THE THIRD RESTATEMENT AND THE JURISPRUDENTIAL EVOLUTION OF DUTY: TRACKING THE "DUTY WAR" IN PALSGRAF AND BEYOND (WITH A FOCUS ON THE INFLUENCE OF H.L.A. HART)

*Timothy Lockwood Kelly**

ABSTRACT

This Article is about the jurisprudential evolution of the concept of duty from the times of Blackstone, Austin, and Holmes, through each of the three Restatements of Torts, and up to the present day. I frame this history using the Palsgraf *debate between Justice Cardozo and Judge Andrews as a touchstone for analysis. Although past Restatements endorsed the "relational" view of duty associated with Cardozo (which can be traced back to Blackstone), the recent Restatement (Third) of Torts endorses a non-relational, "social" view of duty associated with Andrews (which can be traced back to Austin and Holmes). I discuss the jurisprudential history leading up to this reversal by the Restatement, as well as the reception of the third Restatement since publication. I argue that recent critiques of the third Restatement are unpersuasive, but that the third Restatement nonetheless shows little hope of resolving the duty debate. While acknowledging disputes about the third Restatement's doctrinal merits, I focus more on Professors John Goldberg and Ben Zipursky's yet-unscrutinized philosophical claim that H.L.A. Hart's "internal" view of law favors their relational theory of duty and so bolsters the argument against the third Restatement's social duty theory. I reject that novel argument, explaining that Professors Goldberg and Zipursky misunderstand Hart, whose jurisprudence is in fact no more or less hospitable to either theory of duty. This observation supports my overarching conclusion that the third Restatement, despite its*

* J.D., Temple University Beasley School of Law, 2019; M.A. in Philosophy, The New School for Social Research, 2016. Thank you to Temple Law Professors Theresa Glennon and Richard Greenstein for their advice on drafts and generosity more generally. Thank you also to the Drexel Law Review—especially Whitney Petrie and Krystal Bordoni-Cowley—for editing and publishing the paper.

merit, will not be able to convert committed relational duty theorists to the social duty theory and that the debate over duty shows no sign of stopping.

TABLE OF CONTENTS

INTRODUCTION 88
I. RELATIONAL DUTIES TO FORESEEABLE PLAINTIFFS V. SOCIAL DUTIES TO THE WORLD 93
II. *PALSGRAF*: A CONVENIENT, BUT OVERSIMPLIFIED, MODEL OF THE DIVIDE OVER DUTY...103
III. PERENNIAL CLASHES IN THE DEBATE OVER DUTY AND THE GOALS OF ITS LIMITATIONS...106
A. *Early Drums of War: Duty Debates Before the First Restatement*...106
B. *Reprisals: Drafting the Second Restatement While Each Theory Braves Attack*...113
C. *The Turncoat: Drafting and Debating the Third Restatement*..120
IV. THE WAR WILL RAGE ON: REJECTING GOLDBERG AND ZIPURSKY'S JURISPRUDENTIAL ARGUMENT THAT H.L.A. HART WOULD FAVOR THEIR RELATIONAL THEORY...........130
CONCLUSION 140

INTRODUCTION

"An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[1] In so few words, the definition of duty in the Restatement (Third) of Torts ("R3") shocked the legal community. What was surprising was the conspicuous omission of a particular word: ". . . creates a [*foreseeable*] risk of physical harm." For some, this

1. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(a) (AM. L. INST. 2010). Throughout the article I use the term "harm" to refer only to physical harm to person or property.

omission sounded a return to America's jurisprudential roots.[2] For others, it was a foolish attempt to dethrone Justice Cardozo and crown Judge Andrews victor of the *Palsgraf* debate.[3]

Still, R3 continued: "In exceptional cases, . . . an articulated countervailing principle or policy warrants [courts] denying or limiting liability in a particular class of cases."[4] Even without foreseeability, then, duty for conduct creating an unreasonable risk of harm remains limited under R3 where the conduct or actor partakes of some category exempted from liability for policy reasons.[5] For some, this was a solid strategy for upholding governmental priorities, tempered by a prudent recognition of the limitations of judiciaries' competencies.[6] For others, this smacked of untethered discretion of the sort endorsed by Andrews as "practical politics."[7]

More broadly, R3 designed the duty that results from unreasonable creation of risk of physical harm to be a social duty owed to any actually-harmed persons, rather than a relational duty of particularized encumbrance only toward

2. *See, e.g.*, W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 698 (2008) ("[T]ort cases did not rely on any affirmative analysis of duty until the mid-nineteenth century.") (citing Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 267 n.7 (2006)); Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 48 (1934).

3. *See* Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928); *see also, e.g.*, John C.P. Goldberg, *Introduction: The Restatement (Third) of Torts: General Principles and the John W. Wade Conference*, 54 VAND. L. REV. 639, 641–43 (2001) (noting professors who, at the 2005 ALI meeting, expressly "lament[ed] the possible 'passing of *Palsgraf*'"); *Discussion of Restatement of the Law Third, Torts: Liability for Physical Harm*, 2005 A.L.I. PROC. 33 (2018) ("Is it your intention . . . to reverse the law of the land and substitute Justice Andrews' dissenting opinion in *Palsgraf* for Mr. Cardozo's majority opinion . . . ?" (Professor Joseph W. Little speaking to the President of the American Law Institute)); Ernest J. Weinrib, *The Passing of* Palsgraf*?*, 54 VAND. L. REV. 803, 803 (2001); Jordan K. Kolar, *Is This Really the End of Duty?: The Evolution of the Third Restatement of Torts*, 87 MINN. L. REV. 233, 233 (2002); Joseph W. Little, Palsgraf *Revisited (Again)*, 6 PIERCE L. REV. 75, 75 (2007).

4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(b).

5. *See id.* § 7(b) cmt. i.

6. *See, e.g.*, Cardi & Green, *supra* note 2, at 704–08.

7. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting); *see also, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 333 (2006) [hereinafter G&Z, *Shielding Duty*].

foreseeably at-risk persons.[8] It made that duty rebuttable only upon a showing that the conduct at issue fits into a categorical and expressly stated policy-based exception, regardless of whether the plaintiff was foreseeable.[9] And, in so doing, it crafted duty to serve as an instrument of social policy, rather than as a basis for remedying quasi-moral fault in breach of direct person-to-person obligations.[10]

The American Law Institute's love-hate relationship with *Palsgraf* was no secret from the beginning.[11] Although academics are understandably eager to draw attention to the connections between R3 and *Palsgraf*,[12] however, to view R3 only through that narrow lens would be to overlook its broader historical significance in the underlying "duty war[]"[13] between a *relational* theory of duty and a *social* theory of duty.[14]

Generally speaking, the relational theory understands duty as a relation between the tortfeasor and the harmed plaintiff, such that a successful plaintiff must have been foreseeably

8. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(a); *see also id.* § 7(a) cmt. j.

9. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1252 (2009) (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(b) cmt. i).

10. *See* Weinrib, *supra* note 3, at 811–12.

11. *See* William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 4–8 (1953) (discussing the Restatement drafters' concern with *Palsgraf* even before the case was appealed to Cardozo's court).

12. *See, e.g.*, sources cited *supra* note 3.

13. Cardi & Green, *supra* note 2, at 671 (describing the "battle over the proper role for duty in contemporary tort law"); *see also* Michael L. Rustad & Thomas F. Lambert Jr., *Twenty-First-Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 422–23 (2013) (acknowledging the existence of a "tort-theory war," hinged on the distinction between externalist and internalist views of duty); John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1563 (2006) [hereinafter G&Z, *Seeing Tort Law from the Internal Point of View*] ("In tort, the most familiar divide today is that between the law-and-economics camp that focuses on efficient deterrence, and the philosophical camp that tends to focus on corrective justice. There is another divide, however, that is at least as fundamental and that cuts across this distinction. It is between duty-skeptical and duty-accepting theories of tort. A familiar instantiation of this cleavage is the long-standing debate concerning the independence and intelligibility of the duty element of the negligence cause of action. But this debate is part of a broader dispute as to whether tort law is best conceptualized as a scheme of liability rules or guidance rules.").

14. *See infra* Part IV.

endangered by the negligent conduct.[15] According to the social theory, by contrast, the tortfeasor owes a duty to anyone harmed by the tortfeasor's negligence, regardless of any direct person-to-person relation of foreseeability between the tortfeasor and injured party.[16] These theories—with roots in medieval moral traditions and modern positivist ones, respectively—have taken various forms in the discussions of jurisprudentially diverse professors and practitioners over the centuries, such as most recently in a debate over the treatment of duty in R3.[17]

This most recent debate—between relational duty theorists Professors John Goldberg and Ben Zipursky ("G&Z") on the one hand, and social duty theorist John Cardi on the other—covers duty's doctrinal issues extensively.[18] Regarding duty's philosophical history and the relative attractiveness of competing conceptions of duty's foundations to different schools of thought, however, the debate sometimes fails to satisfy.[19] This Article offers a focused history of duty's philosophical underpinnings[20] and centers on a topic that remains underdeveloped in the debate between G&Z and Cardi: whether H.L.A. Hart's internal view of law is favorable to one or another theory of duty, or whether it otherwise changes the jurisprudential terrain on which the duty war will be fought.[21]

This Article outlines the doctrinal and jurisprudential evolution of duty over the course of this war, proceeding as follows: Part I offers some definitions and a crude sketch of the oppositions driving the fundamental debate between relational

15. *See infra* note 33.

16. *See infra* note 34.

17. *See infra* Part IV.

18. See *infra* notes 185–217 and accompanying text for a discussion on the debate between G&Z and Cardi. See also *infra* note 218 and accompanying text compiling citations to secondary sources speaking to doctrinal issues raised in the debate between G&Z and Cardi about R3's treatment of duty.

19. *See infra* notes 194–200.

20. *See infra* Part IV.

21. *See infra* Part IV.

and social theories of duty.[22] Next, Part II discusses *Palsgraf* as a paradigmatic illustration of that debate,[23] following which Part III takes a step back to survey the shifting jurisprudential sands out of which the duty rules of the (A) first, (B) second, and (C) third editions of the Restatement of Torts grew.[24] Finally, the Article concludes by defending R3's approach, while nevertheless recognizing its shortcomings and impotence to diffuse the long-smoldering and regularly rekindled debate over duty.[25] In so doing I argue, contrary to G&Z, that it remains unclear on which side of the duty war Hart would have fought.[26]

While articles discussing the *Palsgraf* debate and the merits of R3's treatment of duty are numerous already,[27] this Article is the first specifically devoted to outlining the philosophical evolution of the concept of duty over the course of the three Restatements.[28] Although the Article advances a position shared by others—that R3, despite its flaws, has some merit[29]—it furthers the debate with a novel argument rejecting G&Z's yet-unscrutinized jurisprudential claim that Hart's internal view favors the relational theory over R3's social theory.[30] The

22. *See infra* Part I.

23. *See infra* Part II.

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See infra* Part IV.

27. *Cf.* Prosser, *supra* note 11, at 2 (noting that, given the extent of literature already published on the role of duty in the *Palsgraf* debate, "[i]t may be worse than useless to add another article to the spate"); *see also, e.g., infra* note 218 (compiling citations on the debate between G&Z and Cardi); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1479–94 (2003); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1086–96 (2001).

28. *See infra* Part III. *But cf.* Kolar, *supra* note 3 (critiquing R3 from a doctrinal standpoint through analysis of R3's reversal of earlier Restatements' handling of duty).

29. *Compare infra* Parts III and IV, *with, e.g.*, Cardi & Green, *supra* note 2, at 673, 726–27, 729 ("[W]e conclude with a general defense of [R3]'s approach. . . . [However, w]e recognize that [R3]'s position on foreseeability does not conform to the preponderance of existing practice. . . .").

30. *See infra* Part IV; *see also infra* notes 194–197 and accompanying text (describing G&Z's argument on this topic).

upshot is that R3 is worthy of serious consideration and the debate over duty theory remains far from resolved.

