WHY NO DUTY?

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Setting up the Problem

Typically, first-year tort students quickly learn that there are several elements in a cause of action sounding in negligence, one of which is the matter of duty. Although it is said that the plaintiff possesses the burden to prove that a legal duty of due care was owed to him, duty is best understood as a defendant's doctrine. Not only is it conventionally the defendant who will contest the issue of duty, but also it is a finding of no duty that allows a defendant to escape responsibility in tort for harming another through behavior that was unreasonable (or could well have been so found).[1]

Why do we allow wrongdoers to avoid tort liability? After all, denying the plaintiff's claim would appear to undermine a wide range of justifications usually given for creating fault-based liability in the first place. Individual justice is sacrificed by not allowing the victim to have the satisfaction of obtaining a determination that the injurer legally wronged him. The role played by tort liability—deterring the sort of unreasonable conduct in which the injurer engaged—is abandoned. No compensation in tort is forthcoming to the plaintiff from the at-fault defendant, with the result that the accident costs of the defendant's misconduct are not thereby internalized into the defendant's activity.

Surely, if we are going to have a common law system of negligence, there must be a very strong reason for allowing someone to get away with causing harm to another by failing to act in a way that a reasona-

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1. The presumption that there is a duty to exercise due care, which in exceptional cases is overridden by "an articulated countervailing principle or policy," is embraced by the *Restatement (Third)*. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 7 (2010).

ble person would have. I explore those situations and their justifications in this Article.[2]

By way of a bit of ground clearing, I will put aside cases in which the defendant escapes liability because the harm he caused is not fairly part of the careless risk he took. From my perspective, these cases, which we used to call "no proximate cause" cases,[3] raise different issues of individual fairness that are outside my current inquiry. I also put aside consideration of the victim's own ordinary negligence in bringing about his injury. These days, the victim's carelessness results only in a partial reduction of recovery against a negligent defendant under the regime of pure comparative fault.[4] By contrast, a careless defendant with no duty to exercise due care completely escapes liability.[5]

It is also essential to keep the duty issue separate from the question of whether or not there was a "breach" of the duty to take due care—although this is not always easy to do. Someone who owes another a legal duty and harms the other individual through conduct that is judged to be *reasonable* will not be liable in negligence because there was no breach. For example, if a defendant did not act unreasonably because it was unforeseeable that her conduct would risk harm to another[6] or because the precaution necessary to avoid the harm would have been unreasonably burdensome,[7] there is no *breach* rather than no *duty* owed to the harmed individual (at least not on these grounds).

The essence of fault-based liability is that duty and causation are not enough; the defendant's conduct must also have fallen below the level expected of a reasonable person under the circumstances. In other words, when a defendant prevails at trial because there was no breach, this is not a victory on the grounds of no duty (although there are cases, to be sure, in which a defendant is or would be successful on

2. I previously explored this matter in Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 613–18 (2002), and Stephen D. Sugarman, *A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada*, *in* 17 SUPREME COURT LAW REVIEW, 375, 386–90 (2d ser. 2002). For another writing on this general theme, see Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787 (2001).

3. The *Restatement (Third) of Torts* has embraced a "scope of liability" notion in lieu of the confusing phrase "proximate cause." *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM ch. 6, at 492 (2010).

4. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 (2000).

5. I also put aside here the matter of defendants who are more than merely careless; namely, intentional and reckless wrongdoers.

6. *E.g.*, Bolton v. Stone, [1951] A.C. 850 (H.L.) at 858 ("[T]he further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence.").

7. *See, e.g.*, Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 768–69 (La. 1999).

both grounds). Alas, all too often judges and others talking about no-breach cases confusingly use no-duty language.[8] This is unfortunate. This is a theme to which I will return in Part III of this Article.

II. Why Might Unreasonable Defendants Escape Tort Liability on No-Duty Grounds?

In the following sections, I identify six separate reasons that might justify a no-duty determination and provide illustrations. For a number of injuries, one might offer more than one justification for a no-duty result, and so for purposes of explication, some of the examples may illustrate more than one justification.

In discussing some examples, I show that even if the right sort of no-duty argument may be made, it is not necessarily convincing. This is demonstrated in three ways. First, in some cases the law has changed over time as courts have rejected the old no-duty argument. Second, sometimes there is a division among the states, with some embracing the no-duty argument and others declining to do so. Third, for some examples I will offer my own criticism of the no-duty rules. This is all to emphasize that my central goal here is not to reshape the law as to when a tort duty is or is not owed. Rather, my primary objective is to show how no-duty decisions may be gathered up from all corners of tort doctrine and put into six categories. These categories, or types of arguments, seek to justify relieving a tort defendant of liability not because a jury should find his conduct faultless, but rather because of overriding considerations that free from tort liability someone who a jury might have found to have acted in an unreasonably careless way.

I loosely group the no-duty justifications into two bunches. The first bunch appeals to utilitarian considerations, the second to matters of moral value.

A. Tort Is the Wrong Regime to Deal with the Victim's Complaint

One justification for finding that no duty exists is that the victim who turns to tort law is looking in the wrong place for a remedy. There is a place (or are places) to deal with her complaint, but that place is not tort law. A clear example of this is the American law on workplace injuries with regard to claims made by employees against their employers. Employers owe their workers no duty of due care in tort because the workers' compensation system has replaced tort law

8. *See, e.g.*, Adams v. Bullock, 125 N.E. 93, 94 (N.Y. 1919).

as the mechanism for providing compensation to victims.[9] In addition, it might be argued that a combination of workers' compensation funding mechanisms and other institutions (like occupational safety agencies and unions) have replaced tort as other ways of assuring workers with reasonably safe workplaces. Of course, this is an instance in which a finding of no duty in tort is brought about by statute, and many of my examples will be common law no-duty cases. But this example illustrates the general point that the claimant who would try to sue in tort would be told that he is in the wrong realm.

The "fireman's rule" provides that property owners who carelessly set fires that require the services of firefighters are not liable in tort to those firefighters who are injured battling the flames.[10] Proponents offer many reasons for the rule, although some criticize the rule and not all states have adopted it.[11] I focus here on the reason that because firefighters already receive generous disability benefits that come with their jobs, they should turn exclusively to that form of compensation rather than to tort law. This is a no-duty way of thinking about the fireman's rule, and it parallels the workers' compensation solution. In effect, the property owner—who pays taxes that are used to hire firefighters and to provide them with disability benefits when injured—is viewed as a temporary employer of the firefighter who was hurt while combating the property owner's blaze.

