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Note

Is This Really the End of Duty?:
The Evolution of the Third Restatement of Torts

Jordan K. Kolar*

With a little imagination, the story could read more like film noir than legal doctrine. A group of legal scholars—let us call them the “Negligence Nine”—gather secretly in a poorly lit basement in the wrong part of town. Through the cigar smoke and the smell of stale booze, they fiddle anxiously with their fedoras and consider their options: “This Duty character has given us trouble from the beginning,” one complains. From the shadows, a raspy voice and a radical proposal: “I’ve said from the beginning that we never needed him—why don’t we finish the job that Prosser started?” Some nod soberly and some feign shock, but all mull over the same question: Is this really the end of Duty?

In May of 1999, the notably less shrouded American Law Institute (ALI) convened to consider exactly such a proposal. The previous month, Reporter Gary Schwartz had presented for the Members’ consideration the Restatement (Third) of Torts: General Principles, the third and final volume of the Third

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1. For the suggestion that Prosser was famously opposed to the centrality of duty in negligence law, see John C. P. Goldberg & Benjamin C. Zipursky, The Restatement (Third) and the Place of Duty in Negligence Law, 54 Vand. L. Rev. 657, 661-62 (2001). See also Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 7, Reporters’ Note cmt. a (Tentative Draft No. 2, 2002) [hereinafter Tentative Draft No. 2] (observing Prosser’s suggestion that the concept of duty did not develop until negligence emerged as a distinct theory of liability, and even then was only employed “in order to confine the scope of liability” (citing William Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1, 12-13 (1953))).
Restatement project. Schwartz's draft had removed duty as a prima facie element of negligence. The General Principles volume was supposed to have been the end of the Third Restatement project, but it was actually only the beginning.

Almost everything about the Third Restatement project has been different from previous efforts. Where the volumes of previous Restatements sought to restate general areas of tort law (to which individual volumes were generally dedicated), the third volume purported to be a "doctrinal elaboration of the core subject of the law of torts, liability for physical harm." It

2. See RESTAMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft 1999) [hereinafter DISCUSSION DRAFT].

3. Id. § 3; see also text accompanying infra note 50 (quoting the full text of the Discussion Draft's section 3).

4. See infra note 5 (describing the progression of the Third Restatement project).

5. The third volume's subtitle alone, General Principles, suggests the markedly different approach the ALI took toward this most recent torts Restatement project. The First and Second Restatements consisted each of four volumes, finished respectively in 1939 and 1979. See RESTAMENT (SECOND) OF TORTS (1979); RESTAMENT (FIRST) OF TORTS (1939); see also Lance Liebman, Foreword to RESTAMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), at xiii-xv (Tentative Draft No. 1, 2001) [hereinafter FIRST TENTATIVE DRAFT FOREWORD]. "Work on the Third Restatement," ALI Director Lance Liebman noted in the foreword to the 2001 Tentative Draft, "proceeded in a different fashion" from that of the previous Restatements. Id. at xiii. "Rather than proceeding directly to work on a single, comprehensive new Torts Restatement, the Institute first undertook to 'restate' two sub-areas of the field of torts: Products Liability and Apportionment of Liability." Id.; see also Harvey S. Perlman & Gary T. Schwartz, General Principles, 10 Kan. J.L. & Pub. Pol'y 8, 9-10 (2000) (describing the developments from the First Restatement to the Third Restatement project). According to Liebman, these two areas were in particular need of restatement and clarification because, "Products Liability had grown exponentially in magnitude as a legal subject," and Apportionment was "essentially a new topic, resulting from the death of contributory negligence." FIRST TENTATIVE DRAFT FOREWORD, supra, at xiii. The Products Liability and Apportionment projects were completed in 1998 and 2000, respectively. Id.

6. For example, the first volumes of the First and Second Restatements are devoted entirely to intentional torts, and the second volumes are dedicated to a restatement of negligence principles. See RESTAMENT (SECOND) OF TORTS (1979); RESTAMENT (FIRST) OF TORTS (1939). Professor Schwartz, expressing his "less is more" philosophy, see infra note 7, described the First Restatement, presumably pejoratively, as a "fat, four-volume effort." Perlman & Schwartz, supra note 5, at 8.

7. FIRST TENTATIVE DRAFT FOREWORD, supra note 5, at xiii. Professor Schwartz described the rationale for the different path taken by the Third Restatement. "If it took twenty years to do the Restatement (Second), given the enormous expansion in the case law, and given the enormous new range of
was, however, the volume's treatment of duty that would prove most controversial.  

Duty has traditionally played a prominent role in negligence doctrine. First year law students are taught almost universally that negligence consists of four distinct elements: duty, breach, causation, and harm. To establish a prima facie

controversies that now surround tort law,” Professor Schwartz argued, “it would take fifty years to revise the Restatement (Second) in its four-volume totality.” Perlman & Schwartz, supra note 5, at 9. “[T]here ha[d] never been any thought,” he contended, “of completely redoing the second Restatement in four volumes from start to finish.” Id. He suggested that such a project would be useless upon arrival. Id.

8. See infra notes 18-19 and accompanying text (discussing the controversial treatment of the duty concept). Put simply, Schwartz proposed removing duty as an affirmative element of negligence, and replacing it with duty's obverse. See DISCUSSION DRAFT, supra note 2, §§ 3-4, 6. According to the Discussion Draft, judges, as a matter of policy or principle, could relieve defendants of liability for otherwise negligent acts upon a judicial determination that the defendant owed “no-duty” to the plaintiff. See DISCUSSION DRAFT, supra note 2, §§ 3, 6; see also infra notes 50-57 and accompanying text.

9. See infra notes 21-29 and accompanying text (discussing duty as an element of negligence).

10. A survey of numerous prominent torts casebooks reinforces the pedagogical prominence of the four-element tort of negligence. See, e.g., GEORGE C. CHRISTIE, CASES AND MATERIALS ON TORTS 108-09 (1983) (citing the four elements); RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 128 (5th ed. 1990) (reciting “duty, breach, causation, and damages” as the elements of a “standard negligence action”); JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 221-22 (3d ed. 2001) (describing an actor’s “basic obligations” and citing the four elements from section 281 of the Restatement (Second) of Torts); JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 131 (9th ed. 1994) (same). A number of modern textbooks cite a five-element negligence rule. See, e.g., DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 93 (3d ed. 1997); MARK F. GRADY, CASES AND MATERIALS ON TORTS 213-468, 555-784, 851-98 (1994) (dedicating Chapter Four to Duty, Chapter Five to Breach of Duty, Chapter Seven to Cause-in-Fact, Chapter Eight to Proximate Cause, and Chapter Ten to Actual Damages); JOSEPH W. LITTLE & LYRISSA BARNETT LIDSLEY, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACT 35-95 (2d ed. 1997) (devoting sections 4.02-06 to Duty, Breach, Cause-in-Fact, Proximate Causation and Damages, respectively); DAVID W. ROBERTSON, CASES AND MATERIALS ON TORTS 83-94 (2d ed. 1998) (subdividing the causation element into two distinct elements, factual cause, or “cause-in-fact,” and proximate cause). Since all authors acknowledge duty as an element, the difference between the four-element characterization and the five-element characterization of the tort of negligence is, for this Note’s purpose, doctrinally immaterial. Professors Dobbs and Hayden, for example, note that

[d]ifferent courts may state these [five] required elements in slightly
case of negligently inflicted harm, plaintiffs must offer evidence sufficient to allow a jury to find the existence of all four of these elements.\(^\text{11}\) Though in the most standard cases the duty analysis may not require rigorous attention, acknowledging that the duty inquiry may often be routine is not to argue that duty is not actually a prima facie element of an action in negligence.

In 2000, Vanderbilt University Law School devoted its John W. Wade Conference to a discussion of the 1999 General

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Principles Discussion Draft. The conferees—most notably Professors John Goldberg and Benjamin Zipursky, the co-authors of the Conference’s main paper—took particular aim at the ALI’s dismissal of duty as an affirmative and co-equal element of negligence. Goldberg and Zipursky argued vigorously for the maintenance of duty as a key component of negligence law and for the reinstatement of duty to its proper place in the Third Restatement’s negligence doctrine. After all, they complained, “it is the promise of a relatively clear, unified, and comprehensive account of negligence that undergirds the project of restating the law.”

The Wade Conference helped to break the duty issue wide open. In March of 2001, the ALI released the first Tentative Draft of the final volume of the Third Restatement, now retitled Liability for Physical Harm (Basic Principles). The


13. See generally Goldberg, supra note 12, at 639, 641-43; Goldberg & Zipursky, supra note 1 at 723-36.

14. See Goldberg & Zipursky, supra note 1, at 724-32. Implicit in Goldberg and Zipursky’s criticisms is the tension between passive restatement and progressive legal reform inherent in Restatement projects. Professor Schwartz briefly addressed this tension when he described the ALI’s response to the recent “modern tort crisis.” See infra notes 34-35 and accompanying text. “The American Law Institute [first] addressed that ‘torts crisis’ by commissioning a project in the late 1980s that was not a Restatement at all, but rather a broad-ranging effort to kind of reform or recommend revised criteria for not only tort liability rules, but tort practices more generally.” Perlman & Schwartz, supra note 5, at 8. When the volume was published in 1991, it “basically was dead on arrival”; Schwartz conceded that “the study was kind of a fiasco, an effort to engage in a certain kind of major law reform which did not produce any result that the ALI was willing to support.” Id. at 9. Subsequently, “the ALI turned back to more traditional Restatement projects.” Id.