I. RELATIONAL DUTIES TO FORESEEABLE PLAINTIFFS V. SOCIAL DUTIES TO THE WORLD

The "duty war" is characterized by the opposition between, on one side, a relational theory of duty focused on plaintiff foreseeability;[31] and, on the other side, a non-relational, act-centered view of duty without regard for plaintiff foreseeability, which I refer to as the social theory of duty.[32]

31. John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of* Macpherson, 146 U. PA. L. REV. 1733, 1826 (1998) [hereinafter G&Z, *Moral of* Macpherson] ("When we use the phrase . . . 'the relational conception of duty,' we intend to denote a conception that is *relational* in its analytical structure, as opposed to non-relational; a conception that is *relationship-sensitive*, as opposed to abstract and context-independent, and that is *non-instrumental* in that it rejects a reductive-instrumentalist account of 'duty' in terms of the pros and cons of liability rules, and takes seriously the idea that duty refers to a kind of obligation. . . . Furthermore, we will suggest that both the conceptual structure and, to a certain extent, the content of the judgments about duty that are embedded in negligence law, reflect ordinary moral judgments about duties owed to others."); *id.* at 1838 ("Under the relational conception of duty, foreseeability can be relevant in at least two ways that implicate a substantive role for the court, not just the jury. First, as indicated above, a plaintiff has standing to bring a cause of action only if the defendant breached a duty owed to *her*. . . . Second, under the conception of duty we have been advocating, courts face a threshold question as to whether members of the class of persons to which the defendant belongs owe a duty to members of the class of persons to which the plaintiff belongs, to take care to avoid a certain kind of harm. . . . Accordingly, the foreseeability of the particular plaintiff's injury to the defendant is relevant to the factual issue of whether the duty so interpreted has been breached. But, foreseeability is also relevant to the threshold question itself.").The term "foreseeability" can mean various things, including foreseeability of consequences, Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961) (discussing the "*Wagon Mound*" case, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co., [1961] A.C. 388 (P.C.) (Austl.)), or foreseeability of the type of injury, Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928) (dicta). Generally, however, the foreseeability limitation is relevant only to liability, not damages—the traditional eggshell plaintiff rule typically exposes tortfeasor's to unforeseeable damages so long as liability is established. *See generally, e.g.*, Benn v. Thomas, 512 N.W.2d 537 (Iowa 1994). Although these fine distinctions of foreseeability occasionally come up in the debates among the theorists discussed in this article, *see, e.g.*, *Palsgraf*, 162 N.E. at 101 (dicta), those distinctions are immaterial to my broader focus in this article on the jurisprudential evolution of duty in the Restatements. Accordingly, in this article I discuss foreseeability only in a general way, using the term to refer at least to plaintiff foreseeability, but sometimes also other types of foreseeability.

32. *See, e.g.*, Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 6 (1870) [hereinafter Holmes, *Codes*] ("[The law of torts] contains duties from all the world to all the world."); Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 661 (1873)

These general rules imposing duty notwithstanding, many adherents of each theory allow for policy-based exceptions to their respective general rules. Some do so by endorsing multifactorial standards affording the decisionmaker discretion to decide whether some particular defendant should be exempted from liability.[33] Others, preferring to minimize *ad hoc* discretion and to promote predictability, reject multifactorial standards in favor of categorical duty exemptions.[34] Either way, although both the relational and the social theories of duty generally admit of policy-based exceptions, the theory of social

[hereinafter Holmes, *Theory*] (stating that torts generally consist of a breach of "a duty imposed on all the world, in favor of all"); *Palsgraf*, 162 N.E. at 102 (Andrews, J., dissenting) ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone."); *see also* G&Z, *Moral of* Macpherson, *supra* note 31, at 1756 ("[For Holmes] it was a mistake to say that a given defendant's tort liability derived from his breach of an obligation owed to the injured plaintiff. Rather, liability attached because the defendant had violated state directives commanding each citizen to refrain from unreasonable conduct threatening injury to others. . . . To say that tort law imposed a duty on all to act reasonably toward all was, in the end, an imprecise way of saying that courts had adopted a rule imposing liability on anyone who causes harm through an unreasonable act. Thus, for Holmes, negligence was necessarily *non-relational*. The tort was not properly described as causing harm by an unreasonable act toward a particular person or class of persons, but simply as causing harm by acting unreasonably.").

33. *See, e.g.*, Cardi & Green, *supra* note 2, at 674 ("Thus, [Prosser's] factor approach to determining duty was born, one to give substance to the 'policy' determination that Prosser had famously stated—and to which the court cited—was what duty was all about. These factors were employed in *Biakanja* to expand liability by imposing a duty where one had not previously existed. The factors' significance was destined to expand, however, and they provided a legacy for future duty law in California." (citing Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); Prosser, *supra* note 11, at 15 (describing the "many factors" relevant to the limitation of duty (citing *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting) (describing the many factors that inform the "practical politics" limitation on liability, although that limit arises in the analysis of proximate causation rather than of duty))). Notably, although the multifactorial standard for limiting liability endorsed in Andrews's *Palsgraf* dissent—the earliest link in this chain of citations—is assigned to the jury in its analysis of proximate cause, 162 N.E. at 104 (Andrews, J., dissenting), those multifactorial standards following after Andrews that were influenced by Prosser locate this multifactorial analysis under duty, *see, e.g.*, *Biakanja*, 320 P.2d at 19; Prosser, *supra* note 11, at 15.

34. *See* Cardi & Green, *supra* note 2, at 703 ("[B]y presenting the standard duty of care as a strong default where the defendant's conduct created a risk, the Third Restatement joins G&Z in rejecting the California and nationwide trend toward applying the *Biakanja-Rowland*'s multifactorial duty analysis as a routine matter in negligence cases. . . . Rather than encouraging rampant instrumentalism—or even frequent, noninstrumental no-duty inquiries—section 7 limits no-duty rules where the defendant created a risk to the 'exceptional case.' It exhorts courts to make no-duty rulings on a categorical basis. Further, it instructs courts to articulate the policy or principle on which they are acting.").

duty relies on such policy exceptions more heavily because, unlike the relational theory, it does not additionally limit duty to foreseeability.[35]

Some theorists describe the social duty theory as eliminating the duty requirement from negligence analysis altogether—except to the extent that it serves as a placeholder for courts to contemplate policy reasons to deny liability at the outset.[36] This perception of the social theory flows from the observation that its default rule in favor of duty allows courts to sidestep any requirement of a "duty-breach nexus"—a requirement that, in the Venn diagram of persons to whom the tortfeasor owed a duty and persons to whom the tortfeasor's conduct was

35. Indeed, social duty theorists sometimes argue that relational duty theorists' use of foreseeability simply obscures their own regular recourse to policy-based exceptions. *See, e.g.*, Cardi & Green, *supra* note 2, at 725, 729–30 ("[It is wise to be] hesitant to endorse even a narrow role for foreseeability in courts' duty analyses. Once foreseeability makes its way into the judicial tool shed, it is inevitably abused. Its role expands, using as flint and tinder the judicial desire to provide prospective guidance rules and the need to make more palatable the policy decisions that foreseeability so ably obscures . . . . The malleability of foreseeability also provides a cover for courts to obscure the real reasons for their decisions."); Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) ("[J]udges should not rely on, or hide behind, words like . . . foreseeable, unforeseeable . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions."); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) ("[Foreseeability is] so open-ended [it] can be used to explain any decision, even decisions directly opposed to each other . . . [so as to] undermine clarity and certainty in the law whenever [it is] embedded in a legal standard."); Patricia K. Fitzsimmons & Bridget Genteman Hoy, Note, *Visualizing Foreseeability*, 45 ST. LOUIS U. L.J. 907, 908, 911 (2001) ("[A] foreseeable act may just as well be called 'strawberry shortcake' [because it is just a placeholder for] a malleable standard used by judges in their roles as gatekeepers and tweakers.").

36. *See, e.g.*, G&Z, *Moral of* Macpherson, *supra* note 31, at 1777 ("At the heart of that model is a philosophical claim that duty, cast as a non-instrumental concept, is incoherent, empty, or redundant, and hence that duty cannot possibly be understood as an independent element of the tort. Rather, if duty means anything, it can only constitute an oblique reference to considerations of public policy that counsel for or against the imposition of liability on unreasonable actors."). Even some social duty theorists describe the social theory this way. *Id.* at 1756 (citation omitted) ("[For Holmes,] [i]f one had to use the language of obligation and duty, one could say that the tort law imposed 'duties of all the world to all the world.' However, Holmes found even this formulation misleading insofar as it suggested that tort law presupposed a mysterious set of extra-legal duties. To say that tort law imposed a duty on all to act reasonably toward all was, in the end, an imprecise way of saying that courts had adopted a rule imposing liability on anyone who causes harm through an unreasonable act. Thus, for Holmes, negligence was necessarily *non-relational*.").

negligent, the plaintiff belonged to the region of overlap.[37] Instead, the social duty theory effectively creates a duty-by-default, defining duty so as to be coextensive with negligence absent some policy-based exception.[38]

Relational duty theorists see this as a flaw in the social theory, arguing that to take duty for granted would be to deviate from prevailing jurisprudence and to deprive from tort law an important moral component otherwise entailed by the duty-breach nexus's implicit requirement that there be overlapping foreseeabilities: that an unreasonable actor (i.e., one whose conduct creates a foreseeable risk of harm to someone) has a duty only for those harms to entities toward whom she acted unreasonably (i.e., ones foreseeably put at risk by the unreasonable conduct, on account of which foreseeable risk the unreasonable conduct is held to have been unreasonable in the

37. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 709 (2001) [hereinafter G&Z, *Place of Duty*] ("[I]t is not sufficient to have injury, duty, breach, and causation; these elements need to be connected in the right way. In particular, the defendant's breach must be a breach of a duty owed to the plaintiff herself, or to the class of persons to which she belongs. In cases in which there is a breach and a duty, but the breach is not a breach of the duty owed to the plaintiff, the plaintiff has no cause of action in negligence. Courts often reject such claims under the rubric of denying that there is a duty, which is really a shorthand way of stating that there is no duty *owed to the plaintiff* to refrain from the conduct in which the defendant engaged, which is in turn a somewhat confusing way to say that, insofar as there was a breach of a duty of care, it was not a breach of a duty of care owed to the plaintiff, but, at most, a breach of a duty owed to someone else. A more felicitous way of putting the point might be that there must be a certain 'nexus' between the breach and the duty, or the breach must be a breach of a duty to the plaintiff. The phrase 'no duty' is sometimes used to convey that the required nexus between duty and breach is missing."). Notably, the cited article, *Place of Duty* by G&Z, was written about one of R3's earlier drafts of the duty section, which was ultimately abandoned. Because, therefore, not all of their arguments in *Place of Duty* remain relevant to the published version of R3, I am careful to use *Place of Duty* only for general information and for arguments made by G&Z that remain applicable even to the published version of R3.

38. *Id.* at 715–16 (footnote omitted) ("[Leon] Green himself went quite a bit further, asserting that the power-conferring aspect of the duty element was the *only* feature that distinguished 'duty' from 'breach.' A duty skeptic, he claimed that the duty question is in its substance identical to the breach question, and hence that the only thing the duty element accomplishes is to enable courts to police more vigorously the breach issue."); *id.* at 715 n.186 (citations omitted) ("[Leon] Green shared Holmes's skeptical view that the duty question collapses into the breach questions because both turn on the same considerations of probability of harm, ease of precaution, etc. Hence, for Green, the significance of courts rendering duty as an independent element of the tort was entirely procedural: it permitted courts to serve a gatekeeping function by deciding whether to let the jury have the breach question.").

first place).[39] A defendant whose conduct causes harm to a plaintiff in this area of foreseeability overlap may be described as "blameworthy" or "at fault" for that harm—as culpable for that harm in a quasi-moral sense, albeit in a civil law context—and generally would be liable to the foreseeable plaintiff under either theory of duty.[40] By contrast, a defendant who causes harm to a plaintiff by means of conduct that was negligent insofar as it created a foreseeable risk of harm to some potential plaintiff(s), but where the actual plaintiff was not herself among those foreseeably endangered by that negligence, would generally be liable to that unforeseeable plaintiff only under the social theory of duty.[41] The relational theory would not impose liability in the latter case because blameworthiness or fault—a moral defect arising from the defendant's failure of the overlapping foreseeability demands of the duty-breach nexus—is missing, a requirement that cannot, according to the relational theory, be satisfied by other arguably moral considerations, such as that of social utility under an instrumentalist approach.[42]

By contrast, one of the key arguments against the relational theory of duty is that of "concept-skepticism"—the view that abstract legal concepts are meaningless except to the extent that they are empirically meaningful insofar as they have been applied to concrete facts.[43] According to this view, a judge

39. G&Z, *Place of Duty*, *supra* note 37, at 712 ("The nexus requirement arguably goes to one of the basic ideas of our tort law—that a person is entitled to an avenue of civil recourse against another person only because the other person has wronged *her*. In negligence, that means that the duty breached must be a duty to the plaintiff." (citing Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 87 (1998))).

40. *Id.* at 708–09.

41. *See id.* at 710.

42. *See infra* notes 223–224 and accompanying text for information and citations pertaining to the relational theory's concern with morality (understood by G&Z in terms of plaintiff foreseeability and blameworthiness, without regard for utilitarian understandings of morality) as illuminating with respect to duty law.