When initially enacted, the National Vaccine Injury Compensation Program (NVICP)[12] appeared to allow those who said they were victims of the unwanted side effects of vaccinations to recover either from the plan's fund or in tort (subject to the requirement that the victim first go through the fund's claims process).[13] Recently, the U.S. Supreme Court ruled out the tort remedy for design-defect claims against vaccine manufacturers on so-called "preemption" grounds

9. It should be noted that the American solution is by no means the only way to deal with such accidents. European nations tend to allow both workers' compensation claims and tort claims (allowing recovery in tort only for damages not already provided by the country's industrial injury scheme), and Israel relies only on tort, not having adopted a specific workplace injury compensation scheme. Hence, unlike employers in the United States, employers in those nations do have a tort duty of due care to their workers.

10. *E.g.*, Levandoski v. Cone, 841 A.2d 208, 209–10 (Conn. 2004).

11. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-106 (McKinney 2010) (permitting recovery for "neglect, willful omission, or intentional, willful or culpable conduct"); N.J. STAT. ANN. § 2A:62A-21 (West 2000) (same).

12. 42 U.S.C. §§ 300aa-10 to -34 (2006).

13. *See id.* § 300aa-11(a)(2)(A).

under the National Childhood Vaccine Injury Act.[14] This no-duty result was achieved by Justice Scalia's remarkable grammatical *tour de force*, in which he interpreted the word "unavoidable" in the statute to mean (or include) "avoidable."[15] I find it utterly baffling that someone like Justice Scalia, who is thought to interpret statutes by the simple reading of the plain text, would reach such a result. His opinion also reflects a misunderstanding of the state of tort law at the time the NVICP was enacted. But all of this carping is for another day. The point is that concerns about whether vaccines were properly designed are now turned over exclusively to the Federal and Drug Administration (FDA), with its expertise, and away from trial judges and juries as a result of the 6–2 decision in *Bruesewitz*. And if injured victims are to obtain any compensation, it is to come from the NVICP fund and not tort law.

This is but the latest in a line of pro-defendant decisions in which the Supreme Court has interpreted congressional language as preempting the claimant from seeking a tort remedy, thereby freeing the defendant from a tort duty to exercise due care. In these cases, the Court has concluded that tort is no longer a proper place for individuals to try their complaints about, say, the design of medical devices[16] or the warnings contained on cigarette packages and in advertisements.[17] Rather, the FDA or Congress is the final word on whether reasonable precautions were taken, which results in the defendant owing no duty in tort to the claimant.

In the examples so far discussed, the *government* has created alternatives to tort for airing victim concerns. Consider next the professional athlete who is injured on the field by a carelessly behaving competitor. Generally speaking, for conduct that is merely negligent, there is no tort remedy.[18] One justification for this no-duty solution is that professional sports have *privately* developed mechanisms for dealing with the social goals said to be advanced by tort law, and they are the method for dealing with careless conduct that injures athletes. More precisely, professional sports have elaborate on- and off-field penalty mechanisms for dealing with misconduct that takes place dur-

14. Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1082 (2011). Although victims of manufacturing-defect claims continue to be able to sue in tort, those are rarely, if ever, the basis for claims under this program.

15. *See id.* at 1075–76.

16. *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 323–30 (2008). *But see* Wyeth v. Levine, 555 U.S. 555, 581 (2009) (concerning prescription drugs rather than medical devices).

17. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 524 (1992).

18. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520 (10th Cir. 1979).

ing the game.[19] These are thought to well serve the punishment, deterrence, and justice goals of tort law. As for compensation, there is a well-developed system outside of tort law as well—the combination of guaranteed contracts (when available) and disability insurance. Those arrangements are ones to which professional athletes have ready access, given that they have agents who know about these opportunities, to say nothing of their typical union membership in a body that is concerned about the future lives of those who are injured while playing, including those injured by the unreasonable behavior of another player.

In a similar vein, most states have concluded that if one's property has burned in a fire because the relevant water company carelessly failed to have water available to fight the fire, the property owner generally has no valid legal claim against the water company because the company owes him no duty to act with due care.[20] This is an example in which the property owner clearly relies on the water being competently supplied, believing that alternative fire-fighting water supplies need not be arranged. Normally one would think that there would be a legal duty owed to the property owner, and a few states reach that result.[21] But where there is no duty in tort, one justification is that, in this setting, the victim should look to the institution of private fire insurance rather than tort law to obtain compensation. Fire insurance is widely available, widely bought, and something that society thinks responsible property owners should obtain. Hence, in reality, the tort claim would generally involve a fight between the fire insurance company and the water company. Viewed that way, many believe that it is better for the loss to fall on the fire insurer because it is in a good position to price its insurance based on each specific piece of property's fire risk; the water company, by contrast, will generally only charge the municipality a bulk rate for the water pressure in the lines that lead to all of the hydrants in the jurisdiction.[22]

For another example, when the media negligently publishes something defamatory about a public figure, that victim may not successfully sue the publisher because, as a matter of federal constitutional

19. *See, e.g.*, NAT'L FOOTBALL LEAGUE, OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE (2011), *available at* http://www.blogandtackle.net/wp-content/uploads/2011/08/2011NFLRuleBook.pdf.

20. *See, e.g.*, H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897 (N.Y. 1928).

21. For a discussion of conflicting viewpoints, see Libbey v. Hampton Water Works Co., 389 A.2d 434, 434–35 (N.H. 1978).

22. *See id.* at 435 ("Water companies are in business to supply water, not to extinguish fires. Their rates reflect this assumption; they are uniform, not varying with the greater or lesser inherent danger in given areas.").

law, there is no tort duty of due care owed to the victim.[23] One argument in support of this result is that the Supreme Court has concluded that a wronged public figure should seek a remedy not in tort law, but through a reply in the media—access to which, it is assumed, a public figure will readily have.

The field of financial loss provides yet other instances in which would-be tort claimants are denied recovery on no-duty grounds because courts prefer them to pursue other *private* remedies instead. Here, the rejection of a tort claim is generally based on the argument that the victim should seek relief in contract law.[24] For example, if someone purchases a defective product and suffers financial losses as a result, then recourse must generally be sought in contract and not tort.[25]

For a different example of this same point, assume that one spouse inflicts emotional distress on the other spouse, who then sues in tort. Some jurisdictions, which generally allow tort actions for emotional distress wrongfully imposed on a clearly foreseeable victim, will deny recovery in such cases on the ground that the offending spouse owes the other spouse no duty of care in tort.[26] One justification for this result is that the wronged spouse should instead seek relief in family law through divorce or separation proceedings.

In sum, what characterizes all of these no-duty arguments is that there is another forum available to the plaintiff to deal with the plaintiff's complaint. To be sure, that other forum may in the end provide no remedy. And even if it does provide a remedy, that remedy might not address all of the goals said by some to be served by tort—justice, deterrence, cost internalization, and compensation, for example. Still, if these reasons are to be believed, the point is that the legal system has concluded that it would be better for victims to turn elsewhere, thereby relieving the actor of a legal duty of due care in tort.

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23. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 282–83 (1964).

24. *See* RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 & cmt. e(4) (Council Draft No. 1, 2006) (adopting the "economic loss rule" and discussing when tort is set aside because of the availability of a contract remedy).

