).

[113] *See* Cardi & Green, *Duty Wars*, *supra* note 4, at 712 ("[A]lthough negligence liability is necessarily relational, the element of duty is not.").

[114] *Palsgraf*, 162 N.E. at 102; *see also* PENNER, *supra* note 27, at 29 n.38:

> [T]he defendant's liability to compensate others who suffer by his lack of care is restricted to those individuals whose harms *have actually occurred* and are ones which a reasonable man would foresee as occurring due to the defendant's lack of care. The primary duty, however, identifies no specific class of people.

To assert that everyone owes a duty of care to the world at large is not, as Goldberg and Zipursky suggest, to "fallacious[ly] jump"[115] from the idea that duty does not rest on contract or some other formal relationship, to the notion that duty is somehow not owed to other people.[116] For the world-at-large view, understood as in rem, does not contemplate that negligence occurs in a vacuum, but only that the duty of care is owed to other people through the medium of the same holistic "thing" each person controls. Given that the breakdown of privity as a bar to early common law actions is what gave birth to negligence as a distinct cause of action,[117] the absence of any relation between plaintiff and defendant is precisely what makes negligence, negligence.

Finally, the conflation of duty with policy considerations – which Goldberg and Zipursky identify as a major deficiency of the world-at-large view[118] – is actually perpetuated by their own strongly relational understanding. Goldberg and Zipursky offer the case of *Lauer v. City of New York*[119] as their signature illustration of how framing the question of duty can influence whether a court decides the question in its primary sense or instead as a stand-in for what are actually policy conclusions extraneous to any substantive notion of obligation.[120] In *Lauer*, a father sued for emotional distress when he was mistakenly identified as the chief suspect in an investigation into the death of his son as a result of a report by the city's medical examiner erroneously concluding that the death was a homicide – an error which the examiner failed to disclose when he became aware of his mistake.[121] The court held that the examiner could not be found liable because he owed no duty of care to the father.[122] Affected prominently by concerns about overexposing defendants to liability, the court emphasized that it "must be mindful of the precedential,

[115] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 708-09.
[116] *Id.*
[117] *See supra* note 66.
[118] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.
[119] 733 N.E.2d 184 (N.Y. 2000).
[137] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.
[121] 733 N.E. 2d at 186.
[122] *Id.* at 189.

and consequential, future effects of [its] rulings, and 'limit the legal consequences of wrongs to a controllable degree.' "[123]

Goldberg and Zipursky challenge *Lauer* on the ground that its holding was motivated by concerns about opening the floodgates of litigation – a policy concern irrelevant to the intuitive moral idea of being obligated to behave in a particular way to particular persons.[124] They argue that if the court had confronted the point that a medical examiner, who knows his report will subject a person to criminal investigation, should be mindful of the profound effect of the report's accuracy on the person's life, then the court could have easily arrived at the conclusion that "the examiner has an obligation to provide the suspect with the relief from the false prosecution that the examiner helped initiate and alone was situated to halt."[125] To be sure, Goldberg and Zipursky concede that even if the court in *Lauer* had considered the duty question in a strongly relational sense instead of as a mere stand-in for policy concerns, the court's duty decision might still have been the same.[126] Nevertheless, they "see no reason to doubt that the framing of the question bore on how it was resolved."[127]

However, even if it is assumed that the policy concern underlying the duty question in *Lauer* was dispositive, such concerns are invited into the duty inquiry by the strongly relational view that Goldberg and Zipursky advance. Because the duty of care, on this view, has no categorical boundary in law, it becomes conceptually inundated with variables foreign to any substantive notion of obligation, including factual particulars, judicial policy preferences, and concerns about opening the floodgates of litigation. On this analysis, it is perhaps telling that the court's understanding of duty in *Lauer* reflected a strongly relational view. The court emphasized the need for "the equation [to] be balanced" between "[f]ixing the orbit of

[123] *Id.* at 187 (internal citations omitted).
[124] Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 733-34.
[125] *Id.*
[126] *Id.*
[127] *Id.*

duty"[128] and insuring against over-litigation – the need for "the damaged plaintiff [to] be able to point the finger of responsibility at a defendant owing, *not a general duty to society, but a specific duty to him*."[129]

None of this is to say that policy has absolutely no role to play in making duty decisions. Indeed, Goldberg and Zipursky, Esper and Keating, and Cardi and Green all acknowledge the unavoidability of certain prudential concerns such as over-litigation and judicial economy that, while having little to do with any substantive notion of obligation, must be factored into the analysis if duty is to be institutionalized, adjudicated, and enforced.[130] But because of the in personam quality it tries to attach to the transient and impersonal nature of negligence, a strongly relational view offers no law to protect duty from being swallowed by prudential considerations and other ancillary factors. Contrarily, by predicating the duty of care on a simply and generally defined "thing," an in rem system distinctly partitions substantive notions of duty from ancillary concers, thereby defending against the very conceptual conflation that Goldberg and Zipursky seek to avoid.

Because every person is susceptible to negligent behavior simply by the exercise of freedom in a crowded world, Goldberg and Zipursky's amorphous, highly particularized approach, even if attempting to trace ordinary moral thought,[131] fails to reflect the simple and general morality necessary to give viability to a norm that

---

[128] 733 N.E. 2d 184, 187 (N.Y. 2000).

[129] *Id.* at 188 (emphasis added).

[130] *See* Cardi & Green, *Duty Wars*, *supra* note 4, at 704-05 ("[T]here are, at times, demands on law that it take a certain form that renders it efficacious, capable of being internalized, and amenable to application by judges . . . ." (quoting John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1586 (2006))); Esper & Keating, *A Reply*, *supra* note 4, at 1246 ("[W]e think that instrumental considerations do figure in negligence law and properly so in many circumstances."); *see also* Cardi & Green, *Duty Wars*, *supra* note 4, at 707 n.217 (listing other tort scholars who concur that extraneous policy considerations have at least some proper role to play in courts' duty determinations).

[131] *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 693; Goldberg & Zipursky, *Moral of* MacPherson, *supra* note 10, at 1742.

guides a large and varied population.[132] Goldberg and Zipursky thus attempt to clean up the "mess" of duty law[133] by the very means that makes it.