43. G&Z, *Moral of* Macpherson, *supra* note 31, at 1758–59, 1777 (footnote omitted) ("[Prosser and other Holmesians argued that] courts' justification for decisions . . . [holding] that defendant owed no duty of care to the plaintiff—had to fail because it presupposed something

asking about duty in order to determine liability is like a "dog chasing its own tail"[44] because "[t]here is a duty if the court says there is a duty; the law . . . is what we make it."[45] While this skeptical critique corrodes the conceptual foundations of any theory at which it is aimed,[46] the relational theory's dogmatic dependence on a meaningful concept of foreseeability renders it especially susceptible to conceptual corrosion under this skeptical attack.[47] By contrast, the social theory—which, absent an exception, simply assumes duty in cases of affirmative negligence—is relatively less reliant on vulnerable concepts and so has less to lose in the face of concept skepticism.[48] Thus, social duty theorists do not hesitate to deploy this concept-skeptical

which did not exist, namely an intelligible concept of duty. We call this 'the conceptual argument for duty-skepticism.' . . . Cast in its strongest form, Prosser's claim was that duty is meaningless—a piece of 'artificial' gibberish. A judicial opinion written so as to conclude that 'liability does not attach because the defendant owed no duty to the plaintiff,' may as well have been written to conclude that 'liability does not attach because defendant is not a carrot.' Alternatively, Prosser asserted that the notion of duty, even if intelligible, was hopelessly indeterminate. The notion of 'relation' and its metaphoric counterpart—Lord Atkin's 'neighbour' principle—were 'so vague as to have little meaning, and as a guide to decision [they had] no value at all.' A court desirous of finding liability could always 'find the necessary "relation" in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff.' Thus, in the blunt terms of Prosser's 1953 Michigan lectures: 'There is a duty if the court says there is a duty; the law, like the Constitution is what [courts] make it.' . . . At the heart of that model is a philosophical claim that duty, cast as a non-instrumental concept, is incoherent, empty, or redundant, and hence that duty cannot possibly be understood as an independent element of the tort. Rather, if duty means anything, it can only constitute an oblique reference to considerations of public policy that counsel for or against the imposition of liability on unreasonable actors.").

44. Prosser, *supra* note 11, at 15–16 ("Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question . . . . In deciding whether [a defendant] shall be liable for this particular damage, it is of no aid to ask whether the rule we make is to extend to it.").

45. *Id.* at 15.

46. *Cf.* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1571 n.35 (describing Holmesian concept-skepticism as like "cynical acid" that, by its terms, should, in principle, prove caustic to almost any concepts or theories it touches).

47. *See* G&Z, *Moral of* Macpherson, *supra* note 31, at 1759.

48. As discussed *infra* notes 204–207 and accompanying text, although the concept of "negligence" is vulnerable to the concept-skeptical critique, the arbitrariness in the application of that arguably meaningless concept is diffused across a plurality of jurors in their analysis of breach, rather than concentrated in the decision of a solitary judge. Furthermore, even if the social theory does not survive the concept-skeptical critiques of its own adherents entirely unscathed, it does reduce the number of opportunities for arbitrariness by effectively skipping the analysis of duty and thereby avoiding that initial inquiry into foreseeability.

critique against the relational theory's duty concept,[49] and, consequently, are sometimes called "duty skeptical."[50]

Both theories[51] are consistent with legal positivism: the view that conventional law is ontologically independent of morality and yet nonetheless authoritative.[52] However, the relational

49. *See, e.g.*, G&Z, *Place of Duty*, *supra* note 37, at 667–68 ("To the extent that [the provision on policy-based exceptions to duty in a preliminary draft of R3] recognizes 'duty,' it is only as a word that (when preceded by a 'no') happens to be used by courts inclined to concoct a defense to an otherwise well-formed negligence claim. . . . [I]t says: '*if* the court finds there is no duty,' then there will be no liability. . . . [This] formulation intimates that a 'no duty' holding always boils down to a judicial determination that, all things considered, there ought not be liability. . . . It is[] . . . a wild card for judges to use when they believe, for whatever reason, that liability should be cut off. This is not merely a shifting of phraseology. It is a reconceptualization of duty that converts what the courts regard as an essential element of a negligence case into a grant of discretionary authority to individual judges to dismiss or allow negligence suits.").

50. G&Z, *Moral of* Macpherson, *supra* note 31, at 1744 (describing the "duty-skeptical arguments developed by Holmes and later elaborated by Prosser, Green [one of the R3 Reporters and coauthor of *Duty Wars*, *supra* note 2], and others," and mentioning the evidence such theorists cite as "authority for[] duty-skepticism and the embrace of a policy-driven or instrumentalist account of negligence").

51. Although this is true for all social duty theorists, at least some relational duty theorists—like Professors G&Z, who, as discussed more later, heavily emphasize the correspondence between legal duties and moral obligations, *infra* notes 223–224 and accompanying text—likewise describe themselves as positivist. *See, e.g.*, G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1591 ("One can share, as we do, Holmes's sense that, notwithstanding its obvious connections to moral norms, tort law really is a distinctive enterprise. One can also share, as we do, his belief that tort law is 'created' rather than found in nature, and that its content has changed and will continue to change along with changes in the economic, intellectual, political, and social environment in which tort operates. And yet none of this entails that tort law is a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands.").

52. G&Z, *Moral of* Macpherson, *supra* note 31, at 1754, 1781 ("Modern law should not be understood as grounded in religious or moral laws, nor as an organic expression of tradition, but instead ought to be conceived of as a set of directives formulated and enforced by individual officials (judges) on behalf of the State and in furtherance of the State's own regulatory purposes. This understanding was the upshot of Holmes's tireless effort to establish that modern law aimed 'to transcend moral and reach external standards,' standards which derived from what, in any given era or epoch, was 'understood to be convenient.' . . . For Holmes, constitutional law, as much as tort law, was the creation of judicial decisions, construed as authoritative interpretations of the dictates of the sovereign. The notion that the Constitution drew its content from rights existing independent of the state's acts struck him, like his predecessor and kindred spirit Jeremy Bentham, as a piece of unscientific, metaphysical nonsense. The only meaningful notion of substantive rights (as opposed to remedial rights, or rights of action) was the notion of positive or legal rights, rights that existed by virtue of their recognition and enforcement through judicial decisions." (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 2, 77 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881))); *see also, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [hereinafter Holmes, *Path of the Law*] (discussing the distinctiveness of legal and moral concepts).

theory's duty-breach nexus requirement that there be overlapping foreseeabilities causes it to aggrandize the role of morality in questions of duty, such that legal duties presumptively parallel underlying moral obligations and tort law is primarily concerned with addressing moral fault with corrective justice.[53] By contrast, the social theory—being disinterested in foreseeability as pertains to duty (a consideration the court delegates to the jury in its analysis of breach and/or proximate cause),[54] and proceeding instead with an instrumentalist emphasis on governmental policy—denies morality (in the sense of identifying fault or blameworthiness) any such role.[55]

53. *See, e.g.*, G&Z, *Moral of* Macpherson, *supra* note 31, at 1826 ("[B]oth the conceptual structure and, to a certain extent, the content of the judgments about duty that are embedded in negligence law, reflect ordinary moral judgments about duties owed to others."); G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1587–88 ("There are a variety of jurisprudential reasons for analyzing legal duties as analogous to moral duties, without seeing legal duties as simply a set of applied moral duties. And there are a variety of reasons, institutional and otherwise, why the content of these kinds of duties—moral and legal—will often differ. Yet to appreciate this gap is not to deny that it is often the case that the law of tort contains moral concepts that judges are required to deploy sensitively in articulating the content of the legal obligations within tort law.").

54. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010); Zipursky, *supra* note 9, at 1254–55 ("[R3] means to rule out foreseeability in duty, to modify it slightly in breach and then to make the modified foreseeability (foreseeable likelihood) central, and to replace it with a more carefully crafted, but related, concept of 'scope of the risk' in proximate cause (now referred to as 'scope of liability'). This trio of moves is explicitly intended to correct certain problems that are said to exist currently: a tendency of courts to usurp the jury's role by treating foreseeability as a duty issue and deciding that unforeseeability entails no duty, and a tendency of courts to give juries inadequate guidance on the proximate-cause issue by utilizing a free-form notion of foreseeability.").

55. *See* G&Z, *Moral of* Macpherson, *supra* note 31, at 1739 (describing the "Holmes-Prosser" model as the "instrumentalist" model); *id.* at 1846–47 ("It is dogma among torts scholars that, as Prosser put it, duty is merely shorthand for a laundry list of policy factors bearing on whether liability should be permitted or barred in some class of cases. . . . Our aim has been to challenge this dogma. Duty, as the word itself suggests, is a non-instrumental concept. . . . Far from rejecting the concept of duty, *MacPherson* embraces duty, yet insists on a flexible, moral interpretation of the content of the concept. A relational conception of the duty of due care should now be recognized as an option in negligence theory."). Throughout this article, I follow G&Z in generally treating "moral" considerations as ones pertaining to fault or blameworthiness in the sense of the duty-breach nexus, which may be contrasted with instrumentalist considerations of utility that I do not include under the heading of morality. *See supra* note 48, as well as *infra* notes 204–207 and accompanying text.

As a result, whereas relational theories view legal duties as rules of guidance that motivate actors internally in part due to a belief that those rules correspond to underlying moral obligations (such as that against negligently harming foreseeably at-risk persons),[56] social duty theories at least traditionally[57] viewed legal duties as rules of liability compelling obedience via external command backed by threat of sanction that are of interest only for egocentric predictive purposes.[58] Importantly, however, the ascendancy of Hart's distinction between the "internal" and the "external" view of law—according to which those with an "internal view" see law as a set of guidance rules that are legitimate and binding insofar as they were validly issued by a recognized authority,[59] while

56. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1563–64 ("On [the guidance-rule conceptions of tort], tort is a collection of 'dos' and 'don'ts': It mandates how we are obligated to act with regard to the interests of others and provides persons who are victimized by breaches of these obligations with the ability to obtain satisfaction, through law, for having been mistreated. Although guidance-rule conceptions of tort lend themselves naturally to certain rights-based accounts of tort law, they are not limited to such accounts.").

57. But see *infra* Part IV for a discussion of how contemporary social duty theories might deviate from this tradition by taking advantage of Hart's internal view of law.

58. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1563 ("On the liability-rule view, tort law sets standards for when one person or entity can be ordered by a judge to bear the losses of another. The justifications identified for this loss reallocation vary: Efficiency, fairness, and other considerations might be invoked. Yet in all its variants, liability-rule tort theory embraces the notion that tort is about allocating losses and concomitantly rejects the idea that the payment of damages in a tort case is an instance of an injurer being held to account for having breached an obligation to conduct herself in certain ways toward the victim."); *id.* at 1588–89 ("The 'liability rule' objection states that what courts actually do in tort cases is recognize and apply rules governing who should have to pay for which injuries. In Hartian terms, one might say that courts in these cases recognize power-conferring rules that give plaintiffs the ability to exact damages from tortfeasors. Or, if one wishes to use the idea of 'duty-imposing rules,' one might say that courts are not imposing duties upon individuals requiring them to act or forbear from acting in certain ways, but instead are imposing duties on persons to pay for others' losses whenever certain conditions have been met. In either case, the courts are not recognizing primary rules of conduct enjoining non-tortious conduct. If tort is about rules of conduct at all, it is about rules enjoining the payment of damages.").

59. *See* Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1171–72 (2006) (footnote omitted) ("The internal point of view is a crucial element in H.L.A. Hart's theory of law. Hart first introduces the notion by pointing out that, within a social group which has rules of conduct, 'it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct.' Those who are

those with an "external view" see law as a set of liability rules that will be followed only insofar as is necessary for the actor's self-interest[60]—has to some extent modified this dichotomy.[61]

Still, as discussed more later, that Hartian development aside, and for all practical purposes, the duty war between the relational and social theories shows no sign of stopping.[62]

concerned with the rules in the latter way have, Hart tells us, adopted the internal point of view towards the rules. Hart thus defines the internal point of view in a very specific manner, by reference to the notion of 'accepting and using a rule.' Furthermore, as Hart's more general discussion in *The Concept of Law* makes clear, he has in mind quite specific and closely related conceptions both of what a rule is and of what it means to accept and use a rule. A rule is, according to Hart, a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform. To use the rule is to conform one's own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group. The existence of such 'social' rules, as Hart calls them, thus consists of these very facts of acceptance and use. Since the internal point of view is just the perspective of those who accept the rule, it follows that, as a conceptual matter, a social rule does not even exist unless a sufficiently large number of people within the requisite group adopt the internal point of view with respect to some regular pattern of behavior. A social rule in Hart's sense lies, according to Hart, at the foundation of every legal system. The rule of recognition, as he calls this fundamental rule, is a complex social practice of the kind just described which holds among those persons in a society whom we would intuitively recognize as its officials. The normative character of the rule of recognition, like all Hartian social rules, is duty- or obligation-imposing. More particularly, it imposes a duty on officials to apply other rules which can, in accordance with criteria set out by the rule of recognition, be identified as valid law. The existence of a rule of recognition is, according to Hart, a necessary condition of the existence of a legal system.").