25. *See* E. River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 872 (1986); Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965).

26. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1301–03 & n.24 (1996) (discussing why a jurisdiction should adopt a rule barring interspousal claims for negligent infliction of emotional distress).

B. The Judicial System Cannot Suitably Administer Claims like This

A second justification supporting the absence of a duty in tort is that, in certain types of cases, the judicial process we use to administer tort claims is simply not capable of properly processing the claims that would be brought were there a tort duty of due care.

Consider the rule in states like California, which provides that there is no duty of due care to prevent the negligent infliction of emotional distress upon someone the defendant did not directly physically impact or threaten to impact, unless that person was both present at the scene of the harm and a close relative of the physically injured victim.[27] It is easy to imagine instances in which negligently caused injuries to third parties could also cause emotional harm to dozens, hundreds, or even thousands of individuals who witnessed, read about, or later saw a video of the direct physical injury the defendant caused.[28] Allowing claims in all such cases could produce a flood of claims that has the potential to swamp the judicial system, causing huge delays in the handling of much more serious injuries. This fear of judicial paralysis is frequently offered as a justification for denying a tort duty to those who were in fact negligently so harmed.[29] These victims are generally thought to have suffered smaller injuries, comparatively speaking, and, for the sake of being able to provide justice for other claimants, these victims are denied a tort remedy.

I can also understand the flood-of-claims argument when a court disallows lawsuits by children for both emotional distress and "loss of consortium" every time a parent is seriously injured by a careless defendant.[30] But I am less convinced that a parent who rushes to the scene of an accident where her child lies seriously harmed should be denied recovery because she did not witness the initial crash on the ground that this would open up the courts to too many cases. Yet I concede that the line needs to be drawn somewhere and, on grounds of administrative convenience, those with practical experience in these matters must be trusted to try to draw it sensibly.

A different sort of concern about the inability of the judicial system to administer certain claims is that the courts—especially juries—will regularly make multiple mistakes, or will at least be seen by the public as doing so. This could come in the form of inconsistent decisions

27. *E.g.*, Thing v. La Chusa, 771 P.2d 814, 829–30 (Cal. 1989).

28. Think about the driver who carelessly caused the death of Princess Diana or the doctor who negligently caused the death of Michael Jackson.

29. *See, e.g.*, Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 433 (1997).

30. *See, e.g.*, Borer v. Am. Airlines, Inc., 563 P.2d 858, 866 (Cal. 1977).

about similar facts or outcomes that the public feels confident that it can second-guess and conclude were inconsistent. We cannot expect our system to be perfect or totally free from public criticism. But there could be some types of claims that create an especially acute risk of this result, which could wind up damaging the legitimacy of the judicial system in general and thereby cause far greater social harm. In such cases, it might be thought better simply to deny access to the courts even if that means the actual victims of another's fault would go uncompensated.

Here are two examples that are sometimes justified on this basis. First, in most states, participants in recreational sporting activities owe each other no duty of ordinary due care in tort.[31] One explanation for this is that juries will not be able to sensibly determine whether the victim was harmed by the negligence of the fellow participant or whether the injury was just a risk of the sport. All too often, a finding by the jury of the former would be seen by the public as more properly a case of the latter. Second, products liability claims could historically be brought only against the individual who directly sold the product to the consumer.[32] One explanation given for this result was that, because a product passed from a manufacturer through the hands of another party to the user-victim, juries would never know what the original buyer did to, or with, the product, thereby making it impossible for jurors to properly decide whether it was the initial negligence of the manufacturer or the fault of someone else that caused the injury.

Yet another potential problem area for the judicial system concerns cases in which we worry about collusion between plaintiffs and defendants. Suppose, for example, a husband is driving the family car and is in an accident in which his wife, who is either a passenger or a pedestrian, is injured. If the wife sues the husband, it will probably be to gain access to money provided from the family's liability insurance policy, which would raise a worry that the husband might concede that he was negligently driving when he was not. The old common law family-immunity doctrine would preclude such claims.[33] Although traditionally termed a separate or specialized doctrine, this "immunity" claim is really a no-duty idea, and the fraud concern given in justification of the doctrine is an example of the justification I am ex-

31. *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 711 (Cal. 1992).

32. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051–52 (N.Y. 1916); Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Ex. Div.) 405.

33. *See* Waite v. Waite, 618 So. 2d 1360, 1361 (Fla. 1993) (discussing policy justifications).

ploring here.[34] Most states appear to have abandoned the family-immunity rule,[35] and some states even find that insurance contract terms that exclude coverage when the claim is by another household member contrary to public policy.[36] In those states, insurers are simply left to ferret out any inappropriate collusion on a case-by-case basis. On balance, this might well be the best solution. My only point here is to show how the old doctrine might be justified as applicable to certain intra-family claims on the ground of judicial incompetence to ferret out the truth.

C. Permitting Tort Claims Will Induce Individuals to Respond in Socially Unacceptable (Perverse) Ways

A third category of no-duty cases is somewhat anguishing because it reflects a reluctant acceptance of the idea that in some situations one has to choose the lesser of two evils. I have in mind a setting in which the courts conclude that allowing a tort claim would, alas, result in behavior that is so socially undesirable that, on balance, it is actually better—or less bad—to deny recovery to the wronged and otherwise deserving victim.

One example in this category concerns recreational injuries. As noted above, in a large majority of states, if one skier carelessly knocks down another skier from behind and injures his victim, a tort claim will not lie because the injurer is said to owe no duty of ordinary care to the victim.[37] Another justification for this no-duty rule—the justification I want to focus on here—is the belief that imposing liability would have a highly undesirable social outcome; specifically, fearing the possibility of being sued, individuals would be afraid to engage in sporting activities that carry risks to others and would, in effect, stay at home and get fat. Put differently, some judges believe that imposing liability for negligence among participants will cause recreational activity to come to a halt or, perhaps less dramatically, to be substantially reduced.[38] That outcome, it is said, would be so undesirable that a tort duty will be denied in order to avoid this socially perverse response.[39]

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34. Other justifications have also been advanced in support of the family-immunity doctrine.

35. *See, e.g.*, Broadbent v. Broadbent, 907 P.2d 43, 50 (Ariz. 1995) (claims by children against parents); *Waite*, 618 So. 2d at 1361 (spousal claims). *But see* Renko v. McLean, 697 A.2d 468, 470 (Md. 1997).

36. *See, e.g.*, Ky. Farmers Bureau Mut. Ins. Co. v. Thompson, 1 S.W.3d 475, 477 (Ky. 1999).

37. *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 711 (Cal. 1992).

