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

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INTRODUCTION

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

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1. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 38 (1980). Because "[t]he framework of the nineteenth-century tort of negligence was provided by the duties of care," there is "little doubt that a practical understanding of negligence liability required an understanding of the whole range of individual duty situations." D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 178 (1999). To supply the substantive basis for the single tort of negligence, these narrowly defined individual duties had to be merged into a single or universal duty. Any substantive limitations of liability that were common to these individual duties, therefore, were also merged into the single duty, yielding a duty that is both universal or general and still subject to substantive limitation.

2. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(a) & reporters' note cmt. a (Proposed Final Draft No. 1, 2005). For a more extended discussion of the historical development of duty, see W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 673–78 (2008).

Having transformed the fragmented, individualized rules of the writ system into a general rule of negligence liability, courts then had to confront the issue of whether many types of unreasonable conduct should be immunized from the newly adopted standard of tort liability. Under the writ system, the characteristic legal rule was not one of negligence or strict liability, but rather one of immunity from liability.[3] Insofar as an immunity had been justified by concerns of public policy, that justification became harder to defend throughout much of the twentieth century. Many activities had long been exposed to tort liability without any apparent detrimental effect, making it seem highly dubious that the particular activity protected by an immunity would be unduly restricted by negligence liability. Instead, the salutary features of negligence liability would force the activity to be conducted in a socially reasonable manner—the outcome consonant with public policy. Due to this dynamic, the considerable expansion of tort liability over the course of the twentieth century can be largely explained by the way in which a consolidated negligence rule of general application enabled courts to reject many of the immunities and other limitations of liability that had been recognized by the early common law.[4]

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

3. *Cf.* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 928 (1981) (arguing that "fault liability emerged out of a world-view dominated largely by no-liability thinking"). Many of these liability-limiting rules were expressly ones of immunity, whereas others operated like an immunity by either limiting the duty of the risky actor to exclude the negligently caused harms in question or otherwise privileging the risky conduct.

4. *See id.* at 959–61; Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 605–06 (1992) (concluding that up until the 1960s, judicial tort opinions "for the most part, sharpened and clarified tort doctrines that had been presented somewhat more crudely in nineteenth-century cases," and positing that the "vitality of negligence" then caused an expansion of tort liability lasting until the 1980s).

5. *See generally, e.g.*, PHILIP K. HOWARD, THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM (2001) (arguing that the common interest is undermined by the fear of being sued and providing numerous examples in support). *But see* Carl T. Bogus, *Fear-Mongering Torts and the Exaggerated Death of Diving*, 28 HARV. J.L. & PUB. POL'Y 17, 19–36 (2004) (critiquing the claim that tort litigation has led to the widespread removal of diving boards from adequately deep swimming pools).

6. For a good overview of the tort-reform movement, see Michael Orey,

The concern about excessive tort liability was shared by judges, who in the latter decades of the twentieth century increasingly made rulings that limited the ordinary duty to exercise reasonable care.[7] In doing so, judges relied on a number of the same factors or policies that had previously been invoked to expand duty beyond the limits established by the early common law. "[C]ourts saw that the . . . factors might be the basis not only for the imposition of a previously unrecognized duty, but also for a withdrawal of tort liability through a no-duty determination."[8]

Based on the case law, the *Restatement (Third) of Torts* has adopted the rule that "an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm," but that "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."[9] The *Restatement (Third)* then defines these policy factors as involving "[c]onflicts with social norms about responsibility," "[c]onflicts with another domain of law," "[r]elational limitations," "[i]nstitutional competence and administrative difficulties," or "[d]eference to discretionary decisions of another branch of government."[10] The *Restatement (Third)*, though, does not tell courts how to apply these policy factors. It instead "exhorts courts to make no-duty rulings on a categorical basis," while further "instruct[ing] courts to articulate the policy or principle on which they are acting."[11]

The *Restatement (Third)*'s treatment of duty has been sharply criticized for adopting a "brand of instrumentalism" that is inconsistent with the substantive nature of a tort duty rooted in individual obligations.[12] According to these critics, the only

How Business Trounced the Trial Lawyers, BUS. WK., Jan. 8, 2007, at 44.

7. *See* Dilan A. Esper & Gregory C. Keating, *Abusing "Duty*,*"* 79 S. CAL. L. REV. 265, 289–323 (2006) (describing the increase in no-duty rulings in California); William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1704–12 (1997) (describing the increase in no-duty rulings in Texas); Schwartz, *supra* note 4, at 659–63 (describing how, "in the post-modern era, the duty concept has made a comeback").

8. Cardi & Green, *supra* note 2, at 676.

9. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005).

10. *Id.* § 7 cmts. c–g.

11. Cardi & Green, *supra* note 2, at 703 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmts. a, c, j (Proposed Final Draft No. 1, 2005)).

12. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 333 (2006); *see also* ALAN CALNAN, DUTY AND INTEGRITY IN TORT LAW 52 (2009) (arguing that "instrumental pragmatists [who] see duty as the means to achieving various social ends like deterrence and compensation" "are about to memorialize their

legitimate policy-based limitations of duty pertain to institutional considerations (deference to other bodies of law or difficulties of adjudicating the claims in question), thereby excluding no-duty rules based on other forms of public policy: "[U]ndue reliance on a policy-driven defense to liability in the face of otherwise unexcused and unjustified negligent conduct runs directly counter to the basic principle that negligence law, like tort law generally, exists to provide remedies for every instance of legally wrongful and injurious conduct."[13] The *Restatement (Third)*, however, unequivocally states that no-duty determinations are exceptional,[14] and so the only controversy in this regard involves the appropriate policy reasons for limiting the liability of a defendant whose unreasonable conduct proximately caused the plaintiff's injury. Thus, for example, a different line of criticism maintains that the policy factors identified by the *Restatement (Third)* are too narrow and "do not adequately reflect the breadth of factors that courts take into account in making no-duty determinations."[15]