60. *Id.* at 1180 ("Some citizens comply because they themselves hold the internal point of view toward the rule of recognition (and, by extension, toward the rules it identifies as valid), but others only pay attention to the rules and comply with them to the extent that they have to, 'because they judge that unpleasant consequences are likely to follow violation.' Hart maintains that such persons have adopted the 'external point of view' towards the rules of their society, and continues, [']At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment.[']" (quoting H.L.A. HART, THE CONCEPT OF LAW 90–91 (2d ed. 1994) [hereinafter HART, THE CONCEPT OF LAW])).

61. *See, e.g.*, G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1575 ("Hart's jurisprudential argument . . . creates philosophical space for a non-Holmesian, duty-accepting account of tort law."). Although some argue that Hart's internal view favors the relational theory, I argue that, although his internal view changes the terrain of the battle, it favors neither camp more than the other. *See infra* Part IV.

62. *See infra* Part IV.

II. *PALSGRAF*: A CONVENIENT, BUT OVERSIMPLIFIED, MODEL OF THE DIVIDE OVER DUTY

The issue in *Palsgraf* was whether a railroad company, whose employee knocked a package out of the arms of a "fun-seeking Italian boy[]"[63] while carelessly helping him onto a departing train, is liable for harm to a woman some distance away who was crushed by a scale that was knocked over when the package, which happened to contain fireworks, exploded upon hitting the ground.[64]

The case came before the New York Court of Appeals after the Appellate Division affirmed a jury verdict in favor of plaintiff Helen Palsgraf.[65] Although future United States Supreme Court Justice Benjamin Cardozo's majority opinion ultimately reversed and dismissed the complaint, Judge William Andrews sought to affirm, arguing that by acting without reasonable care toward the boy's property, the railroad employee undertook a duty for any harm proximately caused by that unreasonableness.[66] This duty to "society"[67] encompassed harm even to unforeseeable plaintiffs like Ms. Palsgraf.[68] For Andrews, questions of foreseeability and other fact-sensitive limits on liability should be addressed as factors

63. Little, *supra* note 3, at 76.

64. Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928); *see also* William H. Manz, Palsgraf*: Cardozo's Urban Legend?*, 107 DICK. L. REV. 785, 794 (2003) (providing a thorough analysis of the facts underlying *Palsgraf*, based on news articles published shortly after the event, and noting that the only estimates as to distance stated that Ms. Palsgraf was "more than ten feet away" from the package when it landed (citing *Bomb Blast Injures 13 in Station Crowd*, N.Y. TIMES (Aug. 25, 1924), https://www.nytimes.com/1924/08/25/archives/bomb-blast-injures-13-in-station-crowd-package-of-fireworks.html)).

65. *Palsgraf*, 162 N.E. at 99.

66. *Id.* at 102 (Andrews, J., dissenting) ("The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger but to all who might have been there—a wrong to the public at large.").

67. *Id.* at 102–03 ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone. . . . Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

68. *Id.* at 103 (stating that when a negligent act occurs, "[n]ot only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.").

informing the inquiry at trial into proximate causation, an inquiry located squarely within the traditional ambit of the quintessential fact-finder: the jury.[69] That analysis of proximate causation is, for Andrews, guided by "practical politics"[70] as interpreted out of the tea leaves of a discretionary multifactorial standard in which foreseeability is a major focus.[71] By committing questions of foreseeability to this inherently fact-sensitive analysis, courts could force themselves to hesitate—for fear of shutting their doors on a plaintiff regarding the foreseeability of whom reasonable minds might differ—so as not to inadvertently usurp the role of the jury when ruling on foreseeability as a matter of law and dismissing a complaint before trial.[72]

Contrary to Andrews, Justice Cardozo held that out of any harm proximately caused by a breach of duty, a defendant is liable only for that harm caused to plaintiffs foreseeably endangered by that breach.[73] For Cardozo, therefore, duty required a relation of quasi-moral fault running directly from defendant to plaintiff.[74] Thus, Cardozo differed from Andrews

69. *Id.* at 104 ("[T]he natural results of a negligent act—the results which a prudent man would or should foresee—do have a bearing upon the decision as to proximate cause.").

70. *Id.* at 103–04 ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. . . . The words we used were simply indicative of our notions of public policy.").

71. *Id.* at 104 ("[P]roximate cause is not to be solved by any one consideration. . . . The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the event would not happen. The court must ask itself whether there was a natural and continuous sequence between cause and effect.").

72. *Id.* at 105 ("[G]iven such an explosion as here it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff. . . . I cannot say as a matter of law that the plaintiff's injuries were not the proximate result of the negligence.").

73. *Id.* at 101 (majority opinion) ("One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.").

74. *Id.* at 100 ("What the plaintiff must show is 'a wrong' to herself, *i.e.* [sic], a violation of her own right, and not merely a wrong to some one else, nor conduct 'wrongful' because unsocial, but not 'a wrong' to any one. . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.").

by recognizing duties only in claims by foreseeable plaintiffs (e.g., the fun-seeking boy who was negligently helped, if he were to have brought a claim), but not by unforeseeable ones (e.g., Ms. Palsgraf).[75] Notably, however, although Cardozo held that foreseeability should be analyzed under duty, and although duty has long been considered the domain of the court rather than the jury, Cardozo mentioned in passing that some questions of foreseeability under duty are properly left to the jury when reasonable minds might differ.[76]

Andrews's opinion for the dissent is emblematic of the social theory, according to which a negligent actor owes a duty to society as a whole, one that encumbers the tortfeasor regarding any physical harm caused—regardless of plaintiff foreseeability.[77] The majority opinion by Cardozo, by contrast, exemplifies the core tenets of the relational theory, according to which duty depends on the subjective blameworthiness of the defendant for risk negligently created relative to a foreseeable plaintiff.[78]

As discussed more later, R3 endorses the social theory by omitting from its definition of duty any requirement of plaintiff foreseeability.[79] Although one could criticize R3 as merely

75. *Id.* at 99 ("The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.").

76. *Id.* at 101 ("The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury. Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station."). Indeed, it is not entirely clear whether, when he reversed the jury award for Ms. Palsgraf, Cardozo saw the case as presenting categorical questions of foreseeability within the court's ordinary purview, or as presenting factually particularized questions of foreseeability that could be denied from the jury in this case as a matter of law because reasonable minds could not differ as to the outcome. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1899–900 (2011) [hereinafter Cardi, *Hidden Legacy of* Palsgraf].

77. *See Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

78. *Id.* at 99 (majority opinion) ("The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all.").

79. *See infra* Section III.C. (discussing R3 and its treatment among secondary sources).

trying to rewrite the outcome of the *Palsgraf* debate,[80] to do so would be to grapple only with a straw man. For one thing, such criticism overlooks an important difference between the proposals of R3 and of Andrews: whereas R3 provides for policy-based exceptions to duty where such exceptions are categorical and expressly stated by the court as a matter of law, Andrews omits any such limitation from his general rule imposing duty, choosing instead to limit liability primarily through the jury's multifactorial analysis of practical politics under the heading of proximate cause.[81] More importantly, however, such criticism ignores R3's broader historical significance: instinctively refusing to let sleeping dogs lie, R3 reanimated the perennial debate over duty, one that is older than America itself and colored with far greater variety than is found in the *Palsgraf* debate alone.[82]

III. PERENNIAL CLASHES IN THE DEBATE OVER DUTY AND THE GOALS OF ITS LIMITATIONS

A complete understanding of R3's treatment of duty calls for some acquaintance with the evolution of the concept over the course of debates starting long before, and continuing still after, the publication of each Restatement.

A. *Early Drums of War: Duty Debates Before the First Restatement*

Relational theorists locate the seeds of their view in the medieval religious concept of "trespass."[83] Those seeds eventually developed into mature legal concepts through the work of William Blackstone, among others.[84] Professors G&Z,

80. *See* sources cited *supra* note 3 and accompanying text.

81. *See infra* notes 208–212 and accompanying text.

82. *See infra* Part III.

83. *See, e.g.*, G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1565–67; *see also Palsgraf*, 162 N.E. at 101 (describing negligence law as having evolved out of the concept of trespass).

84. *See* sources cited *supra* note 83 and accompanying text.

arguing for the historical validity of the relational theory, say that

> tort and its historical antecedents were (as tort still is) rife with concepts that link it to notions of morality. The medieval progenitor of tort—the older notion of a "trespass"—linked tort to biblical notions of sin and transgression. Later writers including John Locke and William Blackstone had categorized actions brought under these writs as comprising the category of "private wrongs."
>
> . . . [O]ne way to understand how writers like Blackstone thought about tort is to start with an account of individual rights, derive from that account a set of relational duties the breach of which constitutes private wrongs, then further derive the idea of a private right of action—a power to seek recourse through law that belongs to the right holder whose rights have been violated by the doing of the wrong.[85]

By contrast, social duty theorists can trace their lineage to the early positivist realist John Austin.[86] Austin argued that, in the first instance, all obligations run from legal subjects to a sovereign commander, and that only thereafter might inter-subject tort obligations and civil remedies for breach arise according to sovereign will.[87] These horizontal inter-subject

85. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1565–67.

86. *Id.* at 1567 ("In [Austin's] view, it is only because the English sovereign had chosen to enact laws authorizing persons to bring private suits for damages in response to others' conduct that the Blackstonian category of private wrongs—and the relational duties underlying them—had come into existence. . . . [Austin] characterized tort as imposed on citizens by the state (through its judges), rather than built up from a foundation of rights embodied in Anglo-American social norms and practices.").

87. *Id.* (stating that for Austin tort rights of action exist only because of the sovereign's decision to arm people with the power to sue others); *see also id.* ("[T]o Austin, tort law was not about judges and juries giving expression to conventional understandings of rights and wrongs,

obligations, being derived from more fundamental vertical obligations from subjects to the sovereign commander, extend wherever sovereign policy prescribes, taking account of plaintiff foreseeability only if the sovereign says so.[88] The primacy of the vertical relation over horizontal ones in Austin's jurisprudence—such that the sovereign may override civil rules stipulated to govern derivative inter-subject relations—presents a structure on which social theories of duty, focused more on practical questions of policy than moral questions of foreseeability, are modeled.[89]

Turning to this side of the Atlantic, it was not until the industrial era that courts started considering duty as a separate element in a cause of action for negligence.[90] Only once duty was no longer taken for granted did questions concerning its meaning and limitations enter American legal discourse.[91] By the end of the nineteenth century, future United States Supreme Court Justice Oliver Wendell Holmes had established himself

nor about giving legal expression to some sort of pre-legal right to recourse against one's wrongdoers. Rather, it was about the sovereign issuing a special kind of command granting to certain persons a positive-law power to sue under certain conditions, and only thereby creating a set of relational legal duties that actors who might be subject to suit were bound to observe on pain of sanction at the request of their victims.").

88. *Id.* at 1567–68 (describing the horizontal aspects of Austin's theory of tort law as organized in a "top-down" manner); *see also* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601–15 (1958) [hereinafter Hart, *Separation of Law and Morals*]; *id.* at 604 ("The picture that [Austin's] command theory draws of life under law is essentially a simple relationship of the commander to the commanded, of superior to inferior, of top to bottom; the relationship is vertical between the commanders or authors of the law conceived of as essentially outside the law and those who are commanded and subject to the law.").

89. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 931 (2010) [hereinafter G&Z, *Torts as Wrongs*] ("How did [components of the social theory] come to be a dominant instinct among tort theorists? We conjecture that the answer rests partly in the influence of a positivistic conception of law traceable back to Holmes and ultimately Austin. According to this conception, legal wrongs are those acts that violate a command or dictate issued by a political superior or sovereign." (citing JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 11–13 (Hackett 1998) (1832) (defining laws as rules enacted "by persons exercising supreme and subordinate government," but defining norms set only by public opinion as "positive morality"))).

90. Cardi & Green, *supra* note 2, at 698–700. *But see* G&Z, *Moral of* Macpherson, *supra* note 31, at 1761 n.104 (dismissing this historical account as "anachronistic and profoundly wrong-headed").