38. *Id.*

39. *Id.*

I accept this sort of argument. Yet in this specific setting, I am rather skeptical about whether it is convincing as an empirical matter. Knowing how much individuals enjoy playing sports and how ignorant they are of tort law, I am generally doubtful that skiing and the like would come to a halt, or be sharply reduced, were ordinary negligence law applied. This instinct is reinforced because I have not seen good evidence of the withdrawal from recreational sports in a state like Wisconsin, which applies the regular tort obligation of due care to participants.[40]

The denial of tort recovery to public figures who are merely negligently defamed by the media has also been justified by a perverse-behavioral-response argument—that there will be excessive "self-censorship" by the media so as to chill the exercise of the right to free speech (that society so greatly values).[41] Hence, once more, carelessly harmed victims are denied recovery in tort. Although this justification for a no-duty result rests in the First Amendment to the Constitution, it reflects this category of cases. As the media is hyper-aware of the possibility of defamation actions, I take the concern about excessive self-censorship more seriously here, especially when I think about out-of-state media defendants being sued in local state courts by otherwise popular local state officials.

Most states have concluded that social hosts should not be held liable for carelessly serving drinks to their guests.[42] These cases typically arise when the guest later goes out and, because of her drunken state, carelessly injures the victim, who subsequently sues the host. One justification for this no-duty rule is that the socially valuable enjoyment of alcohol in important social settings (weddings, birthday parties, and the like) will be destroyed as individuals will inevitably overreact in the face of potential liability.[43]

Notice that this is but a specialized illustration of one reason that has historically been used to justify a limited tort duty of social hosts to their guests as a general matter.[44] Fully imposing on hosts the due-care principle, some have argued, would cause individuals to stop (or reduce) hosting others out of an exaggerated fear of liability.[45] More

40. *See, e.g.*, Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993).

41. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

42. Nina J. Emerson & Sarah B. Stroebel, *Another Look at Dram Shop Liability*, 73 WIS. LAW., Aug. 2000, at 14, 17.

43. *See* Reynolds v. Hicks, 951 P.2d 761, 764–65 (Wash. 1998).

44. The *Restatement (Second) of Torts* treated a land possessor's obligations to licensees, which include the guests of social hosts, through a variety of provisions. *See* RESTATEMENT (SECOND) OF TORTS §§ 330, 341–342, 343B (1965).

45. *See Reynolds*, 951 P.2d at 764–65.

precisely, a fear of this perverse social response has been historically used to justify what at common law was a partial no-duty obligation toward licensees. By now, however, a majority of states have, in general, lumped licensees and invitees together, holding that both are owed the full duty of due care (in the relevant circumstances),[46] which suggests that most courts are no longer concerned about a serious decline in social interaction. But for the minority of states that have retained the old distinction,[47] a fear of perverse behavioral responses still may justify no-duty outcomes. Moreover, even in the majority-rule states, many legislatures have responded to the change in the common law with specialized, so-called "recreational use of land" statutes out of a fear that applying the ordinary tort-duty rules would cause too many individuals who freely allow or tolerate their land being used for recreational activities to fence their land off and deny recreational access to the substantial detriment of individuals seeking to enjoy the outdoors.[48] In effect, legislatures have concluded that it is better to maintain public access than it is to threaten landowners with liability for failing to address dangers they should have known and done something about.

The American rule that strangers owe no tort duty to take reasonable steps to save endangered fellow citizens[49] is justified on many grounds. One justification is the concern that imposing a duty would lead to perverse behavioral responses.[50] One such response might be that some individuals would become officious intermeddlers, rushing in to annoy individuals who do not need help.[51] Another is that some individuals would feel bound to attempt rescues when they are not competent to do so and, in their bumbling, would make things worse.[52] Yet another is that some individuals would be afraid to go out into the world for fear of being held responsible for failing to help

46. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 & cmt. a (Tentative Draft No. 6, 2009).

47. *See, e.g.*, Carter v. Kinney, 896 S.W.2d 926, 930 (Mo. 1995); RESTATEMENT (SECOND) OF TORTS § 330 cmt. h(3) (1965).

48. *See* Bragg v. Genesee Cnty. Agric. Soc'y, 644 N.E.2d 1013, 1017–18 (N.Y. 1994) (discussing recreational use of land statutes).

49. *E.g.*, Farwell v. Keaton, 240 N.W.2d 217, 221–22 & n.3 (Mich. 1976); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(b) (2010) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

50. *See* Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV 879, 882 (1986).

51. *Id.* at 886–87.

52. *Cf. id.* at 905 ("It is also possible that potential finders will actually cause losses and then hide the items that they find from their true owners.").

others they encounter.[53] In sum, these concerns about perverse behavioral responses have been used to justify no duty in tort. Whether these concerns are empirically justified is another matter. There does not seem to be evidence of these bad outcomes from European nations that impose a tort duty on those who fail to make "easy" rescues.[54] Still, were these fears based in reality, one can appreciate why a no-duty rule would be adopted.[55]

Some have tried to justify the previously discussed fireman's rule on the ground that, without such a rule, individuals who carelessly set fires would refrain from timely calling the fire department and would instead foolishly try to put out the fire themselves, thereby risking not only larger harm to their own property but potentially harm to the property of others.[56] This justification also rests on the ground that such a perverse behavioral response makes it better to deny, rather than allow, recovery to the carelessly injured firefighter. Were this fear truly warranted, I could again appreciate the force of the argument. Yet absent solid empirical evidence, it strikes me as wild speculation that owners would actually risk increased damage to their property because of a vague fear that a firefighter called to the scene might be injured by the flames and then sue the careless owner, especially when the owner's tort liability would normally be covered by his fire insurance policy.

Following the California Supreme Court's decision in *Tarasoff v. Regents of the University of California*, a majority of states now recognize a duty of mental health professionals to warn a targeted victim when a patient of the professional has seriously threatened to kill or maim that person.[57] Yet, some courts and scholars reject imposing a duty of due care in such settings by raising concerns about perverse behavioral responses. These concerns are threefold: (1) patients will stop seeking therapy or stop being candid with their therapists; (2) therapists will wrongly commit patients to mental institutions so as to

53. *See id.* at 884.

54. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

55. Adding to the empirical argument on this issue, one might claim that even without a legal duty, most competent individuals voluntarily engage in "easy" rescues anyway so that the upside behavioral gain from imposing tort liability in such settings would be minimal at best. But this alone may not overcome the concern on the other side that someone who could easily have engaged in an easy rescue, but did not, should escape liability. For another possible justification of a no-duty result in such settings, see discussion *infra* Part II.D.

56. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 431 (5th ed. 1984).

57. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 42 (Tentative Draft No. 4, 2004); *see also* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976).

assure themselves of not being sued were the patient to attack someone; and (3) by way of overdeterrence, therapists will excessively warn of possible attacks, causing mental harm to third parties. In fact, these concerns seem not to have played out over the years in which a duty has been imposed in such situations, but one can appreciate how courts at the outset might have been apprehensive.[58]

Difficult cases arise when criminals come into places of business and threaten customers with weapons as a way to force employees to turn over their cash. Suppose an employee refuses and the criminal then shoots a customer in anger. Assume the customer or her heirs then sue the business, claiming that a reasonable employee would have turned over the money. Focusing only on the case before it, a jury might well agree and find the defendant liable. Yet, courts might believe that to allow this result would increase the number of now-emboldened robbers, leading not only to more lost cash but, inevitably, more injured bystanders. Once more, I find such a view, which has been used to justify a no-duty rule in this sort of case,[59] to be questionable as an empirical matter. But I concede that it is in the same vein as the position held by many that in the end it is better to stick firmly to the position that "we do not negotiate with terrorists."

In the case of *Randi W. v. Muroc Joint Unified School District*, the plaintiff-student claimed to have been sexually molested by a school employee who, it appears, had engaged in similar misconduct in the past that his former employer knew about.[60] But when asked for a reference by his potential new employer, his former employer praised him and said nothing about his apparent misbehavior.[61] The plaintiff understandably argued that had the former employer been forthcoming, her district would not have hired the person and she would not have been molested.[62] The California Supreme Court upheld her tort claim against the former employer, at least with respect to allegations of misrepresentation.[63] Defendants argued that allowing such tort claims would undermine the job reference system to such a degree that in the future, former employers would simply acknowledge that *X*

58. *See* Peter H. Schuck & Daniel J. Givelber, Tarasoff v. Regents of the University of California*: The Therapist's Dilemma*, *in* TORTS STORIES 99, 113–17 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (discussing the duty imposed by *Tarasoff*).

59. *See, e.g.*, Boyd v. Racine Currency Exch., Inc., 306 N.E.2d 39, 42 (Ill. 1973); *see also* Ky. Fried Chicken of Cal., Inc. v. Superior Court of L.A. Cnty., 927 P.2d 1260, 1266–70 (Cal. 1997) (listing cases).

60. Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 585–86 (Cal. 1997).

61. *Id.* at 585.

62. *See id.* at 586.

63. *Id.* at 595.

worked for them and would refuse to say anything about *X*, good or bad. Were this perverse response to occur, it would deprive those on the hiring side from valuable information about prospective employees.[64] For some, this is a good reason to deny the assault victim's claim by deciding that the former employer owed the victim no duty in tort.

Florida's and Virginia's so-called "bad baby" compensation plans might also illustrate this perspective.[65] Those legislatures, some argue, curtailed the tort rights of newborns harmed by the medical malpractice of certain doctors because of their determination that allowing such tort claims would deprive the citizens of the state, more generally, of essential medical services.[66] Doctors, it was thought, would flee—and perhaps were already fleeing—to other states. The NVICP, discussed above,[67] also arguably reflects this justification: Congress curtailed tort rights because of the fear of a socially worse consequence of keeping them in place—the public loss of firms willing to make essential vaccines. Notice that in both these instances, the decision to create an alternative realm for the victims to turn for compensation was driven by the concern that existing duties of care in tort law were creating perverse responses that were socially intolerable.

In contrast, in most of the other examples I have discussed in this category, governments have not created specific alternative compensation plans to which victims can turn. That said, perhaps it is worth mentioning that many states have created "victims of violent crimes" laws, to which some individuals being denied tort claims can apply. Alas, these state compensation plans have functioned poorly and pay very modest benefits, usually only to destitute victims and all too often after extremely long delays.[68]

D. Trumping Social Values Override the Victim's Claim in Tort

I put a related fourth category of no-duty cases under the heading of "trumping social values." This brings us to the first of three value-based justifications. In these cases, the courts conclude that a broader and more important social value is at stake, one that would be unac-

64. *See id.* at 590.

65. Florida Birth-Related Neurological Injury Compensation Plan, FLA. STAT. §§ 766.301–316 (2010); Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000 to -5021 (1950 & repl. vol. 2007).

66. Peter H. White, Note, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487, 1496–97 (1988).

67. *See supra* notes 12–15 and accompanying text.

68. For an early analysis and historical background, see Robert E. Scott, Note, *Compensation for Victims of Violent Crimes: An Analysis*, 8 WM. & MARY L. REV. 277 (1967).

ceptably sacrificed if a duty of ordinary care were imposed. Put differently, this value trumps the normal desirability of discouraging and punishing conduct that juries conclude to be unreasonable. In this category, therefore, it does not matter whether imposing a tort duty would result in changed and undesirable behavior. If that were the case, this could shift the example to the "perverse behavioral response" category. As I see it, that prior category concerns an overall appraisal of the net social utility of allowing or disallowing tort claims in such settings, and the empirical reality of how individuals respond to the law matters greatly. By contrast, this "trumping values" category turns on a judicial appraisal of the value of the defendant's behavior.

It is important to see that this no-duty reason is not quite the same as a no-breach reason, although they are quite similar. Take, for example, the already-discussed common law rule that there is no duty in tort to come to the assistance of strangers.[69] Relevant here is a different justification from the belief that perverse and unhelpful behavioral responses would occur if there were such a duty. Rather, I want to focus on the justification that the liberty to remain uninvolved with other individuals' problems trumps the obligation to help them even when, in a specific case, a jury thought or might think it reasonable to do so.

One might argue that the courts in this situation are merely weighing the burden of rescuing against the benefit to the victim and so are making a breach determination for each particular case. But I do not think this is the right way to think about it. Rather, I think that courts are saying that the liberty right to remain uninvolved is of such importance that it trumps the entire idea of holding potential rescuers to a duty of due care toward strangers. It is, in a sense, making a decision at the wholesale level, whereas juries' breach decisions are made one by one at the retail level. Moreover, courts might be concerned that, in considering the burden on liberty in an individual case, juries might not have a wide enough perspective to take the liberty value fully into account. For that reason, courts seize on this category of injuries and decide such cases as a matter of law.

The common law no-duty rule has its special bite in cases in which it was obvious who could have come to the victim's assistance and where a nearly effortless act could have saved the victim from a terrible injury or death. In such cases, juries indeed might find the defendant to have been unreasonable were they permitted to do so. But if courts

69. *See supra* notes 49–55 and accompanying text.

view the defendant's liberty interest to be important enough, then the no-duty result follows.

For myself, I fail to see why the liberty value is so important to protect in instances in which an obvious defendant could so easily have saved the victim's life, but I acknowledge that others may see this differently. And I concur that our liberty could be compromised if potential victims could begin using tort law to involuntarily enlist us in their aid on the grounds that it would benefit them at what an individual jury might consider to be an acceptable cost.

A similar analysis might apply to cases that exempt from liability movie and television directors who depict an unusual act of violence that is soon thereafter engaged in by copycats who attack the plaintiff-victim.[70] What I am imagining here is a jury that focuses solely on the victim of this attack might well find (with its retail perspective) that the defendant should have known of the risk of a copycat response and was unreasonable in portraying this episode or scene on television or in film. That is, the jury might heavily discount the value of the artistic free expression at stake in a larger sense because it is looking at the burden of eliminating this scene solely in this case. But a court, especially an appellate court, may take a wholesale look at the matter and conclude that artistic freedom is too important and that it would be socially unacceptable in settings like this to burden media presenters with the cost of copycat conduct, even if the jury were to decide that the attack would not have happened but for the showing of the film.