15. Goldberg & Zipursky, supra note 1, at 664.

16. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) [hereinafter TENTATIVE DRAFT NO. 1]; see also FIRST TENTATIVE DRAFT FOREWORD, supra note 5, at xiii (stating that the Third Restatement project was formerly titled Torts: General Principals). According to the foreword that accompanies the first Tentative Draft, Michael Green, who had previously served as co-Reporter for the now completed Apportionment project, joined Professor Schwartz as co-Reporter for the Basic Principles volume. Id. at xiv. While Professor Green assumed primary responsibility for the treatment of causation, he also collaborated with Professor Schwartz on “affirmative duties.” Id. Sadly, Professor Schwartz took ill shortly before the ALI’s 2001 annual meeting and
ALI renamed the draft in order to "convey more accurately [the volume's] intended scope." The director of the ALI, Lance Liebman, explicitly acknowledged the controversy surrounding the Discussion Draft's treatment of duty, noting that "the project has benefited from the discussion and even from the disagreement that it has engendered."

Whether it is possible to discern this benefit remains to be seen. At the May 2001 annual meeting, the ALI approved the first Tentative Draft in its entirety—except for its two duty provisions, which the members remanded to the Reporters for further revision. That remand produced a second Tentative Draft, released in March of 2002.

In the wake of this controversy, this Note has one central goal: to evaluate the adequacy of the ALI's evolving account of negligence and duty. Relying on the critical framework provided by Goldberg and Zipursky, this Note examines the 2001 and 2002 Tentative Drafts in an attempt to discern whether subsequent ALI responses provide a convincing argument for the exclusion of duty as an element of negligence.

Part I summarizes the history of duty's place in negligence
died on July 25, 2001. Lance Liebman, Foreword to RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES), at i, xiii (Tentative Draft No. 2, 2002) [hereinafter SECOND TENTATIVE DRAFT FOREWORD]; Introductory Note to TENTATIVE DRAFT NO. 2, supra note 1, at xxv. Professor Green presented and defended Professor Schwartz's work at the 2001 meeting, with the help of ALI Council member Kenneth Abraham. SECOND TENTATIVE FOREWORD, supra, at xiii. Professor Green has since been joined on the Third Restatement project by co-Reporter William Powers, Jr. Id.

17. FIRST TENTATIVE DRAFT FOREWORD, supra note 5, at xiii.
18. Id. at xiv-xv. At least for the purposes of the first Tentative Draft, the disagreement proved to be too much. See infra note 19 and accompanying text (describing the ALI's decision to reconsider Schwartz's controversial duty provisions).
19. Introductory Note to TENTATIVE DRAFT NO. 2, supra note 1, at xxv. The foreword to the second Tentative Draft does not acknowledge that the ALI considered Schwartz's treatment of duty controversial. See ALI, Actions Taken on 2001 Annual Meeting Drafts, at http://www.ali.org/ali/ALI2001_ActionsTKN.htm (last visited August 26, 2002) ("Tentative Draft No. 1 of the Restatement Third, Torts: Liability for Physical Harm (Basic Principles), was tentatively approved, except for §§ 6 and 7 [relating to duty], which were recommitted to the Reporters for revision."); THE ALI REPORTER, Torts Reporter Gary Schwartz is Dead at 61, Summer 2001, at http://www.ali.org/ali/-R2304_Schwartz.htm (last visited August 26, 2002) ("The [Tentative] draft . . . was acclaimed . . . , and except for the need for further consideration of its controversial treatment of duty, approved by the membership.").
20. See TENTATIVE DRAFT NO. 2, supra note 1, at i.
law, paying particular attention to the development of duty's role in the previous Restatement projects. Part II fleshes out, in greater detail, Goldberg and Zipursky's stance in favor of the centrality of duty in negligence law. Part III chronologues the ALI’s response to those criticisms of its negligence and duty provisions. Despite the ALI's frequent lip service to accommodate Goldberg and Zipursky’s concerns, this Part exposes the ALI's persistent efforts to deny duty its rightful (and doctrinally proper) place as a key, stand-alone element of the tort of negligence.

I. DUTY, NEGLIGENCE, AND THE RESTATEMENT OF TORTS

A. THE FIRST AND SECOND RESTATEMENT APPROACH TO THE ROLE OF DUTY

The conception that American negligence law includes a positive duty element predates the First Restatement of Torts. Furthermore, as recently as 1984, Professors Prosser

21. See, e.g., THOMAS M. COOLEY, THE ELEMENTS OF TORTS 263 (Chicago, Callaghan & Co. 1895) (“[N]egligence, in a legal sense, is but the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.” (emphasis added)). Other authorities speak more cryptically of the duty element. See, e.g., MELVILLE MADISON BIGELOW, THE LAW OF TORTS 106 (8th ed. 1907) (observing that a negligent defendant “owed a duty to the plaintiff not to be negligent” (emphasis in original)); 1 FRANCIS HILLIARD, THE LAW OF TORTS 124 (Boston, Little, Brown & Co. 1859) (describing negligence as “the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do”). Neither Bigelow nor Hilliard seemed to speak explicitly of duty as a discrete and positive obligation (or at least not all of the time). Bigelow, for example, notes that “[i]n many cases the duty will be obvious on the general facts, and hence will not call for special consideration; in other cases it will not be obvious that there was a duty, or what the nature of the duty was. Such cases will call for examination of the question.” BIGELOW, supra, at 107. When Bigelow later offered a “definition” of negligence, however, he stated that negligence “consists in failure in the particular place or situation to conform to the conduct of a prudent, careful, skillful, or diligent man often called the average man; which failure, if it cause [sic] damage, is a breach of duty.” Id. at 110. Bigelow, then, spoke not of a general duty to exercise reasonable care (or a general duty not to be negligent), but a specific duty rooted in a “particular place or situation” and, presumably, to a particular person so situated. Id. An actor’s duty arises out of peculiarities, not generalities. Likewise, Hilliard, in a general discussion of torts that preceded his discussion of negligence, focused conspicuously on the concept of a positive duty, referring to “an invasion of some legal right”; questioning whether an actor “was under
and Keeton recited the "traditional formula" for negligence that included as the first element "a duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks."22

The First Restatement codified the four elements of negligence: duty, breach, causation, and harm.23 The First Restatement held an actor "liable for an invasion of an interest of another, if . . . the interest invaded is protected against unintentional invasion."24 The Reporter notes, "This Clause states the requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions."25 That is, the protected interest must be protected specifically against negligence. Other sections of the First Restatement confirm the First Restatement's commitment to the role of affirmative duty. Section 284 defines negligent conduct as either "an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another, or . . . a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do."26 Section 281 does not purport to resolve which interests might be protected and which might not.27 This language of the First Restatement went unchanged between the Tentative Draft No. 4 in 1929 and the final published version in 1939.28

When the Reporters of the Second Restatement revisited the general negligence provisions of the First Restatement several decades later, they elected to make no changes to either

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22. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984); see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30, at 175 (1941). It should be noted that this authority was published at the height of Professor Schwartz's alleged "modern tort crisis." See supra note 14; infra notes 34-35 and accompanying text (describing Shwartz's alleged "tort crisis").

23. See RESTATEMENT (FIRST) OF TORTS § 281 (1939) (laying out the four elements in the First Restatement).

24. Id.

25. Id. § 281 cmt. b.

26. Id. § 284 (emphasis added).

27. See id. § 281.

28. Compare RESTATEMENT (FIRST) OF TORTS § 281 (1939), with RESTATEMENT (FIRST) OF TORTS § 165 (Tentative Draft No. 4, 1929).
the wording of the duty element or the language of the comment which accompanied that element.\textsuperscript{29} The Reporters did, however, take issue with the First Restatement's treatment of breach.\textsuperscript{30} The breach element of the First Restatement required that "the conduct of the actor [be] negligent with respect to such [invaded] interest or any other similar interest of the other which is protected against unintentional invasion."\textsuperscript{31} The Second Restatement required, instead, that the conduct of the actor be "negligent with respect to the other, or a class of persons within which he is included."\textsuperscript{32}

B. THE RESTATEMENT PHILOSOPHY AND THE SHIFT FROM DESCRIPTION TO PRESCRIPTION

One of the thrusts of Goldberg and Zipursky's criticism of the Third Restatement Discussion Draft is its failure to accurately reflect actual legal practice.\textsuperscript{33} This tension is merely a theme of this Note, and not its topic. It bears mentioning, however, that even the historical context in which this debate takes place is an object of dispute. Professor Schwartz has justified his doctrinal departure on, among other things, the grounds that the modern era of tort doctrine faces unique challenges. The Second Restatement, Schwartz suggested, was

\textsuperscript{29} See \textsc{Restatement (Second) of Torts} § 281 & cmt. b (1979).

\textsuperscript{30} According to the Second Restatement Reporters, this breach provision reflected a distinction, explicitly acknowledged in comment g of section 281 of the First Restatement, "that conduct which is negligent because it involves an unreasonable risk of harm to one interest of the plaintiff, such as his property, does not make the defendant liable when it results in harm to another interest of the plaintiff, such as his person." \textsc{Restatement (Second) of Torts} § 281, note to institute at 1 (Tentative Draft No. 4, 1959); \textsc{Restatement (First) of Torts} § 281 cmt. g (1939). The language of the old clause (b) reflected dictum in \textit{Palsgraf v. Long Island R.R. Co.}, 162 N.E. 99, 100 (N.Y. 1928) that allegedly negligent conduct must be negligent "with respect to the particular interest of the plaintiff which has in fact been invaded." \textsc{Restatement (Second) of Torts} questions on Tentative Draft No. 4 at ix (Tentative Draft No. 4, 1959). The Reporter insisted that this position is no longer "even dictum," having been thoroughly repudiated by case law. \textsc{Restatement (Second) of Torts} § 281, note to institute at 1 (Tentative Draft No. 4, 1959).