The validity of these critiques depends on the form of analysis that a court should employ when deciding whether to limit the ordinary duty to exercise reasonable care. That type of guidance is absent from the *Restatement (Third)*, creating an important indeterminacy that makes it vulnerable to critiques of these types. The indeterminacy does not stem from disagreements concerning the ability of courts to limit tort liability for institutional reasons, such as the desirability of deferring to other domains of law. The problem instead pertains to cases in which courts limit liability for other reasons of public policy. By recognizing such a limitation of duty, has the *Restatement (Third)* implicitly adopted a contestable rationale for tort liability? Or is there a mode of public-policy analysis that does not necessarily entail a commitment to one of the contested rationales for tort liability? If so, what does that mode of analysis imply about the type of factors that a court could defensibly rely upon to limit duty? What implications does the approach have for the allocation of decision making between the judge and jury? These questions are all implicated by the foregoing critiques of the *Restatement (Third)* approach, and the resolution of each one depends on the form of duty analysis that courts should employ when limiting liability for reasons of public policy.

Such a mode of duty analysis can be gleaned from the case law. As Part I explains, in addition to the private interests at stake in

position in the *Restatement (Third) of Torts*").

13. John C.P. Goldberg & Benjamin C. Zipursky, *The* Restatement (Third) *and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 749–50 (2001).

14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

15. Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the* Restatement (Third) of Torts, 60 HASTINGS L.J. 1, 6 (2008).

the lawsuit, the resolution of a tort claim can affect other interests. Insofar as these social interests have a legally recognized value that is not adequately addressed by the other elements of the tort claim, the court must consider these social values in its formulation of duty. The adequate protection of these social interests can justify limitations of the ordinary duty to exercise reasonable care. Such a policy-based limitation of duty does not necessarily require the type of economic or utilitarian calculus that many find to be controversial. Social value can limit duty within a rights-based system of private law. Part II illustrates these points with case law addressing the issue of social-host liability for drunk-driving accidents. Part III concludes by discussing the nature of the social-value inquiry in relation to the appropriate allocation of decision making between the judge and jury. In principle, the social-value inquiry can depend on the facts of the specific case, yielding particularized formulations of duty. These determinations are still appropriately made by judges as a matter of law, however, because the court is formulating the duty by reference to categorical (or social) values not otherwise implicated by the other elements of the tort claim. A court that clearly identifies those values and explains why they appropriately limit liability would be applying the law in the manner contemplated by the *Restatement (Third)*.

I. SOCIAL VALUE IN A SYSTEM OF PRIVATE LAW

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

> It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules, . . . the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it.[16]

The influence of public policy on tort law was famously emphasized by Oliver Wendell Holmes, the intellectual architect of modern tort law: "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . ."[17]

The practice of tort law is dominated by negligence liability, and within the negligence claim, public-policy considerations are relevant to the element of duty. According to William Prosser, the judicial analysis of duty is "only an expression of the sum total of

16. Nor. Plains Co. v. Boston & Main R.R. Co., 67 Mass. (1 Gray) 263, 267 (1854).

17. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (Boston, Little, Brown & Co. 1881).

those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[18] The case law "is replete with citations to this statement."[19]

Nevertheless, some scholars have argued that the element of duty should not depend on this type of policy inquiry. To understand why, consider *Hamilton v. Beretta U.S.A. Corp.*, in which the New York Court of Appeals held that "any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs."[20] The assessment of social costs and benefits depends on the "precedential, and consequential, future effects" of the proposed duty, requiring that the duty be formulated so as to "limit the legal consequences of wrongs to a controllable degree."[21] The court's reliance on a social cost-benefit test appears to invoke a consequentialist conception of tort liability that is most prominently associated with law and economics. An allocatively efficient tort rule creates social costs that are less than the associated social benefits, and so an efficiency-oriented court would limit liability whenever the social costs exceed the social benefits as per the approach enunciated in *Hamilton*. The efficiency rationale for tort liability, however, is controversial. It has been forcefully critiqued by those who maintain that tort law is a system of private law that corrects or redresses the injustices stemming from the defendant's violation of the plaintiff's individual tort right.[22] An individual right cannot be limited on the ground that doing so would enhance social wealth or welfare. Limiting the scope of a tort right (and its correlative duty) simply because the total cost of liability exceeds the total benefits, therefore, inappropriately injects concerns of social welfare into a system of private law.

According to John Goldberg and Benjamin Zipursky, courts have been misled in this regard by tort scholars, beginning with Holmes and culminating with the contemporary economic analysis of tort law: "In place of thinking about duty, scholars have told modern courts they must think about all the different results that may flow from opening and closing the floodgates of litigation in various degrees."[23] The formulation of duty in cost-benefit terms is

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18. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 180 (1st ed. 1941).

19. Cardi & Green, *supra* note 2, at 674 n.18.

20. Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060–61 (N.Y. 2001).

21. *Id.* at 1060.

22. *See, e.g.*, JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 1–63 (2001) (arguing that tort law is best interpreted as a matter of corrective justice); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (same).

23. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1846 (1998).

substantively incompatible with "[r]ights-based reasoning and duty-based reasoning" having "philosophical credentials [that] are at least equal to those of the utilitarian thinking which has dominated tort law for so many decades."[24] By rejecting the utilitarian approach of comparing all social costs and benefits in favor of a private-law conception of tort liability that exclusively focuses on individual rights and their correlative individual duties, courts could "diminish reliance upon multifactor analyses that are unmanageable, unprincipled, and unpredictable."[25]

This critique is hard to square with doctrinal history. As illustrated by the earlier quotation from Judge Shaw, courts were discussing the importance of public policy prior to the time when they could have been influenced by Holmes and his successors. Indeed, opinions like those authored by Judge Shaw presumably led Holmes to the conclusion that the common law, at bottom, is based on considerations of public policy.[26] Who was influencing whom?