Notice that this justification does not depend upon showing that imposing a tort duty in such settings would have a chilling effect on the director's right of free expression, thereby causing film makers to steer too wide a berth from controversial depictions of violence. That sort of justification falls under the "perverse behavioral response" category discussed above. Rather, the argument here is that the defendant's freedom of expression is especially important to protect from the financial burdens of tort law.

E. The Victims Are Morally Undeserving

A fifth category of no-duty cases concerns victims thought to be so morally undeserving that the courts will not open their doors to such a person even if he has been carelessly injured by another.

I think that this principle initially justified the common law doctrine of contributory negligence. That is, the wrongful nature of the vic-

70. *See, e.g.*, Olivia N. v. NBC, 178 Cal. Rptr. 888, 892–94 (Ct. App. 1981).

tim's act made the claimant completely undeserving of recovery against someone who carelessly caused him harm. While this common law rule is typically called a "defense," it functioned as a no-duty rule. That is, so far as tort law was concerned, it was alright to carelessly harm such victims because of their unworthiness.

While this rule's complete bar is now generally overturned, there are other examples of tort doctrine that reflect this outlook. First, there is the original and parallel rule that land occupiers owe no tort duty to trespassers.[71] Again, one justification of this rule is that the undeserving nature of trespassers meant that land owners could carelessly cause them harm and escape responsibility for that harm. Of course, over time this rule too was substantially weakened so as to allow certain classes of (less wrongful) trespassers to recover in certain circumstances against merely negligent land owners.[72] And in *Rowland v. Christian*, the California Supreme Court, in a decision later followed in a small number of other states,[73] completely abandoned this no-duty-to-trespassers rule.[74] And yet in response, the California legislature and the *Restatement (Third) of Torts* have concluded as a matter of principle that some especially undeserving trespassers are still owed no duty of ordinary care in tort by land possessors.[75]

Moreover, even in states that seemingly have replaced the complete defense of contributory negligence with pure comparative fault, one can find unusual cases in which recovery is denied to some flagrantly careless victims of other individuals' negligence (outside of the trespasser setting). This might occur, for example, when the victim is engaged in criminal or other highly socially unacceptable conduct, like making a pipe bomb.[76] While, doctrinally, courts might say that comparative fault was not meant to apply in this setting and therefore re-

71. William L. Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427, 427 (1959).

72. *See* RESTATEMENT (SECOND) OF TORTS §§ 334–339 (1965) (allowing recovery under certain circumstances for constant trespassers, known trespassers, and child trespassers).

73. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 Reporters' Note cmt. a (Tentative Draft No. 6, 2009).

74. *See* Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968).

75. *See* CAL. CIV. CODE § 847 (West 2007) (extending immunity from liability to landowners when the injury was sustained during or after the commission of certain felonies); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 (Tentative Draft No. 6, 2009) (lowering the duty owed to flagrant trespassers who are not "helpless" or "unable to protect themselves"). For the background story that led to the adoption of the California statute, see Wendy Lilliedoll, An Unexpected Windfall for California's Tort Reform Movement: *Bodine v. Enterprise High School* 34–44 (2004) (unpublished student paper), *available at* http://www.law.berkeley.edu/sugarman/Wendy_TortStoryFinal_ii.doc.

76. *See, e.g.*, Barker v. Kallash, 468 N.E.2d 39, 40, 44 (N.Y. 1984).

covery will be denied in full under the prior contributory negligence principle, a better understanding of this result is that there is no duty of ordinary care owed to such undeserving claimants.

F. Imposing a Duty of Care on This Defendant Would Result in an Unfairly Crushing Liability

I put in this final no-duty category cases in which the defendant has been negligent in the ordinary sense and harm has been done. But the harm is so enormous as compared with the nature of the defendant's wrongdoing that the consequence of the conventional application of tort law would be, in the view of judges, an unfairly disproportionate punishment of the defendant's misconduct. In such instances, we see courts finding ways to limit liability via the invocation of no-duty rules.

Some of these cases concern public utilities (or similar defendants) in which a single lower level employee carelessly acts in a way that causes untold harms to a vast number of individuals. Courts seem quite concerned that, absent a no-duty limit, the defendant would be subject to inappropriately crushing liability. Were the utility to be destroyed by tort law and no other firm would be willing step into the role, then such a case would be best put into the "perverse behavioral response" category. But my sense is that these cases do not depend on the community having to go without this vital public service were tort law to function in its normal way. Rather, it is simply the quantity of liability that sufficiently troubles the courts and causes them to step in and limit the defendant's exposure.

For example, we have seen this sort of justification given by the New York Court of Appeals in support of limiting the recovery of damages to actual customers of Consolidated Edison following the utility's careless causing of the famous New York City blackout.[77] Similarly, utility-crushing liability is sometimes given as a justification for the no-duty rule with respect to water companies that negligently cause water to be unavailable at fire hydrants when needed to fight fires.[78] For myself, I find these crushing-liability arguments somewhat dubious. Public utilities can generally pass on their tort liability through higher rates to their customers or spread their tort liability among other utilities via liability insurance. There is also something unsavory about allowing one to be let off for carelessly causing a huge amount of harm, as compared with someone who causes only a mod-

77. *See* Strauss v. Belle Realty Co., 482 N.E.2d 34, 36–38 (N.Y. 1985).

78. *See* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 897–98 (N.Y. 1928).

est amount of harm. Nonetheless, I do concede the moral argument that the penalty can seem wildly disproportionate in certain cases, and I agree that if one accepts that argument as compelling, then no duty in tort follows.

In a similar vein is Congress's decision to limit, in advance, the potential tort liability of power companies that could possibly arise from the operation of nuclear power plants.[79] Although a statutory solution, rather than one from common law, the congressional vision at the time was that nuclear power was very important for the nation to develop. But the utilities were refusing to provide nuclear power for fear of crushing liability.[80] As a result, victim compensation that might be obtained from the utilities in the event of nuclear accident was restricted (although at the same time at least some compensation was guaranteed).[81]

G. Summary of No-Duty Grounds

I believe that these six categories of justifications reflect appropriate arguments in favor of no-duty rules. They are not about the likelihood of harm or the burden of preventing it—the two major inquiries made in determining the reasonableness of the defendant's actions (in other words, whether he breached his duty). To the contrary, they rest on considerations that could lead one to conclude that, overall and on balance, it would be unwise to allow a tort claim by someone who might otherwise be able to recover on the ground that the defendant unreasonably failed to prevent the injury. Perhaps others will put forward different categories of reasons or will decide to regroup the reasons I have advanced in a different way. What is most important for now, I think, is to always keep in mind that the arguments advanced here are in support of freeing a potential defendant from tort liability when a jury found or might reasonably find him to have failed to exercise due care under the circumstances.