\textsuperscript{31} \textsc{Restatement (First) of Torts} § 281(b) (1939).

\textsuperscript{32} \textsc{Restatement (Second) of Torts} § 281 (1979). \textit{But cf.} \textsc{Restatement (Second) of Torts} § 281 (Tentative Draft No. 4, 1959) (requiring merely that "the conduct of the actor [be] negligent with respect to the other" (emphasis omitted)).

\textsuperscript{33} See \textit{supra} notes 14-15 and accompanying text.
the product of an era of consensus in tort law.\textsuperscript{34} Schwartz argued that, by contrast, tort law has been "in crisis"\textsuperscript{35} since the mid-1970s.

Those who chronicled the first two Restatement projects paint a different picture. The Introduction to the First Restatement describes the First Restatement's commencement in an era of significant legal change and uncertainty.\textsuperscript{36} William Draper Lewis, the Director of the ALI at the time of the First Restatement's publication, went as far as to say that the goal of the First Restatement, to inject certainty and clarity into an increasingly uncertain area of American law, "is accomplished in so far as the legal profession accepts the Restatement as prima facie a correct statement of the general law of the United States."\textsuperscript{37} The First Restatement's clear purpose was to stem the tide of that uncertainty; the First Restatement seems from the beginning to have been conceived as a functional, or positivist, work.\textsuperscript{38}

The Second Restatement also highlighted these twin themes: functionality in the face of uncertainty. The Second Restatement was, once again, a rock in a sea of change. The "enormous change in torts" that preceded the promulgation of the Second Restatement reflected "new conceptions of the social function of this branch of law . . . ; the scope of change wrought by the courts may, indeed, have transcended that in any other field."\textsuperscript{39} Herbert Wechsler, then ALI Director, also reiterated the Restatement's functional approach; he described the "prime objective" of the Second Restatement as a revision of "[First] Restatement formulations in the light of changes in the course

\textsuperscript{34} See Perlman & Schwartz, supra note 5, at 8-9.
\textsuperscript{35} Id.
\textsuperscript{36} Factors such as an ever increasing volume of the decisions of the courts, establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable, taken in connection with the growing complication of economic and other conditions of modern life, [were] rapidly increasing the law's uncertainty and lack of clarity . . . and . . . will force the abandonment of our common-law system . . . unless a new factor promoting certainty and clarity can be found.

William Draper Lewis, Introduction to RESTATEMENT (FIRST) OF TORTS, at ix (1939).
\textsuperscript{37} Id.
\textsuperscript{38} See supra notes 36-37.
\textsuperscript{39} Herbert Wechsler, Introduction to RESTATEMENT (SECOND) OF TORTS, at ix (1965).
of the decisions.”40 Wechsler, however, was quick to note that reflecting change was not the sole purpose of the ALI’s revision: “The object also is to detect any errors that were made, to clarify where statement was unclear, to take account of criticism of analysis or of articulation expressed in the literature through the years.”41 The Second Restatement, then, sought both to account for changes in tort law generally since the publication of the First Restatement and also to correct errors inherent in the First Restatement itself. Wechsler’s comments also allude to the relevance of a new source of information about American tort law—academic scholarship—not explicitly acknowledged by or incorporated into the First Restatement. Wechsler described the Second Restatement as “a fully reconsidered text.”42

Wechsler’s Introduction to the Second Restatement, however, also acknowledged a new purpose of the Restatement project: normative prescription in addition to positivist description. Wechsler posited that since the publication of the First Restatement, it “has been a vital force in shaping the law of torts, as it has developed in the courts and has been taught to a full generation [of students] in the schools.”43 The Second Restatement also introduced a new format “which call[ed] for more expansive commentary, giving fuller statement of the reasons for positions taken, commentary no less carefully examined . . . than the black letter rules themselves.”44

C. THE THIRD RESTATEMENT DISCUSSION DRAFT: RE-ENVISIONING NEGLIGENCE DOCTRINE

The Foreword to the Third Restatement’s 1999 Discussion Draft reflected the tension between the ALI’s descriptive and prescriptive methodologies.45 Both the nature of the Third

40. Id.
41. Id.
42. Id.
43. Id. at vii (emphasis added).
44. Id.
45. With the Third Restatement, the ALI once again confronted uncertainty and obfuscation in American tort law. See supra notes 14, 34-35 and accompanying text (describing the “crisis” facing modern tort law); see also Geoffrey C. Hazard, Jr., Foreword to DISCUSSION DRAFT, supra note 2, at xi (1999) (noting there are “thousands of judicial decisions addressing one or another of these basic tort ideas, and literally hundreds of law-review articles and commentaries in the academic literature”). The foreword to the Discussion Draft seems to give equal time to the concerns of professionals and
Restatement generally, and the approach of the third volume specifically, however, have represented a departure from the previous Restatements’ comprehensiveness. In contrast to the Second Restatement’s broad-brush approach, Geoffrey C. Hazard, Jr., the ALI Director who presided over the submission of the 1999 Discussion Draft, described the drafting approach of the Third Restatement as “selection by exclusion.”

Indeed, the approach of the 1999 Discussion Draft struck some commentators as a drastic and unnecessary departure, and many were concerned with the Draft’s reformulation of negligence doctrine. For instance, while the previous Restatements described negligence by enumerating its traditional four elements, the Discussion Draft described negligence liability by stating, “An actor is subject to liability for negligent conduct that is a legal cause of physical harm.” The Discussion Draft further departs from the First and Second Restatements by describing a negligent actor merely as one who “does not exercise reasonable care under all the circumstances.”

46. See supra notes 5-7 and accompanying text.
47. Hazard, supra note 45, at xi.
49. See RESTATEMENT (SECOND) OF TORTS § 281 (1979); RESTATEMENT (FIRST) OF TORTS § 281 (1939). But cf. DISCUSSION DRAFT, supra note 2, § 6, Reporter’s Note cmt. a (asserting that the Second Restatement’s definition of negligence “does not include any explicit duty element”).
50. DISCUSSION DRAFT, supra note 2, § 3.
51. Id. § 4; cf. RESTATEMENT (FIRST) OF TORTS § 282 (1939) (defining negligence as “conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm”); RESTATEMENT (SECOND) OF TORTS § 282 (1979) (employing identical
The most controversial provision in the Discussion Draft concerned the treatment of the duty element in negligence law. Section 6 of the Discussion Draft laid out the role (or rather, non-role) of duty in negligence liability. Rather than portraying duty as a positive (or affirmative) requisite of tort liability, the Discussion Draft states that an individual is liable for the harm caused by her negligent conduct (as defined in sections 3 and 4) unless the court makes a finding of "no-duty" based on considerations of policy or principle. In the accompanying comments, Professor Schwartz defended this unusual conception of the role of duty. In the easy cases, Schwartz asserted, "duty is in truth a nonissue."
II. GOLDBERG AND ZIPURSKY: REINSTATING DUTY

In 2000, Goldberg and Zipursky authored the Vanderbilt Law School's centerpiece symposium article on the Third Restatement General Principles volume. Their article challenged the removal of duty as an element of negligence and its redefinition as "absence of an exemption from liability." Their criticism takes two approaches: structural and doctrinal. First, Goldberg and Zipursky criticize Schwartz's structural effort to limit duty's scope. Second, in a doctrinal critique, the authors maintain that duty plays an important role in negligence cases. They argue that the Restatement project should clarify duty's doctrinal significance despite the element's arguable indeterminacy.

A. STRUCTURAL CRITIQUE

Goldberg and Zipursky first denounce Schwartz's limited scope for the negligence provision. In parallel fashion to the minimalist approach of this third volume of the Third Restatement, Schwartz limited the application of his negligence provisions only to physical harm, "including..."
personal injury and property damage. Schwartz specifically exempted "economic losses or emotional distress that are not the consequences of physical harm." Goldberg and Zipursky assert that this emasculated negligence provision unjustifiably "runs counter to the ordinary usage that it is meant to explicate." More importantly, the assertion that collisions between strangers (as a prototype of negligence actions for physical harm) form the "core" of modern negligence (or, alternatively, that these interactions are what modern negligence law is "all about") is, at best, a "historical or empirical claim." A restatement of negligence, the authors argue, should not be a "history of negligence" but instead should be "a document that purports to lay bare the elements of negligence as it is defined by the courts." Treating collision cases as the "core" of negligence law wrongly suggests that they embody "some sort of analytic primacy in the explication of negligence, [or] that they reveal negligence stripped down to its elements." Goldberg and Zipursky argue that courts apply the traditional four elements of negligence to these cases as they do all others. To take the matter further, while Schwartz may be correct that the duty element is more germane to those negligence topics he seeks to exclude from his account of negligence, his exclusion of those negligence topics

64. DISCUSSION DRAFT, supra note 2, § 3 cmt. a. Goldberg and Zipursky insist that "there are several areas of negligence law that his model fits poorly." Goldberg & Zipursky, supra note 1, at 674.

65. DISCUSSION DRAFT, supra note 2, § 3 cmt. a.

66. Goldberg & Zipursky, supra note 1, at 675. It is in this sense that their criticism is structural rather than strictly doctrinal; Goldberg and Zipursky challenge not only the formulation of the negligence provision but the purpose that the negligence provision purports to serve. Id. at 677.

67. Id. at 676.

68. Id.

69. Id. at 676-77.

70. See id. at 677. Courts "treat [collision] cases as instantiations of the four-element tort of negligence with no greater or lesser significance than any other instantiations of negligence, including cases of malpractice, landlord liability, and affirmative duties." Id. These latter causes of action are all negligence torts arguably excluded by Schwartz's note on the scope of negligence.