C. Esper and Keating

Esper and Keating, though espousing a notion of duty that is only minimally relational and limited to physical personal injury, nevertheless fail to convince for many of the same reasons as Goldberg and Zipursky. The relationality of Esper and Keating's understanding requires, as the sole substantive condition for a finding of duty, that the risk of physical injury to the plaintiff merely have been reasonably foreseeable to the defendant[134] – a condition that apparently generalizes duty far beyond Goldberg and Zipursky's understanding. However, a lone foreseeability requirement quickly collapses the law of duty into a particularized analysis much like the strongly relational view.[135] This is because while Esper and Keating emphasize the generality of the duty of care as an element of law,[136] they fail to specify any "thing" on which this generality is predicated. Rather, by conditioning the existence of duty on foreseeability at all[137] – a condition even the regular satisfaction of which will depend on the context of each given case[138] – Esper and Keating predicate duty on the same sort of situational connection between the plaintiff and the defendant as Goldberg and Zipursky's strongly relational analysis.

Although Esper and Keating sympathize with the argument for severing duty from foreseeability – conceding that doing so "might well flush out judicial abuses of power masked by the doctrine that

---

[132] *See supra* notes 69-75 and accompanying text.

[133] *See* Goldberg & Zipursky, *Place of Duty*, *supra* note 3, at 736.

[134] Esper & Keating, *A Reply*, *supra* note 4, at 1232.

[135] *See* Cardi, *Hidden Legacy*, *supra* note 2, at 1885-86 (explaining that in both practice and in theory, the foreseeability inquiry lacks generality because the inquiry necessarily turns on particular classifications or facts).

[136] Esper & Keating, *A Reply*, *supra* note 4, at 1225.

[137] *Id.* at 1232.

[138] *See infra* text accompanying notes 160-64 for discussion of *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, 100 S.W.3d 715 (Ark. 2003), in which the court, while relying only on the question of foreseeability in deciding duty, nevertheless considered the case's particular facts in rendering its decision.

duty is a question of law for the courts"[139] – they ultimately urge against it, claiming that it presents two major problems.[140] One alleged problem is that severing duty from foreseeability ignores modern case law, under which foreseeability plays a vital role in courts' duty determinations.[141] But as Cardi and Green have argued, foreseeability is inevitably abused by the courts when infused with the element of duty as a question of law.[142] For unlike rights and duties based in some "thing," Esper and Keating's foreseeability restraint provides little in the way of a principled concept to protect duty against inundation by judicial policy preferences.[143] Because there is no qualitative difference between the strongly relational and minimally relational views, Esper and Keating's unspecified insistence that "duty rulings should be rare"[144] serves as a mere verbal barrier against the same fact-heavy analysis and judicial abuse that they denounce. With no real law to summarize, a purely descriptive restatement of modern duty decisions is "an unattainable goal."[145] Foreseeability having led the law hopelessly astray,[146] the Third Restatement wisely and faithfully returns to duty's foundations in asserting a world-at-large view.

Nevertheless, Esper and Keating claim that a second major problem with eliminating foreseeability from duty is that doing so holds people legally responsible for failing to prevent harms they could not have anticipated.[147] In effect, they argue that foreseeability's eradication from the duty of care raises information costs to such a degree that compliance with the duty is rendered impossible in those situations in which a person cannot foresee the consequences of his actions.

---

[139] *See* Esper & Keating, *A Reply*, *supra* note 4, at 1232-33.
[140] *Id.* at 1233.
[141] *Id.*
[142] Cardi & Green, *Duty Wars*, *supra* note 4, at 724-25.
[143] *See* Cardi, *Hidden Legacy*, *supra* note 2, at 1896 (attributing the "inherent instability" of foreseeability in part to the lack of any principle by which to define its scope).
[144] Esper & Keating, *A Reply*, *supra* note 4, at 1225.
[145] Cardi & Green, *Duty Wars*, *supra* note 4, at 726.
[146] *See* DOBBS, *supra* note 3, § 256 (listing six primary objections to determining duty based on foreseeability).
[147] Esper & Keating, *A Reply*, *supra* note 4, at 1234.

However, whether a person has an obligation is only one question in the broader inquiry of whether that person is liable.[148] In this regard, Esper and Keating's concern that the Third Restatement's position "holds people responsible for failing to prevent harms they could not reasonably have anticipated"[149] makes more sense in the wider context of liability rather than duty.[150] Indeed, Esper and Keating themselves stress that duty's definitional component of reasonable care is an extension of the concept of reasonableness, the adjudication of which is best left to the jury.[151] If this is the case, it would seem to follow that reasonable foreseeability should also be left to the jury instead of bridling the universal scope of a basic moral obligation.[152]

For example, Esper and Keating offer the case of *Monreal v. Tobin*[153]to illustrate that strongly particular duty decisions, which they reprove, fail to articulate any serious rules about when a duty of care exists.[154] In that case, involving a highway collision, the court held that a driver traveling at the posted speed limit at night, in light traffic, and under clear weather conditions, owes no duty to other vehicles on the highway to change lanes when another driver approaches him from behind at a speed exceeding the posted limit.[155] Esper and Keating argue that this holding distorts the underlying moral intuition that it likely tries to capture – that all things considered, the defendant acted reasonably by not changing lanes as the plaintiffs alleged he should have.[156] Esper and Keating reason that

---

[148] *See* Palsgraf v. Long Island R.R., 162 N.E. 99,102 (N.Y. 1928) (Andrews, J. dissenting) ("The measure of the defendant's duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another." (quoting Spade v. Lynn & B.R. Co., 52 N.E. 747, 748 (Mass. 1899)).

[149] Esper & Keating, *A Reply*, *supra* note 4, at 1234.

[150] *See supra* notes 113-14 and accompanying text.

[151] Esper & Keating, *A Reply*, *supra* note 4, at 1229 ("[T]he idea of 'reasonable' care at the heart of negligence law is an extension and special application of the 'intuitive moral idea' of 'reasonableness.'").

[152] *See id.* at 1240, 1244-45, 1255 (referring to the general duty of care as "a matter of genuine moral obligation" "predicated on our common status as human beings").

[153] 72 Cal. Rptr. 2d 168 (Cal. Ct. App. 1998).

[154] Esper & Keating, *A Reply, supra* note 4, at 1227-28.

[155] *Monreal*, 72 Cal. Rptr. 2d at 176.

[156] Esper & Keating, *A Reply, supra* note 4, at 1228.

the court's duty ruling distorts this moral intuition because the intuition suggests not that the defendant had no obligation of care under the circumstances, but simply that he was not at fault.[157]

But in deciding there was no duty, *Monreal* gave major consideration to the foreseeability of the injuries the plaintiffs suffered as the alleged result of the defendant not changing lanes.[158] The court concluded that it was not reasonably foreseeable that the defendant's failure to change lanes would result in the death of the plaintiffs' decedents because a reasonably prudent person in the defendant's situation (1) would have reasonably assumed that a driver behind him would pass on the adjacent lane pursuant to traffic regulations, and (2) would not have anticipated that this driver would cause the defendant's vehicle to collide with the car in front of him.[159] Yet, Esper and Keating offer no explanation for why this foreseeability determination does not also distort the highly plausible underlying intuition that the defendant simply acted reasonably in not changing lanes.