III. The Confusion of Breach and Duty

Having now described the sorts of arguments that might justify a no-duty rule, I want to return to a point I raised briefly at the outset: the duty element in tort cases sounding in negligence is much confused and much abused.

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79. *See* Price-Anderson Act, 42 U.S.C. § 2210(e) (2006). Yet because of the seemingly realistic fear that without tort limitation, there would be no nuclear power industry, perhaps this example seems better put in the "perverse behavioral response" category.

80. *See* Marc A. Franklin et al., Tort Law and Alternatives 884 (9th ed. 2011).

81. *Id.*

It is often said that while breach is a question for the jury (or more generally the trier of fact), duty is a question for the judge—a difference that is perhaps most salient when there is a jury, although even in bench trials it is important to keep the duty and breach issues distinct.[82] Alas, this old saying, about which issue is for which actor, is wrong and contributes to the confusion.

Judges, both at the trial and appellate levels, have roles in the breach question beyond merely stating for the jury the legal principle that breach is a matter of deciding how a reasonable person should act under the circumstances and then gauging the defendant's conduct against that. After all, trial judges may, and indeed do, have an obligation to decide whether the defendant's conduct was reasonable or unreasonable as a matter of law—at least when asked by the appropriate party through a proper motion (for example, a motion for a directed verdict or summary judgment). The test against which these motions are measured is whether a jury could reasonably decide otherwise.[83] If not, then the judge is to step in and assert that there was or was not a breach.

In practice, plaintiffs rarely ask for these rulings because, generally speaking, if the plaintiff's lawyer thinks that the case is strong enough to get a directed verdict, then the lawyer is usually not worried about the jury deciding against her client. And to ask for and have such a motion granted even in a very strong case—when there is any risk that this could be overturned on appeal, thereby causing delay and requiring a new trial—is something that the plaintiff is eager to avoid. Defendants typically feel otherwise. They worry that juries will find them at fault when they were not, and if the judge grants a directed verdict that is later overturned, defendants—who get to keep their money while all of this is going on—are much less bothered by delays. The point, in any event, is that when no jury could reasonably find that the defendant failed to exercise due care and the defendant asks for a directed verdict and gets it, the breach issue has been decided by the trial judge and not the jury.

Moreover, appellate courts sometimes decide the breach issue or make a decision that dictates the outcome of the breach issue. The former happens when the appellate court, in effect, chastises the trial judge for failing to properly grant a directed verdict request by the defendant. For example, even though appellate judges normally defer to the judgment of trial judges, who personally encountered the evi-

82. *E.g.*, Farwell v. Keaton, 240 N.W.2d 217, 219–20 (Mich. 1976).

83. *See, e.g.*, Andrews v. United Airlines, Inc., 24 F.3d 39, 41–42 (9th Cir. 1994).

dence, including live witnesses, an appellate court will occasionally conclude that, even seen in the best light possible, the plaintiff simply has failed to offer proof that could reasonably demonstrate a lack of due care by the defendant. These cases tend to be of two sorts. On the one hand, the harm that took place may be so unexpected that the appellate court concludes, and explains why, the injury was unforeseeable. And it cannot be unreasonable to fail to avoid harms that you could not plausibly imagine would occur. Hence, because *de minimis* risk-taking conduct is not something that the reasonable person would avoid, someone taking such a risk may not be found at fault. On the other hand, sometimes the amount of cost or effort that would have been required by the defendant to avoid the harm that took place is so self-evidently overwhelming that it would unquestionably be unreasonable to ask the defendant to bear that burden. In those cases too, appellate courts sometimes decide that there was no breach as a matter of law. For the purposes of this Article, the vital thing to appreciate is that in these cases the judges are deciding the breach issue and not the duty issue.

A good example is *Adams v. Bullock*, a case in which a boy had swung a wire in the air that caught on overhead trolley wires, sending live electricity into his body and seriously injuring him.[84] For Judge Cardozo, this sort of freak harm was simply unforeseeable; it had never happened before, according to the proof tendered, and the circumstances did not make the live wires appear to Cardozo to be dangerously in harm's way.[85] Moreover, as Cardozo saw it, there was nothing that the trolley company could reasonably do about it anyway.[86] It could not insulate its wires because then the trolley could not function, and having the power train put underground was altogether too much to ask.[87] Hence, looked at from either side of what later has become known as the Hand Formula in deciding the breach issue (is *PL* greater than *B*?), both the *P* (the probability part of the risk consideration) and the *B* (the burden side of the equation) are overwhelmingly in the defendant's favor.[88] When there can be no other result than a finding of no breach by the defendant, one can understand why Cardozo, speaking for the New York Court of Ap-

84. Adams v. Bullock, 125 N.E. 93, 93 (N.Y. 1919).

85. *Id.*

86. *Id.* at 94.

87. *Id.*

88. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

peals, reversed the trial judge and the jury verdict for the plaintiff that the trial judge had allowed to stand, and ordered a new trial.[89]

Some qualifications should be offered about this famous opinion. First, it turns out that at that time many children were in fact being injured by coming in contact (usually via other wires) with live train and trolley wires, something that the defendant trolley line probably should have known about—and probably did—although the plaintiff's lawyer oddly failed to offer proof of this past experience.[90] Second, while undergrounding the power might have been too much to ask of the defendant, putting up a shield or guard at the particular point of the injury arguably was not. This was a unique place on the trolley line where individuals were above the wires on a well-used bridge and much closer than normal to the trolley wires, which could be reached (as the plaintiff did) with the help of gravity. So, maybe the outcome of the case is one that is actually best explained by inadequate representation of the plaintiff.

Perhaps more important for my purposes, Cardozo's opinion has a different exasperating feature. As I see it, he is clearly deciding the breach question, and as I have already said, I have no problem with courts doing so when juries could not reasonably decide otherwise. But, he uses the "duty" word.[91] This is wrong and misleading. To be sure, it is a correct usage of the English language to say that the defendant had "no duty" to bury the wires underground. But, as a legal matter, this mixes up duty and breach. There was no issue of "duty" presented to the New York Court of Appeals. Had harms like this been shown to be common and well known to trolley lines and had powerful evidence been presented that this bridge was evidently a specially dangerous locale for such an injury—one that could have been avoided by spending a couple of dollars on a wooden guard over the wire as it emerged from under the bridge—then there seems no doubt that the jury verdict for the plaintiff would have been upheld. Hence, what Cardozo should more precisely have said was that, under these facts, it was not unreasonable to fail to underground the trolley, that failing to do so did not amount to failing to exercise due care, or that a reasonable trolley line would not have buried the wires—all ways of emphasizing that there was no breach.