91. *See* Cardi & Green, *supra* note 2, at 698–702.

as the foremost opponent of the relational theory of duty.[92] In doing so, he developed an alternative theory—a social duty theory, in the terms used in this Article—complete with the distinct flavor of Holmesian skepticism.[93]

Cultivating the Austinian seeds of positivist realism, Holmes thought the theory of relational duties as discrete person-to-person obligations contingent on foreseeability bespoke an impure jurisprudence shot-through with quasi-moral considerations of fault as a sort of civil culpability.[94] Holmes, like Austin, saw law as valid independent of moral authority[95]: law derives authority from the power of the sovereign, to which each subject is compelled by self-interest generally to submit.[96] Thus, for Holmes, a client who asks an attorney to explain the client's legal duties does not ask to be chastised in a moralizing tone about what she *should* or *should not* do.[97] Rather, she asks

92. G&Z, *Moral of* Macpherson, *supra* note 31, at 1756 ("[F]or Holmes, negligence was necessarily *non-relational*. The tort was not properly described as causing harm by an unreasonable act toward a particular person or class of persons, but simply as causing harm by acting unreasonably.").

93. *See* Holmes, *Codes*, *supra* note 32, at 6 ("[The law of torts] contains duties from all the world to all the world."); Holmes, *Theory*, *supra* note 32, at 660–61 (stating that torts generally consist of a breach of "a duty imposed on all the world, in favor of all"); G&Z, *Moral of* Macpherson, *supra* note 31, at 1756 ("Holmes's theory of torts further entailed a particular account of the obligations created by tort law. Given his premises, modern tort law could not be described as reflecting or enforcing moral or conventionally-recognized duties owed by one citizen to another. In modern societies, there were no such duties. Instead, the courts imposed liability for unreasonable conduct because they had concluded that it was the only rule that provided deterrence and compensation without unduly interfering with individual freedom. Accordingly, it was a mistake to say that a given defendant's tort liability derived from his breach of an obligation owed to the injured plaintiff. Rather, liability attached because the defendant had violated state directives commanding each citizen to refrain from unreasonable conduct threatening injury to others." (citation omitted)); *see also* Palsgraf v. Long Island R.R., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) ("Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone.").

94. *See id.*

95. *Id.* at 1781 n.192.

96. *Id.* at 1781 ("For Holmes, constitutional law, as much as tort law, was the creation of judicial decisions, construed as authoritative interpretations of the dictates of the sovereign."); *see also* Hart, *Separation of Law and Morals*, *supra* note 88, at 603 (explaining his view of Austinian command-sovereignty in terms of the relationship between gunman and a stick-up victim).

97. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1568 ("As Holmes famously argued in *The Path of the Law*, a client who asks his lawyer to inform him of the content

for value-neutral predictive information concerning what consequences *will* or *will not* follow from certain sorts of conduct.[98]

Consequently, one's horizontal relations with other subjects are legally significant not for quasi-moral reasons of subjective blameworthiness or fault, but rather because the sovereign has provided for civil liability among subjects to remedy certain proscribed harms.[99] Regarding duty in negligence cases, for example, the sovereign may provide liability for all negligently caused harm—regardless of foreseeability or fault—although the sovereign could, of course, declare exceptions to that general rule.[100] Holmes arrives at this understanding of duty by building upon the foregoing Austinian arguments with his own concept skepticism—his distrust for assertions that legal concepts like "foreseeability" have meaning in themselves and his consequent reduction of those concepts to the empirical realities of how they are applied.[101] Having wielded this concept-skeptical approach as a weapon to discredit the relational theory of duty as an independently meaningful element of tort delineated by discernible boundaries of interpersonal obligation,[102] Holmes is regarded as the original duty skeptic and preeminent theorist of social duties.[103]

of his legal duties is not asking for advice on what he ought to do, if 'ought' is used in a moral sense. He is, instead, seeking a reliable prediction about the sort of conduct that will or will not expose him to court-ordered sanction." (citing Holmes, *Path of the Law*, *supra* note 52, at 462)); *cf.* Hart, *Separation of Law and Morals*, *supra* note 88, at 593–615 (critiquing Holmes's variety of positivism).

98. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1568.

99. *Id.* at 1567–71.

100. *See id.*

101. G&Z, *Moral of* Macpherson, *supra* note 31, at 1777.

102. *Id.* at 1756 ("If one had to use the language of obligation and duty, one could say that the tort law imposed 'duties of all the world to all the world.' However, Holmes found even this formulation misleading insofar as it suggested that tort law presupposed a mysterious set of extra-legal duties. To say that tort law imposed a duty on all to act reasonably toward all was, in the end, an imprecise way of saying that courts had adopted a rule imposing liability on anyone who causes harm through an unreasonable act. Thus, for Holmes, negligence was necessarily non-relational.").

103. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1564, 1570–71.

As commercial entities' radii of liability continued to expand during the early twentieth century, jurists who remained unpersuaded by Holmes sought to create a new class of policy-based exceptions to duty: ones for harms to unforeseeable plaintiffs.[104] Among the influential proponents of this theory of relational duty was Francis Bohlen, a professor of law at the University of Pennsylvania who served as the Reporter for the First Restatement from 1923 until its publication in 1934.[105] Preoccupied with the problem of the unforeseeable plaintiff, Bohlen was the first to recognize the potential of *Palsgraf*.[106] Shortly after the Appellate Division's opinion found its way onto his desk, Bohlen wrote up a draft section on duty for negligent creation of risk, attached to the draft a statement of the facts in *Palsgraf*, and distributed the documents to the Restatement advisers for review.[107] Among the recipients was Cardozo, who decided to attend the debates on this section as a non-voting observer, even though he was aware that the case there discussed could very likely end up in his court.[108] At the conclusion of the drafting debates in Philadelphia, Bohlen's draft—inspired by a relational theory of duty tailored specifically to exclude unforeseeable plaintiffs like Ms. Palsgraf[109]—was approved by the advisers within a narrow margin of perhaps only one vote.[110] The section, in relevant part, read as follows:

> The actor is liable for an invasion of an interest of another, if:

104. G&Z, *Moral of* Macpherson, *supra* note 31, at 1752, 1760–61; Cardi & Green, *supra* note 2, at 698–99 ("According to many historians, the industrial revolution led courts to impose limits on negligence liability in order to foster burgeoning industry.").

105. Laurence H. Eldredge, *Francis Hermann Bohlen*, 91 U. PA. L. REV. 387, 388–89 (1943); Prosser, *supra* note 11, at 4.

106. *See* Prosser, *supra* note 11, at 4.

107. *Id.*

108. *Id.*

109. *See id.* at 4–5.

110. *Id.* at 5.

> . . . (b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other . . . .[111]

The words "negligent with respect to such interest . . . of the other" served generally to bar unforeseeable plaintiffs—specifically, plaintiffs not from a class of foreseeably at-risk persons—because one cannot act negligently toward a plaintiff to whom no risk was foreseeable.[112] Additionally, although various sections of the first Restatement acknowledge established common law deviations in particular contexts from the general rule for duty,[113] none of its provisions expressly authorize courts to declare policy-based exceptions to its general duty rule.[114] In these ways, Bohlen and the Restatement advisers repudiated the traditional practice of taking duty for granted, absent some policy-based exception, with respect to negligently caused harms.[115]

When Cardozo returned to Albany to find *Palsgraf* on his docket, he concurred with Bohlen and the Restatement advisers that duty should not extend to unforeseeable plaintiffs like Ms. Palsgraf,[116] although he suggested that at least sometimes the determination of foreseeability under duty should nevertheless belong to the jury rather than the court.[117] By contrast, Andrews advocated a Holmesian social duty applicable wherever there is negligent creation of risk toward anyone, regardless of plaintiff foreseeability.[118] Still, Andrews allowed for policy-based discretionary limits on liability, although notably he sought to remove that discretion from the court's consideration of duty, delegating it instead to the jury in its multifactorial

111. RESTATEMENT (FIRST) OF TORTS § 281 (AM. L. INST. 1934).
112. *Id.* § 281 cmt. c.
113. *See, e.g.*, *id.* §§ 314–429.
114. *See* G&Z, *Place of Duty*, *supra* note 37, at 668.
115. *See* Prosser, *supra* note 11, at 4–8.
116. *See id.*; Palsgraf v. Long Island R.R., 162 N.E. 99, 100–01 (N.Y. 1928).
117. *See supra* note 76 and accompanying text.
118. *See supra* notes 66–68 and accompanying text.

analysis of practical politics under the heading of proximate cause.[119]

In the end, however, it was the relational theory of duty advanced by Bohlen and Cardozo that made its way into the first Restatement.[120] By endorsing the relational theory and thereby limiting duty to foreseeable plaintiffs, the first Restatement memorialized an until-then scattered and theoretically unsystematic minority of "no duty" precedents that had popped up during the industrial era.[121] In doing so, moreover, the first Restatement rejected the dominant assumption of the pre-industrial era: that, in light of governmental policy against the negligent causation of physical harm, duty should be taken for granted.[122]

B. *Reprisals: Drafting the Second Restatement While Each Theory Braves Attack*

When, in 1952 at the American Law Institute, the wheels of drafting began once more to turn,[123] so too did Holmes, Andrews, and Cardozo turn over in their graves as the jurisprudential pillars of their theories came under attack.[124] It was around that time that critiques of post-*Palsgraf* duty law as messy and incoherent began to swell into a chorus.[125] William Prosser—a Holmesian giant of tort law[126] who was the Reporter for the second Restatement and had conducted an extensive

119. *See supra* notes 69–72 and accompanying text.

120. *See* RESTATEMENT (FIRST) OF TORTS § 281 (AM. L. INST. 1934); Prosser, *supra* note 11, at 4–8.

121. *Compare* Prosser, *supra* note 11, at 11–12 (acknowledging unforeseeable plaintiff no-duty precedents in times before *Palsgraf*), *with* G&Z, *Moral of* Macpherson, *supra* note 31, at 1748–52 (same, in times before industrial era).

122. *See* Cardi & Green, *supra* note 2, at 698–700.

123. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, INTRODUCTION (AM. L. INST. 1965).

124. *See* G&Z, *Place of Duty*, *supra* note 37, at 736; Cardi & Green, *supra* note 2, at 726–27.

125. *See* G&Z, *Place of Duty*, *supra* note 37, at 736 (intimating that the law of duty is an inconsistent and unpredictable mess both between and within jurisdictions); *see also* Cardi & Green, *supra* note 2, at 726.

126. G&Z, *Moral of* Macpherson, *supra* note 31, at 1753 (identifying Prosser and Holmes as among the theorists who have had the most significant influence on the development of tort law, and noting how Prosser's view on duty "derives in large part from Holmes's work").

survey of how duty was handled in the post-*Palsgraf* era[127]—arrived at this conclusion himself in 1954, in perhaps the most famous essay on the topic: Palsgraf*, Revisited*.[128]

For Prosser, the problem of duty's theoretical messiness and unpredictability is not one that can be solved by identifying some rational principle to serve as a sort of North Star, by reference to which one might distinguish between cases where duty should or should not be imposed.[129] Rather, the only principle of duty determinations is a dynamic one guided by the evolving needs and interests of society.[130] Thus, the problem of duty can be solved only by recognizing that, as posited, duty just means what the court says it means.[131]

Boldly raising his emphatically instrumentalist banner under the Holmesian flag of duty skepticism,[132] Prosser rejected the proposition that legal concepts such as "foreseeability" are useful in discerning where duties begin or end—or, in turn, that concepts like "duty" are useful in delineating liability at all.[133] Instead, emphasizing the social theory's instrumentalist undercurrent,[134] Prosser argued that analyses of concepts like "duty" are nothing but opportunities for judicial line-drawing between cases the court will or will not allow to go to trial.[135] Prosser summed up his instrumentalist, duty-skeptical critique of the relational theory of duty as follows:

127. *See* Cardi, *Hidden Legacy of* Palsgraf, *supra* note 76, at 1873 (referencing Prosser, *supra* note 11).

128. Prosser, *supra* note 11, at 12 ("Such is the state of the law. It is one of troubled waters, in which any one may fish.").

129. *See id.* at 10, 13, 28–32.

130. *Id.* at 15.

131. *Id.* at 15–16.

132. *See* G&Z, *Place of Duty*, *supra* note 37, at 736 (describing the social duty theory as "a vision of negligence combining Holmesian skepticism about law with Prosser's recasting of tort law as 'social engineering'").

133. *See* Prosser, *supra* note 11, at 12–19; *see also* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1571 n.35.

134. *See* G&Z, *Place of Duty*, *supra* note 37, at 736 (describing "Prosser's recasting of tort law as 'social engineering'").