Esper and Keating may reply that *Monreal* followed a strongly relational approach instead of considering *only* whether the harm suffered was unforeseeable such that no duty could be said to exist.[160] However, there is no reason to suppose that the court would not have engaged in the same sort of particularized analysis even if it followed Esper and Keating's "generalized" approach. For example, in *Coca-Cola Bottling Co. of Memphis, Tenn. v. Gill*, the court, in basing duty solely on the question of foreseeability,[161] held that the owner of a concessions trailer owed a duty of care to a school custodian who was electrocuted when he came into contact with the trailer

[157] *Id.*
[158] 72 Cal. Rptr. 2d at 176-78.
[159] *Id.* at 178.
[160] The court in *Monreal* followed a balancing test in making its duty decision, giving consideration to a multitude of factors including "the foreseeability of harm to the plaintiff, the degree of certainty the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, . . . and the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 176-77 (internal citation and quotation marks omitted).
[161] *See* Cardi, *Hidden Legacy*, *supra* note 2, at 1888 & n.42 (identifying handful of states that base duty only on the question of foreseeability).

which the school had rented.[162] In so holding, the court found relevant, among other things, that the owner "had significantly changed the trailer's electrical system that first had the two-plug, 50-amp cord," and "had chosen not to install an auxiliary ground system using the eight-foot metal rod and, indeed, had removed the lug nut on the trailer's tongue."[163] Determining, based on these circumstances, that there was a foreseeable risk that members of the public like the plaintiff would be injured if the concessions trailer was improperly grounded, the court held that the duty element had been satisfied.[164] Cases like *Coca-Cola* demonstrate that lacking any principled definition, the question of foreseeability, no matter how supposedly generalized, is vacuous without factual particularities to inform it. The question, therefore, is best adjudicated outside the element of duty.

The purported problem that duty without foreseeability awkwardly expects people to take into account what they cannot anticipate actually stems from the relationality of Esper and Keating's view. By maintaining that the question of whether or not a duty exists traces the question of whether or not a risk of injury is foreseeable, Esper and Keating invent the very same information-cost problem that they implicitly try to solve. Put differently, they, like Goldberg and Zipursky, fallaciously treat the duty of care as if it were some item to be discovered through the application of a test – an obligation residing in only certain situations.[165] By contrast, an in rem conception of duty avoids this artificial problem in the first instance. In the context of negligence, where the law must give normative guidance to a sea of freely moving actors, information costs are optimized through a set of rights and duties that attach not directly to these actors by virtue of their interrelations, but through the intermediary of a "thing" that each of them exclusively controls. However, because Esper and Keating, like Goldberg and Zipursky, view even the general duty of care as an obligation encompassing a

[162] 100 S.W.3d 715, 723-25 (Ark. 2003).
[163] *Id.* at 725.
[164] *Id.*
[165] *See supra* note 78.

set of relations directly between defined classes of people,[166] they set foot on a slippery slope from the very outset of their analysis.

CONCLUSION

The Third Restatement does not explicitly endorse an in rem understanding of the duty of care. However, the rule that it articulates, which completely extracts foreseeability and any other particularized analysis from the duty question, is rooted in the very genesis of negligence as a discrete subject of law – a genesis to which the development of a duty owed by "all the world to all the world" was foundational.[167] Contrary to the suggestion of Restatement critics, a duty to the world at large does not entail a nihilistic view under which duty offers no substantive concept of obligation and serves as a mere instrument for issuing policy driven decisions. Rather, properly conceived, a duty to the world is a duty owed to people at large by virtue of the exclusive and moral dominion every person is entitled to exercise over his personal freedom. By measuring the scope of duty on the basis of the "thing" of personal freedom, an in rem conception provides the normative guidance necessary to facilitate the conduct of a vast and anonymous network of people who necessarily impose risks of physical harm on each other in pursing their various ends.

• • •

[166] *See supra* text accompanying notes 93-98.

[167] *See* RESTATEMENT 3D, *supra* note 7, at § 7 reporter's note, cmt. a; *see also* Palmer, *supra* note 66, at 87-88 n.9.

DISCRETION TO TAX E-DISCOVERY COSTS

A NECESSARY REFORM?

Corey Patrick Teitz[†]
with a Preface by Rhonda Wasserman[*]

PREFACE

Corey Teitz's paper was written for my Electronic Discovery Seminar. In the seminar, I attempt to expose students to the law and rapidly changing technology that have transformed modern-day discovery. For the first eight weeks of the course, I introduce students to the most important cases and rules regulating electronic discovery; to new practices designed to facilitate such discovery, such as e-discovery special master programs and predictive coding; and to articles that explore some of the provocative issues surrounding e-discovery. I bring in guest lecturers – both lawyers and technical experts – who introduce students to the *practice* of e-discovery and offer them a hands-on lesson with an e-discovery review platform.

For his final paper in the seminar, Teitz chose to write about e-discovery costs and cost-shifting. As the volume of electronic discovery has skyrocketed and its costs have spiraled, litigants have sought to shift these costs onto their adversaries. Teitz asks whether Federal Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920 permit the taxation of e-discovery costs against the losing party at the conclusion of a lawsuit. After identifying the various stages of e-discovery and the associated costs, Teitz scrutinizes the text of Rule 54(d) and section 1920. He evaluates alternative

† J.D. 2014, University of Pittsburgh School of Law.
* Professor of Law and Buchanan, Ingersoll & Rooney Faculty Scholar, University of Pittsburgh School of Law. Preface © Rhonda Wasserman, 2014.

interpretations of these texts offered by courts, and analyzes a recent Supreme Court decision that supports a narrow reading of the statute. Teitz proposes an amendment to section 1920 to permit greater cost-shifting, which he believes will create incentives for cooperation in e-discovery, reduce overly broad discovery requests, and ultimately reduce the cost of e-discovery.

• • •

I. INTRODUCTION

This paper proposes that federal district courts should have discretion to tax electronic discovery ("e-discovery") costs to a losing party in any litigation. An amendment to section 1920 of Title 28 of the United States Code ("section 1920") is necessary in order to grant this discretion to the courts. The amendment would represent a slight shift away from the traditional "American Rule" that each party pays its own costs in civil litigation. However, this shift is necessary due to the prevalence and ever-increasing costs of e-discovery in modern litigation.