89. *Adams*, 125 N.E. at 94.

90. For the story behind this well-known case, see Elizabeth Smallwood, A First-Year Tort Law Institution: *Adams v. Bullock* (2004) (unpublished student paper), *available at* http://www.law.berkeley.edu/sugarman/adamsfinal-1.doc.

91. *Adams*, 125 N.E. at 94.

In the same vein, consider *Harper v. Herman*, a case in which a young man dove off a recreational boat and seriously injured himself when it turned out that the water into which he dove was quite shallow.[92] The owner and operator of this small craft knew of the shallow water, where he deliberately anchored for his passengers to go swimming.[93] The court concluded, however, that he had no duty to warn the passenger of the water's depth without adequately explaining why.[94] It seems to me that there is hardly any liberty interest of the boat captain at stake and that a duty of due care should have been imposed. After all, the victim was a welcomed passenger on the defendant's craft. Whether or not there was a breach is another matter, however. It appears that the young man may well have dove in quickly, in a way that the captain did not anticipate, making it not actually unreasonable to have failed to give a warning. But that is not a duty matter.

Frequently the breach question is well understood to be a fresh matter to be decided entirely on the facts of the specific case. Due care, or breach, is a "standard" against which the defendant's conduct is measured by the jury (or fact-finding judge in a bench trial). I have assumed this to be the case in the discussion so far. But in some situations, appellate courts have decided to adopt or announce "rules" that more precisely specify what is or is not due care in a certain type of case.[95]

One advantage of rules is that case results are likely to be more consistent; for example, the same facts will be decided in the same way (either breach or no breach), rather than being left to juries who might find the identical conduct reasonable in some cases and unreasonable in others. A second advantage is that rules make clear to defendants in advance just what is expected of them, which may provide some sense of security to those who want to do things but not run afoul of the law. A third advantage is that cases may well be more quickly settled, or indeed, resolved without formal legal proceedings, when it is reasonably clear to both sides what the legal outcome will be.

Rules have costs, however. They fail to take into account the myriad of little factual variations in cases subject to the rule, and those facts might actually, in close cases, make the defendant's conduct judged to be other than what the rule specifies. The rule that requires

92. Harper v. Herman, 499 N.W.2d 472, 474 (Minn. 1993).
93. *Id.* at 473.
94. *See id.* at 475.
95. Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531, 534–35 (N.Y. 1981).

motor vehicle drivers to get out of their vehicles at railroad crossings and look down the track if they could not see far enough for safety from the driver's seat is a good example (albeit applicable to plaintiff's, not defendant's fault).[96] It turns out that certain grade crossings have such complex configurations that it would actually be unreasonably foolish to get out to look down the track, but a victim who failed to do so would be deemed negligent under the rule. This problem is nicely illustrated by Justice Holmes's opinion in *Goodman*, which first set out the rule, and then by Justice Cardozo's later opinion in *Pokora*, which effectively scuttles the rule.[97]

A different example of a rule would be that it is unforeseeable that a criminal would injure a patron in one's parking lot if this had not happened previously.[98] Hence, the first person harmed on the defendant's property in this way would always lose. In such instances, the failure of the plaintiff to win should be understood as a no-breach determination and not one about there being no duty to take precautions against the harm that happened.

One problem with a rule that exempts first victims from recovery is that sometimes other facts might demonstrate that, in certain areas and with respect to certain property, it was actually not at all unforeseeable that someone might be attacked in the parking lot—say, for example, dozens of these attacks had recently occurred in parking lots right down the block and the defendant was well aware of that. Those considerations favor using the due-care standard over a rule.

When doing so, however, courts sometimes continue to confuse duty and breach. In *Posecai v. Wal-Mart Stores, Inc.*, the victim, who had been shopping at the defendant's store, was attacked in the defendant's parking lot.[99] The court concluded that, given the limited past history of similar attacks, the risk of harm to the plaintiff was slight.[100] (So far, so good.) But it was misleading then to conclude that the defendant owed the victim no duty to protect her from the crime.[101] Instead it should have said that there was, as a matter of law, no breach of the duty of due care that the defendants clearly did owe to a customer and invitee on their property.

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96. *See* Balt. & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927).

97. *See* Pokora v. Wabash Ry., 292 U.S. 98, 102–06 (1934).

98. *See* Posecai v. Wal-Mart Stores, Inc., 752 So. 2d 762, 766–68 (La. 1999) (discussing various rules states have adopted on this issue).

99. *Id.* at 764.

100. *Id.* at 768–69.

101. *Id.* at 769.

A different cost of a rule is that sometimes the rule reflects an understanding of the available harm-avoiding technology at the time the rule was adopted and yet later on new technology has become available that would make it much easier to avoid the harm in question. Additionally, rules may not reflect the fluid nature of society's understanding of what sort of precautions defendants should reasonably take. For example, society may become more risk averse (or the opposite), or the value of a life saved may be thought to be much more than it previously was. In such situations a defendant could be found not negligent for complying with a rule when a contemporary jury, reflecting today's social judgment, would have found the defendant to be at fault for not preventing the injury.

In my view, these reasons—combined with more talented plaintiff lawyers—have substantially undercut the use of rules and have made negligence law increasingly more a matter of deciding whether there was a breach in the specific circumstances—namely, applying the due-care standard and not applying a due-care rule. Nonetheless, where there is a rule as to what constitutes breach, that rule should be applied by the trial judge both in giving instructions to the jury and, more importantly, in deciding whether the rule was complied with as a matter of law; and if so, deciding for the defendant if the proper motion has been made.

But all of this is about breach. It is all about deciding in one way or another, in one context or another, whether the defendant or plaintiff was at fault. It is not about duty. Hence, if the rule calls for the defendant to do *X* and the defendant does *X* but fails to do *Y*, it is not helpful and only confusing to say that the defendant has no duty to do *Y*. Rather, the right thing to say is that the defendant did not breach his duty to act with due care by failing to do *Y*.

IV. Conclusion

In the *Restatement of Torts* and in the decisions of common law courts throughout the country, the absence of duty in tort arises in what appear to be highly varied contexts. Typically the courts seem to pay little attention to themes that run across doctrinal areas. In this Article, I have attempted to draw together a range of no-duty issues by gathering them under six general headings. These, I hope, show us that there are indeed a number of reasons why we might want to deny potential plaintiffs the right to a tort recovery against someone who carelessly injured another. By seeing that these same themes arise in different settings, we may become more thoughtful about how to decide cases when new no-duty claims arise. We might also be willing to

reassess whether or not the reason given for a no-duty result in some specific setting is actually convincing (especially when set alongside other situations in which this same reason has been offered). I also hope that I have succeeded in distinguishing no-duty problems from no-breach problems by demonstrating ways in which courts, while perhaps coming to the right solution, have mislabeled the doctrine under which they are actually justifying the result. That distinction should further help to clear up the point that duty is not about fault.