71. Conversely, a three-element negligence provision may be a more doctrinally sound description of those negligence topics included in his limited scope. Perhaps a three-element provision is a better description of physical injury claims than it is of thornier claims like duty-to-warn or emotional distress. It would be logically flawed, however, to argue by extension that the three-element provision is thereby inherently superior.
that do not correspond to a three-element account from his version of the Restatement is not an intellectually honest way to argue that negligence embodies a three-element tort.72

B. DOCTRINAL CRITIQUE

More importantly, Goldberg and Zipursky argue that even if one were to accept Schwartz's limited account of the Restatement project, it is still necessary to include a meaningful conception of duty.73 Goldberg and Zipursky challenge Schwartz's contention that duty is a nonissue in straightforward, collision-type negligence cases.74 There are categories of negligence cases, they argue, that cannot be "captured" without a concept of duty in its affirmative, obligation sense.75 Duty, they claim, represents a necessary element to restate even "traditional" accidental physical injury cases.76 Goldberg and Zipursky offer several examples of "courts wrestling with duty-as-an-element within the ambit of [the Discussion Draft's] Section 3"77 negligence liability provision as emblematic of duty's key role in physical injury negligence cases.78

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72. Goldberg and Zipursky question Schwartz's "decision to avoid duty so far as possible, and to exclude areas that make duty-avoidance impossible." Id. at 730. Put another way, "because of [Schwartz's] unduly narrow account of the legal core of negligence, [he] is compelled to write off huge chunks of tort law as being outside the arena of 'general principles' and outside the law." Id. at 731.

73. Id. at 678.

74. See id.

75. See id. Goldberg and Zipursky highlight two such categories: "duty to warn" and "duty not to increase the risk of plaintiff suffering harm by a third party tortfeasor." Id.

76. See id.

77. Id.

78. See id. For example, the plaintiff in Mussivand v. David acquired a sexually transmitted disease, indirectly, from his spouse's lover. 544 N.E.2d 267, 265 (Ohio 1989). The question was not whether the defendant owed a duty of care to protect his lover from acquiring the disease, but whether the defendant's duty of care extended to the lover's spouse. Id. at 270. The Ohio Supreme Court held that the defendant did owe a duty to the plaintiff to disclose his condition. See id. at 273; see also Hopping v. College Block Partners, 599 N.W.2d 703, 705-06 (Iowa 1999) (discussing whether the owner of a building and the restaurant business located within the building had a duty to remove accumulations of ice and snow as a result of their having been notified and having had an opportunity to remove the condition); Parmely v. Hildebrand, 603 N.W.2d 713, 717-18 (S.D. 1999) (discussing the extent to which the seller of a house owed a duty of care to a purchaser regarding the disclosure of defects in the house). Goldberg and Zipursky emphasized that in
C. WILL THE REAL DUTY PLEASE STAND UP?: ADDRESSING DUTY’S INDETERMINACY

Goldberg and Zipursky also addressed the argument that duty should be disregarded because of its indeterminacy. Professor Harvey Perlman, who drafted alternative negligence provisions for the General Principles volume,79 has argued vehemently for duty’s demise.80 The thrust of Perlman’s

Mussivand, “The court did not hold that the duty was owed generally to the public, but only to foreseeable plaintiffs such as known spouses.” Goldberg & Zipursky, supra note 1, at 679. In the court’s words, “We do not . . . mean to say that [the defendant], subsequent to his affair with [the plaintiff’s] wife, [would] be liable to any and all persons with whom [the wife] may have sexual contact.” Mussivand, 544 N.E.2d at 273. Furthermore, “the liability of a person with a sexually transmissible disease to a third person, such as a spouse, would be extinguished as soon as the paramour spouse knew or should have known that he or she was exposed to or had contracted a venereal disease.” Id. In sum, the defendant’s duty was limited both with respect to the question of to whom the duty extended and with respect to how long the duty lasted before it expired. The Ohio Supreme Court’s formulation is quite distinct from the more general duty Schwartz espouses.

79. Professor Perlman served as one of the Reporters for the Restatement (Third) of Torts: General Principles. See Goldberg, supra note 13, at 640. Professors Perlman and Schwartz both drafted negligence provisions for consideration for the General Principles volume of the Third Restatement of Torts. Id. Even as of the time of the Wade Conference at Vanderbilt, see supra note 14, both sets of negligence provisions were under consideration for inclusion in the Third Restatement. Id. Professor Goldberg observed, however, that as the Wade Conference submissions went to press, “it appear[ed] that Professor Schwartz’s provisions [would] provide the focus for ALI discussions in the immediate future.” Goldberg, supra note 13, at 640. Professor Perlman and Schwartz co-hosted the Kansas Law School Symposium on the Restatement (Third) of Torts: General Principles. See Perlman & Schwartz, supra note 5, at 8.

80. See Perlman & Schwartz, supra note 5, at 15. Perlman argued for a “consistency of language that will allow us to speak to each other so the courts of Florida and the courts of Texas do not have wholly different views about what ‘duty’ means.” Id. Strangely, Perlman can be read as endorsing a traditional approach to negligence; his provisions purported to outline the basic elements of any tort case, whether an intentional tort, negligence, or strict liability, as “the nature and the scope of the defendant’s legal obligation, the breach, cause in fact, scope of liability, and legally recognizable harm.” Id. Perlman, however, clearly objects to duty: “What I have done in this section, and what I have done throughout the material that I have drafted, is to not use the word ‘duty’ in any context, because I do not understand it.” Id. He then clarified his conception of “legal obligation” as a question of “the general nature of the obligation.” Id. at 16. Perlman was concerned with whether “the obligation [is] based in negligence or in strict liability” and whether one has an “an obligation to avoid intentional behavior.” Id. Perlman thus comes full circle, if cryptically so, to join Schwartz in asking the basic question: Does the defendant in this case have an obligation to avoid negligent behavior (or, alternatively, is the conduct in question subject to liability only for intentional
argument is that duty is syntactically imprecise and indeterminate—if ten different jurisdictions mean ten different things when they use the word "duty," the solution is to dispense with duty. 81

Goldberg and Zipursky agree that "the concept of duty in negligence contains traps and confusions for judges, lawyers, and academics." 82 At the heart of the Restatement's purpose, however, lie the efforts of judges, lawyers, and academics to respond to these concerns with attempts at clarification of the duty element. Goldberg and Zipursky insist that

[t]o make this observation [that the concept of duty contains traps and confusions] is not to join sides with the Reporters to reinvent negligence law without duty under the guise of restatement. It is merely to concede the premise of the General Principles project: that the law of negligence would benefit from a clarification of its basic provisions. Duty is ineliminable in a restatement of negligence. Its confusions should precipitate a more refined analysis that clarifies the law of duty, rather than concealing or obfuscating it. 83

In response to this legal challenge, however, they clarify, rather than dismiss, duty. According to Goldberg and Zipursky, duty possesses four distinct meanings, and the challenge of the Restatement project is to separate the "primary," affirmative, obligatory sense of duty from its alternative meanings. 84 In addition to duty in its primary or "obligation" sense, duty also functions as a "nexus requirement," masquerades as "breach-as-a-matter-of-law," and, finally, operates as an "exemption from the operation of negligence law," or "no-duty." 85 Courts use duty in its "nexus" form as a shorthand to describe the lack of a nexus between the defendant's duty and the plaintiff's injury. 86 Put another way, "the defendant's breach must be a breach of a duty owed to the plaintiff," and not to some other person or group of persons. 87 The courts also invoke the language of duty "as a platform on which it may stand in order to decide for itself the unreasonableness or breach issue, and thus surreptitiously to

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81. See supra note 80 and accompanying text.
82. Goldberg & Zipursky, supra note 1, at 698.
83. Id.
84. See id. at 698-709.
85. See id. at 709-23.
86. See id. at 709.
87. Id.
shrink the scope of the rule stating that the breach issue ordinarily is for the jury."88  Finally, Goldberg and Zipursky concede that courts speak of duty in the sense reflected in section 6,89 or more accurately that courts speak of defendants as having "no-duty."90 Goldberg and Zipursky insist, however, that duty in its obligation sense is both functionally and doctrinally distinct from, and does not "collapse" into, duty in its exemption sense.91 From this discussion emerges Goldberg and Zipursky's central criticism: Regrettably, "[m]odern scholars sometimes have assumed that the question, and the notion of obligation as it exists in negligence, is trivial because it is clearly satisfied in every case."92 Most importantly, the fact that courts have used duty in its negative, exemption

88. Id. at 713.
89. See supra notes 53, 55 and accompanying text.
90. Goldberg & Zipursky, supra note 1, at 718.
91. See id. at 720-23. The Restatement Reporters have also acknowledged some of duty's "alternative" forms. The Discussion Draft, for example, acknowledged that duty serves as a placekeeper for "breach-as-a-matter-of-law," albeit improperly. DISCUSSION DRAFT, supra note 2, § 6 Reporter's Note cmt. a; see infra note 96 and accompanying text. The second Tentative Draft further explained that courts [may] take the question [of whether an actor exercised reasonable care] away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes express this result in terms of duty. Here, the rubric inaccurately conveys the impression that the court's decision is separate from and antecedent to the issues of negligence. In fact, these cases merely reflect the one-sidedness of the fact bearing on negligence; they are not properly treated as cases involving exemption from or modification of the ordinary duty of reasonable care.

TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. i.
92. Goldberg & Zipursky, supra note 1, at 705. The authors continue: Prosser conveyed this idea when he said: "[I]n negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." Others, most famously Judge Andrews in dissent in Palsgraf, have made the point by stating that there is a "duty to the world" to act reasonably. Professor Schwartz offers his own version when he says that duty is ordinarily a "non issue."

Id. (footnotes omitted). Goldberg and Zipursky are not the only authors to see in Schwartz's negligence provisions the ascendancy of Andrews at the expense of Cardozo. See generally Ernest J. Weinrib, The Passing of Palsgraf?, 54 VAND. L. REV. 803, 808-09 (2001) (asserting that the proposed Restatement's conception of the duty element would threaten Cardozo's structured, two inquiry analysis of duty by submerging the inquiry into an inquiry fashioned according to general policy, thus lacking refined analysis).
sense, as Discussion Draft section 6 proposes courts should do, does not preclude the doctrinal necessity of duty in its affirmative or obligation sense.

III. THE THIRD RESTATEMENT AND THE DEFENSE OF "NO-DUTY"

Part III examines the Restatement project's development since the 1999 Discussion Draft. This Part begins by summarizing the ground Schwartz covered in the original Discussion Draft. Part III then discusses the work of Professors Schwartz and Michael Green in the 2001 first Tentative Draft and the contributions of co-Reporters Green and William Powers in the 2002 second Tentative Draft.

A. THE 1999 DISCUSSION DRAFT: LAYING THE FOUNDATION FOR THE DISMISSAL OF DUTY

In the Discussion Draft, Professor Schwartz acknowledged that many courts require the establishment of "duty" as an initial prerequisite for recovery in negligence. He clearly considered this judicial language as pretextual.

93. See supra notes 89-90 and accompanying text. For Schwartz's assertion that certain language used by courts is used to describe duty in its exemption sense, see supra note 57 and accompanying text.

94. See Goldberg & Zipursky, supra note 1, at 725. Goldberg & Zipursky continue:

A restatement should recognize that... "no duty" pockets of the case law exist, and that they have certain contours. But this does not entail denying the existence of "duty" in the obligation sense or the fact that the four-element test is the law. On the contrary, it permits both.

Id. Goldberg and Zipursky reject the "false dichotomy between concepts of obligation, on the one hand, and the practical concerns of law and policy, on the other." Id. at 732. To embrace the dichotomy, as Schwartz has apparently done, and to choose the latter over the former produces merely "a collection of ad hoc policy decisions." Id. at 731.

95. See DISCUSSION DRAFT, supra note 2, § 6 cmt. a. Comment a states, While courts frequently say that establishing "duty" is the first prerequisite in an individual tort case, courts commonly go on to say that there is a "general duty" to "exercise reasonable care" to avoid subjecting others to "an unreasonable risk of harm, or to comply with the "legal standard of reasonable conduct." Though cast in the language of duty, these formulations merely give expression to the point that negligence is the standard of liability. This point, however, is a basic and general tort principle . . . , which absent unusual circumstances does not require restatement on a case-by-case basis. Accordingly, in such cases, duty is in truth a nonissue. To be sure, the recognition of a general duty to avoid negligence replaces the view
relegation of duty to a nonissue recognized two subsets of cases that require a distinct concept of duty as obligation: affirmative duty cases (such as duty-to-rescue) and, unusual cases. Schwartz's treatment of these "unusual cases" reveals that his doctrinal departure is not merely of taxonomical and organizational significance. These "unusual cases" concern the heart of Schwartz's "no-duty" argument: "There are... situations in which the requirements of negligence, legal causation, and physical harm are or can be satisfied, but in which, for reasons of principle or policy, the imposition of liability seems plainly troublesome." For Schwartz, a negligence plaintiff has established a prima facie case of negligence by establishing breach, causation, and harm. According to Schwartz, judges on occasion deny liability for reasons of mitigating policy. Under a traditional account of negligence, a judge would deny liability by granting a defense motion for failure to state a claim on grounds that the plaintiff had failed to establish the duty element, and therefore had failed to establish a prima facie case.

It is not immediately obvious that the category of cases concerning affirmative duties and the category of "unusual cases" (as Schwartz conceives of them) are actually distinct. Judges have Schwartz's permission to explicitly consider the duty element in both categories. Courts have traditionally limited liability in duty-to-rescue cases by articulating a policy that, as a general matter, actors have no duty to rescue another. It appears that cases of affirmative duty (which the

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often associated with 19th-century tort law, to the effect that only particular relationships between the parties give rise to a negligence liability obligation.

Id. 96. See id. § 6 cmt. b. The general rule of tort law "does not impose the affirmative duty to rescue or to intervene." Id. Therefore, the role of duty (or Schwartz's taxonomical preference for duty-to-rescue cases, "affirmative duty") is relevant only "in cases considering the application of and exceptions to [this] no affirmative duty rule." Id. 97. See id. § 6 cmt. c. 98. Id. 99. DISCUSSION DRAFT, supra note 2, § 3; see also text accompanying supra note 50 (quoting the full text of section 3). But cf. TENTATIVE DRAFT NO. 2, supra note 1, § 6 cmt. b (evincing, arguably, a different take on the elements of a prima facie case for negligently inflicted harm). 100. See, e.g., FED. R. CIV. P. 12(b)(6). 101. See supra note 96.
Discussion Draft purports to address\textsuperscript{102} are merely a subset of the "unusual cases" (with which judges are encouraged to dispense by principle or policy).

It is important to note that Schwartz has recognized both the role of duty as obligation and its exemption partner, "no-duty\textsuperscript{103} (though, from Goldberg and Zipursky's perspective, in a way that inverted their respective doctrinal significance). Schwartz also recognized that courts sometimes invoke duty as a proxy for breach-as-a-matter-of-law.\textsuperscript{104}

Critically, Schwartz found support for his account of duty in judicial statements. Judicial statements lend support both to the proposition that duty is functionally a nonissue\textsuperscript{105} and to the proposition that the duty a defendant owes a plaintiff, if any, is a duty to avoid unreasonable conduct—a duty not to be

\begin{footnotesize}
\begin{enumerate}
\item See Discussion Draft, supra note 2, §§ 17-18.
\item For a brief discussion of Goldberg and Zipursky's four distinct meanings of duty, see supra notes 86-91 and accompanying text.
\item See Discussion Draft, supra note 2, § 6 cmt. h (stating that courts sometimes take the negligence issue away from the jury and express its decision in terms of whether or not the defendant owed the plaintiff a duty to behave in a certain manner); Tentative Draft No. 2, supra note 1, § 7 cmt. i (stating the same proposition); supra note 91. Schwartz does not issue the usual complaint that such declarations inappropriately usurp the role of the jury in the determination of the breach question. Instead, Schwartz complains that these expressions [of breach-as-a-matter-of-law in the guise of no duty] inaccurately convey the idea of a duty issue that is separate from and antecedent to the negligence issue. In fact, these are merely cases in which the one-sidedness of the evidence permits the court itself to specify the content of the negligence standard.
\item Discussion Draft, supra note 2, § 6 cmt. h.
\item For an extensive (and largely critical) discussion of the role of duty in American negligence law, see Fazzolari v. Portland School District No. 1J, 734 P.2d 1326, 1327-32 (Or. 1987). The Fazzolari court concluded that duty plays an affirmative role when an injured plaintiff invokes obligations arising from a defendant's particular status or relationships, or from legislation, beyond the generalized standards that the common law of negligence imposes on persons at large. In cases based solely on common-law negligence, "no-duty" is a defensive argument asking a court to limit the reach of these generalized standards as a matter of law. Duty remains a formal element of the plaintiff's claim only in the sense that the plaintiff loses if the defendant persuades a court to phrase such a limit in terms of "no duty."

Id. at 1331-32 (emphasis added). For another case announcing that new duties arise from special relationships or legislation, see Lauer v. City of New York, 733 N.E.2d 184, 187, 189-90 (N.Y. 2000). See also Goldberg & Zipursky, supra note 1, at 733-34 (discussing Lauer).
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negligent.\textsuperscript{106}

B. THE 2001 TENTATIVE DRAFT: ONE STEP FORWARD, TWO STEPS BACK?

1. Doctrinal Analysis

Schwartz initiated and defended his move to demote duty in the 1999 Discussion Draft.\textsuperscript{107} His continued defense of this move in the 2001 Tentative Draft (in light of criticism like Goldberg and Zipursky's) is more coherent, and more entrenched, than in 1999.\textsuperscript{108} Schwartz's defense partially

\textsuperscript{106} See Stagl v. Delta Air Lines, Inc., 52 F.3d 463, 469-70 (2d Cir. 1995) (affirming the district court and holding that the defendant airline owed the injured plaintiff only a "duty to act reasonably under the circumstances" (quoting Stagl v. Delta Air Lines, Inc., 849 F. Supp. 179, 184 (E.D.N.Y. 1994))).

Schwartz pointed to other sources to support his proposition that American negligence doctrine contemplates only a general duty to refrain from negligent conduct. First, Schwartz denied that the Restatement (Second) of Torts regards duty as an issue in negligence outside of the context of affirmative duties (such as duty-to-rescue). See DISCUSSION DRAFT, supra note 2, § 6, Reporter's Note cmt. a. But cf. supra note 29 (laying out duty as a prima facie element of negligence in the Second Restatement). Second, according to Schwartz, even the revered Prosser treatise denies the usefulness of the duty concept. See DISCUSSION DRAFT, supra note 2, § 6, Reporter's Note cmt. a. Schwartz cites Prosser and Keeton for the proposition that "in negligence cases the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk." Id. (quoting KEETON, supra note 22, at 356). Schwartz contends that "[t]his language, often quoted by courts, renders the duty concept superfluous." Id. This simple statement contains two separate propositions that are each tenuously grounded: that a large number of courts cite this language as a form of endorsement, and that a sufficiently large number of courts endorse this language so as to render superfluous the concept of duty as obligation. It is possible, drawing on Goldberg and Zipursky, that duty in its positive sense remains doctrinally and functionally salient even in the face of judicial opposition to the concept.