Part II of this Note will discuss how discovery costs have been taxed historically, and the interplay between Rule 54(d) of the Federal Rules of Civil Procedure and section 1920. Part III will discuss how electronically stored information ("ESI") has affected discovery processes and describe the costs involved with producing ESI in the e-discovery context. Part IV will analyze the alternative approaches that lower federal courts have taken in taxing e-discovery costs and will show that the narrow approach is most consistent with recent Supreme Court precedent.[1] Part V will discuss the benefits of an

[1] A few other articles have identified the alternative approaches taken by courts, but have either advocated narrowing, rather than broadening, the availability of taxation of e-discovery costs, or have neglected the relevance of the recent Supreme Court precedent of *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012). *See, e.g.*, Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235 (2012) (advocating narrow approach, based on *Taniguchi*); Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a "Loser Pays" Rule for E-*

amendment to section 1920 and will address how the potential chilling effect this amendment may have on parties can be mitigated.

II. DISCOVERY AND TAXATION OF COSTS HISTORICALLY

Discovery is a pretrial phase of litigation that allows each party to request and obtain information from the opposing party.[2] Prior to the advent of e-discovery, production of documents meant actually handing over physical copies of documents after manually screening them for relevance and privilege. The traditional "American Rule" is that each party pays its own costs of litigation, including the costs involved with requesting and producing information during discovery.[3] Limited exceptions to this rule have been established over time through amendments to the Federal Rules of Civil Procedure and related federal statutes.[4] The following two subsections discuss how these exceptions were applied to litigation prior to the advent of e-discovery.

A. Federal Rule of Civil Procedure 54(d)

Rule 54(d) governs costs that may be taxed to a losing party after a trial has been conducted and the court enters judgment in a case. The rule states: "Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party."[5] This rule seems to grant district courts broad discretion in allowing all costs other than attorney's fees. However, the Supreme Court has announced that this discretion

---

Discovery Costs, 60 CLEV. ST. L. REV. 1103 (2013) (advocating narrow approach, without mentioning *Taniguchi*); Emily P. Overfield, Comment, *Shifting the E-Discovery Solution: Why* Taniguchi *Necessitates a Decline in E-Discovery Court Costs*, 118 PENN. ST. L. REV. 217 (2013) (advocating narrow approach, based on *Taniguchi*).

[2] BLACK'S LAW DICTIONARY 533 (9th ed. 2009) (*s.v.* discovery).

[3] 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2665 (3d ed. 1998 & Supp. 2012).

[4] *See* 28 U.S.C. § 1920 (2012); FED. R. CIV. P. 54.

[5] FED. R. CIV. P. 54(d)(1).

is limited by federal statute. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* the Court held that the discretion to tax costs allowed by Rule 54(d) is limited to the categories of costs enumerated in section 1920.[6]

B. Federal Statute Allowing for Taxation of Costs: 28 U.S.C. § 1920

Section 1920 lists six categories of costs that are taxable to the losing party in a case.[7] The only relevant category for the purpose of this Note is found in section 1920(4): "Fees for the exemplification and the cost of making copies of any materials where the copies are necessarily obtained for use in the case." Exemplification means an authenticated copy of a document from public records that may be used in the case.[8] Accordingly, this phrase has no relevance in determining whether courts have discretion to tax e-discovery costs to a losing party. Courts that have decided cases dealing with this issue have focused exclusively on whether e-discovery costs are taxable under the "cost of making copies" language of section 1920.[9]

Prior to its amendment in 2008, section 1920(4) allowed for only "the cost of making copies of papers," but this section was broadened to allow for the cost of making copies of electronic documents.[10] Some federal district courts have interpreted the 2008 amendments to mean that all costs involved with e-discovery are taxable to the losing party.[11] Part IV will explain why the broad approach of taxing all e-discovery costs is incorrect in light of recent Supreme Court precedent. First, however, a quick overview of e-discovery itself is necessary.

---

[6] *See* 482 U.S. 437, 441-42 (1987) ("Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).").
[7] 28 U.S.C. § 1920(1)-(6) (2012).
[8] BLACK'S LAW DICTIONARY 653 (9th ed. 2009).
[9] *See infra* Parts IV.A & IV.B.
[10] Joshua A. Haft, Note *Section 1920 and E-Discovery*, 74 U. PITT. L. REV. 359, 370 (2012).
[11] *See infra* Part IV.A.

III.
THE RISE OF ESI AND E-DISCOVERY

Advances in technology over the last several decades have led to a rapid increase in the amount of ESI in existence. The sheer volume of ESI has made it impossible for parties to conduct discovery in the manner originally contemplated by the Federal Rules of Civil Procedure (copying or printing paper documents and manual review). For example, in 2011 the total amount of ESI created worldwide surpassed 1.8 zettabytes (1.8 trillion gigabytes).[12] This is the digital equivalent of 500 million billion files or 200 billion high definition movies (assuming a two-hour runtime for each).[13] To provide further illustration, this amount of information would fill 57.5 billion Apple iPads, each with thirty-two gigabytes of storage.[14] The amount of ESI generated worldwide has more than doubled every two years throughout the last decade and this trend is expected to continue for the foreseeable future.[15] Because of this rapid increase in ESI, e-discovery has become the dominant form of discovery.

A. Costs Involved with Producing ESI

There are many costs involved with the various phases of e-discovery. Generally speaking, litigants categorize costs into three categories: collecting, processing, and reviewing.[16]

1. Collecting

This phase involves identifying custodians and sources of relevant ESI and collecting that ESI. "Collecting" can mean making a digital copy of the relevant ESI on physical media or moving it to a secure

---

[12] JOHN GANTZ & DAVID REINSEL, INT'L DATA CORP. 2011 DIGITAL UNIVERSE STUDY, EXTRACTING VALUE FROM CHAOS 1 (June 2011), *available at* perma.cc/NY4M-T36N.

[13] Press Release, EMC Corp., World's Data More than Doubling Every Two Years – Driving Big Data Opportunity, New IT Roles (June 28, 2011), *available at* perma.cc/C2YK-VMWM.

[14] *Id.*

[15] GANTZ & REINSEL, *supra* note 12, at 1.

