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Putting “Duty” Back on Track

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Abstract: *Brown v. USA Taekwondo* grapples with the problems that have dogged California law governing the determination of duty in negligence for more than fifty years now. The great California duty decisions of the late 1960s—*Rowland v. Christian* and *Dillon v. Legg*—were the bookends to an age of American tort law inaugurated by *MacPherson v. Buick* and *Palsgraf v. Long Island Railroad*. *MacPherson* and *Palsgraf* altered both the internal structure of negligence law and tort law’s relation to contract and property by making reasonable foreseeability of harm the master principle of responsibility in tort. *Rowland* and *Dillon* brought the age of reasonable foreseeability to a close. As their implications unfolded over time, we learned that making reasonable foreseeability of harm the fundamental test for both the existence of obligation and the extent of liability imposes more responsibility than we can bear. Reaching the limits of reasonable foreseeability as the master principle of duty doctrine left courts hard-pressed to say when fundamental responsibilities of care should be expanded and when they should be contracted. Ever since, California courts have been muddling their way through duty cases. They have been uncertain both about when an actor bears some responsibility for reducing a risk or mitigating a harm and about how they should go about making such determinations. *USA Taekwondo*’s efforts to recast *Rowland*’s laundry list of relevant factors as a two-step test shows us how we might begin to bring our own age of confusion to a close.

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1 Introduction

*Brown v. USA Taekwondo*¹ – the California Supreme Court’s most recent reckoning with the doctrine of duty in negligence law – is an important and illuminating confrontation with a controverted corner of contemporary tort law. For decades now, California courts have been muddling their way through duty cases. They have been uncertain not only about when an actor bears some responsibility for reducing a risk or mitigating a harm, but also about how they should go about making such determinations. Ironically, perhaps, this predicament is the product of some of the most celebrated and fundamental developments in the law of torts during the latter half of the twentieth century. The great California duty decisions of the late 1960s – *Rowland v. Christian* and *Dillon v. Legg* – were the bookends to an age of American tort law. *MacPherson v. Buick* and *Palsgraf v. Long Island Railroad* inaugurated that age by making reasonable foreseeability of harm the master principle of tort law. *Rowland* and *Dillon* brought the age of reasonable foreseeability to a close by showing us that reasonable foreseeability of harm can impose more responsibility than we can bear. Reaching the limits of reasonable foreseeability as the master principle of duty doctrine left courts hard-pressed to say when fundamental responsibilities of care should be expanded and when they should be contracted. Ever since, courts in California and elsewhere have struggled to put duty doctrine back on track. *Brown v. USA Taekwondo*’s efforts to recast *Rowland*’s laundry list of relevant factors as a two-step test shows us how we might begin to bring our own age of confusion to a close. Or so I shall argue.

2 Duty Doctrine’s Predicament

California duty doctrine has two fundamental sources. One is Section 1714 of the California Civil Code. Section 1714, first enacted in 1872, provides that “[e]veryone is responsible... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.”² Section 1714 thus establishes a default rule – recognized repeatedly by California courts – that each person has a duty “to exercise, in his or her activities, reasonable care for the safety of others.”³ But California duty doctrine also has another principal source, one less fundamental but more proximate: *Rowland v. Christian*,⁴ the California Supreme Court’s great mid-

¹ 483 P.3d 159 (Cal. 2021).

² Cal. Civ. Code § 1714(a) (West 2023).

³ *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1172 (Cal. 2011).

⁴ 443 P.2d 561 (Cal. 1968), *superseded by statute*, Cal. Civ. Code § 847, *as recognized in* *Calvillo-Silva v. Home Grocery*, 968 P.2d 65 (Cal. 1998) (Footnote 7 in *Calvillo-Silva* explains as follows: “According to the

twentieth-century attempt to explain just how courts should go about determining if a duty of care exists in circumstances where its presence is disputed. In *Rowland*, the Court took it upon itself to spell out the “factors” that ought to guide determinations of duty:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁵

In the more than 50 years that have passed since *Rowland* was decided, California courts have been unsure of just how to connect these two sources of duty into a single stream of doctrine. Are the “*Rowland* factors” an independent and sufficient source of duty? Should a court apply these factors directly to facts to determine whether to recognize a duty of care? Or is their role to test whether there are reasons of policy to carve out some exception to the basic principle of California (and American) tort law that everyone owes everyone else a duty of reasonable care?

In California case law, these debates have played out most prominently in the context of “special relationships” and “affirmative duties to act.” That they have seems both intuitive and puzzling. Intuitive, because affirmative duty decisions raise

author, this bill is intended to reverse only in part the ruling in *Rowland v. Christian* as to trespassers, i. e., trespassers who are injured during the course of, or after the commission of, any specified felony, or attempt to commit a specified felony, for which they are subsequently convicted.”).

5 *Id.* at 564. The California Supreme Court has since read *Rowland*’s multi-factor “test” to place special emphasis on “foreseeability” as the preeminent factor:

As we have observed, “*Rowland* enumerates a number of considerations... that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate: ‘the major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.’ The foreseeability of a particular kind of harm plays a very significant role in this calculus ...”

Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 588 (Cal. 1997) (citation omitted). Other jurisdictions take the same approach. *See, e.g.*, *Mesiar v. Heckman*, 964 P.2d 445, 450 (Alaska 1998) (listing foreseeability as the first of a list of factors); *Doe v. Garcia*, 961 P.2d 1181, 1184 (Idaho 1998) (same); *Thorne v. Miller*, 722 A.2d 626, 629 (N.J. Super. Ct. Law Div. 1998) (same). Connecticut explicitly enumerates foreseeability as the most important of the factors. *E.g.*, *Jaworski v. Kiernan*, 696 A.2d 332, 336–38 (Conn. 1997).

questions of law more often than negative duty decisions do. When affirmative duty is at issue, the general rule is “no duty to act.”⁶ Section 1714’s general duty of care states a negative duty. In general, we are all obligated not to impose unreasonable risks on others through our actions, but in general, we are not obligated to protect others from harm at the hands of perils we are not responsible for creating.⁷ This general rule of “no duty to act,” however, is pockmarked by exceptions. Affirmative duties to act attach to various responsibility-creating special relationships. The general rule and its various exceptions jostle against one another, and the tensions between them drive courts to arguments of principle and policy.

Moreover, *Rowland* itself addressed a circumstance perched on the uncertain boundary between negative and affirmative duty – namely, the duties that landowners owe to entrants onto their land. Those duties have both negative and affirmative dimensions. On the one hand, landowners must manage their properties so that they do not unreasonably endanger people properly on their property. That obligation sounds in “negative duty.” On the other hand, landowner obligations sometimes extend to protecting people on the property from harm at the hands of third parties. That obligation sounds in “affirmative duty.” Indeed, under the traditional categories that *Rowland* displaced, invitor-invitee counted as a special relationship. *Rowland* may therefore speak to affirmative duty determinations even more directly than it speaks to duty determinations in general.

In light of these considerations, it is hardly surprising that intermediate appellate courts in California have often brought *Rowland* to bear in affirmative duty cases. *Brown* itself illustrates the fact that determinations of affirmative duty can be difficult to make. As teenagers, the plaintiffs in *Brown* “trained in the Olympic sport of taekwondo... [t]ravell[ing] to compete at various events in California and throughout the country with their coach, Marc Gitelman. Gitelman took advantage of these opportunities to sexually abuse the young athletes.”⁸ Plaintiffs brought suit against Gitelman, the United States Olympic Committee (“USOC”), USA Taekwondo (“USAT”), and others. The trial court dismissed their complaint. The Court of Appeal reversed the judgment dismissing the USAT but affirmed the judgment dismissing the USOC. Reasonable courts disagreed over whether the circumstances of the case gave rise to any affirmative duties and, if so, who bore those duties. The USAT appealed to the California Supreme Court.

⁶ See *Regents of Univ. of Cal. v. Superior Court*, 413 P.3d 656, 663 (Cal. 2018).

⁷ See, e.g., *Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 663–64 (Cal. 2018) (citations omitted); 46 George L. Blum & Kimberly C. Simmons, *Cal. Jur. 3d Negligence* § 15 (2023) (“[N]o person owes a duty to rescue or assist another if the first person has not created the peril in which the other person is placed.”) (citing *Seibert Sec. Servs., Inc. v. Superior Ct.*, 22 Cal. Rptr. 2d 514 (Ct. App. 1993)).

⁸ 483 P.3d 159, 161 (Cal. 2021).

Intermediate appellate court decisions had coalesced around three different approaches to the interpretation and application of *Rowland*. Some decisions “held that a plaintiff can establish a duty to protect by satisfying either the special relationship doctrine or the *Rowland* factors. Under this approach, *Rowland* serves as an independent source of duty.”⁹ Neither the presence of a special relationship under standard doctrine nor satisfaction of the *Rowland* factors is necessary, and either is sufficient. Other decisions, including the intermediate appellate decision in *Brown* itself, had interpreted *Rowland* to require a “two-part framework... holding that a plaintiff must satisfy both the special relationship test and the *Rowland* factors before a duty to protect the plaintiff from third party harm can be imposed on the defendant.”¹⁰ On this interpretation, neither test is sufficient and both are necessary. Still other decisions had “taken the view that the special relationship test incorporates the *Rowland* factors – that is, that ‘[r]esolution of the issue whether a special relationship exists giving rise to a duty to protect (or warn) comprehends consideration of the same factors underlying any duty of care analysis’ under *Rowland*.”¹¹ According to these decisions, special relationship doctrines state rules that specify the application of the *Rowlands* standard to various recurring kinds of cases.