The more fundamental point, however, is that courts can rely on public-policy factors for limiting the tort duty within a system of private law. Consider how the Ohio Supreme Court conceptualized public policy in the early twentieth century:

> A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts. . . . In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.[27]

This conceptualization of public policy is not defined by the maximization of "public welfare" as per a utilitarian or other welfarist cost-benefit exercise; it instead is comprised of "common sense and common conscience" as they relate to the "plain, palpable duty" owed by one person in the community to another, "having due regard to all the circumstances of each particular relation and situation." Individual duties, like their correlative individual rights, can depend on social values of the appropriate type, including those pertaining "to matters of public morals, public health, public safety,

24. *Id.*
25. *Id.* at 1847.
26. *Cf.* Cardi & Green, *supra* note 2, at 707–08 ("In light of [the] considerable evidence that policy reasoning plays a role in courts' duty decisions, [Goldberg and Zipursky] are left either to claim that courts do not mean what they say or to concede that their critique of . . . duty is largely normative.").
27. Pittsburgh, C., C. & St. L. Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916).

public welfare, and the like."

Rights-based tort rules, including those justified by a principle of corrective justice, protect morally fundamental individual interests from incurring burdens merely for reasons of social expediency, such as the pursuit of social wealth or welfare. In order for individuals to have a right to physical security, for example, their interest in physical security cannot be compromised simply because doing so would confer greater wealth or welfare on others. As Stephen Perry describes the position: "At least within nonconsequentialist moral theory, it makes sense to think of this [security] interest as morally fundamental, and hence as falling outside the purview of distributive justice; our physical persons belong to us from the outset, and are accordingly not subject to a social distribution of any kind."[28]

The security interest can have this moral attribute for reasons of personal autonomy or self-determination. As Perry elaborates: "The main reason that personal injury constitutes harm [and is protected by the individual tort right] is that it interferes with personal autonomy. It interferes, that is to say, with the set of opportunities and options from which one is able to choose what to do in one's life."[29]

This type of autonomy-based tort right excludes any justification for liability that is inconsistent with the normative value of autonomy or self-determination, regardless of the other social values that would be furthered by the liability rule.[30] The grounds for the tort right (based on the value of autonomy) can then simultaneously govern the correlative duty, thus satisfying the requirement that in a system of private law, "the reasons that justify the protection of the plaintiff's right [must be] the same as the reasons that justify the existence of the defendant's duty."[31]

Such an individual tort right and its correlative duty necessarily require courts to consider how the liability rule benefits and burdens autonomy interests within the community. A rights-based liability rule must equally respect the autonomy of both the right-holder and the duty-holder. The liability rule must also

28. Stephen R. Perry, *On the Relationship Between Corrective Justice and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 237, 239 (Jeremy Horder ed., 2000).

29. *Id.* at 256.

30. *See generally* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153–59 (Jeremy Waldron ed., 1984) (formulating individual rights as "trumps over some background justification for political decisions that states a goal for the community as a whole"); Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301–04 (2000) (explaining why Dworkin's formulation of rights as "trumps" limits or constrains the available justifications for governmental coercion to those that are consistent with the value promoted or protected by the right).

31. Ernest J. Weinrib, *The Passing of* Palsgraf?, 54 VAND. L. REV. 803, 806 (2001).

equally respect the autonomy of other individuals in the community who would be affected by it. Consequently, the content of the right and scope of the correlative duty must depend on a social-value factor that addresses the issue of how the liability rule would affect autonomy interests other than those represented by the private parties involved in the lawsuit. In a system of private tort law, courts must consider social values of the appropriate type in order to satisfy the principle of equality.

For example, when the Ohio Supreme Court defined "public policy" by reference to "matters of public morals, public health, public safety, public welfare, and the like,"[32] it identified concerns that can be readily understood in relation to their importance for the exercise of autonomy or self-determination within the community. So conceptualized, these policy factors are of integral importance for determining "man's plain, palpable duty to his fellow men"[33] within a system of private law.

Courts, therefore, can rely on public-policy factors in order to limit duty without necessarily committing themselves to a utilitarian or efficiency rationale for liability. Similarly, the *Restatement (Third)* can incorporate public-policy factors into its rules governing duty while being "quietly agnostic as to whether the source of the obligation in tort law is some brand of instrumentalism, moral-justice concerns, other justifications, or a combination of some or all of these reasons."[34] The mere invocation of public policy as a reason for limiting liability says nothing about the underlying rationale for liability. The issue instead turns on the types of social values that courts rely on to reach such a conclusion.

II. THE EXAMPLE OF SOCIAL-HOST LIABILITY

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

In the seminal case adopting social-host liability as a matter of common law, the New Jersey Supreme Court held that "a host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent

32. Kinney, 115 N.E. at 507.
33. *Id.*
34. Cardi & Green, *supra* note 2, at 673 n.6.

operation of a motor vehicle by the . . . guest."[35] According to the court, "whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."[36] The fairness inquiry "depends 'ultimately' on balancing [the] conflicting interests involved."[37]

The private interests that were at stake in the lawsuit involved the plaintiff's interest in physical security and the liberty interests of the defendants as social hosts.[38] The plaintiff was seriously injured in a head-on collision with an automobile driven by a friend of the defendants who had been drinking alcohol at their home prior to departing in his car.[39] Defendants claimed that they had served the guest "two or three drinks of scotch on the rocks," but plaintiff's expert testified that the guest "had consumed not two or three scotches but the equivalent of thirteen drinks; that while at [defendants'] home [the guest] must have been showing unmistakable signs of intoxication; and that in fact he was severely intoxicated while at [defendants'] residence and at the time of the accident."[40] On these facts, the question of liability was straightforward when framed exclusively in terms of these private interests: "The usual elements of a cause of action for negligence are clearly present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable."[41]

The allegation of liability, however, also implicated an important set of social interests that required further consideration. Assuming that a duty otherwise existed, the liability question turned entirely on whether the particular burden that would be incurred by the defendants to prevent their intoxicated guest from driving was reasonable in light of the foreseeable risk of physical harm that would otherwise be faced by those on the public roads, including the plaintiff.[42] As is ordinarily true in a negligence case, the liability inquiry accounted for at least some social interests, namely, the interests of similarly situated right-holders other than the plaintiff who could be foreseeably harmed by the conduct in question.[43] The liability inquiry, though, would not account for the burden that would be incurred by other duty-holders in future

35. Kelly v. Gwinnell, 476 A.2d 1219, 1224 (N.J. 1984).

36. *Id.* at 1222 (emphasis omitted) (quoting Goldberg v. Hous. Auth., 186 A.2d 291, 293 (N.J. 1962)).