\textsuperscript{107} See DISCUSSION DRAFT, supra note 2, § 6 cmts. a, c.

\textsuperscript{108} It does not appear, ALI Director Lance Liebman's observations notwithstanding, see supra note 18 and accompanying text, that the Wade Conference criticism yielded a genuine reevaluation of Schwartz's negligence account, but merely a more developed articulation of the themes in the Discussion Draft. While the justificatory language in the first Tentative Draft commentary was augmented to address the concerns raised at the Wade Conference, the provision's substance remains the same. Schwartz and Green note Goldberg and Zipursky's article in passing, and observe only that the authors provide "an extensive citation of recent judicial opinions that set forth the requirements of duty and breach," and that their article "recommends that the duty issue be discussed by judges in every case, although the article acknowledges that in physical-harm cases the discussion will normally be
 appeared in the comments accompanying the negligent liability provision. Schwartz and Green, the co-Reporters responsible for the first Tentative Draft, were less equivocal in their insistence that a duty-free negligence provision is not just how courts should understand negligence (a normative account) but how they do understand negligence (a positive account). In an interesting turn, Schwartz and Green describe the equivalence of the concept of “duty” and the “subject to liability” language in section 6 (section 3 of the Discussion Draft). Schwartz and Green imply that the language “subject to liability” is a substitute for the concept of duty. It is perhaps more accurate to say that Schwartz and Green, in order to relegate duty as an object of assumption, rather than an object of investigation, create a duty so general—a “duty to avoid negligence or to exercise reasonable care”—that it ceases to be functionally meaningful. This argument, however, emerged as mere rhetorical gymnastics—a syllogism based on the false premise that a general obligation to exercise reasonable care (or to not be negligent) can adequately replace the doctrinal richness of duty as obligation. Such rhetorical gymnastics abound in the first Tentative Draft. For example, consider Schwartz and Green’s assertion that the duty courts recognize is merely a “general duty” to “avoid negligence” or “exercise reasonable care.” Schwartz and Green allege that the Second Restatement perfunctory and routine.” TENTATIVE DRAFT NO. 1, supra note 16, § 6, Reporters’ Note cmt. d.

109. See, e.g., TENTATIVE DRAFT NO. 1, supra note 16, § 6, Reporters’ Note cmt. d.

110. “The rule of liability for physical harm stated in this section [unchanged from the Discussion Draft’s § 3] incorporates the courts’ understanding that persons are under a general duty to exercise reasonable care.” See TENTATIVE DRAFT NO. 1, supra note 16, § 6 cmt. d.

111. They wrote:

To state that a person is under such a [general] duty [to exercise reasonable care] is equivalent to stating that the person is subject to liability for negligent conduct that causes physical harm. Given this equivalence, in physical-harm cases courts may proceed directly to the standard of liability set forth in this section.

Id.

112. Id.

113. This gesture seems more of an appeasement of, rather than an engaged response to, those who defend duty as obligation against the forces of “no-duty,” duty’s obverse.

114. See supra notes 110-12.
endorses a general duty of reasonable care. On this count, the first Tentative Draft, like the Discussion Draft before it, may be bluffing. If the telltale signs of a bluff are overconfident bidding and mediocre cards, then the note is suspicious. Not only does the Second Restatement endorse a general duty, Shwartz and Green argue, this general duty cannot be found in the Second Restatement as "black-letter doctrine" but is merely "implicit" in section 281, the section governing liability for negligence. "To be sure," they continue, "one of [the] specific elements [in section 281] is that the actor's conduct is negligent 'with respect to' the plaintiff." Schwartz and Green confess that section 281 does not clarify whether the issue of the "foreseeable plaintiff" is a feature of duty or of proximate cause. "Modern scholars," Schwartz and Green argue, "tend to classify the issue under the heading of proximate causation," though Justice Cardozo certainly did not. Schwartz and Green's curious analysis suggests that duty's "downgrade" from affirmative and obligatory to "general" is not so much a compromise as it is a step toward duty's actual demise. "In light of this [general] duty," Schwartz and Green continue, "it is exactly proof of the defendant's negligence that establishes the relevant 'breach.'" "Duty" and "breach," it turns out, mean the same thing; presumably, a finding of a breach suffices to establish a defendant's duty to a plaintiff.

Where section 6 disappointed duty proponents, a cursory glance at section 7 gave cause for hope. Section 7, the first Tentative Draft's duty provision, bore the most evidence of a direct response to the duty critics. Comment a, for example,

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115. See Tentative Draft No. 1, supra note 16, § 6, Reporters' Note cmt. d.
116. See Discussion Draft, supra note 2, § 6, Reporter's Note cmt. a.
117. See Tentative Draft No. 1, supra note 16, § 6, Reporters' Note cmt. d.
118. Id. (quoting Restatement (Second) of Torts § 281(b) (1979)).
119. Tentative Draft No. 1, supra note 16, § 6, Reporters' Note cmt. d.
120. See id.
121. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100-01 (N.Y. 1928) (designating the issue of the "foreseeable plaintiff" as a question of duty).
122. See infra notes 123-24 and accompanying text.
123. Tentative Draft No. 1, supra note 16, § 6 cmt. d (emphasis added).
124. This observation illustrates how (literally) subversive Schwartz and Green's negligence account is.
125. Section 7 was also substantively revised to a degree. While the Discussion Draft instructed that even a negligent defendant is not liable to the plaintiff "if the court determines that the defendant owes no duty to the
was retitled *The Proper Role for Duty*. The comment merely reiterated the section 6 claim that, within the scope of negligently inflicted physical harm, “courts have recognized a general duty of reasonable care that operates on the defendant.” Comment a goes further, arguing that because this general duty lies implicit in standard negligence actions (and likewise implicit in section 6), “courts can rely directly on [section] 6 and are not obliged to refer to the general duty on a case-by-case basis.”

Having excised duty as an obligation, Schwartz and Green now encourage courts to dispense with any reference even to the lesser “general duty.” For example, Schwartz and Green suggest that a judge may find “no duty to the plaintiff, either in general or relative to the particular negligence claim.”

Ostensibly, this buttresses their account of duty as limitation on liability. Denials of duty may focus generally on the relationship between the plaintiff and defendant or may focus on particular negligence claims. Schwartz and Green emphasize that these specific denials of duty “preserve other negligence claims that the plaintiff might have against the defendant.” It is not clear whether they offer this observation as a normative or a positive argument for adopting their account; later language seems to suggest the latter. Certainly the distinction between general denials of duty and specific denials of duty fleshes out Schwartz’s argument, but as

plaintiff,” the Tentative Draft adds, “either in general or relative to the particular negligence claim.” Compare DISCUSSION DRAFT, supra note 2, § 6, with TENTATIVE DRAFT NO. 1, supra note 16, § 7.

126. TENTATIVE DRAFT NO. 1, supra note 16, § 7 cmt. a.
127. Id.
128. Id. This statement is potentially significant; at the very least, it seems mildly inconsistent with the argument from section 6, comment d, that the language “subject to liability” is functionally (if not doctrinally) coterminous with the duty concept. See supra note 111.
129. See TENTATIVE DRAFT NO. 1, supra note 16, § 7.
130. See id.
131. Id. § 7 cmt. a.
132. See id. In situations where the denial of a particular duty preserves other negligence claims, “the issue is one of limitations on duty, rather than the complete absence of duty.” Id. In other cases, courts may “profess to find an absence of duty between the defendant and the plaintiff,” but still “courts may acknowledge that the defendant can be liable to the plaintiff for reckless conduct; accordingly, those cases as well involve limitations on duty rather than denials of duty altogether.” Id. This language unmistakably presages the second Tentative Draft and suggests the hand of Green. See TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. a.
a justificatory matter it falls short. Furthermore, because the distinction remains contingent on the validity of the larger argument that duty's proper role is one of "no-duty," the distinction between general and specific denials of duty is largely cosmetic.

Another example of such a cosmetic argument appears in the final paragraph of comment a. Schwartz notes that determinations of no-duty need not always cut against the plaintiff. "[O]n occasion no-duty determinations can also focus on the plaintiff. By relieving the plaintiff of the obligation to act reasonably by way of self-protection, such holdings function to eliminate the defense of comparative responsibility that otherwise would diminish the plaintiff's recovery." This observation, however, like the one comparing general denials of duty to specific ones, serves only to beg the question: Just because a court's decision not to obligate a plaintiff to engage in self-protection can be characterized as a "no-duty" policy determination does not indicate why one should so characterize a decision, and certainly not why such characterizations should drive negligence doctrine, all other things being equal.

2. Structural Analysis

The first Tentative Draft's quasi-structural changes fare somewhat better. The Discussion Draft's subtitle, General Principles, has been replaced with Liability for Physical Harm (Basic Principles). Compared to the Discussion Draft, the Tentative Draft places greater emphasis on the limits of the scope of its negligence provisions. This scope is limited in

133. It is conceivable that this sub-argument was intended to be descriptive, rather than justificatory.

134. TENTATIVE DRAFT NO. 1, supra note 16, § 7 cmt. a; see also TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. h (Plaintiff Negligence and No-Duty Determinations).