[16] NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, 12-13 (2012), *available at* perma.cc/TN8R-S7FH.

server or cloud server. Collection can be difficult and costly when a party requests information that is stored only on archival or backup tapes.[17] Costs also increase depending on the number of custodians holding relevant ESI and the number of sources of ESI.[18] In a recent study of large corporate litigants, collection was found to be the least costly for litigants, consuming less than eight percent of e-discovery expenditures on average.[19]

2. Processing

The processing phase involves several potential steps to make the ESI easier to review. These steps can include restoration of damaged files, conversion of files to a more usable format, indexing or cataloging files, decrypting secure files, as well as de-NISTing,[20] de-duplication, and validation.[21] This phase requires technical expertise, and many litigants hire outside vendors to process their collected data.[22] Processing consumes nineteen percent of e-discovery expenditures on average.[23]

3. Reviewing

Reviewing is the final phase of e-discovery prior to production. Review can occur either manually or through the use of technology assisted review, also known as predictive coding.[24] If the review is manual, attorneys or experienced legal assistants review each piece

---

[17] *Id.* at 22.
[18] *Id.*
[19] *Id.* at xiv, 20.
[20] De-NISTing involves removing all files that are in a database maintained by the National Software Reference Library, a project of the National Institute of Standards and Technology (NIST). These are common files that are found on most computers, such as word processing or internet browsing applications. It is unnecessary to preserve these standard files for review. *See* NAT'L SOFTWARE REFERENCE LIBRARY, *available at* perma.cc/V8HV-JEL6 (archived Aug. 27, 2014).
[21] *Processing Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL, perma.cc/G7WV-AHFQ (archived July 13, 2014).
[22] PACE & ZAKARAS, *supra* note 16, at 38.
[23] *Id.* at 42.
[24] Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, *3-4 (2011).

of ESI to determine whether it is relevant and whether it is privileged.[25] This is a labor-intensive process, which is why this is the most expensive phase of e-discovery. On average, review consumes seventy-three percent of total litigant expenditures on e-discovery[26].

Predictive coding is not widely used, and until recently no court approved it as an acceptable review practice.[27] The process involves manual review by an experienced attorney in conjunction with a computer that can "learn" what is relevant to the case based on the responses of the attorney.[28] This has the potential to save litigants significant amounts of money because the attorney only needs to review a fraction of the total documents that would otherwise need to be manually reviewed.[29] Predictive coding is likely to gain traction in the future because of the potential cost savings and the fact that recent studies have shown that it is at least as efficient and effective as teams of manual reviewers.[30]

B. A Note on Costs

The study used by this paper to detail what percentage of costs is allocated to each phase of e-discovery relied on the self-reporting of costs by litigants.[31] One major cost driver that was not reported by litigants is the cost of preservation of ESI. The reason for failing to report this cost is twofold. First, the cost of preservation is usually incurred internally, which means that a litigant has already incurred the costs of the people and equipment needed for preservation.[32] Second, there is no clear standard defining what costs should be classified as preservation expenses rather than ordinary business expenses.[33]

---

[25] *Id.*
[26] PACE & ZAKARAS, *supra* note 16, at 41-42.
[27] *See* Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) (endorsing, for the first time in federal case law, the use of predictive coding as an appropriate method of reviewing ESI).
[28] *Id.* at 183-84.
[29] *Id.*
[30] Grossman & Cormack, *supra* note 24, at *3.
[31] PACE & ZAKARAS, *supra* note 16, at 5.
[32] *Id*. at 85-86.
[33] *Id.*

While these costs are not well tracked or managed, some litigants estimated that preservation costs were greater than the costs of collecting, processing and reviewing combined.[34] Concerns about these costs have led to a proposed amendment to Federal Rule of Civil Procedure 37(e).[35] The proposed amendment provides greater guidance as to when a duty to preserve begins and what must be preserved, and also provides safe harbor to litigants who attempt to preserve in good faith.[36] This paper proposes that the cost of preservation should be taxable just as any other cost of e-discovery, provided that the litigant seeking recovery tracks the cost so that the court has a reasonable basis to make an award.

C. Overall Costs and Projection of Future Costs

The global e-discovery market was valued at $3.6 billion in 2010, $3.0 billion of which was attributable to the United States market.[37] The market is expected to grow to $9.9 billion by 2017, with $7.2 billion attributed to the United States.[38] The likely reason that the American market for e-discovery products and services dwarfs the rest of the world is the tradition of allowing broad discovery. While this was a boon for attorneys in the days of manual discovery and paper documents, it is now a boon to e-discovery vendors instead.

Attorneys recognize that e-discovery has become unnecessarily expensive.[39] Costs have been described as skyrocketing, exploding, and spiraling.[40] Some attorneys have called for wholesale discovery reform because of the costs involved with e-discovery.[41] While the

---

[34] *Id*. at 87-88.
[35] COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 314-28 (2013).
[36] *Id.*
[37] TRANSPARENCY MARKET RESEARCH, EDISCOVERY (SOFTWARE AND SERVICE) MARKET: GLOBAL SCENARIO, TRENDS, INDUSTRY ANALYSIS, SIZE, SHARE AND FORECAST, 2010-2017, at 4 (2011), *available at* perma.cc/TAT3-5EAN.
[38] *Id.*
[39] PACE & ZAKARAS, *supra* note 16, at 1.
[40] *Id.*
[41] *Id.*

need for some change is obvious, this paper proposes that an overall reduction in e-discovery costs can be achieved through less radical means than wholesale discovery reform.

The next section discusses how courts have taxed e-discovery costs in recent cases and argues that the narrow approach to taxing costs is correct under current Supreme Court precedent.

IV.
APPLICATION OF FRCP 54(D) AND § 1920 TO E-DISCOVERY

The federal district courts have used two distinct approaches when deciding whether the costs of e-discovery should be taxed to the losing party: the broad approach and the narrow approach.[42] These approaches stand in opposition to each other. The broad approach allows the winning party to recover all costs associated with e-discovery.[43] The narrow approach allows for recovery of only a small subset of costs involved with e-discovery: the actual costs of duplicating a native electronic document or the costs of converting an electronic document to a PDF, TIFF, or other requested form.[44] These competing approaches are explained in detail below, and subsection C will explain why the narrow approach is the correct approach.

A. The Broad Approach

Three cases decided after the 2008 amendment to section 1920 espouse the broad approach to taxing e-discovery costs. The first is *CBT Flint Partners, LLC v. Return Path, Inc.,* decided in 2009 by the United States District Court for the Northern District of Georgia.[45]

---

[42] *See* Hoelting, *supra* note 1, at 1119-22.
[43] *Id.* at 1121.
[44] *Id.* at 1119-22. PDFs and TIFFs are the two most-used file formats for the production of ESI. These formats allow the requesting party to view a file as an un-editable static image and also usually include a text-searchability function for ease of use.
[45] 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *vacated on other grounds*, 654 F.3d 1353 (Fed. Cir. 2011).