37. *Id.* (citing and quoting from Portee v. Jaffee, 417 A.2d 521, 528 (N.J. 1980)).

38. *Id.* at 1229.

39. *Id.* at 1220.

40. *Id.*

41. *Id.* at 1222.

42. *Id.*

43. *See id.*

cases.[44] If the defendants in this particular case were to incur negligence liability, how would the ensuing duty burden the liberty interests of others in the community? Individuals who serve drinks to their social guests would incur at least a limited responsibility for their guests' behavior while driving home. How would that duty affect behavior in the community? That issue would not be considered by the jury in its evaluation of the other elements of liability, explaining why the court determined that it had to decide whether a duty existed by making a "value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care."[45]

> While we recognize the concern that our ruling will interfere with accepted standards of social behavior; will intrude on and somewhat diminish the enjoyment, relaxation, and camaraderie that accompany social gatherings at which alcohol is served; and that such gatherings and social relationships are not simply tangential benefits of a civilized society but are regarded by many as important, we believe that the added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving outweigh the importance of those other values. Indeed, we believe that given society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but that in any event if there be a loss, it is well worth the gain.[46]

Lest there be any doubt that the court's "value judgment" was not one of social efficiency writ large, it concluded by observing that "[t]he goal we seek to achieve here is the fair compensation of victims who are injured as a result of drunken driving."[47]

By recognizing that both the "just compensation" and "fair compensation" of accident victims depend on a "value judgment" of whether any "loss" that would be suffered by others in society is "worth the gain," the court engaged in the type of duty analysis that is appropriate within a rights-based tort system, whether grounded on a principle of justice or fairness. Consider a tort right that is justified by a principle of equality that values individual autonomy or self-determination. This general principle holds that each person has an equal right to freedom (or autonomy or self-determination) and then gives different values to the individual interests in physical security and liberty, depending on their relative importance for the exercise of this general right. The physical harms suffered by the victims of drunk-driving accidents severely compromise their

44. *Id.* at 1228.
45. *Id.* at 1222.
46. *Id.* at 1224.
47. *Id.* at 1226.

autonomy, with premature death being the extreme outcome, and yet tort law cannot exclusively focus on the security interest of these right-holders in formulating liability rules. To exercise autonomy, individuals must have both security and liberty, making the issue of fair or just compensation dependent on how the liability rule balances the right-holders' interests in physical security with the liberty interests of duty-holders. If the imposition of duty would curtail the exercise of liberty within the community, then these social interests are relevant to the determination of fair or just compensation.[48]

Consistent with this reasoning, the dissent in the case focused on the social interests implicated by the finding of liability that were not otherwise relevant to the issue of liability in the case at hand.[49] The dissent began by quoting from a number of decisions made by courts in other jurisdictions that had relied on this public-policy concern in concluding that no duty exists.[50] As one of these courts had observed:

> [H]ow is a host at a social gathering to know when the

48. The issue of fair or just compensation can be directly analyzed in terms of a compensatory tort right. As I have argued at length elsewhere, a compensatory tort right is defined by a default rule that prioritizes the right-holder's security interest over a duty-holder's conflicting liberty interest. Although the priority directly yields a rule of strict liability, this form of liability has limited application in a compensatory tort system. Due to the inherent limitations of the compensatory-damages remedy, the compensatory right is best protected by a demanding standard of negligence liability. The default rule of negligence liability can then also be limited. The compensatory right is based on a priority of the conflicting interests that is justified by a principle of equality which values individual autonomy or self-determination, making the priority relative to that overarching, general principle. The default priority, therefore, can be overridden when required by the value of autonomy, thus justifying the protection of liberty interests via the varied limitations of negligence liability, including no-duty rules. *See generally* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS (2008). When formulated in this manner, compensation is just because the tort award (an exercise of governmental coercion) is justified by a principle of equality. The compensation is also fair insofar as the compensatory tort right conforms to the community's notion of fairness, which appears to be the case. The interpersonal priority of the right-holder's security interest over a conflicting liberty interest of the duty-holder "resonates deeply in public attitudes: if the person in the street is asked whether a party should be liable for injuries that the party causes, the person's answer is likely to be affirmative. These perceptions and attitudes can be easily explained: when a person voluntarily acts and in doing so secures the desired benefits of that action [an exercise of the legally subordinate liberty interest], the person should in fairness bear responsibility for the harms the action causes [to the prioritized security interest of the right-holder]." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 cmt. f (Proposed Final Draft No. 1, 2005) (justifying the compensation afforded by the rule of strict liability for abnormally dangerous activities).

49. *Kelly*, 476 A.2d at 1230 (Garibaldi, J., dissenting).

50. *Id.* at 1231–32.