To settle these disagreements and to clarify the applicable framework for determining whether a defendant has a duty to protect a plaintiff from harm caused by a third party, the Supreme Court granted review in *Brown*. On its doctrinal surface, the decision is clear. The court chose the two-step framework:

[W]hether to recognize a duty to protect is governed by a two-step inquiry. First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty.¹²

Brown thus appears to resolve longstanding disagreements among California courts and clarifies an important corner of California duty doctrine, telling us that the *Rowland* factors come into play only when special relationship doctrine calls for the recognition of a duty of care – and then only to determine if policy considerations call for defeating that conclusion. The *Rowland* factors pick out exceptional circumstances where special circumstances obtain.

Or so it seems. On closer examination, it is unclear what weight should be given to both the presumption in favor of recognizing a duty created by the application of special relationship doctrine and the policy factors that might defeat its application. Formally,

⁹ *Id.* at 163.

¹⁰ *Id.*

¹¹ *Id.* (citation omitted).

¹² *Id.* at 161. The court also affirmed the intermediate appellate court judgment.

Brown's endorsement of a two-step framework is compatible with assigning very different weights to each step. Policy might carry more weight than doctrine, or doctrine might carry the day in all but the most unusual of circumstances. If we step back and take a broader view of the *Brown* opinions, they appear to instantiate a fundamental predicament of contemporary duty doctrine. On the one hand, abstract statements of duty doctrine are universal. Everyone owes everyone else a duty "to exercise, in his or her activities, reasonable care for the safety of others."¹³ This is a statement of principle, a matter of interpersonal morality, a matter of what we owe to each other in the way of right and responsibility. On the other hand, this commitment of principle sometimes yields to "policy" – to instrumental considerations sounding in the general good. How to reconcile these two commitments is a basic dilemma of modern duty doctrine.

Brown imposes formal order on the competing considerations. Principle, as embodied in special relationship doctrine, comes first. Policy, as embodied in the *Rowland* factors, comes second. The opinions in *Brown* say less, though, about how to relate the conflicting reasons embodied in these two steps. Does the second step identify the considerations concealed beneath the settled doctrine deployed in the first step? Are we therefore reviewing duty determinations in light of the reasons that ought to have governed them all along? Or does the second step identify different considerations capable of defeating a duty called for by the first step? My aim in this short paper is to probe this question.

3 The Arc of Duty Doctrine

Section 1714's declaration that "[e]veryone is responsible... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person" is a part of the statute that gave California, freshly minted as a state, civil law. However, in California, as elsewhere, the duty to exercise reasonable care to avoid harming others has never been as fully general as the language of Section 1714. For a century or more, statements of universal obligation have been qualified by reference to "reasonable foreseeability of harm." Indeed, one traditional maxim of moral responsibility – the maxim that "ought implies can" – implies that it is unreasonable to expect people to guard against harm that they cannot reasonably be expected to foresee. And, in practice, reasonable foreseeability of harm is a widely recognized precondition for the imposition of duty to exercise reasonable care.¹⁴ At the time that Section 174 was enacted, though, reasonable foreseeability of physical harm was often not sufficient to

¹³ *Cabral*, 248 P.3d at 1172 (interpreting Section 1714(a) of the California Civil Code, first enacted in 1872).

¹⁴ Many contemporary American jurisdictions take reasonable foreseeability of physical injury to be, in general, the necessary and sufficient condition of a tort duty of care the key to the obligation to exercise reasonable care. The Wisconsin Supreme Court, for example, writes:

trigger a duty of care. Nineteenth-century tort law contained larger domains of “no duty” and assigned much of the domain now held by tort to property and contract.¹⁵

On the property side, the duties owed by landowners to entrants onto their property were governed by three status categories drawn from the law of property: invitee, licensee, and trespasser. The property rights of owners governed the obligations that they owed to those who entered onto their land. The presence or absence of permission to enter – and the extent to which the entrant’s presence on the property benefitted the owner – determined the stringency of the obligation owed to the entrant.¹⁶ On the contract side, when a chain of contracts was present – as it is in

[T]he proper analysis of duty in Wisconsin is as follows: ‘The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act ...’

Miller v. Wal-Mart Stores, Inc., 580 N.W.2d 233, 238 (Wis. 1998) (citations omitted). Numerous other jurisdictions agree. See *Washington v. City of Chicago*, 720 N.E.2d 1030, 1033 (Ill. 1999); *Thompson v. Mindis Metals, Inc.*, 692 So. 2d 805, 807–08 (Ala. 1997); *Rudolph v. Ariz. B.A.S.S. Fed’n*, 898 P.2d 1000, 1003 (Ariz. Ct. App. 1995); *Munson v. Otis*, 396 A.2d 994, 996 (D.C. 1979); *Delmarva Power & Light Co. v. Burrows*, 435 A.2d 716, 718 (Del. 1981); *Fla. Specialty, Inc. v. H 2 Ology*, 742 So. 2d 523, 526 (Fla. Dist. Ct. App. 1999); *Bradley Ctr., Inc. v. Wessner*, 296 S.E.2d 693, 695–96 (Ga. 1982), *abrogated in part by* Dep’t. of Lab. v. McConnell, 828 S.E.2d 352, 358 (Ga. 2019); *Bain v. Gillispie*, 357 N.W.2d 47, 49 (Iowa Ct. App. 1984); *Melchers v. Total Elec. Constr.*, 723 N.E.2d 815, 818 (Ill. App. Ct. 1999); *Seigle v. Jasper*, 867 S.W.2d 476, 483 (Ky. Ct. App. 1993); *Colvin v. AR Cable Services-ME, Inc.*, 697 A.2d 1289, 1290 (Me. 1997); *Baltimore Gas & Elec. Co. v. Flippo*, 705 A.2d 1144, 1154 (Md. 1998); *Glick v. Prince Italian Foods of Saugus, Inc.*, 514 N.E.2d 100, 101–02 (Mass. App. Ct. 1987); *Donald v. Amoco Prod. Co.*, 735 So. 2d 161, 175 (Miss. 1999); *Horner v. Spalitto*, 1 S.W.3d 519, 522 (Mo. Ct. App. 1999); *Hart v. Ivey*, 420 S.E.2d 174, 178 (N.C. 1992); *Nelson v. Gillette*, 571 N.W.2d 332, 340 (N.D. 1997); *Mulvey v. Cuiello*, 687 N.Y.S.2d 584, 588 (N.Y. Sup. Ct. 1999); *D’Amico v. Delliquadri*, 683 N.E.2d 814, 816 (Ohio Ct. App. 1996); *Smith v. Speligene*, 990 P.2d 312, 315 (Okla. Civ. App. 1999); *Roberts v. Fearey*, 986 P.2d 690, 692 (Or. Ct. App. 1999); *Hicks v. Metro. Edison Co.*, 665 A.2d 529, 533 (Pa. Commw. Ct. 1995), *appeal denied*, 675 A.2d 1253 (Pa. 1996); *Horne v. Beason*, 331 S.E.2d 342, 344 (S.C. 1985); *Thompson v. Summers*, 567 N.W.2d 387, 392 (S.D. 1997); *McCall v. Wilder*, 913 S.W.2d 150, 155–56 (Tenn. 1995); *Trail v. White*, 275 S.E.2d 617, 619 (Va. 1981).

¹⁵ See, e.g., Robert Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 928, 944–54 (1981) (arguing “that fault liability emerged out of a world-view dominated largely by no-liability thinking” and delineating domains of “no duty”); G. EDWARD WHITE, *TORT LAW IN AMERICA* 184 (expanded ed. 2003) (arguing that 19th century limitations on negligence recovery were intended to keep a leash on juries); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (“The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”).

¹⁶ See, e.g., *TORT AND ACCIDENT LAW* 441–45, 461–83 (Robert E. Keeton et al. eds., 4th ed. 2004); Rabin, *supra* note 16, at 933–36; WHITE, *supra* note 16, at 190 (1985) (“[T]he liability of landowners... has been persistently dominated by... ‘status’ conceptions of tort liability that had preceded the rise of modern

product accidents involving injuries to product purchasers – “no duty” of care was owed to those foreseeably injured by negligent conduct, absent a contractual relation between injurer and victim.¹⁷

Our law is fundamentally different from the tort law of the turn of the twentieth century. It is heir to the twin revolutions¹⁸ of *MacPherson v. Buick*¹⁹ and *Rowland v. Christian*.²⁰ *MacPherson* overthrew privity of contract in the critical domain of product accidents, allowing tort law to follow its own premise that where “danger is to be foreseen, there is a duty to avoid the injury.”²¹ Reasonable foreseeability of harm swept away privity of contract as a limitation on duty and took over the task of determining duty. For its part, *Rowland* spawned a less sweeping overthrow of the three categories by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth.²² Yet even if *Rowland*’s triumph was less sweeping, over the course of the twentieth century, tort waxed while contract and property waned, and tort law – not contract or property law – came to play an increasingly large role in determining people’s duties with respect to the reasonably foreseeable risks of physical harm that their activities create. *MacPherson* and *Rowland* were, moreover, of a piece with other great twentieth-century tort cases – particularly *Palsgraf v. Long Island Railroad*²³ and *Dillon v. Legg*.²⁴ By repudiating the “directness” test and declaring reasonable foreseeability to be the master test of scope of responsibility, *Palsgraf* did to proximate cause doctrine what *MacPherson* did to duty doctrine. In *MacPherson*, Cardozo declared that when “danger is to be foreseen, there is a duty to avoid the injury” – a duty which arises “irrespective of

negligence.”); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS 432 (5th ed. 1984) (describing “the traditional distinctions in the duties of care owed to persons entering land” as “based upon the entrant’s status as a trespasser, licensee or invitee.”).

