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.