> tolerance of one of his guests has been reached? To what extent should a host refuse to serve drinks to those nearing the point of intoxication? Further, how is a host to supervise his guests' social activities? The implications are almost limitless as to situations that might arise when liquor is dispensed at a social gathering, holiday parties, family celebrations, outdoor barbecues and picnics, to cite a few examples.[51]

The dissent then elaborated on this concern:

> The nature of home entertaining compounds the social host's difficulty in determining whether a guest is obviously intoxicated before serving the next drink. In a commercial establishment, there is greater control over the liquor; a bartender or waitress must serve the patron a drink. Not so in a home when entertaining a guest. At a social gathering, for example, guests frequently serve themselves or guests may serve other guests. Normally, the host is so busy entertaining he does not have time to analyze the state of intoxication of the guests. Without constant face-to-face contact it is difficult for a social host to avoid serving alcohol to a person on the brink of intoxication. Furthermore, the commercial bartender usually does not drink on the job. The social host often drinks with the guest, as [defendants] did here. The more the host drinks, the less able he will be to determine when a guest is intoxicated. It would be anomalous to create a rule of liability that social hosts can deliberately avoid by becoming drunk themselves.
>
> The majority suggests that my fears about imposition of liability on social hosts who are not in a position to monitor the alcohol consumption of their guests are "purely hypothetical" in that the present case involves a host and guest in a one-to-one situation. It is unrealistic to assume that the standards set down by the Court today will not be applied to hosts in other social situations. Today's holding leaves the door open for all of the speculative and subjective impositions of liability that I fear.[52]

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

51. *Id.* (quoting Edgar v. Kajet, 375 N.Y.S.2d 548, 552 (Sup. Ct. 1975)).
52. *Id.* at 1234.

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

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

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

> obvious. The implications of these unaddressed questions demonstrate the frail foundation [of] social host liability.[53]

Cases like this reveal the extent to which courts have relied on a public-policy concern of legal uncertainty as a reason for limiting the ordinary duty to exercise reasonable care. Other than the element of duty, no other element of tort liability considers how the liability rule is likely to be administered across cases and whether any resulting ambiguities will have adverse social impacts. When evaluated in this light, the impact on social relationships turns out to be much more onerous than what might otherwise be suggested by a simple duty not to serve alcohol to an obviously intoxicated guest who is about to drive an automobile.

One website, for example, contains the following advice for homeowners in states that recognize social-host liability:

> HOW TO PREVENT HOLIDAY PARTY ACCIDENTS AND PROTECT YOURSELF OR YOUR BUSINESS:
>
> - Meet with an insurance agent before hosting a party to understand your state's host liability laws, and to make sure you're properly insured.
> - Limit your guest list to your close friends and family.
> - Host your party at a restaurant or bar that has a liquor license, rather than in a home or office.
> - Provide filling food (breads and other starchy foods) for guests and non-alcoholic drinks[.]
> - Schedule entertainment or activities that do not involve alcohol.
> - Arrange transportation or sleeping arrangements for those who should not drive.
> - Stop serving alcohol one hour before the party is scheduled to end and offer guests coffee throughout the party.
> - Do not serve guests who are visibly intoxicated.
> - Consider collecting keys when your guests arrive to better control them leaving intoxicated.
> - Review your insurance policy with your agent before the event to ensure that you have the proper liability coverage.[54]

53. Graff v. Beard, 858 S.W.2d 918, 921 (Tex. 1993) (citation omitted) (footnote call numbers omitted).

54. That Money, Throwing a Party? Are You Protected from Lawsuits?—Social Host Liability & Personal Umbrella Policies (May 8, 2007), http://www.thatmoney.com/read-220-Throwing_a_Party__Are_You_Protected

The advice (supplied by insurance sellers) relies on the ability of individuals to protect themselves from tort liability by purchasing liability insurance, and the "firm belief that insurance is available" was invoked by the New Jersey Supreme Court to justify the duty.[55] "Homeowners who are social hosts may desire to increase their policy limits; apartment dwellers may want to obtain liability insurance of this kind where perhaps they now have none."[56]

The availability of insurance obviously reduces the problem of legal uncertainty faced by duty-holders, but they still face substantial costs. Even if the insurance company (unrealistically) provides full indemnification for legal representation and adverse judgments, the individual duty-holder as defendant in the tort suit must still participate and incur the associated costs of time, anxiety, and so on. Moreover, the relationship between the insurance company and policyholder is rife with conflicts that can leave the policyholder vulnerable to incurring a substantial part of the financial cost of an adverse tort judgment.[57] Simply increasing the policy limits is also no panacea for the individual duty-holder. In addition to the added cost of paying higher premiums, there remains the problem of figuring out how much insurance is enough. What if the guest is involved in a multicar accident, subjecting the social host to millions of dollars of liability? Perhaps the ordinary individual can readily afford a multimillion-dollar liability-insurance policy, but that conclusion is controversial.[58] The availability of liability insurance does not mean that courts can ignore the financial burden that is borne by individuals subject to an uncertain duty.[59]

_from_Lawsuits____Social_Host_Liability___Umbrella_Policies.htm [hereinafter Throwing a Party?].

55. *Kelly*, 476 A.2d at 1227. *See generally* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008) (describing the interrelationships between the growth of tort liability and the availability of liability insurance).

56. *Kelly*, 476 A.2d at 1225.

57. *See, e.g.*, Crisci v. Sec. Ins. Co. of New Haven, Conn., 426 P.2d 173, 176–77 (Cal. 1967) (recognizing the conflict of interests that exists with respect to the insurer's decision to reject a settlement offer that is below the limits of an insurance policy held by a property owner when the adverse tort judgment can exceed those limits).

58. *Cf.* Throwing a Party?, *supra* note 54 ("A personal umbrella policy will provide an extra $1 million of coverage in addition[] to a traditional homeowners policy. Most people do not realize the extra coverage only cost[s] about $100–$200 per year.").