¹⁷ See e.g., TORT AND ACCIDENT LAW, *supra* note 17, at 926–36; William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1099–1100 (1960). But see Lahav, *A Revisionist History of Products Liability* (Jan. 10, 2023) <https://ssrn.com/abstract=4321152> (arguing that, in the nineteenth century, privity was not the solid barrier to product liability that the received wisdom takes it to be).

¹⁸ The developments, of course, are much broader than these cases. On the demise of “privity of contract” see Prosser, *supra* note 18, at 1099–1100 (1960).

¹⁹ *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

²⁰ 443 P.2d 561 (Cal. 1968).

²¹ *MacPherson*, 111 N.E. at 1051. Prior to *MacPherson*, reasonable foreseeability of physical injury was the first and principal determinant of the existence of a duty of care within the constricted domain ceded to tort. See, e.g., *Blyth v. Birmingham Waterworks Co.* (1856) 159 Eng. Rep. 1047 (Exch.).

²² For a survey of the state of the law in various jurisdictions see DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, *THE LAW OF TORTS* § 278 (2d ed. 2016).

²³ 162 N.E. 99 (N.Y. 1928).

²⁴ 441 P.2d 912 (Cal. 1968) (en banc).

contract.”²⁵ In *Palsgraf*, Cardozo declared that “[t]he risk reasonably to be perceived defines the duty to be obeyed.”²⁶ Cardozo’s great opinions thus made reasonable foreseeability of harm the master test for both the existence and the extent of liability.

Rowland and *Dillon* – both decided in 1968 – were the California Supreme Court’s two great contributions to the triumph of reasonable foreseeability of harm as the master principle of law of negligence. *Brown v. Taekwondo*’s attempt to move the law of duty forward takes this lesson of *Rowland* as its touchstone:

In... *Rowland*... we summarized the policy considerations that guide the [duty] inquiry. To depart from the general principle that all persons owe a duty of care to avoid injuring others, we explained, ‘involves the balancing of a number of considerations’: ‘the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and [the] consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.’ We reasoned that while the common law categories of landowner duties might align with some of these considerations in some cases, they did not align in every case. It followed that a victim’s status as a trespasser, licensee, or invitee cannot be determinative of a landowner’s duties. The inquiry whether a landowner owes a duty to her invitees instead begins with the ‘basic policy’ that ‘everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property,’ and then considers whether more particular considerations of policy call for departure from the basic rule.²⁷

Rowland is thus California’s *MacPherson* – its declaration that tort duties will henceforth be determined by the principles and policies of tort law, not settled by the principles and policies of other bodies of law.

Dillon, for its part, is California’s *Palsgraf*. *Dillon* declares that, henceforth, liability for the negligent infliction of emotional distress (“NIED”) will no longer be governed by special and arbitrarily restrictive rules.²⁸ The scope of liability for emotional distress inflicted will depend primarily on the scope of foreseeable emotional distress unreasonably risked.²⁹ And *Dillon*, too, belongs in the pantheon of great and foundational twentieth-century negligence cases. It is, the *Third Restatement* tells us, “the seminal decision establishing a right of bystander recovery for

²⁵ *Id.*

²⁶ *Palsgraf*, 162 N.E. at 100.

²⁷ *Brown v. USA Taekwondo*, 483 P.3d 159, 167 (Cal. 2021) (citations omitted). Justice Cuellar’s concurrence also underscores the centrality of foreseeability to *Rowland*. “In deciding whether to limit the general duty [of care that everyone presumptively owes to everyone else] our cases, starting with *Rowland*, have repeatedly emphasized defendants’ reasonable ability to anticipate a particular kind of harm.” *Id.* at 173 (Cuellar, J., concurring).

²⁸ 441 P.2d 912 (Cal. 1968) (en banc).

²⁹ *Id.*

negligence.”³⁰ It owes that enduring prominence not only to the impact that it has had, but also to the boldness of the vision that it pursued. For most of the twentieth century, liability for the infliction of pure emotional harm expanded, but slowly and steadily. In *Dillon*, this slow, measured march exploded into a revolutionary cry. The California Supreme Court castigated “duty” doctrine itself as an illegitimate “legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”³¹ “Duty,” according to the *Dillon* opinion, was an arbitrary – and therefore unjustifiable – limit on liability.³²

In part, *Dillon*’s denunciation of “duty” doctrine was prompted by the facts of the case. Legg’s negligent driving killed a young child, Erin Lee Dillon. Both her sister and her mother were nearby. Both witnessed the collision. Neither suffered physical harm, but both allegedly suffered “great emotional disturbance and shock” and “injury to her nervous system.”³³ Lower courts allowed the sister’s claim to stand but dismissed the mother’s claim on the ground that the sister had been – whereas the mother had not been – close enough to the accident to have feared for her own safety.³⁴ The California Supreme Court responded to this ruling by overruling the ‘zone of danger’ rule which made the distinction dispositive.³⁵

[W]e have before us a case that dramatically illustrates the difference in result flowing from the alleged requirement that a plaintiff cannot recover for emotional trauma in witnessing the death of a child or sister unless she also feared for her own safety because she was actually within the zone of physical impact.

... The case... illustrates the fallacy of the rule that would deny recovery in the one situation and grant it in the other. In the first place, we can hardly justify relief to the sister for trauma which she suffered upon apprehension of the child’s death and yet deny it to the mother merely because of a happenstance that the sister was some few yards closer to the accident. The instant case exposes the hopeless artificiality of the zone-of-danger rule. In the second place, to rest upon the zone-of-danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery. The

30 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 Reporter’s Note cmt. c (AM. L. INST., Tentative Draft No. 5, 2007). The Reporters note that “29 American jurisdictions [including California] now follow *Dillon* or some modified version of the *Dillon* approach.” *Id.* at cmt. a. This nose count was deleted from the final version of the Restatement promulgated by the ALI.

31 *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968) (en banc).

32 *See id.* at 920–21.

33 *Id.* At 914.

34 *Id.* at 915.

35 The “zone of danger” rule permits a plaintiff whose physical safety was endangered by a negligent actor to recover for her emotional distress, even if she is not physically harmed by that negligence. It denies recovery to a bystander who witnesses the very same horrific accident and experiences identical emotional trauma, but who is not physically endangered by the negligent conduct in question. *Id.* at 915–16.

zone-of-danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of impact.³⁶

Powerful and tragic as the facts of the case were, though, they were not the only consideration driving the decision. Reasons of principle were equally important. By 1968, it was plain that the scope of the defendant's liability ought to be determined by reasonable foreseeability of harm. The court wrote:

In the absence of 'overriding policy considerations... foreseeability of risk [is] of... primary importance in establishing the element of duty.' (*Grafton v. Mollica* (1965). 231 Cal.App.2d 860, 865, 42 Cal.Rptr. 306, 310)... Defendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance. ...

Harper and James state the prevailing view. The obligation turns on whether 'the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor. ... [T]he obligation to refrain from... particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.' (2 Harper & James, *The Law of Torts*, at p. 1018; fns. omitted.)³⁷

The time had come, in short, for the law to work itself pure – to cast off the shackles of outdated doctrine, and to let liability extend to the limit of the reasonably foreseeable. *Dillon* therefore instructed California courts to decide whether a defendant should be liable for a plaintiff's emotional harm by determining "whether the accident and harm was reasonably foreseeable."³⁸

Rowland and *Dillon* are of a piece with *MacPherson* and *Palsgraf* – chapters in the same story of reasonable foreseeability's reign as the master principle of negligence law – but they occupy very different places in that story's narrative arc. Indeed, they are opposite bookends. *MacPherson* and *Palsgraf* inaugurate the rise of the principle, whereas *Rowland* and *Dillon* bring the period of reasonable foreseeability's rise to a close. *Rowland* and *Dillon* are landmarks of the law, on par with *MacPherson* and *Palsgraf*, but *Dillon* turned out to mark the end of its age in American tort law. The age that it brought to a close was the age when reasonable foreseeability of harm rose to preeminence as the fundamental principle of the law

³⁶ *Id.* at 915.

³⁷ *Id.* at 919–20.

³⁸ *Id.* at 921. In inquiring into the reasonable foreseeability of the harm, courts were to pay special attention to three factors: the proximity of the emotionally harmed plaintiff to the accident, the directness of the plaintiff's observation of the accident, and the closeness of the relationship between the emotionally and physically harmed persons. *Id.*

of negligence and transformed not only the law of torts but also the landscape of private law. Privity of contract as a precondition of product liability and the status categories of landowner liability were both casualties of reasonable foreseeability's triumph. Product and premises liability are its progeny. The transformed landscape left by the triumph of reasonable foreseeability within the law of negligence – and the triumph of tort over contract and property when foreseeable risks of physical harm are at issue – is the landscape of private law in our time.