There, the court allowed the taxation of $243,453.02 in fees paid to the defendant's e-discovery vendor in response to plaintiff's discovery requests.[46] The fees were for services including collecting, searching, identifying and producing relevant documents.[47] The court's reasoning was based on the facts that plaintiff requested a "massive quantity" of data (over 1.4 million documents) and that the services performed in culling this data were not the type of services normally performed by an attorney in the course of discovery.[48] The court also mentioned in its justification for allowing taxation that the use of an e-discovery vendor most likely reduced the overall cost of discovery in the case.[49] The court did not state whether the fees for these services were equivalent to "fees for exemplification or the cost of making copies" for use in the case. Only these or equivalent costs are taxable under § 1920.

The second case supporting the broad approach is *In re Aspartame Litigation*, decided in 2011 by the United States District Court for the Eastern District of Pennsylvania.[50] In that case the court allowed several defendants to recover costs related to collecting, preserving, processing, sorting, de-duplicating, converting, reviewing and privilege-screening electronic documents.[51] The court relied on reasoning similar to that in *CBT Flint Partners* to justify taxing these costs: there was a massive amount of data involved, the parties agreed that e-discovery was appropriate, the functions performed were not those typically performed by a lawyer in the context of discovery, and the services performed reduced the overall cost of discovery.[52] The court, like the *CBT Flint* court, did not attempt to reconcile its decision with the statutory language of section 1920.

Lastly, *In re Ricoh Co., Ltd. Patent Litigation* suggests that the United States Court of Appeals for the Federal Circuit may support the

---

[46] *Id.* at 1380-81.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] 817 F. Supp. 2d 608 (E.D. Pa. 2011).
[51] *Id.* at 614-16.
[52] *Id.*

broad approach to taxing e-discovery costs.[53] In that case the court stated, "The act of producing documents is not so narrowly construed as to cover only printing and Bates-labeling a document."[54] The court also noted that it did not consider the costs of hosting an online database for document review "to fall into the unrecoverable category of 'intellectual efforts.'"[55] The court did not ultimately decide the question of whether these costs could be properly taxed under section 1920, because the parties in the case entered into a detailed fourteen-page cost sharing agreement prior to trial and the Federal Circuit held that the district court erred awarding costs to the winning party because the agreement was controlling.[56] The court's reasoning, however, suggests that it would have upheld the district court's taxing of costs to the losing party in the absence of the cost-sharing agreement.

B. The Narrow Approach

Several federal district court cases decided after the 2008 amendments to section 1920 support the narrow approach to taxing e-discovery costs,[57] as do two recent decisions from the Courts of Appeals. This section focuses on these two recent decisions as illustrations of the narrow approach.

In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.,* the Third Circuit held that decisions allowing taxation of essentially all costs involved with e-discovery "are untethered from the statutory mooring" of section 1920.[58] The court also pointed out that saving costs is not an appropriate basis for allowing taxation of costs and that section 1920(4) authorizes only the taxation of costs for exemplifica-

---

[53] 661 F.3d 1361 (Fed. Cir. 2011).
[54] *Id.* at 1365.
[55] *Id.*
[56] *Id.* at 1366-67.
[57] *E.g.*, Fast Memory Erase, LLC v. Spansion, Inc., No. 3-10-CV-0481-M-BD, 2010 WL 5093945 at *5-6 (N.D. Tex. Nov. 10, 2010); Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632 at *5-6 (S.D. Tex. May 26, 2009); Fells v. Va. Dep't of Transp., 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).
[58] 674 F.3d 158, 169 (3rd Cir. 2012).

tion or making copies.[59] The court upheld the district court's taxation of costs for converting ESI into TIFFs and for converting VHS tapes to DVDs.[60] These services were viewed as the digital equivalent of making paper copies; therefore taxing these costs was not an abuse of discretion.[61] But, the court held, the district court *did* abuse its discretion in taxing $95,210.13 in vendor costs for collecting, searching, identifying, and producing electronic documents because they were not the equivalent of making paper copies.[62]

The second case is from the Fourth Circuit Court of Appeals. In *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, the district court adopted the Third Circuit's reasoning and allowed taxation only of the costs of TIFF and PDF conversion and the cost of copying the digital files to a compact disc.[63] The Fourth Circuit affirmed the district court's holding, citing to the plain meaning and legislative history of section 1920.[64] The court also cited Supreme Court case law holding that there is a presumption that the party producing information must bear the expense of production.[65] In this case the winning party was able to recover only $218.59 of $111,047.75 spent on e-discovery.[66]

C. The Narrow Approach is Correct Under Current Law

The previous discussion shows that federal courts have not yet reached a consensus as to whether the broad or narrow approach to taxing e-discovery costs is correct. However, a recent United States Supreme Court case involving a different subsection of section 1920 indicates that the narrow approach is correct.

---

[59] *Id.*
[60] *Id.* at 167-68.
[61] *Id.*
[62] *Id.* at 171-72.
[63] 718 F.3d 249, 253 (4th Cir. 2013); 28 U.S.C. 1920(6) allows district courts to tax as costs: "Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."
[64] *Id.* at 260.
[65] *Id.* at 261 (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).
[66] *Id.* at 252-53.

1. Recent Supreme Court Decision: Taniguchi v. Kan Pacific Saipan, Ltd.

Taniguchi involved section 1920(6), which specifically authorizes the compensation of interpreters as taxable costs.[67] The Court held that section 1920(6) should be read narrowly, and that costs for translation of written documents do not fall under the category of "compensation of interpreters."[68] The Court reviewed the legislative history[69] and amendments to section 1920 as well as the plain meaning of the word "interpreter." More directly relevant to the broader question of e-discovery, the Court also noted that its decision was "in keeping with the narrow scope of taxable costs" historically,[70] and that "taxable costs are limited by statute and are modest in scope." Thus it did not make sense to read a broad definition of "interpreter" into the statute.[71] The Court reasoned in addition that if Congress had intended costs of written translation to be taxable under section 1920(6) it would have stated so explicitly.[72]

2. *Taniguchi* Ratifies the Narrow Approach

The Supreme Court's decision in *Taniguchi* interpreted section 1920(6), not section 1920(4), but it is very unlikely that the Court would treat these subsections differently. One commentator has suggested that the Court's holding in *Taniguchi* is unrelated to the issue of taxing e-discovery costs and that the legislative history of the 2008 amendments to section 1920 supports the broad approach to taxing e-discovery costs.[73] Both of these propositions are incorrect. *Taniguchi*