59. A similar observation was made by Gary Schwartz in 1992:

> We are . . . left with a tort system that entails financial consequences that were very poorly anticipated 30 years ago. To gain a sense of the significance of the increased cost of liability, assume that you are a judge who is asked to rule on the extent of liability of a community health center serving a low-income community. In 1970, your understanding might well have been that the price of liability

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

> The fears expressed by the dissent concerning the vast impact of the decision on the "average citizen's" life are reminiscent of those asserted in opposition to our decisions abolishing husband-wife, parent-child, and generally family immunity in France v. A.P.A. Transport Corp., [267 A.2d 490, 490 (1970)], and Immer v. Risko, [267 A.2d 481, 481 (1970)]. In Immer, proponents of interspousal immunity claimed that abandoning it would disrupt domestic harmony and encourage possible fraud and collusion against insurance companies. In France, it was predicted that refusal to apply the parent-child immunity would lead to depletion of the family exchequer and interfere with parental care, discipline and control. As we noted there, "[w]e cannot decide today any more than what is before us, and the question of what other claims should be entertained by our courts must be left to future decisions." Some fifteen years have gone by and, as far as we can tell, nothing but good has come as a result of those decisions.[60]

Perhaps social-host liability would not result in a "revision of cocktail-party customs [that constitutes] a sufficient threat to social well-being to warrant staying our hand," as the New Jersey Supreme Court concluded[61] and the New Jersey Legislature subsequently affirmed,[62] or perhaps the duty rests on a "frail foundation" as the Texas Supreme Court concluded.[63] The important point for present purposes is that the issue turns on social values that are not addressed by the other elements of the tort claim, requiring consideration of that issue with respect to the

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> insurance is typically low, and this understanding would have enabled you to establish liability at the broad level that you deemed otherwise appropriate. Assume now, however, that you today read in a reliable journal that the high cost of liability insurance is requiring these centers to give up on certain medical services that the centers themselves regard as quite important to patients' welfare. You may well suspect that these cost increases are due to some malfunction in the liability insurance mechanism. Even so, faced with the reality of the clinics' new situation, you would be inhibited from issuing a ruling that might broadly define these clinics' tort liability.

Schwartz, *supra* note 4, at 691 (footnote call numbers omitted).

60. *Kelly*, 496 A.2d at 1228–29 (citations omitted).

61. *Id.* at 1227.

62. *See* N.J. STAT. ANN. § 2A:15-5.6 (West 2000) (recognizing a statutory cause of action for damages against a social host for drunk-driving accidents caused by a guest to whom the host "willfully and knowingly provided alcoholic beverages" when the guest "was visibly intoxicated" and defining conditions under which the guest is presumed to be visibly intoxicated).

63. Graff v. Beard, 858 S.W.2d 918, 921 (Tex. 1993).

element of duty.

III. SOCIAL VALUES AND THE JUDGE-JURY ISSUE IN THE *RESTATEMENT (THIRD)*

The cases addressing social-host liability inform the way in which the *Restatement (Third)* formulates the duty question:

> [A] number of modern cases involve efforts to impose liability on social hosts for serving alcohol to their guests. A jury might plausibly find the social host negligent in providing alcohol to a guest who will depart in an automobile. Nevertheless, imposing liability is potentially problematic because of its impact on a substantial slice of social relations. Courts appropriately address whether such liability should be permitted as a matter of duty.[64]

Rather than describe the social-value inquiry or any other form of duty analysis, the *Restatement (Third)* instead identifies the exceptional circumstances that might justify a limitation of duty, including instances in which the duty raises concerns about "[c]onflicts with social norms about responsibility"[65] and "[r]elational limitations."[66] These two concerns are implicated by the issue of social-host liability. Social norms of responsibility place primary blame for the automobile accident on the drunk driver, not the social host. "[T]he extension of tort liability beyond those who . . . are primarily responsible for an accident" has been identified by commentators as being a "likely point of divergence with many Americans' values."[67] Due to relational limitations, the ability of a social host to control her guest's behavior is also more problematic than the typical case involving risks (like those of an automobile accident) that are more directly controlled by the defendant (the driver of the car). These concerns are not usually present, making social-host liability an extraordinary issue that requires courts to consider whether these cases justify a limitation of the ordinary duty to exercise reasonable care.

Nevertheless, the *Restatement (Third)* approach has been criticized on the ground that it does "not adequately reflect the breadth of factors that courts take into account in making no-duty determinations."[68] Indeed, the social-value inquiry that courts employ in social-host cases is not fully described by the *Restatement (Third)* factors pertaining to "conflicts with social norms about

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64. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005).

65. *Id.* § 7 cmt. c.

66. *Id.* § 7 cmt. e.

67. Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 720 (2006) (emphasis omitted).

68. Twerski, *supra* note 15, at 6.

responsibility," "relational limitations," and "administrative difficulties."[69]

The *Restatement (Third)*, however, cannot be descriptively complete because it does not prescribe the form of analysis that justifies a no-duty ruling. The mode of analysis must be specified in order to identify all of the relevant no-duty factors. A social-value inquiry based on allocative efficiency, for example, relies on the full set of social costs and benefits, unlike an inquiry based on a normative value such as individual autonomy or self-determination, which excludes any social cost or benefit that is inconsistent with the normative value.[70] To describe fully the relevant no-duty factors, the *Restatement (Third)* would have to adopt a contestable rationale for liability, a choice it has wisely avoided.[71] The descriptive limitations of the *Restatement (Third)*'s no-duty factors stem from modesty, not inadequacy.

At best, the *Restatement (Third)* can only describe in very general terms the considerations that merit an inquiry into the desirability of the duty, a triggering device that is still quite useful in light of the default rule that "in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of [the] ordinary duty."[72] Due to this incompleteness, issues not obviously implicated by the *Restatement (Third)* factors could also justify a limitation of duty, as illustrated, once again, by cases that limit duty based on a concern that the unlimited duty is likely to have a detrimental impact on the nature of the risky activity.[73]

Once we recognize that the no-duty factors in the *Restatement (Third)* will be descriptively incomplete unless accompanied by a prescribed form of duty analysis such as the social-value inquiry, its approach can also be defended against criticisms regarding the appropriate specificity of a no-duty ruling and how it relates to the allocation of decision making between the judge and jury.

The element of duty is a matter of law to be determined by the

69. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmts. c, e–f (Proposed Final Draft No. 1, 2005).

70. *See supra* note 30 and accompanying text.

71. *See supra* note 34 and accompanying text.

72. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 6 cmt. f (Proposed Final Draft No. 1, 2005).