Ironically, for all the power of its facts and the passion of its reasoning, the most evident effect of *Dillon* was to cause the very same court to repudiate reasonable foreseeability as the measure of responsibility for pure emotional harm and to constrain the scope of such liability. A mere twenty years after the California Supreme Court decided *Dillon v. Legg*, it reversed course in *Thing v. La Chusa*:

The *Dillon* experience confirms, as one commentator observed, that '[f]oreseeability proves too much... Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm.' It is apparent that reliance on foreseeability of injury alone... is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.³⁹

Making reasonable foreseeability of pure emotional harm the test of duty turned out to be self-defeating. Instead of giving liability for emotional harm a secure place in the law of negligence, it set courts searching for ways to curtail such liability.

Thing therefore domesticates the principle that “the risk reasonably to be perceived” determines the scope of responsibility for harm done by converting *Dillon*'s general “guidelines” into a hard and fast rule:

[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress – a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.⁴⁰

³⁹ 771 P.2d 814, 826–27 (Cal. 1989) (citing Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985)). This passage is also quoted in RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 Reporter's Note cmt. i (Am. L. Inst. 2023).

⁴⁰ *Thing*, 771 P.2d at 829–30. The *Dillon* court proposed these three criteria as “factors” whose presence or absence will “indicate the degree of the defendant's foreseeability.” *Dillon*, 441 P.2d at

Parents who witness the deaths of their children may recover for their own trauma, but parents who learn that their children have suffered such fates secondhand may not. One may reasonably doubt that the latter parent is much less distressed.

By limiting *Dillon* in this way, *Thing* reversed the course of nearly a century of common law development and reversed the arc of duty doctrine. *Dillon* struck down as “artificial” the zone of danger limitation on recovery for emotional distress only to be itself cabined, two decades later, by a comparably artificial distinction between witnessing firsthand and learning secondhand of the death of one’s child. The age of reasonable foreseeability’s rise and forward march had come to a close. To be sure, *Dillon* remains a landmark of California and, indeed, American law.⁴¹ But cabining liability for NIED through the use of arbitrary rules has returned to vogue. Twenty years after *Thing*, the *Reporter’s Memorandum to Tentative Draft No. 5* of the *Restatement Third* testified to American tort law’s present predicament by its concession that the boundaries of NIED liability must be drawn arbitrarily.⁴² American negligence law is now plagued by an inability to fix the boundaries of liability for emotional distress in a way which reflects a principle more discriminating than the principle that liability must have *some* limit.⁴³

Rowland was followed by a similar retreat. The California legislature was quick to make clear that the case did not create a duty of care to felony criminal trespassers.⁴⁴ Later, California courts began to turn *Rowland* on its head by converting it into a standing tool for questioning the existence of duty. *Rowland* was faithful to Section 1714’s declaration that duty usually does exist. In the service of that premise, *Rowland* displaced property law limitations on tort duties. In the 1990s and 2000s, though, some California appellate courts used the fact that duty is a question of law

920–21. *Thing* thus contracts the scope of NIED liability by converting *Dillon*’s open-ended standard into a rule. The phrase “risk reasonably to be perceived” is borrowed from Cardozo. In *Palsgraf* he wrote “[t]he risk reasonably to be perceived defines the duty to be obeyed,” *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 344 (1928).

⁴¹ It is “the seminal decision establishing a right of bystander recovery for negligence.” See *supra* note 31 and accompanying text.

⁴² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. m (Am. Law Inst. 2010).

⁴³ For discussion see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (AM. L. INST., Tentative Draft No. 5, 2007) (“Although harm to pets (and chattels with sentimental value) can cause real and serious emotional harm in some cases, lines, arbitrary at times, that limit recovery for emotional harm are necessary.”) See generally Gregory C. Keating, *When is Emotional Distress Harm?*, Stephen G.A. Pitel, Jason W. Neyers and Erika Chamberlain (eds.), *Tort Law: Challenging Orthodoxy*, 273, 277–78, Hart Pub. (2013).

⁴⁴ See Cal. Civ. Code § 847 (West, Westlaw through 2023 Reg. Sess.) (enacted in 1985) (superseding in part *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968)).

for courts to determine as cover for issuing highly particularized rulings of “no duty.”⁴⁵ Those rulings often reached no farther than declaring as law the judge’s view of the proper decision with respect to liability on the facts at hand. Representative holdings include: mass transit agencies owe a general duty of care to passengers exiting and entering trains, but “no duty” to an inebriated passenger whom it has escorted off the train once he is on the platform;⁴⁶ drivers owe a general duty of care to other drivers, but “no duty” to change lanes when traveling at a legal speed in either the second or third lane of a four-lane freeway at night, on dry pavement, in light traffic and clear weather;⁴⁷ businesses owe a general duty of care to protect customers on their premises from assault at the hands of third parties, but “no duty” to protect a customer’s life by “comply[ing] with the unlawful demand of an armed robber that property be surrendered.”⁴⁸ *Gilmer v. Ellington*,⁴⁹ one of the cases in this vein, nicely illustrates the appellate court’s misuse of *Rowland*. Applying the *Rowland* factors, *Gilmer* decided that a driver who gestures to another driver that it is safe to turn owes no duty to that driver – and is not liable for negligence if the hand gesture was misleading and it was, in fact, not safe to turn.⁵⁰ This turns upside down two shared presumptions of *Rowland* and Section 1714: everyone owes everyone else a duty of care, and that duty is categorical, not particular. *Gilmer* establishes a barely discernible sliver of license in a sea of obligation.

4 Brown’s Answer

Brown v. USA Taekwondo addresses the application of *Rowland* in the context of a circumstance that presents special difficulties: the special case of affirmative duties to act. Affirmative duty cases can present very subtle questions of responsibility, but it is easier to get a preliminary grip on them if we ignore their subtleties. In affirmative duty cases, the risk that endangers the victim does not arise primarily out of a course of conduct initiated by the defendant whose responsibility for preventing or mitigating the victim’s injury is at issue. Instead, the defendant charged with an affirmative duty normally bears *some* diffuse responsibility for the victim’s vulnerability to harm at the hands of other people. There is, for instance, a “special relationship... between a school and its students because a student ‘is placed under the control and protection of the other party, the school, with resulting loss of control

⁴⁵ See Dilan A. Esper & Gregory C. Keating, *Abusing Duty* 79 S. Cal. L. Rev. 265 (2006).

⁴⁶ *McGettigan v. Bay Area Rapid Transit Dist.*, 67 Cal. Rptr. 2d 516, 523–24 (Ct. App. 1997).

⁴⁷ *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168, 176 (Ct. App. 1998).

⁴⁸ *Ky. Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260, 1262 (Cal. 1997).

⁴⁹ 70 Cal. Rptr. 3d 893 (Ct. App. 2008).

⁵⁰ *Id.* at 896.

to protect himself or herself.”⁵¹ The party charged with the affirmative duty is normally in an excellent position either to prevent the risk from harming the victim *ex ante*, or to mitigate the harm *ex post*.⁵²

In affirmative duty cases, then, reasonable foreseeability of harm does not play its usual role of qualifying and shaping a presumed general duty to exercise due care. There is no general tort duty to prevent or mitigate harm caused by someone else’s conduct.⁵³ The affirmative duty branch of negligence law thus starts from a default rule of “no duty.” That default rule is pockmarked by exceptional affirmative duties that arise out of some “special” relationship between the party charged with the duty and the party owed the duty.⁵⁴ This reversal of presumption is often thought to reflect a categorical moral difference. Negative duties not to carelessly injure others are usually regarded as matters of right and justice, whereas affirmative duties to rescue others are usually regarded as matters of generosity or beneficence.⁵⁵ Yet, it is also often thought that affirmative duty doctrine does not track our ordinary sense of

51 R.K. v. U.S. Bowling Congress, 531 P.3d 901, 906 (Wash. Ct. App. 2023) (internal citations omitted).

52 The circumstance in which a defendant might have prevented the harm entirely is illustrated by *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 344–46 (Cal. 1976), which held that a therapist had a duty to warn the plaintiff parents of a young woman who was killed by a patient of the therapist of the fact that the patient had expressed a credible intention to kill the young woman. The circumstance in which a defendant might have mitigated the harm is illustrated by *Union Pac. Ry. Co. v. Cappier*, 72 P. 281, 282 (Kan. 1903), which held that the railway was under no duty to rescue the victim, a trespasser who had one leg and one arm cut off when he was run over by one of Union Pacific’s rail cars. The court concluded that “the acts of [the] trespasser himself[,]... his own negligent conduct [was] alone the cause” of his injury. *Id.*

53 Justice Kruger’s opinion explains that “[t]his general rule... ‘derives from the common law’s distinction between misfeasance and nonfeasance, and its reluctance to impose liability for the latter.’ That distinction has deep roots in the law.” *Brown v. USA Taekwondo*, 483 P.3d 159, 165 (Cal. 2021) (first quoting *Tarasoff*, 551 P.2d at 343 n.5, then citing Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 UNIV. PA. L. REV. 217, 219 (1908) (“There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.”)).

54 “Relationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests, are all examples of special relationships that give rise to an affirmative duty to protect.” *Brown*, 483 P.3d at 166 (citations omitted).