135. TENTATIVE DRAFT No. 1, supra note 16, at i; see also FIRST TENTATIVE DRAFT FOREWORD, supra note 5, at xiii (explaining that the new title is designed to "convey more accurately [the Restatement's] intended scope").

136. See supra note 135. Schwartz and Green observed that just as the general standard of liability stated in this section is limited to physical harm, the general duty of reasonable care is affirmed only in cases involving physical harm. In cases involving negligence that causes emotional distress or economic loss, there is no rule of liability that is as general as this section's physical-harm rule. Accordingly, in such cases courts need to consider whether there is any particular rule of liability that is applicable. In providing this consideration, courts frequently employ the terminology of duty in explaining whether liability is or is not available.
two important ways. First, like the Discussion Draft, the Tentative Draft's negligence provisions are limited to liability for physical harm (as opposed to economic or emotional loss).\footnote{137} Second, the Tentative Draft purports to restate the "basic," rather than "general" principles of the cases falling within that scope.\footnote{138} The substitution of "basic" for "general" (in addition to the inclusion of Liability for Physical Harm in the subtitle) seems to respond directly to Goldberg and Zipursky's structural criticism; the Restatement no longer claims to articulate the "general" principles of tort law, but merely the "basic" principles of those cases falling within the intended scope. This cosmetic change, however, does not adequately address the question of why the heart of the Restatement should be directed at those categories of cases that are least controversial and, presumably, the least in need of clarification.

Nonetheless, the scope limitations might still buttress the project's internal coherence. Schwartz and Green circumvent Goldberg and Zipursky's doctrinal criticism with a structural response—they reclarify the project's scope and illustrate the coincidence of the generality of the scope of cases covered by section 6 and the generality of the duty specified by the same section.

It is not clear if this argument is as externally coherent as it is internally coherent. Conceding that a different rule of liability applies to cases outside the purported scope of the Restatement than to those within that scope does not justify

\footnote{TENTATIVE DRAFT NO. 1, supra note 16, § 6 cmt. d. In a familiar rhetorical turn, Schwartz and Green suggest that even in those cases for which the duty discussion is indispensable, courts do not really talk about duty but merely "employ the terminology of duty." \textit{Id.}}

\footnote{137. See TENTATIVE DRAFT NO. 1, supra note 16, § 6 (Liability for Negligent Physical Harm); FIRST TENTATIVE DRAFT FOREWORD, supra note 5, at xiii (conceiving the Third Restatement as a "new doctrinal elaboration of the core subject of the law of torts, liability for physical harm" (emphasis added)). In comment d, the Reporters state,

\texttt{[J]ust as the general standard of liability stated in this section is limited to physical harm, the general duty of reasonable care is affirmed only in cases involving physical harm. In cases involving the negligence that causes emotional distress or emotional loss, there is no rule of liability that is as general as this section's physical-harm rule.}}

\footnote{TENTATIVE DRAFT NO. 1, supra note 16, § 6 cmt. d. The Tentative Draft, by its very title, purports to restate the "basic," rather than "general," principles of the cases falling within the scope. \textit{Compare} DISCUSSION DRAFT, supra note 2, at i, with TENTATIVE DRAFT NO. 1, supra note 16, at i.}

\footnote{138. See supra note 137.}
the initial inclusion and exclusion. Schwartz's "scope" argument may successfully rebuff Goldberg and Zipursky's doctrinal argument but it does not adequately dispose of their larger structural complaint.

Furthermore, the first Tentative Draft continues to reveal Schwartz's underlying hostility toward the concept of duty. According to Schwartz, cases involving emotional distress or economic loss may implicate a different "rule of liability" than cases involving physical harm, and courts need to consider if "liability is or is not available." Duty is further abstracted because courts might use "the terminology of duty" to explain a new rule of liability, but their use of the terminology does not mean they are actually talking about duty. Schwartz implies a false judicial consciousness surrounding the concept of duty, notwithstanding his admission that "the duty issue requires explicit attention" in cases of duty-to-rescue or "unusual cases." Schwartz takes back almost as much ground as he appears to give. Regardless, even with the scope clarifications, the first Tentative Draft is vulnerable to Goldberg and Zipursky's structural critique.

In sum, the first Tentative Draft does not reflect any changes in the provisional language of the Discussion Draft. Further, substantive changes to the Tentative Draft are found in the commentary and are more appropriately characterized as justificatory, instead of revisionist. One must ask, "Has Duty drawn its last breath?"

C. THE 2002 TENTATIVE DRAFT

If the 2002 Tentative Draft was not the substantive revision Goldberg and Zipursky might have hoped for, they can take heart that it takes their criticism seriously, something the 2001 Tentative Draft arguably did not do. Ultimately, however, the second Tentative Draft's greatest achievement is the sophistication with which it disposes of duty while appearing to preserve it.

139. See supra notes 111-14 and accompanying text.
140. See TENTATIVE DRAFT NO. 1, supra note 16, § 6 cmt. d.
141. See supra note 113 and accompanying text.
142. See TENTATIVE DRAFT NO. 1, supra note 16, § 6 cmt. d; see also supra notes 96-98 and accompanying text (describing the Discussion Draft's introduction of the concepts of, and distinction between, duty-to-rescue cases and unusual cases).
143. See supra Part II.A.
Sections 6 and 7 of the first Tentative Draft (addressing liability for negligence and duty, respectively) were the only sections not to survive the 2001 annual ALI meeting. The ALI has not explained what about the first Tentative Draft's treatment of negligent liability and duty its members found so "controversial," but presumably at least some of its members shared Goldberg and Zipursky's general concern that Schwartz (and Green) had gone too far. The 2002 Tentative Draft demonstrates an attempt at compromise.

Strikingly, section 6 now presents negligence as a five-element tort (rather than the three-element tort its predecessors had embraced). "An actor ordinarily has a duty to exercise reasonable care," unless the court determines under section 7 "that the duty of reasonable care is inapplicable," in which case an actor is subject to liability if his...
failure to exercise reasonable care is both the factual and proximate cause of harm.\textsuperscript{149} Comment b, titled \textit{Elements of a Prima Facie Claim for Negligently Caused Physical Harm},\textsuperscript{150} emphasizes that section 6 includes the “five” prima facie negligence elements.\textsuperscript{151} “[S]ubsection (a),” comment b declares, “addresses the first element, duty.”\textsuperscript{152}

Has the ALI caved? Has duty been restored to the doctrinally preeminent gatekeeper function that, according to Goldberg and Zipursky, it so richly deserves? Hardly. Duty is still just the obligation “to exercise reasonable care” and, more importantly, still “does not require attention from the court.”\textsuperscript{153}

\textsuperscript{149} \textit{Id.} § 6(b). The second Tentative Draft does not use the phrase “proximate cause,” but instead refers to harm “within the scope of liability.” \textit{Id.} Green and Powers note later that while issues of scope of liability are “most often described as ‘proximate cause’ by judges, lawyers, and legal scholars . . . the term ‘proximate cause’ has rarely been used in prior Restatements.” \textit{Id.} at 191 special note on proximate cause. The Reporters concede that “the term ‘proximate cause’ has been in widespread use in judicial opinions, treatises, casebooks and scholarship,” but decline to use it “because it is an especially poor [term] to describe the idea to which it is connected.” \textit{Id.} The term is included in a parenthetical following the real title, \textit{Scope of Liability}, “to communicate clearly with judges, lawyers, and academics who understand limitations on liability under the proximate-cause rubric.” \textit{Id.} With a touch of what can only be described as desperation, the Reporters note that “[t]he Institute fervently hopes that the Restatement Fourth of Torts will not find this parenthetical necessary.” \textit{Id.} In this particular instance, the balance between positivist legal description and normative prescription, see \textit{supra} notes 22-26 and accompanying text, seems to have swung completely toward a specific legal agenda, abandoning a well-established legal term almost everyone knew and with which almost everyone, presumably, was fairly comfortable (even if “proximate cause” continues to evade comprehension conceptually).

\textsuperscript{150} The title of this comment and its reference to “elements,” unprecedented in the Third Restatement project, is an undeniable reference to section 281 of the Second Restatement and its \textit{Statement of the Elements of a Cause of Action for Negligence}. \textit{See RESTATEMENT (SECOND) OF TORTS} § 281 (1979).

\textsuperscript{151} \textit{See TENTATIVE DRAFT NO. 2, supra} note 1, § 6 cmt. b.

\textsuperscript{152} \textit{Id.} The Reporters, covering familiar ground, note that “[d]uty is a question of law for the court to determine.” \textit{Id.} Unfortunately for those still harboring hope, not only is an actor merely under a “duty to exercise reasonable care” but the duty “does not (ordinarily) require attention from the court.” \textit{Id.}

\textsuperscript{153} \textit{Id.} Section 6, comment \textit{f} affirms that

[a]n actor ordinarily has a duty to exercise reasonable care. That is equivalent to saying that an actor is subject to liability for negligent conduct that causes physical harm. Thus, in cases involving physical harm, courts ordinarily need not be concerned with the existence or content of the ordinary duty.

\textit{Id.} § 6 cmt. \textit{f}. 
Green and Power's rhetorical sophistication and subtlety reveals an interesting theme in the second Tentative Draft that was only nascent in previous drafts. In distinguishing the "legal" element of duty from the "factual" elements of breach, harm, and causation, Green and Powers imbue duty with dueling personalities. Prior drafts held fast to the proposition that duty constituted, in Schwartz's words, a "non-issue,"\(^\text{154}\) however, by highlighting duty as "a question of law for the court to determine,"\(^\text{155}\) Green and Powers entice the courts to take charge of negligence claims by their original horns—duty. Hence, in a comment to section 7, Green and Powers cite "no-duty rules and the scope-of-liability doctrines (often called 'proximate cause')" as the "two different legal doctrines for withholding liability."\(^\text{156}\)

Further, their account of duty's "[p]rocedural aspects"\(^\text{157}\) sends similar mixed messages. Though comment \(b\) to section 6 identifies duty as the "first element" of negligence,\(^\text{158}\) section 7 places upon the defendant the "procedural obligation to raise the [no-duty] issue."\(^\text{159}\) This procedural obligation reinforces the idea that duty functions (as a presumptive matter of a plaintiff's prima facie negligence claim)\(^\text{160}\) more as an affirmative defense than as an element of a plaintiff's case.