---

[67] 132 S. Ct. 1997, 2000 (2012).
[68] *Id.* at 2006-07.
[69] One of the main reasons Congress passed the 1853 Fee Act was that losing litigants were facing exorbitant fees in some jurisdictions. The Fee Act was intended to be far-reaching and it specified the exact nature and amount of items that can be taxed in the federal courts. Costs that may be taxed to a losing litigant are limited to those specifically contained in the Fee Act and its successor, section 1920. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2001 (2012) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-48 (1975)).
[70] *Id.* at 2006.
[71] *Id.*
[72] *Id.* at 2006-07.
[73] *See* Haft, *supra* note 10, at 371 n.81.

is related to the issue of taxing e-discovery costs because the Supreme Court held that section 1920 as a whole, and not just section 1920(6), should be interpreted narrowly.[74] *Taniguchi* therefore provides insight into how the Supreme Court would likely interpret *any* provision under section 1920, including section 1920(4).[75] It is both reasonable and logical to assume that the Court would consistently apply this reasoning and interpret section 1920(4) narrowly when deciding a case involving e-discovery taxation issues.

In addition, the legislative history cited by the commentator as support for the broad approach to taxing e-discovery costs is both weak and inconclusive. There is no doubt that the 2008 amendments to section 1920(4) were intended by Congress to specifically account for some costs associated with e-discovery and that the amendment was titled "Assessment of Court Technology Costs."[76] However, these facts do not evidence a clear Congressional intent to break from the longstanding rule that taxable costs under section 1920 are narrow in their scope.[77] Finally, the commentator relies on the statements of a sole member of the House of Representatives as "strong evidence of congressional intent to allow the taxation of e-discovery costs, despite the legislative history's lack of clarity regarding the scope of taxation."[78] The Supreme Court has used statements made during Congressional hearings and debates as evidence of legislative intent.[79] But it is unlikely that the Court would

---

[74] 132 S. Ct. at 2006:

> Our decision is in keeping with the narrow scope of taxable costs. . . . Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts.

[75] Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 258 (4th Cir. 2013) ("Although the ordinary meaning of ['copies'] is expansive, its application is limited by the 'broader context of [§ 1920] as a whole.' The Supreme Court has observed that taxable costs under the statute are 'modest in scope' and 'limited to relatively minor, incidental expenses.'" (quoting *Taniguchi,* 132 S. Ct. at 2006; *In re Total Realty Mgmt., LLC,* 706 F.3d 245, 251 (4th Cir. 2013)).

[76] *See* Haft, *supra* note 10, at 370-71.

[77] *See Taniguchi*, 132 S. Ct. at 2006-07.

[78] *See* Haft, *supra* note 10, at 370-71.

[79] David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legisla-*

find the statements of one member from one branch of Congress to be strong enough evidence to control the interpretation of an admittedly ambiguous statute in a manner that overturns a longstanding rule requiring a narrow interpretation of section 1920. This is especially true considering that the statements themselves are vague and could reasonably be construed as supporting the narrow approach to taxing e-discovery costs.[80] Accordingly, it is very likely that the Supreme Court would apply the reasoning from *Taniguchi* and narrowly interpret section 1920 in a future case involving taxation of e-discovery costs.

3. Federal Cases Decided Subsequent to *Taniguchi* Support the Narrow Approach

The cases supporting the broad approach to taxing the costs of e-discovery were all decided prior to *Taniguchi*. The two cases decided after *Taniguchi* both support the narrow approach. The first case is *Country Vintner*, discussed above. In that case the Fourth Circuit relied heavily on the reasoning of the Third Circuit in *Race Tires*, but it did cite to *Taniguchi* for the proposition that the plain meaning of "making copies" should be applied.[81] While the Fourth Circuit did not recognize *Taniguchi* as a direct authority on this matter, it did ultimately reach the conclusion that the narrow approach is appropriate.[82]

---

tive History, 51 WM. & MARY L. REV. 1653, 1665 (2010).

[80] Haft states:

> Representative Zoe Lofgren of California urged the passage of "noncontroversial measures proposed by the judicial conference to improve efficiency in the [f]ederal courts." Representative Lofgren also specifically referenced the amendment to § 1920(4) in stating that one of the proposed statutory amendments "mak[es] electronically produced information coverable in court costs."

See Haft, *supra* note 10, at 370-71. The use of the word "noncontroversial" in the first statement could be interpreted to imply that the amendment is not designed to overturn the longstanding rule that section 1920 should be interpreted narrowly, as overturning the rule would likely lead to controversy. The use of the word "produced" in the second statement could be interpreted to mean that the amendment to section 1920 covers only costs for the production phase of e-discovery, not costs associated with collecting, processing, reviewing, or storing ESI.

[81] Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 258 (4th Cir. 2013).

[82] *Id.* at 261.

The second case decided subsequent to *Taniguchi* is *Ancora Technologies, Inc. v. Apple, Inc.*[83] In that case the United States District Court for the Northern District of California cited directly to *Taniguchi* in holding that storage and hosting costs involved with producing documents are not compensable under section 1920.[84] The district court stated that even though *Taniguchi* did not address the issue of taxing e-discovery costs, the Supreme Court put forth "the principle that section 1920 does not cover all costs that are necessarily incurred in litigation, but only a narrow subset."[85] Accordingly, the court reduced the clerk's order taxing costs by $71,611.52, the amount of fees for hosting the documents in the case.[86]

V.
PROPOSED AMENDMENT TO § 1920

In light of the Supreme Court's decision in *Taniguchi*, the federal district courts are likely to deny the taxation of e-discovery costs unless section 1920 is amended. After proposing specific language for such an amendment, I will consider arguments for and against adopting it.

A. Language of the Proposed Amendment

Below is my proposed amendment to section 1920. The amendment grants federal district judges broad discretion to tax costs related to e-discovery. It also contains provisions that mitigate the potential negative effects of such a rule. Parties can avoid application of this rule by entering into a cost sharing agreement. Losing parties will not be forced to pay the often-high costs of e-discovery if they are unable to do so. Lastly, federal district judges will also have the discretion not to tax e-discovery if justice so requires.

The proposed amendment to section 1920 provides:

---

[83] No. 11-CV-06357 YGR, 2013 WL 4532927 (N.D. Cal. Aug. 26, 2013).
[84] *Id.* at *3.
[85] *Id.*
[86] *Id.* at *4.