55 See, e.g., JOHN STUART MILL, *UTILITARIANISM* 50 (2d ed., Hackett Publishing Co. 2001) (1861) (“Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence.”).

moral obligation. It is widely believed that we have a moral obligation to rescue others from serious peril when we can do so at little cost to ourselves.⁵⁶

Our task is to extract the lessons that *Brown* teaches about the determination of affirmative duties, and to see if it has something to teach us about moving duty doctrine forward in a world where Cardozo's master principle of reasonable foreseeability has come to prove too much.

5 Doctrine and Beyond

Brown's most salient – and surely helpful – contribution is doctrinal. As Justice Cuellar writes in his concurrence:

The majority opinion today sensibly clarifies the procedure for recognizing a duty where plaintiff attempts, by arguing for a 'special relationship,' to cut through the knot of whether defendant did or didn't create a risk. Specifically, *it holds that the Rowland factors as such just feature in deciding whether to limit a duty*. In so doing, it reaffirms that under California law everyone presumptively owes a duty of reasonable care in the management of his or her property or person to avoid injuring others. And it doesn't suggest that a corporate person's duty of reasonable care in the management of its person or property extends any less than to the limits of foreseeable harm without substantial, concrete policy reasons to the contrary.⁵⁷

Both the majority opinion and Cuellar's concurrence, though, attempt to reach beyond doctrine, albeit quietly. There is no soaring rhetoric rising to match *MacPherson* or *Dillon*. Even so, the opinions make large points going to principle, policy, and the division of labor between judge and jury.

⁵⁶ See e.g., Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1556 (2006) ("But tort law's finely articulated incidence of obligations does not simply track moral duty, a point illustrated by the absence of a duty to attempt an easy rescue of a helpless stranger."). The recognition of such a duty to rescue is common to leading consequentialist and contractualist moral theories. See e.g., Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. AND PUB. AFFS., 229 (1972) (asserting that when encounters a fellow human being whom one can save from death or serious harm at relatively small cost to oneself, one has a duty to do so); THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* 224 (1998) (defending the "Rescue Principle," according to which "if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so."). For a comprehensive and subtle discussion arguing that only a more fine-grained principle can capture the duty to rescue that we have, see David Miller, *The Nature and Limits of the Duty to Rescue*, 22 J. OF MORAL PHIL. 1 (2019).

⁵⁷ *Brown*, 483 P.3d at 177 (Cuellar, J., concurring) (italics added).

5.1 Determining Duty: The Place of Doctrine and Policy

The first point of principle falls straight out of the two-step framework. The *Rowland* factors come into play only when the pertinent doctrine has created a presumption in favor of recognizing a duty of care. In an ordinary case of negative duty, that presumption is created by Section 1714 and its progeny, which establish that everyone owes everyone else a duty of reasonable care. In affirmative duty cases, presumptions of duty arise – when they do arise – through the application of special relationship doctrine. *Rowland*’s multifactor test “has now become a touchstone of [California’s] negligence jurisprudence,”⁵⁸ but its proper role is *not* to determine when a duty of care attaches. Its proper role is to determine only when a duty that presumptively does attach should be defeated or limited in some way. Only in exceptional circumstances should courts balance “the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”⁵⁹ *Rowland* should not be read as a license to decide on a case-by-case basis whether duty exists. Contrary to the practice of many California appellate courts from 1990 to 2010, duty should not be treated as if it were a live issue in every case.⁶⁰ A general duty of negative care can normally be presumed to exist, and special relationship doctrines normally determine when affirmative duties of care attach.

The second point of principle follows closely on the first. The flip side of the coin that judgments of duty are *not* to be made on a case-by-case basis is that they *are* to be made categorically. Here, Cuellar’s concurring opinion is explicit:

When we decide on such exceptions... We do so in relatively general terms to ensure that public policy as it applies to a certain broad class of situations with sufficiently common features, rather than the bespoke details of any particular case, supports a *clearly* defined departure from the general principle that “a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances.”⁶¹

This categorical requirement serves to secure the principle that “everyone owes everyone else a duty of reasonable care” from death by a thousand cuts in the form of

⁵⁸ *Id.* at 167.

⁵⁹ *Id.* (citation omitted).

⁶⁰ See *supra* notes 46–51, and accompanying text.

⁶¹ *Id.* at 172 (Cuellar, J., concurring) (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)).

decisions carving out endless slivers of license in a supposed sea of duty. It furthermore serves to secure the proper division of labor between judge and jury. “[E]nsuring that the duty inquiry remains focused at a relatively high level of generality on public policy preserves the proper balance between the court and the jury.”⁶² There is a formal reason for this – duty is question of law for the court to decide, and law must have some generality or cease to be law. But fundamental tort policy also calls for this division of labor. “As a policy matter, we tend to leave questions of breach to the jury as the institutional actor best situated to express, in a particular case, society’s judgment of whether the particular cost of avoiding a particular injury outweighs the particular cost of the injury.”⁶³

Last, the court speaks to principle and policy. Their relation has always been the deep puzzle at the heart of *Rowland*. In *Brown*, as elsewhere, the California Supreme Court speaks of the duty of reasonable care that everyone owes to everyone else as a matter of principle. “Under general negligence principles,” the court explains, “a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others.”⁶⁴ The exceptions to this general duty, however, are a matter of policy. “To depart from the general principle that all persons owe a duty of care to avoid injuring others, we explained, ‘involves the balancing of a number of [policy] considerations.’”⁶⁵ Whereas principles are generally thought to ground claims that people can make on their own behalf, policies are generally thought to identify socially desirable objectives. The lurking conflict of principle and policy here is sharp. The correlative of a duty is a right, and rights are often thought of as, in Ronald Dworkin’s famous phrase, “trumps” that override claims of policy.⁶⁶ Yet *Rowland* supposes that policy will sometimes trump principle – that considerations of what is socially desirable will sometimes trump the constraints that the status of persons as self-governing beings with their own separate lives to lead place on how people may be treated by others and by society at large.

Rights of the sort relevant here protect individual interests against impairment and interference at each other’s hands, and against sacrifice to the general good. We cannot sacrifice someone’s physical integrity just because it would secure a socially desirable objective – less expensive tickets to Taekwondo competitions or less

⁶² *Id.* at 171–72.

⁶³ *Id.* at 175 (citations omitted).

⁶⁴ *Id.* at 164 (quoting *Lugtu v. Cal. Highway Patrol*, 28 P.3d 249, 256 (Cal. 2001)). *Lugtu* itself cites Cal. Civ. Code § 1714.

⁶⁵ *Id.* at 167 (citation omitted).

⁶⁶ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 6 (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not sufficient justification for denying them what they wish, as individuals, to have or to do ...”).

expensive liability insurance, say. Persons are not just vessels through which socially desirable ends are pursued by vesting them with rights if and only if doing so serves some socially desirable objective. Persons have intrinsic value, and that value both requires that we treat people in certain ways and limits what may be done to them in the name of the general good. The law of torts recognizes that each person has a claim that society treat their physical integrity as an especially urgent interest, entitled to special protection.⁶⁷ Everyone owes everyone else a duty of reasonable care because everyone is entitled to equal concern and respect, and everyone has an equally urgent interest in the physical integrity of their person. Section 1714 expresses this fundamental principle of political morality. Yet *Rowland* is naturally read to say that policy sometimes trumps principle and defeats the presumption that duty is owed. Justice Kruger's opinion for the court in *Brown* agrees. "[T]here are exceptions to section 1714's general rule, [but] 'in the absence of [a] statutory provision declaring an exception..., no such exception should be made unless clearly supported by public policy.'"⁶⁸

5.2 Taking Stock: The Opinion of the Court and Cuellar's Concurrence

How, then, are we to understand the relation of policy and principle in California duty doctrine, especially when affirmative duties to act are at issue? Justice Kruger's opinion is clear on doctrine but elusive on policy and principle. It tells us, first, that Section 1714 justifies the presumption of duty in garden variety, negative duty cases. Second, it tells us that in affirmative duty cases, special relationship doctrine determines when a duty is owed. Third, it puts policy in its place. The role of policy is to pick out exceptional cases where presumptions of duty arising out of either Section 1714 or special relationship doctrine is defeated and no duty of care is owed. Yet it is difficult to know when an exception is justified unless we know how powerful the reasons of principle supporting the presumption in favor of a generally applicable duty are and why. And we need guidance with respect to policy, too. What kinds of reasons might justify overcoming a presumptive duty, and why? Justice Cuellar's concurrence goes beyond the primarily doctrinal points of the Court's opinion and attempts to answer these questions.

⁶⁷ In the law of torts, the interest in bodily security is "protected against not only intentional invasion but [also] against negligent invasion or invasion by the mischances inseparable from an abnormally dangerous activity." Restatement (Second) of Torts § 1 cmt. d (1965).

⁶⁸ *Brown*, 483 P.3d at 167 (quoting *Rowland v. Christian*, 443 P.2d 561, 563–64 (Cal. 1968)).