73. As in the case of social-host liability, courts have adopted limited-duty rules regarding athletic activities (pursuant to the doctrine known as primary assumption of risk) out of concern that the unlimited duty would have a chilling effect on the activity. *See, e.g.*, Benitez v. N.Y. City Bd. of Educ., 541 N.E.2d 29, 33 (N.Y. 1989) ("The policy underlying [the rule of assumption of risk in competitive athletics] is intended to facilitate free and vigorous participation in athletic activities."). These rulings are not readily described by a concern about "conflicts with social norms about responsibility," "relational limitations," "administrative difficulties" or any of the other duty factors expressly recognized by the *Restatement (Third)*. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmts. c, e–f (Proposed Final Draft No. 1, 2005).

judge, and the remaining elements of a negligence claim are all decided by the jury, involving either so-called mixed questions of law and fact (the issues of breach and proximate cause) or more purely factual questions (like cause in fact and damages).[74] The decision-making role of the jury is defined by the case-specific nature of its determinations, whereas the judge's role is defined by reference to issues that have implications beyond the case at hand.

The jury's decision-making role is based on the premise that a group of individuals—the jury—ordinarily holds a decisive comparative advantage for resolving case-specific issues over a single decision maker—the trial judge. For categorical issues, by contrast, the judge holds a decisive comparative advantage. Unlike a jury, the judge has experience with a broader range of cases, giving the judge greater capacity to account for these considerations when deciding a matter having categorical importance. Legal rulings are also subject to more demanding appellate review than are jury determinations, giving reviewing judges the opportunity to ensure that the legal rule appropriately accounts for the relevant categorical concerns.[75]

Consequently, the *Restatement (Third)* recognizes that judges should issue a no-duty ruling as a matter of law only when that decision depends on categorical considerations that are not specific to the individual case: "No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases."[76] For these same reasons, a no-duty ruling that is not categorical in nature inappropriately invades the jury's province of decision making.

Many believe that this problem has been occurring with increased regularity. According to Jonathan Cardi and Michael Green:

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74. *See* DAN B. DOBBS, THE LAW OF TORTS § 18, at 33–35 (2000). Some aspects of the elements other than duty are determined by the judge as a matter of law, such as the characteristics of the reasonable person. The jury, though, still decides whether the element has been proven.

75. The judge is supposed to give an issue to the jury in the first instance only if the evidence can support different outcomes. Judges then typically uphold a jury verdict if a reasonable juror could have made such a finding. *See, e.g.*, HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 3–4 (2007). The inherent nature of a valid jury verdict, therefore, implies that reasonable jurors could have reached different conclusions about the same issue, creating a range of outcomes that can survive judicial review—a worrisome problem for issues having categorical importance. By contrast, the judicial review of legal rulings is de novo, which "simply mandates that an appellate court apply the substantive standards governing resolution of the legal question at issue." *Id.* at 24.

76. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. a (Proposed Final Draft No. 1, 2005).

> As observers of tort law appreciate, the gatekeeping function of the court is a pervasive matter, and one that is intimately tied up with the generality of duty rules. Duty—or more precisely, no duty—is often employed to remove a case from the jury, and too frequently is based on the specific facts of the case. Like . . . numerous . . . modern commentators, the Third Restatement shares concerns about this practice because it usurps the jury function. Duty should not be narrowed to the point that it becomes a ticket for a single ride on the tort railroad; when it does, the court has cut the jury out of its historical and proper role in the system. The Third Restatement therefore seeks to quell this practice.[77]

Despite the apparent logic of the *Restatement (Third)*'s position on this issue, it has been forcefully criticized. At the foundational level, Professors Goldberg and Zipursky have criticized the claim that no-duty rules must be specified in categorical terms on the ground that it is "severely underspecified" unless accompanied by "reasons favoring one level of categorization over another."[78] Lacking reasons for deciding upon the appropriate level of categorization, one can rightly question whether the element of duty necessarily requires any level of categorical determination. Indeed, Aaron Twerski argues that the "insistence that no-duty rules are limited to bright-line categories of cases is not warranted. Duty is more robust . . . . Frequently, no-duty findings will find expression in broad categorical rules, but in many instances, they will not. The *Restatement* should reflect this reality."[79]

The logic of the *Restatement (Third)*'s position on duty becomes more clear when considered in relation to the way in which social value can appropriately limit the ordinary duty to exercise reasonable care. In these cases, the judge is evaluating duty by reference to social values that are not otherwise implicated by the other elements of the tort claim. These social values are clearly categorical in nature; they pertain to the impact of the proposed duty on the relevant interests of the category of actors who could be affected by the duty. The categorical nature of the determination makes the issue a matter of law to be determined by the judge.

In resolving this issue, the judge is also applying a rule of general application: does the value that the law attaches to the social benefits of the duty outweigh such a valuation of the social costs?[80] The judicial balancing of these conflicting interests is

77. Cardi & Green, *supra* note 2, at 728–29 (footnote call numbers omitted).

78. Goldberg & Zipursky, *supra* note 12, at 335–36.

79. Twerski, *supra* note 15, at 25.

80. *See, e.g.*, Kelly v. Gwinnell, 476 A.2d 1219, 1224–26 (N.J. 1984) (requiring that the "just" or "fair compensation" of accident victims depend on the "value judgment" of whether the "loss" that would be suffered by others in society is "worth the gain"); Hamilton v. Berretta U.S.A. Corp., 750 N.E.2d 1055, 1060–61 (N.Y. 2001) (requiring that "any extension of the scope of

normatively equivalent to the balancing of interests engaged in by the jury when it evaluates the requirements of reasonable care. Indeed, "the inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether the conduct is unreasonably dangerous (that is, negligent)."[81] But unlike the jury's determination of reasonable care, the judge's determination of duty accounts for the relevant categorical or social interests that are not adequately addressed by the other elements of the tort claim, an issue outside of the jury's province.[82]

This type of no-duty determination can depend on case-specific facts. After all, a rule of general application can be applied on a case-by-case basis, as fully illustrated by the jury's case-by-case application of the rule of negligence liability. No-duty rulings of this type supply the force of Professor Twerski's argument.[83] But even though these rulings rely on case-specific facts, the determination is nevertheless categorical in nature, making it appropriate for resolution by the judge under the *Restatement (Third)*.[84]

Consistent with this reasoning, the *Restatement (Third)* recognizes that "[c]ourts determine legislative facts necessary to decide whether a no-duty rule is appropriate in a particular category of cases."[85] A "legislative fact" is a term of art within the Federal Rules of Evidence: "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge

duty . . . be tailored to reflect accurately the extent that its social benefits outweigh its costs").