135. Prosser, *supra* note 11, at 31.

> What makes it all very perplexing is that our ideas of relations change, and duties with them. . . .
>
> These are shifting sands, and no fit foundation. . . . Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question. . . . In the end the court will decide whether there is a duty on the basis of the mores of the community, "always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."
>
> . . . In deciding whether [a defendant] shall be liable for this particular damage, it is of no aid to ask whether the rule we make is to extend to it. That is merely the dog chasing its own tail.[136]

In the end, Prosser endorsed a default assumption of social duty for any harm caused by negligent conduct, regardless of plaintiff foreseeability.[137] That assumption, Prosser continued, should be rebuttable only upon a showing that the interplay of factors such as tradition, efficiency, risk allocation, and justice—much like Andrews' multifactorial inquiry into "practical politics"[138]—justifies an *ad hoc* exception to duty, bereft of precedential weight, for the particular facts given.[139]

A few years later, while the second Restatement drafting process remained ongoing, H.L.A. Hart launched a probing critique of the Holmesian jurisprudential foundations upon which social duty theorists traditionally relied.[140] A committed positivist, Hart held that legal norms such as duties have reality

---

136. *Id.* at 13, 15–16 (quoting Palsgraf v. Long Island R.R., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting)).

137. *Id.* at 15–19.

138. *Id.* at 7 (quoting *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting)).

139. *Id.* at 15.

140. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1572–74.

independent of moral norms.[141] Nonetheless, Hart took aim at the Holmesian view of legal duties as nothing more than normatively empty rules of liability issued by sovereign command.[142] More specifically, Hart sought to distinguish between legal duties—which are normatively rich and binding upon the actor internally through her own recognition that she ought to obey the law—and the external command of a gunman telling a stick-up victim "give me the money or your life."[143] He observed that, within any social group governed by rules of conduct, "it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct."[144] It is on the basis of this distinction that Hart differentiated the "external" point of view of the law occupied by the legal actor imagined by Holmes, from the "internal" point of view recommended by Hart to subjects and officials.[145]

Where, adopting the internal view, a sufficient proportion of subjects and officials "accept[] and use[]" the rules applicable to them, a legal system satisfying a certain minimum content—basic rules of conduct regarding fundamental social issues, concerning, for example, property or violence—has a chance at

141. *See* Hart, *Separation of Law and Morals*, *supra* note 88.

142. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1564–75 (discussing Holmes's legacy in tort law and how Hart characterized that legacy as taking an external view, which should be rejected in favor of Hart's internal view).

143. Hart, *Separation of Law and Morals*, *supra* note 88, at 603; *see also id.* at 600–15; *supra* notes 59–60 and accompanying text (explaining Hart's internal view in contradistinction to the external view); G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1575 ("The Hartian actor occupies the 'internal point of view,' whereas the Holmesian occupies the 'external point of view.'").

144. HART, THE CONCEPT OF LAW, *supra* note 60, at 89; *see also* Perry, *supra* note 59, at 1171 ("A rule is, according to Hart, a certain kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform. To use the rule is to conform one's own conduct to the relevant pattern, and to accept the rule is to adopt the attitude that the pattern is a required standard both for oneself and for everyone else in the group.").

145. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1572–75; Perry, *supra* note 59, at 1173 ("The internal point of view . . . is the perspective both of the authorities who make this claim and of the subjects of law who accept it.").

long-term viability.[146] For subjects this means accepting and using the "primary rules" set forth by the legislature as guidance for conduct, such as those regulating conduct that is violent or that affects others' property.[147] For officials this means accepting and using "secondary rules" like the "rule of recognition," which articulates the criteria of validity for primary rules and imposes an obligation on officials to enforce and apply those primary rules when valid according to those criteria.[148] Other secondary rules include rules of change (empowering the legislature to modify subjects' normative situation by prescribing primary rules of conduct) and rules of adjudication (empowering the judiciary to apply primary rules announced by the legislature and to direct the application of penalties in case of violation).[149]

On what side, though, did Hart stand in the duty war? Although Hart did not himself throw his hat into the ring, G&Z threw Hart's hat for him after the fact.[150] They argue that Hart probably would have been inclined to endorse the relational theory because Hart's internal view of law is similar to their own internal view in some respects.[151] They highlight how Hart

146. Perry, *supra* note 59, at 1171–72 ("[A] social rule does not even exist unless a sufficiently large number of people within the requisite group adopt the internal point of view with respect to some regular pattern of behavior . . . . [Also,] a legal system cannot exist unless most—if not all—of its officials adopt the internal point of view."); Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYC. PHIL. (Jan. 3, 2003), https://plato.stanford.edu/entries/legal-positivism/ ("[According to] Hart's 'minimum content' thesis . . . there are basic rules governing violence, property, fidelity, and kinship that any legal system must encompass if it aims at the survival of social creatures like ourselves Hart regards this as a matter of 'natural necessity' and in that measure is willing to qualify his endorsement of the separability thesis." (citing HART, THE CONCEPT OF LAW, *supra* note 60, at 193–200)).

147. Perry, *supra* note 59, at 1182–83.

148. *Id.* at 1179 ("The rule of recognition serves two different but related roles. First, it specifies criteria which identify which other rules are to count as valid laws of the relevant legal system. Second, it imposes on certain officials, including in particular judges, an obligation to apply and enforce those valid laws.").

149. *Id.* at 1183 ("[A] rule of change confers powers to legislate, whereas rules of adjudication create the various powers to apply the law and, more generally, to settle disputes, which we associate with courts.").

150. *See generally* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13 (discussing the application of Hart's jurisprudential critique to tort theory).

151. *See infra* notes 194–197 and accompanying text.

urged people to understand primary rules of duty not as liability rules dictated through commands of interest to the legal subject only for predictive purposes, but as guidance rules validly stigmatizing certain conduct as unlawful and thereby obligating the subject internally.[152] Such guidance rules operate internally rather than externally because, unlike sovereign commands, legal duties are understood not just as threatening, but as valid prescriptions from a recognized authority.[153] Validly created by a recognized source, legal duties are normatively binding rules of guidance as to what one ought to do, unlike the normatively empty (yet nonetheless compelling) commands of a gunman.[154]

Although they recognize Hart's commitment to law's independence of morality, G&Z take greater interest in the Hartian actor's internal sense of obligation and analogize that normatively rich understanding of legal obligations to that of the relational theory of duty.[155] They emphasize that Hart sought to "interpret[]" rather than "philosophi[ze]" tort law by looking to "how ordinary citizens, lawyers, and officials talk and act in certain spheres—in particular, . . . what they mean when they say[] that one is under some sort of duty not to injure another."[156] Believing most people think of legal duty as correlated with morality, G&Z suggest that Hart would

152. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1564, 1591 ("Hart's critique of Holmes and his resuscitation of the notion of legal obligation undercuts much of the impetus for duty skepticism in tort, and conversely provides a basis for duty-accepting, guidance-rule theories of tort. . . . [It is not the case that] tort law is a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands. The falsity of these sorts of supposed entailments was exactly what Hart set out to establish at a general or jurisprudential level. Thus, we have fastened on his response to Holmes's theory of law as a way of articulating our own responses to Holmesian accounts of tort law. Tort law is not a law of liability rules, nor is it an exercise in social engineering. It is a law of genuine duties of conduct.").

153. *See id.* at 1572–75; *see also* Hart, *Separation of Law and Morals*, *supra* note 88, at 601–15.

154. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1568–73; *see also* Hart, *Separation of Law and Morals*, *supra* note 88, at 603.

155. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1572–73.

156. *Id.* at 1575; *see also id.* at 1591 ("Hart seemed to have been moved equally by a desire to give law more credit as a partly autonomous social practice than did certain skeptics, and to endow it with less majesty than might a certain kind of natural lawyer.").

probably have endorsed the relational theory,[157] which—limiting duty to foreseeable plaintiffs so as to isolate only those defendants negligent at the crossroads of the duty-breach nexus—reserves liability for those who are blameworthy in the sense of having been negligent not just in general, but toward the person whom they may now have to compensate.[158]

As influential as these theorists were—Prosser's version of the social duty theory has been adopted by many courts,[159] and Hart's internal view of law transformed positivism, even playing a key role in the next round of Restatement debates[160]—their work did little to pacify the duty war, which remained thoroughly polarized between the camps of social and relational duty theorists.[161] This continued inconclusivity was reflected in the second Restatement's ultimate articulation of duty, which bespoke a dissatisfactory dilatory compromise of its own:

> The actor is liable for an invasion of an interest of another, if:
>
> > . . . (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included . . . .[162]

157. *Id.* at 1575 ("[O]nce one concedes, as we believe one must concede, that Hart's picture of legal duties as genuine duties is no less available than Holmes's picture of legal duties as liability rules, the question of how to make sense of tort law ceases to be theoretical or philosophical (as Holmes's analysis seems to suppose), and instead becomes interpretive—how best to characterize tort law as it is actually practiced and understood by participants and observers.").

158. *See id.* at 1584–85 ("[T]he duty of reasonable care can sometimes be owed to anyone foreseeably placed at risk of harm by one's actions, were they to be careless.").

159. *See* G&Z, *Moral of* Macpherson, *supra* note 31, at 1739 (acknowledging Prosser's influence, especially in California).

160. *See infra* notes 194–200 and accompanying text.

161. *See generally* Cardi & Green, *supra* note 2 (detailing the continuing war between duty theories).

162. RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965); *see also id.* § 302 cmt. a ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.").

The second Restatement, like the first, tied duty to plaintiff foreseeability so as to limit liability to fault or blameworthiness in the sense of the duty-breach nexus, once more omitting any instrumentalist provision authorizing courts to declare policy-based exceptions to the general rule for duty.[163] Although, unlike the first, the second Restatement's main text included language extending the scope of duty to harms against a plaintiff who, though personally unforeseeable, nonetheless belongs to a foreseeable class of plaintiffs,[164] that change was inconsequential because a comment to the first Restatement already provided that extension for class foreseeability.[165] Through this merely superficial change, however, the Restatement revealed its reluctance to abandon the fault-oriented foreseeability requirement of the relational theory, but at the same time expressed its growing distaste for the narrowness of that theory's conception of duty, epitomized in Cardozo's person-to-person duties.[166]

This dilatory compromise did nothing, however, to bring an end to the duty war. Instead, it merely kicked the controversy down the road a half century to be reconsidered once more by the next generation of Restatement drafters, turning a blind eye to the doctrinal discord that would fester in the interim.[167]

C. *The Turncoat: Drafting and Debating the Third Restatement*

The first preliminary draft of R3, developed in the late 1990s, reversed course by omitting duty from the prima facie cause of action for negligence altogether.[168] That draft was abandoned in

163. G&Z, *Place of Duty*, *supra* note 37, at 685.

164. *See* RESTATEMENT (SECOND) OF TORTS § 281.

165. *See* RESTATEMENT (FIRST) OF TORTS § 281(b) cmt. c. (AM. L. INST. 1934).

166. *Compare supra* text accompanying note 162, *with supra* text accompanying notes 77–78.

167. *See* G&Z, *Place of Duty*, *supra* note 37, at 736; Cardi & Green, *supra* note 2, at 726.

168. G&Z, *Place of Duty*, *supra* note 37, at 665 ("Section 3 of the *General Principles* draft states that '[a]n actor is subject to liability for negligent conduct that is a legal cause of physical harm.' . . . This is a substantial departure in the expression of the structure of negligence from that of the courts. Most notably, there is no duty requirement in this provision, even though there is

2001,[169] however, after it was heavily criticized at a conference at Vanderbilt,[170] followed by the untimely death of the original Reporter.[171] Still, this early draft was no mere flash in the pan.[172] Rather, it laid bare the jurisprudential zeitgeist from which it sprang, which would tip the scales of drafting toward the theory of social duty in the debates that followed.

In May of 2005, the bulk of what would eventually become R3's section on duty (section 7) was approved by the advisers at the American Law Institute.[173] The relevant parts of the section provided that:

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
>
> (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.[174]

Totally omitting foreseeability from duty and providing for judicially-declared policy exceptions for the first time[175]—and

according to the usual formulation." (quoting RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 3 (Discussion Draft Apr. 5, 1999))).

169. Cardi & Green, *supra* note 2, at 672 n.5, 679–80.

170. *See* Goldberg, *supra* note 3, at 639–42 (formally summarizing the discussion at a conference at Vanderbilt in 2000 where the first draft of R3 was subjected to widespread public critique, and noting that "[t]he responses to Goldberg and Zipursky evince broad support, on various grounds, for their call to return duty to the status of an element of negligence").

171. Cardi & Green, *supra* note 2, at 672 n.5.

172. *Id.* at 689–90 ("Although it was later revised to include an explicit duty section defined by the defendant's creation of a risk, G&Z claim that the Third Restatement's current approach still suffers from the same conceptual flaws.").