Perceptively, Cuellar's opinion situates "special relationship" doctrine on the "edge" between core cases of negative duty ("risk creator" cases) and core cases of "no duty to act" – "disengaged bystander" cases, he calls them.⁶⁹ A "disengaged bystander" is "someone society recognizes as categorically outside the scope of any responsibility, having no material role in creating the risk of plaintiff's harm and so no duty of reasonable care."⁷⁰ Core negative duty cases are ones where the party at issue has, by their course of conduct, imposed a risk of harm on the plaintiff.⁷¹ "Special relationship" cases lie on the boundary between the two domains. Special relationships are, Cuellar writes, "a doctrinal mechanism to sidestep the distinction and make arguable edge cases more tractable." They do so by "weighing up those policy considerations our legal system treats as most relevant in such arguably ambiguous contexts."⁷² So explained, special relationship cases sound like cases where the law imposed a duty to act for forward-looking reasons having to do with the pursuit of desirable social objectives, not for backward-looking reasons having to do with responsibility brought on by endangering others. The parties identified by special relationships appear to have duties imposed upon them because they are in a good position to promote socially desirable ends – deterring harm, compensating harm's victims, spreading losses widely, and so on. They are *not* selected for special responsibilities because, antecedently, they have done something to bring such responsibility upon themselves.

However, other passages strike a different note. Speaking to the considerations particularly pertinent to the case before the court, Cuellar's opinion has this to say:

Though the question is not before us in this case, it bears emphasis, given the all-too-common fact pattern, that USOC is hardly a bystander to plaintiffs' harm. USOC is the organizer of the activity where the harm occurred. Between the organizer of an activity where someone is wronged and a mere bystander there is generally a world of difference: one at least sets the stage for what ends up becoming a tragedy; the other at most stumbles into the theater in the last act, when the story has unfolded and its casualties are known. The person who sets the stage owes the players a general duty to exercise reasonable care. ... The organizer, by bringing people together, may "creat[e] the risk" even if less directly than a criminal or intentional tortfeasor. (Rest.3d, *supra*, § 40, com. c.; cf. *Williams v. State of California* (1983) 34 Cal.3d 18, 23.). Considering the benefits and burdens of imposing some responsibility on that person, a court

⁶⁹ *Id.* at 171 (Cuellar, J., concurring).

⁷⁰ *Id.*

⁷¹ Justice Kruger's opinion for the court explains the distinction precisely. "Although our precedents have sometimes referred to the distinction between 'misfeasance' and 'nonfeasance,' we now understand this terminology to be imprecise and prone to misinterpretation. 'The proper question is not whether an actor's failure to exercise reasonable care entails the commission or omission of a specific act.' Rather, it is 'whether the actor's entire conduct created a risk of harm.'" *Id.* at 165 n.6 (citing RESTATEMENT (THIRD) OF TORTS, LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 cmt. c (AM. L. INST. 2012)).

⁷² *Id.* at 171 (Cuellar, J., concurring).

may decide that an organizer – even one lacking either awareness of a material risk or full control of every administrative nuance – is no bystander at all.⁷³

Here, the difference being marked is not between the imposition of a duty to act for forward-looking reasons of policy and the recognition of a duty for the backward-looking reason that the party at issue acted in a way that endangered others. Instead, the difference is between a narrow, salient, individual responsibility for committing the wrong at issue and a wide, background, institutional responsibility for enabling wrongs committed by others.

For its part, the idea of “enabling” identifies a number of diverse, albeit related, connections to the foreground wrong – putting the victim at risk of the harm wrongly inflicted by another, putting the victim in a position where they are less able to protect themselves from harm at the hands of some third party, conferring on the wrongdoer power or authority that facilitates the wrong to the victim, and so on. On this view, special relationship doctrine picks out subtle cases of negative duty where the duties that attach define a wide zone of responsibility that forms the background within which a wrong to the victim was committed by someone else. In *Brown* itself, because the plaintiffs participated in an activity sponsored by the USAT, the USAT may bear responsibility for creating conditions conducive to the infliction of harm upon the plaintiffs by others, including coaches. So conceived, this “special relationship” is not justified by USAT’s capacity to further the ends of deterrence or loss-spreading. It is justified by the principle that people who put others at risk owe duties of reasonable care to those they put at risk.

6 Finding A Way Forward

By weaving together so many strands of the law, Justice Cuellar’s concurrence underscores a central puzzle of affirmative duty law. Is affirmative duty, as expressed in special relationship doctrine, the deposit of forward-looking policies of harm-prevention and loss-dispersion? Or is it the expression of principle, spelling out what we owe to each other in circumstances where we make others vulnerable to wrong and harm at the hands of third parties? If doctrine is just policy in disguise so that policy is doing the work of establishing the presumptive duty in the first step of *Brown*’s two-step test, the two-step framework is the same step, done twice. The framework simply does policy – first in the guise of special relationship doctrine, and second in the form of explicit consideration of the general policies that justify the imposition of duty. If duty is “only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to

⁷³ *Id.* at 173–74.

protection,”⁷⁴ why should not we do away with special relationship doctrine entirely and determine duty by applying policy directly to the facts at hand? To this day, many intermediate appellate courts write opinions that take this to be the lesson of *Rowland* and *Dillon*. If duty is just policy applied to facts, these opinions seem correct. Yet treating duty as a matter of policy brought to bear on facts leads to the disintegration of duty’s categorical character that plagued California duty doctrine in the decades after *Rowland* was decided.⁷⁵ And, as both Justice Kruger’s opinion for the Court and Justice Cuellar’s concurrence insist, duty determinations ought to be categorical. How, then, are we to cabin the *Rowland* factors?

6.1 Sorting out Doctrine: Existence of Obligation and Extent of Responsibility

The first step toward extricating California duty doctrine from the trap of thinking that duty is a live issue in every case – and always to be determined by reference to a laundry list of relevant policy considerations – is to step back and sort out several pieces of California duty doctrine that are often lumped together. For starters, we need to distinguish the domains of *Rowland* and *Dillon*. The two cases are often seen as inseparable, and for good reasons. Together, they close the chapter of American tort law in which the principle that “[t]he risk reasonably to be perceived defines the duty to be obeyed”⁷⁶ came to govern both the existence of obligation (duty) and the extent of liability (proximate cause). The expansions of negligence liability engineered by *Rowland* and *Dillon* birthed the worry that “[f]oreseeability proves too much.”⁷⁷

Even so, the two cases address different aspects of negligence liability, and that matters. *Dillon* is a “proximate cause” case; it is concerned with the extent of liability for breach of an established duty. There is no question that the defendant driver in *Dillon* owed and breached a duty of care. The question before the court was whether the defendant’s responsibility extended to the emotional harm of the mother who witnessed her daughter’s negligent death at the defendant’s hands – even though she was not herself at risk of physical harm from the defendant’s negligence. The questions here are whether negligence liability extends beyond physical harm to pure emotional distress and, if so, to all reasonably foreseeable emotional distress or to some more restricted domain. Subsequent California decisions have cut *Dillon*’s

74 *Brown*, 483 P.3d at 177 (Cuellar, J., concurring) (quoting *Dillon v. Legg*, 441 P. 2d 912, 916 (Cal. 1968)).

75 See the discussion of the diverse approaches to duty common among California intermediate courts of appeal in Kruger’s opinion for the court. 483 P.3d at 161 and Esper and Keating, *Abusing Duty*, *supra* note 46.

76 *Dillon*, 441 P.2d at 919 (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928)).

77 *Thing v. La Chusa*, 771 P.2d 814, 826–27 (Cal. 1989). See *supra* note 40 and accompanying text.

sweeping principle back because they have come to believe that the principle of reasonable foreseeability extends liability too far when it is allowed to govern pure emotional distress as well as physical harm.⁷⁸

Rowland, by contrast, is about duty – about the existence of obligation, not the extent of obligation. So, too, is *Brown v. USA Taekwondo*. And when the question is whether to recognize the existence of an *affirmative* obligation to protect or to rescue, the foreseeability of the harm at issue is not the most important piece of the puzzle. Two other questions loom larger:

- (1) does the actor who is a candidate for the imposition of the duty bear a “special” *normative* relation to the risk that they are being asked to mitigate, even though they are not primarily responsible for its imposition? And
- (2) is that actor a plausible candidate for the imposition of a duty because they possess competencies and capacities that enable them to take responsibility for mitigating the class of risks or harms at issue?

When Justice Cuellar’s concurrence deploys the concept of “edge cases”⁷⁹ to analyze problems of affirmative duty, the opinion frames some, but not all, affirmative duties in a way that helps answer these two questions.

6.1.1 “Edge Cases”

On Cuellar’s view, special relationship doctrines pick out circumstances where actors who play a background role in exposing others to risks of harm bring upon themselves duties of care. There is, as he elegantly says, “a world of difference” between a “mere bystander” and “the organizer of an activity where someone is wronged... [who] at least sets the stage for what ends up becoming a tragedy.”⁸⁰ This idea of wide, deep, or background responsibility aptly characterizes important affirmative duties. The affirmative duty to protect entrants onto one’s property recognized by California’s law of premises liability, for instance, involves this kind of

⁷⁸ See note 41 *supra* and accompanying text. Post-*Dillon* doctrine on liability for negligent infliction of emotional distress has tended to impose arbitrary limits on such recovery. This is, no doubt, troubling, but that arbitrariness is partly a response to the arbitrariness that afflicts liability for pure emotional harm itself. The law treats emotional distress damages as compensatory, but they are not anchored to independent metrics in the way that economic damages are. Therefore, it is all too easy for damages for emotional distress to become arbitrary, a fact which makes arbitrary limits on them seem less gratuitous. For a recent useful canvassing of the difficulties involved in determining damages for emotional distress in a rational way see Gregory v. Chohan et al., (Texas, 2023). This underscores the fact that the issues with which *Dillon* and *Rowland* grapple are different.