81. FOWLER V. HARPER ET AL., 3 HARPER, JAMES AND GRAY ON TORTS § 18.2, at 765 (3d ed. 2007); *see also* DOBBS, *supra* note 74, § 229, at 583 (observing that the factors relied on by courts to determine the existence of duty "are mainly the very same factors that determine the negligence question"). *Compare* RESTATEMENT (SECOND) OF TORTS § 283 cmt. e (1965) (defining reasonable care in terms of a reasonable person who gives "impartial consideration to the harm likely to be done [to] the interests of the other as compared with the advantages likely to accrue to [the actor's] own interests"), *with Kelly*, 476 A.2d at 1222 (stating that "whether a duty exists is ultimately a question of fairness" in which the fairness inquiry "depends 'ultimately' on balancing [the] conflicting interests involved" (emphasis omitted) (quoting Goldberg v. Hous. Auth., 186 A.2d 291, 293 (N.J. 1962))).

82. In this critical respect, my position is congruent with Professor Twerski's. *See* Twerski, *supra* note 15, at 24 ("My thesis in this Article is that courts ought to focus on policy issues that are not part of risk-utility balancing [implicated by the element of breach] in order to decide duty issues.").

83. *See id.* at 7–20 (providing numerous examples of duty rulings that are closely tied to the particular facts of the case at hand).

84. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. i (Proposed Final Draft No. 1, 2005) ("In conducting its analysis, the court may take into account factors that might escape the jury's attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors.").

85. *Id.* § 7 cmt. b

or court . . . ."[86] Legislative facts are relied on by courts undertaking the social-value inquiry, which largely depends on the "precedential, and consequential, future effects" that would be created by the duty.[87] By recognizing that judges can rely on legislative facts to limit duty, the *Restatement (Third)* clearly permits judges to undertake the social-value inquiry and limit liability accordingly, regardless of whether the ruling also depends on adjudicative facts that could effectively limit the no-duty ruling to the particular facts of the case: "When resolution of disputed adjudicative facts bears on the existence or scope of a duty, the case should be submitted to the jury with alternative instructions."[88] The jury's finding of such a disputed adjudicative fact will determine which duty governs the case, but there is no inherent reason why that duty could not be largely limited to these adjudicative facts. Such a duty, although highly particularized, still depends on legislative facts that are within the judge's competence to evaluate. The requisite way in which a no-duty ruling must be categorical does not prevent it from having limited application.[89]

In the vast majority of cases, however, the ordinary duty to exercise reasonable care produces salutary precedential and consequential effects: risky actors are obligated to exercise reasonable precaution in order to protect others from the foreseeable risk of physical harm. History reveals the extent to which negligence liability ordinarily furthers the values recognized by tort law, requiring exceptional circumstances to justify a limitation of such liability.[90] The circumstances that appropriately trigger duty analysis are not present in most cases, but instead exist when the case presents the types of policy issues identified by the *Restatement (Third)*.[91] Consequently, "in cases involving physical harm, courts ordinarily need not concern themselves with the existence or content of this ordinary duty [to exercise reasonable care]."[92]

86. FED. R. EVID. 201(a) advisory committee's note. Unlike adjudicative facts, "legislative facts are outside the record of the case." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 2.3 (2d ed. 1999).

87. Hamilton v. Berretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001).

88. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. b (Proposed Final Draft No. 1, 2005).

89. *Cf.* Powers, *supra* note 7, at 1700 (recognizing that "particularized definitions of duty" are appropriate when based on "questions of policy" and not "questions of fact").

90. *See supra* notes 3–4 and accompanying text (explaining how this rationale for negligence liability was relied on by courts in the twentieth century to abrogate many of the limitations of liability recognized by the early common law).

91. *See supra* note 10 and accompanying text (listing the types of concerns that trigger no-duty rulings in the *Restatement (Third)*).

92. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 6 cmt. f (Proposed Final Draft No. 1, 2005).

CONCLUSION

The limitation of liability for reasons of public policy is both well established and controversial. Some view the reliance on "public policy" as an economic exercise of cost-benefit analysis that has no place in a rights-based system of private law.[93] Others attribute the increased number of these no-duty rulings to the reformist motivations of a more conservative judiciary that seeks to unduly limit tort liability under the guise of public policy.[94] Either reason could explain why courts have issued no-duty rulings. Duty depends on various factors that have been identified by the courts, but these factors are "so numerous and so broadly stated that they can lead to almost any conclusion."[95] The indeterminacy is particularly pronounced because "[t]here is little analysis of . . . duty in the courts."[96] In light of this case law, one can rightly question the validity of no-duty rulings based on public policy.

To address this problem, the *Restatement (Third)* calls for greater clarity:

> 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.[97]

By adopting the *Restatement (Third)*'s approach to duty, courts can invoke social value as a defensible policy-based rationale for limiting the ordinary duty to exercise reasonable care. The social-value inquiry simply encompasses the full set of legally valued interests that would be affected by the duty and are not otherwise adequately addressed by the tort claim, a policy—indeed, a principle—that must be recognized by a tort system committed to the equal treatment of individuals in the community.

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93. *See supra* notes 22–24 and accompanying text.

94. *See* Esper & Keating, *supra* note 7, at 267–68 (suggesting that with their no-duty rulings, "the California courts may be writing a chapter in [the] ongoing conservative counter-revolution in torts"); Schwartz, *supra* note 4, at 687 ("[The] altered composition of the judiciary is . . . clearly relevant in explaining the recent change in tort directions.").

95. DOBBS, *supra* note 74, § 229, at 583.

96. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984).

97. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005).