Section 7 ignores the same incongruent duality it establishes: duty as an element and duty as a non-element. For example, the Reporters' note to comment \(b\) cites the Federal Rules of Civil Procedure for the proposition that plaintiffs alleging an action in negligence need not plead duty, but also describes duty as a "necessary element of the plaintiff's case."\(^\text{161}\) Furthermore, comment \(b\) alleges that resting the "no-
duty” burden with the defendant “should provide adequate notice to the plaintiff that the defendant claims he or she did not owe [the] plaintiff a duty of reasonable care.” This defense sounds more like a challenge to one of the elements of the plaintiff’s prima facie case than an affirmative defense of “no-duty.”

Green and Powers assert, however, that their proposal does not reestablish duty as an element of negligence. In Section 7, comment b, they refer to Federal Rule of Civil Procedure 9(a), analogizing the existence of duty to the “capacity to sue or compliance with conditions precedent in a contract, which are presumed to exist.” This “compromise,” though, merely reveals the radical nature of their proposal; comparing duty to a contractual condition precedent only muddies the waters, rather than stills them.

Section 7 offers further evidence of duty’s obscured status. The Reporters’ comments c-g to section 7 “explain a number of the factors relevant to . . . determinations” of no-duty. Proto-typically, comment c observes that, “[i]n deciding whether to adopt a no-duty rule, courts often refer to general social norms of responsibility.” For example, commercial distributors of alcohol have a different duty to avoid injury to motorists than do social hosts. Courts have traditionally, however, also referred to general norms of social responsibility in determining that a plaintiff cannot satisfy the now-famous first element of negligence. Comment e, Relational Limitations, is section 7’s soft spot. “Courts,” Green and Powers allege, “sometimes use the rubric of duty to decide whether an

162. Id. § 7 cmt. b.
163. Id. § 7, Reporters’ Note cmt. b. Such a contract plaintiff “is permitted to plead generally compliance with all conditions precedent, leaving to defendant the obligation to provide notice of any specific condition, compliance with which the defendant seeks to put in issue.” Id. (citing 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 337, at 414 n.16 (5th ed. 1999)). It is very difficult to understand how this framework clarifies, rather than obfuscates, the proper role for duty in negligence doctrine.
164. See supra note 162.
165. TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. a; see also id. § 7 cmt. c (Conflicts with Social Norms About Responsibility); id. § 7 cmt. d (Conflicts with Another Domain of Law); id. § 7 cmt. e (Relational Limitations); id. § 7 cmt. f (Administrability); id. § 7 cmt. g (Deference to Discretionary Decisions of Another Branch of Government).
166. Id. § 7 cmt. c.
167. See id.
168. See id.
otherwise negligent actor should be liable to a class of persons in a certain relationship.” 169 For example, a property owner's duty may extend to persons on the property for the owner's benefit but not to a trespasser; a home owner may owe a duty to an adjacent landowner to avoid negligently starting a fire, but may not owe the same duty to a firefighter. 170 “Thus, an actor may have a duty of reasonable care to some persons but not to others.” 171 The idea that an individual's duty goes only so far is as old as Palsgraf. 172 The Third Restatement project has, since the beginning, resisted the idea that negligence may be tied to particular relationships. 173 According to Schwartz, the “relational” camp includes Goldberg and Zipursky. 174 Though both Tentative Drafts include this brief relational discussion, they both omit any reference to Goldberg and Zipursky.

In a final attempt to soften their “no-duty” position and mollify the duty critics, Green and Powers forcefully extend an idea introduced in the first Tentative Draft. 175 That Draft introduced the idea that judges need not dispose of duty entirely, they may merely “modify” it. 176 The second Tentative Draft now acknowledges that a court may determine that an actor “has no duty or a duty other than the ordinary duty of reasonable care.” 177 Under this language, a defendant is not

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169. Id. § 7 cmt. e; see also § 7 cmt. a (“When addressing duty, courts sometimes focus on the relationship between the actor and the person harmed.”).

170. Id. § 7 cmt. b.

171. Id. § 7 cmt. e.

172. See supra notes 120-21; see also supra note 78 (describing the Mussivand court's discussion of the expiration of duty).

173. See, e.g., DISCUSSION DRAFT, supra note 2, § 6, Reporter's Note cmt. a (noting that while some scholars affirm the importance of relationships in duty analysis, “others question this finding”); TENTATIVE DRAFT No. 2, supra note 1, § 6 cmt. e; TENTATIVE DRAFT No. 1, supra note 16, § 6, Reporters' Note cmt. d.


175. See supra notes 16, 132 (noting Green's influence on the first Tentative Draft).

176. See TENTATIVE DRAFT No. 1, supra note 16, § 7 cmt. a.

177. See TENTATIVE DRAFT No. 2, supra note 1, § 7. The full text of section 7 “duty” reads,

A court may determine that an actor has no duty or a duty other than the ordinary duty of reasonable care. Determinations of no duty and modifications of the duty of reasonable care are unusual and are
liable to a plaintiff where "a court determines the defendant owes 'no-duty' to the plaintiff"; if a court finds a defendant possesses a "modified duty, the defendant is subject to liability only for breach of the modified duty."178 "Courts," the Reporters suggest, "also sometimes hold that an actor has a limited duty, such as an obligation to avoid engaging in reckless conduct that causes physical harm."179

Section 7 magically transforms recklessness from a doctrinally distinct mental state to a limited duty of reasonable care. This doctrinal slight of hand recalls the debate over the central mission of the Restatement project.180 If the purpose of the Restatement is to distill basic tort principles (and clarify particularly challenging doctrines), and the purpose of these sections of the Third Restatement in particular is an account of negligence, then re-imagining recklessness as a "modification" of negligence serves only to obfuscate, rather than reveal, the distinction between recklessness and negligence.181

To make matters worse, the Reporters' "modified duty" concept commingles several concepts, such as the distinction between general and specific duties.182 Sometimes, courts focus on particular claims of negligence, forbidding some but preserving others. Thus, a court might hold that a product seller has no duty to warn about risks an ordinary consumer would already know, but still has a duty to exercise reasonable care in designing the product."183 It is almost impossible to understand how the "no-duty" rubric helps to clarify this convoluted area of duty doctrine. Why, for example, is it based on special problems of principle or policy that warrant denying liability or limiting the ordinary duty of care in a particular class of cases. A defendant is not liable for any harm caused if the court determines the defendant owes no duty to the plaintiff, either in general or in relation to the particular negligence claim. If the court determines a defendant is subject to a modified duty, the defendant is subject to liability only for breach of the modified duty.

Id.

178. TENTATIVE DRAFT NO. 2, supra note 1, § 7.
179. Id. cmt. a; see also id. § 7 cmt. b, illus. 1 (comparing liability based on negligence and liability based on "willful and wanton" conduct).
180. See supra Part I.B.
181. Cf. TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. d (noting the influence of property law on the administration of claims involving owners and occupiers of land and emphasizing that "no-duty and limited-duty rules help police the boundaries between . . . various areas of law").
182. See supra notes 128-32 and accompanying text.
183. TENTATIVE DRAFT NO. 2, supra note 1, § 7 cmt. a.
preferable to describe a product seller as having a duty to exercise reasonable care in designing a product but “no-duty” to an ordinary consumer when the risks of the product are apparent? Might it be more coherent to describe the product seller’s duty as encompassing the risks associated with the original design of a product but not extending to those risks known to an ordinary consumer? \(^{184}\) The modified duty concept even resuscitates the prominence of relational factors in duty analysis. \(^{185}\)

Despite these criticisms, the first Tentative Draft took important steps toward assuaging the concerns of those scholars, like Goldberg and Zipursky, who seek to reaffirm the primacy of duty in negligence law. The 2002 Tentative Draft undeniably took greater steps toward achieving a compromise between Schwartz’s original 1999 Discussion Draft position and the stand taken by Professors Goldberg and Zipursky.

CONCLUSION

The Third Restatement project can thus far be characterized as inching toward duty. The Discussion Draft proffered a relatively radical account of negligence and duty, its characterizations of duty’s role and duty’s scope going hand in hand. On one hand, the Discussion Draft indicated defendants owed plaintiffs merely a “duty of reasonable care”—more substantive duties, labeled affirmative duties, were reserved for more complicated cases implicating duty-to-warn and duty-to-rescue. On the other hand, the duty owed to plaintiffs by defendants is so general it can be assumed in most run-of-the-mill cases.

The first Tentative Draft took minor steps toward reconciling Schwartz, Goldberg and Zipursky’s disparate conceptions of duty and negligence. Though the first Tentative Draft purported to address both Goldberg and Zipursky’s doctrinal and structural concerns, its modifications were mostly cosmetic. The second Tentative Draft took the duty critics more seriously. Unfortunately, the ALI continues to hold fast to its inventive account of negligence and duty. The second Tentative Draft’s changes serve only to make more palatable the bitter taste of duty’s dismissal.

\(^{184}\) See id.

\(^{185}\) See supra notes 166-70 and accompanying text.