⁷⁹ *Brown*, 483 P.3d at 171.

⁸⁰ *Id.* at 173 (Cuellar, J., concurring). Cf. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

deep, background responsibility.⁸¹ Just how vulnerable a patron of a shopping center is to a robbery or an assault when they are entering or exiting the center's parking structure depends to a considerable extent on the landscaping, lighting, and design of the structure – and on the security measures implemented by the owner of the shopping center. A landowner's actions may increase or decrease the opportunities for intentional wrongdoers to tortiously wrong the patrons of the shopping center. They control the arena within which the wrongs of others take place.

Other important affirmative duties also fit Cuellar's template. Judge Posner proposes that most affirmative duties fit into three categories:

The first type of case is where the rescuer had either assumed, explicitly or implicitly, a contractual duty to rescue the victim; *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301, 311 (Wash.1998); or had created in the victim a reasonable expectation that he had assumed such a duty. ... 3 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 18.6, p. 717 (2d ed.1986).

In the second type of case, the victim was in the rescuer's custody and thus without access to alternative rescuers. Typical cases of this type are ones in which the victim is a prison inmate or a patient in a mental hospital. E.g., *Overall v. State*, 525 N.E.2d 1275 (Ind.App.1988); *Iglesias v. Wells*, 441 N.E.2d 1017 (Ind.App.1982); *Murdock v. City of Keene*, 137 N.H. 70, 623 A.2d 755, 756–57 (N.H.1993); *Salazar v. City of Chicago*, 940 F.2d 233, 237 (7th Cir.1991); *Clements v. Swedish Hospital*, 252 Minn. 1, 89 N.W.2d 162, 165–66 (Minn.1958). These cases are readily assimilated to cases of the first type through the concept of an implicit contractual duty.

The third class consists of cases in which the victim's peril had been caused by the putative rescuer himself – even if he had caused it nonnegligently, e.g., *** *L.S. Ayres & Co. v. Hicks*, 220 Ind. 86, 40 N.E.2d 334 (Ind.1942); *** but *a fortiori* if he had caused it negligently or otherwise culpably. E.g., *Carlisle v. Kanaywer*, 24 Cal.App.3d 587, 101 Cal.Rptr. 246 (App.1972).⁸²

Posner's first category fits nicely with the idea that affirmative duties to protect grow out of less than entirely plain vanilla instances of negative duties not to harm. If you assume responsibility for rescuing someone, you exercise your agency in a way that brings responsibility upon yourself. Negative duty may likewise lie at the base of those "custody" cases where the affirmative duty is a duty to protect third persons from harm at the hands of someone in your "custody." Taking charge of a

⁸¹ See e.g., *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193, 1197 (Cal. 1984) (quoting Restatement (Second) of Torts § 344 (Am. L. Inst. 1965)) ("It has long been recognized that 'a possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons ... and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.'").

⁸² *Stockberger v. U.S.*, 332 F.3d 479, 481–82 (7th Cir. 2003) (some citations omitted).

dangerous person brings a duty to protect third persons from harm at the hands of the person “in custody.” This is the kind of wide or “edge” responsibility that Cuellar identifies. The party charged with the affirmative duty is not a “mere bystander” to the wrongs committed by the party in their care. How carefully they manage the dangerous person has a significant effect on that person’s opportunities to harm others wrongly. In Posner’s “third class” of cases, the party charged with the affirmative duty bears “causal” – but not culpable – responsibility for the plight of the person to whom they owe the duty. This kind of affirmative duty may push the envelope of “edge” cases to the breaking point.

6.1.2 Beyond “Edge Cases”

The idea of “edge cases” takes us only so far. Not all affirmative duty cases can be recast as special or wide interpretations of negative duties. The affirmative duties that pose problems for this framework include Posner’s preferred kind of custody case, where the party in custody lacks access to other possible rescuers. In this circumstance, the actor with custody is endangering the party in custody *only* by failing to rescue them. That failure is a pure failure to act. The *Ayres* case cited by Judge Posner may also impose a responsibility that goes beyond the broadest conception of negative duty. The *Ayres* court reasoned that because the defendant had control of the escalator in which the child plaintiff had caught their fingers, it had an affirmative obligation to mitigate the child’s injury.⁸³ This affirmative duty attached to the defendant even though they were not negligently responsible for the infliction of that injury.

[U]nder some circumstances, moral and humanitarian considerations may require one to render assistance to another who has been injured, even though the injury was not due to negligence on his part and may have been caused by the negligence of the injured person. Failure to render assistance in such a situation may constitute actionable negligence if the injury is aggravated through lack of due care.⁸⁴

This passage recognizes a legally enforceable affirmative duty to rescue, full stop. The special feature of the duty recognized is that the party upon whom the duty is imposed controls the instrument of injury and is therefore uniquely well-situated to rescue the injured plaintiff. Recasting this responsibility as a wide responsibility to minimize the risk of harm in the first place misconceives the responsibility. The responsibility here is an instance of the general affirmative moral obligation to rescue someone when one can do so at little cost to oneself. That moral obligation

⁸³ *L.S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, 337, 220 Ind. 86, 94 (Ind. 1942).

⁸⁴ *Id.*, at 94.

crystallizes into a legal obligation because the person on whom the legal obligation perches is uniquely well-situated to save the victim.

The most famous of modern California affirmative duty cases – *Tarasoff v. Regents of the Univ. of California*⁸⁵ – is also a pure affirmative duty case. *Tarasoff* imposed an affirmative duty to warn on a therapist not because the therapist bore any background or wide responsibility for their patient's murder of an ex-girlfriend, but because only the therapist could have averted the murder by warning the ex-girlfriend. Only the therapist had both the knowledge of the threat and the expertise necessary to distinguish serious threats from bluster, and the capacity to act accordingly. Even more clearly than *Ayres*, *Tarasoff* recognizes an affirmative duty to rescue, full stop. And it does despite the presence of an obligation of confidentiality owed to the patient. That obligation cuts against the imposition of a duty to warn. Special relationship doctrine thus imposes some affirmative duties to act that operate beyond the outer edge of "edge cases." Some affirmative duties *are* true duties to act. The reasons we have for imposing those duties go beyond the reasons that we have for insisting that, when people do act, they act carefully.

6.1.3 The Significance of Salience

Getting a better grip on the nature and justification of affirmative duties therefore requires moving beyond Cuellar's conception of edge cases and attempting to distill out what it is that makes the circumstances of *Ayres* and *Tarasoff* special. Why does the highly general moral principle that "we ought to rescue someone from terrible physical peril when we can do so at little cost to ourselves" justify the imposition of a legally enforceable tort duty in those two cases, but not, say, in the terrible circumstances of Kitty Genovese's murder as they were traditionally recounted?⁸⁶

At 3 A.M. on a night in 1964, Catherine (Kitty) Genovese was set upon and murdered in the respectable Kew Gardens neighborhood of New York City. The murderer, a blood-chilling, psychopathic figure, took half an hour to accomplish the act, leaving the scene three times and

⁸⁵ *Tarasoff*, 551 P.2d at 343–44, 441–42.

⁸⁶ This story is now believed to be false. "While there was no question that the attack occurred, and that some neighbors ignored cries for help, the portrayal of 38 witnesses as fully aware and unresponsive was erroneous. The article grossly exaggerated the number of witnesses and what they had perceived. None saw the attack in its entirety. Only a few had glimpsed parts of it, or recognized the cries for help. Many thought they had heard lovers or drunks quarreling. There were two attacks, not three. And afterward, two people did call the police. A 70-year-old woman ventured out and cradled the dying victim in her arms until they arrived. Ms. Genovese died on the way to a hospital." Jesse Singal, *How the False Story of Kitty Genovese's Murder Went Viral*, *THE CUT: Crime*, April 5, 2016. The social psychological research spawned by the incident, however, confirmed the phenomenon of the "unresponsive bystander" discussed in footnote 87, *infra* and the accompanying text.

then returning to finish off his victim, who, crawling toward her apartment door, repeatedly screamed that she was being murdered and pleaded for help. Two weeks after the event, *The New York Times*, following up a police tip, carried the horrifying news that 38 neighbors of Kitty Genovese had witnessed the event from their windows, and none had responded even to the point of calling the police. No Good Samaritans in that building – in fact, editorialists and writers of letters to the editor said, no one of ordinary human decency. With the Genovese case, American newspapers were sensitized to the phenomenon of the unresponsive bystander and found it to be very common.⁸⁷

The most obvious difference between the Kitty Genovese case and the *Ayres* and *Tarasoff* cases is the number of potential rescuers. Counter-intuitively, the number of possible rescuers diminishes the odds of rescue by diminishing each potential rescuer's sense of responsibility for averting the peril.⁸⁸ And that diminution in each possible rescuer's sense of responsibility may have moral justification. When many people are equally well-situated to rescue, and only one rescuer is needed, the responsibility lies with each potential rescuer, and with all of them. Unique moral responsibility does not alight on a single candidate.⁸⁹

Special relationships are characterized, in part, by salience – by the fact that the party onto whom the duty is grafted is an evidently prominent candidate for such responsibility. In *Ayres*, the defendant shopkeeper on whose premises the escalator was located was clearly the party in the best position to manage the escalator in which the plaintiff's fingers were caught. In *Tarasoff*, only the therapist had the knowledge and expertise necessary to save Tatiana Tarasoff's life. The list of standard special relationships rattled off by Justice Kruger in her opinion for the court – “parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests” – are all relationships where we antecedently understand one party to have taken upon itself wide, affirmative responsibilities towards the other. In the Kitty Genovese case, by contrast, even if – accepting the traditional story – we think that each of the thirty-eight neighbors who heard her screams but did not bother to pick up the phone to call the police breached a basic moral duty, we might still think that the imposition of a tort duty to rescue poses special problems. It seems unfair (and also impractical) to single out any one unresponsive bystander for a failure shared fully by all thirty-eight of them. No one of those thirty-eight stands out as occupying a role that makes them *the* person on whom responsibility to rescue should alight.