173. *Id.* at 681.

174. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010).

175. G&Z, *Shielding Duty*, *supra* note 7, at 333 (criticizing a preliminary draft of R3 for insisting on "collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability" (citing G&Z, *Place of Duty*, *supra* note 37, at 668 ("[F]or the language of Section 6 is markedly different from the language of almost every other part of

thereby reversing its past allegiance to Cardozo and Bohlen[176]—R3 advocates the imposition of a social duty for any physical harm caused in negligence[177] absent an articulated categorical policy exception.[178] Notably, in explaining the decision to remove foreseeability from duty, R3 denies the usefulness of "foreseeability" as a legal concept in courts' duty analyses, thereby nodding its hat to Holmesian-Prosserian concept skepticism.[179] Still, the foreseeability limit on liability remains widely relevant in the analysis of negligence torts under R3, having been relocated to the elements of breach and scope of liability (formerly proximate cause).[180]

Some critics, however, found no satisfaction in being thrown the bone that those other elements—considered by the jury at trial, but only after the costly process of discovery—would

the draft, and markedly different from that of most of the hundreds of provisions in the first two torts Restatements."))).

176. The transcript of the debate on whether to approve R3's new duty rule shows that the significance of the new rule relative to the *Palsgraf* opinions was lost on no one. Professor Joseph Little, for example, was greeted by laughter when, unable to restrain himself until the afternoon when the section was scheduled to be discussed, he wryly inquired of the Institute's President: "Is it your intention . . . to reverse the law of the land and substitute Justice Andrews's dissenting opinion in *Palsgraf* for Mr. Cardozo's majority opinion in *Palsgraf*?" *Discussion of Restatement of the Law Third, Torts: Liability for Physical Harm*, 33 A.L.I. PROC. 9 (2005); *see also supra* note 3.

177. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(a); *see also id.* § 7(a) cmt. j (discussing the decision to omit foreseeability from duty).

178. *See id.* § 7(b); *see also id.* § 7(b) cmt. i (emphasizing the requirement that any judicially-declared exceptions be categorical); Zipursky, *supra* note 9, at 1252 (explaining R3 § 7(b) cmt. i); Cardi & Green, *supra* note 2, at 682 ("Seeking transparency, the Third Restatement states that the policy or principle employed for the exemption should be 'articulated.'").

179. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1571 n.35.

180. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. j (discussing the proper role of foreseeability in elements other than duty); Zipursky, *supra* note 9, at 1249–55 ("[R3] means to rule out foreseeability in duty, to modify it slightly in breach and then to make the modified foreseeability (foreseeable likelihood) central, and to replace it with a more carefully crafted, but related, concept of 'scope of the risk' in proximate cause (now referred to as 'scope of liability'). This trio of moves is explicitly intended to correct certain problems that are said to exist currently: a tendency of courts to usurp the jury's role by treating foreseeability as a duty issue and deciding that unforeseeability entails no duty, and a tendency of courts to give juries inadequate guidance on the proximate-cause issue by utilizing a free-form notion of foreseeability."). Indeed, R3's section on scope of liability includes an express prohibition on liability to unforeseeable plaintiffs. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. d; *see also* Zipursky, *supra* note 9, at 1252–54, 1266–71.

exclude unforeseeable plaintiffs, and decried R3's provisions for categorical exceptions as reducing duty to an instrument of judicial policymaking.[181] In particular, prominent Professors G&Z staged a multifaceted attack on what they saw as an ill-conceived mutiny against the firmly-rooted theory of relational duty as an obligation between the party foreseeably harmed and the party at fault for unreasonably causing that harm.[182] Although many of their arguments focus on doctrinal questions,[183] G&Z also emphasize a separate jurisprudential argument in support of their relational theory of duty.[184]

Among their doctrinal arguments, G&Z point out that by eliminating foreseeability from duty, section 7(a) collapses the duty-breach nexus and thereby destroys the independence of the duty element.[185] For G&Z, unlike Holmesian-Prosserian skeptics, duty and foreseeability are intrinsically meaningful concepts that courts can discern and apply categorically to limit liability without begging the question.[186] G&Z argue that there is nothing logically incoherent about courts using a relational concept of duty,[187] adding that to do otherwise would deprive

181. G&Z, *Shielding Duty*, *supra* note 7, at 333 (criticizing a preliminary draft of the first Restatement for reducing duty to "a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability" (citing G&Z, *Place of Duty*, *supra* note 37, at 668–69)).

182. *See generally, e.g.*, G&Z, *Place of Duty*, *supra* note 37; G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13; G&Z, *Shielding Duty*, *supra* note 7, at 333 ("[I]n [*Place of Duty*, *supra* note 37,] we strongly criticized . . . [a preliminary draft of R3's] dogmatic insistence on collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability. Such reductionism, we demonstrated, does not follow the usage of the courts and does not promote sound decisionmaking. Although courts tend to invoke the concept of duty in several different senses, in its primary sense it specifies as a condition of negligence liability that the defendant was under an obligation to persons such as the plaintiff to conduct herself with reasonable care so as to avoid causing the kind of injury suffered by the plaintiff."). These Professors led the assault on the first preliminary draft of R3 at Vanderbilt in 2000. *See generally* G&Z, *Place of Duty*, *supra* note 37 (G&Z's famous paper presented at the Vanderbilt conference in 2000).

183. *See infra* notes 185–194 and accompanying text.

184. *See infra* notes 194–200 and accompanying text.

185. G&Z, *Place of Duty*, *supra* note 37, at 709–12 (explaining the duty-breach nexus requirement omitted from R3); *see* Cardi & Green, *supra* note 2, at 711 nn.233–34 (agreeing with G&Z that R3 omits any duty-breach nexus requirement).

186. G&Z, *Place of Duty*, *supra* note 37, at 692–97.

187. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1591.

duty of the quasi-moral character attributed to it by commonsense.[188]

Furthermore, although G&Z themselves recommend equipping courts with the power to declare policy-based duty exceptions,[189] they deny that the mere consideration of such exceptions pursuant to R3's section 7(b) is sufficient to count as a complete analysis of duty.[190] Without more, G&Z fear, R3 transforms the element of duty into a standing invitation for judges as gatekeepers to bring their whimsies to work, responding to each case *ad hoc*.[191] To justify this concern, G&Z highlight similarities between R3's approach and the multifactorial standards influentially developed by Prosser-inspired courts—which standards, G&Z assert, afford judges freewheeling discretion in the name of public policy.[192]

G&Z also argue that R3 does not restate the law and so falls short of its namesake, explaining that they "continue to believe that the historical and doctrinal evidence points strongly in favor of deeming the non-redundant, relational view as the view that has in fact been adopted by most courts,

188. G&Z, *Torts as Wrongs*, *supra* note 89, at 986 ("Afraid since Holmes's time of the sanctimonious sound of 'wrongs,' . . . scholars have convinced themselves that the subject of Torts is really about accidentally caused losses, not wrongs, and that the central task of tort law is to reallocate such losses in the most justifiable manner. Included among them are . . . mainstream doctrinal scholars like Prosser and the Reporters for the forthcoming Restatement (Third) of Torts. Without wrongs at the center, however, all of these theories are doomed to fail."); G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1576 ("[I]t tells us something that, in ordinary conversation, we have no trouble invoking the idea of a legal duty independently of the idea of moral duty and the idea of risk of sanction. . . . That we can in our everyday language and everyday experience talk about legal duties as a distinctive phenomenon was to Hart, and is to us, an important clue as to how we should analyze the concept of law and the concept of a legal duty.").

189. G&Z, *Place of Duty*, *supra* note 37, at 718–20 (citing Strauss v. Belle Realty Co., 482 N.E.2d 34, 34–36 (N.Y. 1985)).

190. *Id.* at 733 (citing Lauer v. City of New York, 733 N.E.2d 184, 188 (N.Y. 2000)).

191. *See id.* at 731, 735–36.

192. Cardi & Green, *supra* note 2, at 688–89 (citing, *e.g.*, G&Z, *Shielding Duty*, *supra* note 7, at 333–34, 340, 361); *see also id.* at 689 n.106 ("G&Z accuse [R3] of imposing 'California's brand of instrumentalism on the entire nation's negligence law,' and they criticize [R3's] reporters' 'dogmatic insistence on collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability.'" (citing G&Z, *Shielding Duty*, *supra* note 7, at 333)).

notwithstanding a relentless academic campaign to change the practice."[193]

In addition to the above doctrinal arguments, G&Z also advance the earlier-mentioned novel jurisprudential argument that Hart's internal view of law uniquely favors the relational duty theory[194]—which theory is driven in large part by its own internal view of duty[195]—and that the recent ascendancy of Hart's internal view over the alternative Holmesian external view[196] therefore bolsters the case against R3's decision to adopt

193. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1583–84 (responding to critics of the theory of relational duty, expressly including "the drafters of the [final published draft of R3]"); Zipursky, *supra* note 9, at 1257–58 ("[R3] neglects the predominance of the idea that foreseeability is central to duty in the articulated positive law of the states. The Reporters risk damaging the credibility of [R3] as a 'restatement' by declining to put foreseeability in the black letter of section 7.").

194. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1581 ("Hart's jurisprudential work helps to establish that there is a place for a meaningful notion of duty qua obligation in the law of torts."); *id.* at 1564, 1586 ("H.L.A. Hart's celebrated critique of Holmes's jurisprudential deconstruction of legal duties—particularly Hart's account of the 'internal aspect' of rules— provides a duty-accepting jurisprudence that is more satisfactory than its duty-skeptical counterparts, yet still sensitive to skeptics' legitimate worries about naïve accounts of legal duties. In short, Hart's critique of Holmes and his resuscitation of the notion of legal obligation undercuts much of the impetus for duty skepticism in tort, and conversely provides a basis for duty-accepting, guidance-rule theories of tort. . . . [O]ur own aim, within tort, has been to avail ourselves of a roughly Hartian framework for thinking about the nature of duties in tort law."); *id.* at 1575 ("Hart's jurisprudential argument . . . creates philosophical space for a non-Holmesian, duty-accepting account of tort law.").

195. *See id.* at 1591 ("One can share, as we do, Holmes's sense that, notwithstanding its obvious connections to moral norms, tort law really is a distinctive enterprise. One can also share, as we do, his belief that tort law is 'created' rather than found in nature, and that its content has changed and will continue to change along with changes in the economic, intellectual, political, and social environment in which tort operates. And yet none of this entails that tort law is a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands. The falsity of these sorts of supposed entailments was exactly what Hart set out to establish at a general or jurisprudential level. Thus, we have fastened on his response to Holmes's theory of law as a way of articulating our own responses to Holmesian accounts of tort law. Tort law is not a law of liability rules, nor is it an exercise in social engineering. It is a law of genuine duties of conduct. In this respect, we are fully on board with Hart as against Holmes.").

196. *Id.* at 1572 ("[W]hile Holmesian duty skepticism may be orthodoxy in tort theory, the identical jurisprudential position [the Holmesian external view of legal obligation] has long been discredited within analytic jurisprudence. The scholar who is credited with this discrediting is, of course, H.L.A. Hart.").

a social rather than relational theory of duty.[197] Relatedly, G&Z propose that it is likely Hart would have endorsed their relational theory also because Hart sought to interpret legal concepts by looking to how those concepts are understood by ordinary people,[198] who (G&Z claim) think of legal duty as correlated with moral blameworthiness.[199] Accordingly, G&Z conclude, because Hart would be inclined toward an understanding of legal duties informed by morality, he would presumably prefer G&Z's fault-oriented relational theory over the instrumentalist social theory of duty.[200]

---

197. *See id.* at 1581–91 (citing R3 as subscribing to the Holmesian external view of tort law and explaining how that external view is inferior to Hart's internal view).

198. *Id.* at 1575; *see also id.* at 1591 ("Hart seemed to have been moved equally by a desire to give law more credit as a partly autonomous social practice than did certain skeptics, and to endow it with less majesty than might a certain kind of natural lawyer. Our goals are very much the same. We have sought here and elsewhere to make sense of tort law on its own terms, rather than to reduce it to other terms that some have supposed to be more 'real' or fundamental, or to fall back on facile claims that tort law's complexities render it incoherent.").

199. *Id.* at 1575 ("Hart's approach points toward the sort of evidence to which one might appeal . . . to support the claim that, in fact, a given body of law is a body of genuine duties, not liability rules.").

200. *Id.* ("[O]nce one concedes, as we believe one must concede, that Hart's picture of legal duties as genuine duties is no less available than Holmes's picture of legal duties as liability rules, the question of how to make sense of tort law ceases to be theoretical or philosophical (as Holmes's analysis seems to suppose), and instead becomes interpretive—how best to characterize tort law as it is actually practiced and understood by participants and observers. With this question in mind, we think there is an overwhelming prima facie case in favor of a duty-accepting conception of tort.").