> § 1920. Taxation of costs. A judge or clerk of any court of the United States may tax as costs the following: . . .
>
> > (7) Fees for the production electronically stored information, including fees for collection, processing, and technology assisted review of such information. These fees may be taxed only if (a) there is no cost-sharing agreement regarding electronically stored information between the parties; (b) the losing party has the ability to pay such costs; and (c) it is in the interest of justice to tax such fees and costs."

B. Benefits of the Amendment

1. Encourages Cooperation Between Parties Before Discovery Begins

The Federal Rules of Civil Procedure, specifically Rules 16 and 26(f), require the parties to meet and confer regarding the scope of e-discovery.[87] These meetings have also been used recently to discuss the potential for sharing costs of e-discovery. An amendment to section 1920 allowing district courts to tax e-discovery costs fosters such agreements. It would create an incentive for requesting parties to work with the producing party to find the most cost-effective ways to meet the goals of the discovery request. It would also likely lead to more focused requests in cases in which the parties do not agree to a cost-sharing agreement because the requesting party will know that it might potentially be taxed for the full costs of producing ESI.

2. Promotes Cost-Effective E-Discovery Processes

Part III of this Note showed how litigants spend their money during e-discovery. Allowing courts to tax the costs of e-discovery would likely lead to more focused discovery requests, and costs of collection and processing would be reduced by a corresponding amount. Review constitutes the larges portion of e-discovery expenditures, at seventy-three percent on average.[88] Under the current system, a requesting party has an incentive to demand manual

[87] FED. R. CIV. P. 16(b)(3)(B)(iii), 16(c)(2)(F), 26(f).

[88] *See* PACE & ZAKARAS, *supra* note 16, at 42.

review, because that review drives up the costs of e-discovery and makes a settlement more appealing to the responding party. Allowing taxation would likely result in more parties agreeing to use predictive coding, because requesting parties would have an incentive to reduce the overall costs of e-discovery: the potential threat of being stuck with the bill. It has been shown that predictive coding is as efficient and effective as manual review, if not more so, while also being less expensive.[89] Review is by far the most expensive phase of e-discovery, and widespread adoption of predictive coding offers one of the most effective ways to reduce these costs.

3. Promotes the Fundamental Purpose of the Federal Rules of Civil Procedure

Those who oppose granting district courts the discretion to tax e-discovery costs often point to the "American Rule" that each side pays its own costs of litigation. They argue that allowing taxation of e-discovery costs will upset the fundamental balance of power in American law. While this might be true to some extent, allowing taxation of e-discovery costs would serve the fundamental purpose of the Federal Rules of Civil Procedure: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[90] As noted, allowing taxation would result in parties choosing more cost-effective e-discovery processes. It would also lead to more just results because it would impair a party's ability to use extensive e-discovery requests as a tool to force a settlement. Parties are less likely to pursue this strategy if there is a possibility that the costs involved with extensive production could be taxed to them after the court has decided the case. Cases would also likely be resolved in a speedier fashion if predictive coding were to become the standard form of review for e-discovery.[91] In short, Congress should recognize that the discovery process has changed significantly in recent decades due to the volume of ESI and the costs involved with pro-

[89] *See* Grossman & Cormack, *supra* note 24, at *3, *43-44.
[90] FED. R. CIV. P. 1.
[91] *See* Grossman & Cormack, *supra* note 24, at *2.

ducing it. Litigants must often rely on outside vendors to perform the most basic tasks of discovery such as locating digital files and producing them in a usable form.[92]

C. Concerns About a Potential Chilling Effect on Plaintiffs Can Be Mitigated

Several law review articles on this topic have argued that the broad approach to taxing e-discovery costs would have a chilling effect on plaintiffs.[93] The authors reason that allowing taxation of e-discovery costs might leave a plaintiff with few resources stuck with a large bill of costs that he or she cannot pay. The mere threat of being saddled with such costs might deter some plaintiffs from filing meritorious claims. This is a valid concern, but it can be mitigated.

1. Taxing E-Discovery Would Be Discretionary, Not Mandatory

The proposed amendment to section 1920 would grant discretion to federal district courts to tax the costs of e-discovery but would not require them to do so. It is true that there is a strong presumption in favor of granting all costs allowable under Rule 54(d)(1).[94] However, the presumption is a policy decision by Congress and can be changed at any time. The proposed language of the amendment (at 7(c)) makes clear that the presumption does not necessarily apply to e-discovery costs. Under that language, courts have discretion to award these costs only if it would be in the interest of justice in a given case.

---

[92] *See* PACE & ZAKARAS, *supra* note 16, at 38.

[93] *See generally, e.g.,* Gillen, *supra* note 1; Hoelting, *supra* note 1.

[94] *See, e.g.,* Reger v. Nemours Found. Inc., 599 F.3d 285, 288 (3d Cir. 2010) ("[T]here is a 'strong presumption' that costs are to be awarded to the prevailing party. . . . This is so because the denial of such costs is akin to a penalty."); *In re* Derailment Cases, 417 F.3d 840, 844 (8th Cir. 2005) ("A prevailing party is presumptively entitled to recover all of its costs."); Save Our Valley v. Sound Transit, 335 F.3d 932, 944-45 (9th Cir. 2003) ("Rule 54(d) creates a presumption for awarding costs to prevailing parties; the losing party must show why costs should not be awarded."); Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 427 (7th Cir. 2000) ("Rule 54(d)(1) establishes a presumption in favor of a cost award.").

2. Mitigating the Potential Chilling Effect on Plaintiffs

The proposed amendment also includes two provisions that avoid a potential chilling effect on plaintiffs. The first (in 7(a)) is that costs can be awarded only when no cost-sharing agreement regarding e-discovery exists between the parties. This provision would promote early discussion and agreement between the parties. It would also create certainty for litigants that a cost-sharing agreement would be controlling and they would not be stuck with the full bill of costs if they lose a case. The second provision (7(b)) conditions the award of costs on the losing party's ability to pay. The losing party should have the burden of proving inability to pay; this could be accomplished by any means that the district court finds appropriate. One likely doctrinal development would be to require parties who desire to avoid being liable for costs raise this issue as early in the litigation as possible.

VI.
CONCLUSION

The volume of ESI and the corresponding costs of producing it have changed the discovery phase of litigation over the last few decades. The amendment to section 1920 proposed in this paper recognizes this change and deals with the exploding costs the change has created. The proposed amendment is an exception from the general American Rule requiring each party to bear its own costs. But it is consistent with the fundamental purpose of the Federal Rules of Civil Procedure and would lead to reduced costs for litigation overall. We should not adhere blindly to the American Rule in every circumstance when a different rule will produce better results.

• • •