Justice Kruger's opinion for the court in *Brown v. USA Taekwondo* recognizes that the legal identification of enforceable duties to rescue is hampered by practical

⁸⁷ ROGER BROWN, *SOCIAL PSYCHOLOGY*, 44 (2d ed. 1986).

⁸⁸ As Roger Brown explains. BROWN, *supra* note 88.

⁸⁹ See Miller, *supra* note 57.

problems quite different from the normative difficulties arising out of the apparently categorical moral difference between negative and affirmative duties:

[O]ur cases have recognized other reasons as well, including “the difficulties of setting any standards of unselfish service to fellow men,” and the challenge of “making any workable rule to cover possible situations where 50 people might fail to rescue.” (*Tarasoff*, at p. 435, fn. 5, quoting Prosser, Torts (4th ed. 1971) § 56, p. 341.)⁹⁰

6.2 Presumption and Policy: Brown’s Two Steps

If, as *Brown* says, special relationship doctrine does – and should do – the work of identifying affirmative duties in the first instance, we need to say more about the criteria that those doctrines deploy. The concept of “edge cases” – and the understanding of affirmative duties that informs that characterization – captures some, but not all, of the work done by special relationship doctrines. The fundamental puzzle presented by affirmative duty doctrine is misconceived when all affirmative duties are taken to be “edge cases” of negative duty. The fundamental puzzle of affirmative duty doctrine is that our law does sometimes recognize pure “duties to act.” When it does so, the law crystallizes a general and diffuse responsibility that we all bear into a concrete legal duty attached to particular social roles. The moral principle that each of us is obligated to “prevent something very bad from happening, or alleviate someone’s dire plight” when we can do so “by making only a slight (or even moderate) sacrifice” is a broad one.⁹¹ It calls for contributing to Oxfam as well as for rescuing people in immediate peril of grave physical harm. Yet our law of torts recognizes only a handful of pure affirmative duties to act. What special features do these duties have?

Part of the answer to this question is that those charged with the duties have special salience. They stand out, in their own eyes, in the eyes of others, and in the eyes of the law, as parties especially well-suited to bear the relevant responsibilities to protect and rescue. When no such salient party can be found, even the most morally compelling moral duty cannot be made into a legal duty. Salience requires both a pre-legal sense of special responsibility and the capacity to translate that perception of responsibility into action. Its principal sources are knowledge, capacity, and – as the legal doctrine says – some “special relation” to the peril at issue. The set of right possible relations encompasses – but is not exhausted by – wide

⁹⁰ *Brown v. USA Taekwondo*, 483 P.3d at 165.

⁹¹ Scanlon, *supra* note 53, at 224.

responsibility for the peril's existence. It extends to a unique capacity to avert or repair the harm in view. *Ayres* and *Tarasoff* are cases in point.

To follow in *Brown's* footsteps – and to continue its progress in putting duty doctrine back on track – we need to pursue three projects. The first is to recognize that affirmative duties to protect and to rescue cannot be assimilated completely to negative duties not to do harm. Some affirmative duties are wide, background, negative duties not to act in ways that unjustifiably endanger other people. But some affirmative duties are what they claim to be: duties to protect and rescue people for whose peril those charged with the duties bear no antecedent negative responsibility. Second, we need to understand the moral bases and practical predicates of justifiable and successful affirmative duties better than we now do. We need to understand more about when and why people are salient bearers of affirmative duties, and what the law might do to reinforce, enforce, and shape such responsibilities. Third, we need to recast the role of the *Rowland* factors in a way that matches up with much of the rhetoric of *Brown v. USA Taekwondo* itself, but that is lost when special relationship doctrines are regarded simply as the precipitation of *Rowland's* policies into fixed legal rules. *Rowland* must instead be consistently applied as a two-step test. In the first step, duty doctrine must govern determinations of duty. In the second, presumptive determinations of duty must be checked against a different set of reasons to see if some rare confluence of considerations rebuts the presumption in favor of recognizing a duty of care.

Dillon v. Legg's assertion that duty is “only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection,”⁹² may have been a salutary corrective in its time. It overthrew an objectionably constricted and formal conception of duty. Nineteenth-century duty doctrine both recognized reasonable foreseeability of harm as the touchstone of responsibility, and declined to adhere to its own first principle of responsibility when contract or property could take hold of a problem. Duty should not be arbitrarily confined in this way. Duty doctrine should be sensitive both to social reality and to reasons bearing on responsibility. Sweeping and rigid constrictions of duty's domain are likely to be arbitrary and unjustifiable. So, too, *Dillon* correctly chastised late nineteenth-century courts' use of duty doctrine as “a legal device... designed to curtail the feared propensities of juries toward liberal awards.”⁹³ When the opposite idea that duty is “only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection”⁹⁴ takes

⁹² *Dillon v. Legg*, 441 P. 2d 912, 916 (Cal. 1968) (quoted in *Brown*, 483 P.3d at 177 (Cuellar, J., concurring)). *Rowland's* “factors” are of a piece with *Dillon* and the general conception of duty embraced by both cases is indebted to Prosser). See e.g., *Brown*, 483 P.3d at 177 (Kruger J. opinion for the court).

⁹³ *Id.* at 916 (Cal. 1968).

⁹⁴ *Brown*, 483 P.3d at 177 (Cuellar, J., concurring) (quoting *Dillon v. Legg*, 441 P. 2d 912, 916 (Cal. 1968)).

hold, though, duty doctrine is threatened with disintegration. The two-step framework endorsed by the *Brown* court collapses into one step. The thoughts that duty is a live issue in every case and ought to be determined by applying policy directly to the facts at hand, tumble naturally out of the proposition that duty is only policy in disguise.⁹⁵ Yet the obligation to exercise reasonable care not to harm others through one's careless conduct is a highly general obligation. And even more narrowly drawn determinations of affirmative duty must be recognizably categorical.

When duty doctrine invites fresh, policy-based determinations of duty in every case, it leads the law down the wrong path. This disorder is one of *Rowland's* legacies, but *Rowland's* legacies also include the cure. To avoid disintegrating duty, we need to understand *Brown's* two steps of duty doctrine in the way proposed by opinion's best rhetoric. The role of the first step in the two-step framework should be to identify reasons that give rise to a presumption of duty (or not). The role of the second step should be to identify reasons that *defeat* such a presumption when it has arisen.⁹⁶ In affirmative duty cases, special relationship doctrine governs the first step. It is the primary guide to the determination of duty, and it does so by picking out both subtle cases of negative duty ("edge cases") and special cases where pure affirmative duties are justifiably imposed. *Rowland's* list of factors does little to help dial in the presence of the special circumstances that justify affirmative duties. Black-letter doctrine does a better job. But the *Rowland* factors have a useful role to play in the second step. The role of the second step is not to revisit the grounds on which judgments of presumptive duty are made in the first instance, but to identify when the case for some presumptive moral duty – say, a duty to pick up the phone and call the police when one observes a horrifying assault on another human being – does not justify recognizing an enforceable legal duty.

In some cases, a presumption of duty created by special relationship doctrine may be defeated because singling out some specific actor to bear a duty to protect or to rescue would be unjust – because the imposition of an enforceable tort duty would arbitrarily single out one person for responsibility when many people were equally plausible candidates for the responsibility. Or perhaps it would be infeasible to impose a duty – perhaps it would deprive the community of some valuable activity by saddling the activity with liability costs that it could not shoulder. Or perhaps imposing a duty would make it impossible to insure and spread the risk, so that a responsibility that should be shouldered socially would instead alight upon a single actor as a crushing burden. Or perhaps imposing a duty would be useless because its

⁹⁵ There is a connection between the tendency of the *Rowland* factors to "disintegrate duty" and the objections to Prosser's instrumentalist conception of duty articulated by John Goldberg and Benjamin Zipursky in *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733, 1846–47 (1998).

⁹⁶ Justice Kruger's opinion for the court appears to endorse this kind of two-step approach. *Brown*, 483 P.3d at 169–170.

imposition would not work to prevent future harm.⁹⁷ When the second step is concerned with those reasons that might defeat a presumptive duty arising from the application of the framework's first step, *Rowland*-based determinations of “no duty” would not only be rare, but they would also rest on reasons not factored into the doctrinal determinations of duty made by applying special relationship doctrine. The prospect of unfortunate consequences might defeat the imposition of otherwise justified duties, but duty doctrine and duties themselves would remain fundamentally relational and categorical.

⁹⁷ The concept of “feasibility” plays a significant role in stringent standards of precaution found in American tort law, and in related legal fields. Indeed, rescues themselves often appear to be governed by a standard of feasibility. For discussion, see GREGORY C. KEATING, *REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS*, 202–209, 214–17 (2022).