Directly responding to G&Z's doctrinal arguments,[201] Jonathan Cardi[202] argues the duty-skeptical thesis that it is impossible to discern or apply foreseeability categorically.[203] Foreseeability is a fact-intensive inquiry, the objective certainty of which is doubtful.[204] When courts rule on questions of foreseeability in duty determinations, they disregard the limits of their institutional competencies, deny jurors the dignity of voicing any different views, and deprive parties of the right to have their facts found by a group of peers rather than one stranger in robes.[205] It is therefore most equitable to commit

201. Cardi & Green, *supra* note 2, at 672 ("We wish to join the rich discussion already begun by John Goldberg and Benjamin Zipursky."). Notably, Cardi's co-author for *Duty Wars*—the most comprehensive article of Cardi's responses to G&Z's critique of R3—was Professor Michael Green, who was one of the R3 Reporters for the period during which the relevant drafts of the duty provision were developed. *Id.* at 672 n.5 ("One of us (Green) is an interested party in the Third Restatement, having served as a co-reporter for the now-titled *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* since 2000. The duty provisions under discussion were originally drafted by Gary Schwartz, who was the original and sole reporter for this portion of the Third Restatement until he was joined by Green in 2000. Since Schwartz's untimely death on July 25, 2001, Green has carried forward Schwartz's drafting of the duty provisions in this Restatement, along with now-President Bill Powers, who joined as a co-reporter in 2001.").

202. Cardi attended the R3 drafting debates too, although, like Cardozo, he was there as a non-participating observer. *Discussion of Restatement of the Law Third, Torts: Liability for Physical Harm*, 33 A.L.I. PROC. 1, 40 (2005). Notably, the official R3 comment on the role of foreseeability for its duty provision expressly relies on an article by Cardi. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. j (AM. L. INST. 2010) (citing W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 801 (2005)).

203. *See* W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 972–83 (2005) (discussing this point thoroughly); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. j; Cardi & Green, *supra* note 2, at 722 ("[F]oreseeability is inherently unamenable to categorical decisionmaking, and that foreseeability is not in fact decided categorically by courts."). *But see id.* ("G&Z have responded that the foreseeability considered by courts in the context of duty is categorical, whereas the foreseeability employed in proximate cause is specific to the particular plaintiff." (citing G&Z, *Place of Duty*, *supra* note 37, at 727–28)).

204. Cardi & Green, *supra* note 2, at 722 ("[F]oreseeability is inherently unamenable to categorical decisionmaking, and that foreseeability is not in fact decided categorically by courts. Rather, foreseeability is a particularly fact-dependent determination, not properly given the broad effect of precedent."). *But see id.* ("G&Z have responded that the foreseeability considered by courts in the context of duty is categorical, whereas the foreseeability employed in proximate cause is specific to the particular plaintiff." (citing G&Z, *Place of Duty*, *supra* note 37, at 727–28)).

205. *Id.* at 722–23. Even Cardozo acknowledged that foreseeability may sometimes be a question for the jury, although he located that question under duty and decided the question in

unprincipled foreseeability determinations to the jury's analysis of breach or scope of liability.[206] As a result, even where R3 must tolerate the unpredictability of inquiries into foreseeability, it diffuses the arbitrariness of that determination by distributing that power across a group of reasonable factfinders.[207]

Furthermore, Cardi continues, R3's allowance for discretionary policy exceptions to duty is commonplace among jurisdictions—indeed, it is not unlike G&Z's own limited toleration of policy exceptions, which likewise must be explicit and categorical.[208] This aspect of R3 is, however, very much unlike those multifactorial standards of untethered juror discretion employed by the Prosser-inspired courts of

Palsgraf as a matter of law on summary judgment. Cardi, *Hidden Legacy of* Palsgraf, *supra* note 76, at 1899 ("[A]lthough Cardozo held that plaintiff-foreseeability is a duty consideration, he also held that plaintiff-foreseeability is properly decided by the jury—unless, in modern parlance, reasonable minds could not differ on the matter. Thus, in dismissing Mrs. Palsgraf's claim, Cardozo held that no reasonable jury could find that Mrs. Palsgraf was a foreseeable plaintiff. This understanding of Cardozo's opinion is jarring because it contradicts the basic axiom that duty's existence is to be decided by the court." (citing Palsgraf v. Long Island R.R., 162 N.E. 99, 100–01 (N.Y. 1928))).

206. *See* Cardi, *Hidden Legacy of* Palsgraf, *supra* note 76, at 1890–98; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. j; *see also* Zipursky, *supra* note 9, at 1249–55 (explaining R3's overall handling of foreseeability); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 (foreseeability in scope of liability); *id.* § 3 (foreseeability in definition of breach).

207. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. a (contrasting the court's competence as to duty with that of the factfinder as to proximate causation); *see* Prosser, *supra* note 11, at 17–19; *id.* at 31 ("The sole function of a rule of limitation in these cases is to tell the court that it must not let the case go to the jury. Yet we are in a realm where reasonable men do not agree."); *cf.* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 8 cmt b. (explaining the rationales for deciding whether to assign certain tasks to courts or to juries).

208. Cardi & Green, *supra* note 2, at 703 ("[B]y presenting the standard duty of care as a strong default where the defendant's conduct created a risk, the Third Restatement joins G&Z in rejecting the California and nationwide trend toward applying the *Biakanja-Rowland*'s multifactorial duty analysis as a routine matter in negligence cases. . . . Rather than encouraging rampant instrumentalism—or even frequent, noninstrumental no-duty inquiries—section 7 limits no-duty rules where the defendant created a risk to the 'exceptional case.' It exhorts courts to make no-duty rulings on a categorical basis. Further, it instructs courts to articulate the policy or principle on which they are acting.").

California and elsewhere,[209] which foster a tendency toward *ad hoc* adjudication on account of their lacking the requirement under section 7(b) that their policy exceptions be both expressly articulated and categorically applicable.[210] Seeking to minimize opportunities for case-by-case judgments wherever they may be found—even with the fact-intensive and precedentially elusive question of foreseeability already deferred to the democratizing domain of the jury in its analyses of breach and scope of liability[211]—R3 constrains what little discretion remains with the judge by requiring that any determination of policy-based duty exceptions be categorical and expressly stated.[212]

Finally, Cardi rejects G&Z's claim that R3's duty provision contravenes prevailing common law.[213] Writing in 2011, Cardi observed that of those jurisdictions where foreseeability may influence duty determinations, almost one third nonetheless expressly commit the question of foreseeability to the jury,[214]

209. *Id.* at 674 ("Thus, [Prosser's] factor approach to determining duty was born, one to give substance to the 'policy' determination that Prosser had famously stated—and to which the court cited—was what duty was all about. These factors were employed in *Biakanja* [*v. Irving*, 320 P.2d 16 (Cal. 1958)], to expand liability by imposing a duty where one had not previously existed. The factors' significance was destined to expand, however, and they provided a legacy for future duty law in California.").

210. *Id.* at 681–82, 702–04. *But see* G&Z, *Place of Duty*, *supra* note 37, at 718–20 (G&Z's contrary view on this).

211. *See supra* notes 204–207 and accompanying text.

212. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. i ("When no such categorical considerations apply and reasonable minds could differ about the competing risks and burdens or the foreseeability of the risks in a specific case, however, courts should not use duty and no-duty determinations to substitute their evaluation for that of the factfinder."); Zipursky, *supra* note 9, at 1252 ("Comment i states that courts should reserve 'no negligence as a matter of law' rulings for cases in which the facts proffered really are too weak to lead a reasonable mind to think that there was negligence. The Reporters quite accurately indicate that courts sometimes believe that a jury should not find that there is a breach because, as a categorical matter, they think it would be troubling if the system permitted tort law to dictate an obligation of care in certain contexts. In these cases, the Reporters say that it is preferable to describe these cases as 'no duty' rather than 'no negligence as a matter of law.'").

213. Cardi, *Hidden Legacy of* Palsgraf, *supra* note 76, at 1901–04.

214. *Id.* at 1901 ("Ambiguities aside, the case law may be conservatively summarized as follows. Of the forty-seven (of fifty-one) jurisdictions that either expressly place plaintiff-foreseeability in duty or are unclear on the matter, thirteen hold that plaintiff-foreseeability is to be decided by the jury."); *cf. supra* note 76 and accompanying text (explaining how Cardozo suggested that it may be best to have the jury assess foreseeability even if that assessment is understood as occurring under the heading of duty).

about the same portion as those expressly committing the issue to the court.[215] The holdings of more than one third of these jurisdictions, however, are unclear about whether, in the context of duty, the judge or jury will decide foreseeability.[216] Even if, therefore, R3 runs contrary to the trend of addressing foreseeability in duty, it concurs with about as many jurisdictions as it contradicts concerning the more important issue of whether such questions of foreseeability in the analysis of duty should go to the jury.[217]

IV. THE WAR WILL RAGE ON: REJECTING GOLDBERG AND ZIPURSKY'S JURISPRUDENTIAL ARGUMENT THAT H.L.A. HART WOULD FAVOR THEIR RELATIONAL THEORY

G&Z's critique of R3 and its social theory of duty is less than persuasive, but R3 has shortcomings of its own and is incapable of converting its committed adversaries to embrace the social theory. Without diving into the specifics of G&Z's doctrinal critiques of R3 and Cardi's responses thereto—about which there already exists considerable literature[218]—it is safe to say that both these critiques and these responses have some merit and are worth consideration. Rather than assessing those doctrinal arguments again here, I hope to contribute to the debate on a different front, by responding to G&Z's yet-

215. Cardi, *Hidden Legacy of* Palsgraf, *supra* note 76, at 1901 ("Fourteen jurisdictions reserve plaintiff-foreseeability for the court.").

216. *Id.* at 1904 ("In the remaining twenty jurisdictions, precedent is too inconclusive to justify a firm characterization.").

217. *Id.* at 1901, 1912. Furthermore, the evidence of R3's empirical outcomes remains scant. For detailed discussions of empirical outcomes for jurisdictions following rules resembling R3's, see, for example, Little, *supra* note 3, at 84–107 (discussing the empirical success of a rule like R3's in Wisconsin) and Louis S. Sloven, *Who Could Have Seen This Coming? The Impact of Delegating Foreseeability Analysis to the Finder of Fact in Iowa Negligence Actions*, 63 DRAKE L. REV. 667 (2015) (discussing the empirical success of a rule like R3's in Iowa).

218. *See, e.g.*, Alani Golanski, *A New Look at Duty in Tort Law: Rehabilitating Foreseeability and Related Themes*, 75 ALB. L. REV. 227, 228 (2012); Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1 (2008). Indeed, the duty theory disputes underlying the debate between G&Z and Cardi was the topic of a conference at Vanderbilt and an associated volume of the Vanderbilt Law Review. *See* Goldberg, *supra* note 3, at 639–40 (introducing the volume and noting its relation to the conference).

unscrutinized jurisprudential argument that Hart's internal view of law uniquely favors their relational theory of duty.[219]

While it is true that Hart's internal view augments the terrain of the battle between the relational and social theories of duty,[220] that internal view is no more compatible with the former theory than the latter.[221] As a general matter, G&Z overlook differences between Hart's internal view and their own.[222] G&Z's internal view of law is grounded in a general parallelism between law and morality—specifically, in the context of negligence, between one's legal duties and the moral obligations one owes to persons foreseeably harmed by one's unreasonable conduct—according to which law tracks morality absent an exception.[223] Thus, G&Z's relational theory takes an internal view of law insofar as a quasi-moral sense of obligation

219. *See supra* notes 194–200 and accompanying text.

220. *Cf.* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1581 ("Hart's jurisprudential work helps to establish that there is a place for a meaningful notion of duty qua obligation in the law of torts."); *id.* at 1575 ("Hart's jurisprudential argument . . . creates philosophical space for a non-Holmesian, duty-accepting account of tort law.").

221. *See infra* notes 230–264 and accompanying text.

222. *See infra* notes 230–245 and accompanying text.

223. G&Z, *Moral of* Macpherson, *supra* note 31, at 1826 ("[B]oth the conceptual structure and, to a certain extent, the content of the judgments about duty that are embedded in negligence law, reflect ordinary moral judgments about duties owed to others."); G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1587–88 ("There are a variety of jurisprudential reasons for analyzing legal duties as analogous to moral duties, without seeing legal duties as simply a set of applied moral duties. And there are a variety of reasons, institutional and otherwise, why the content of these kinds of duties—moral and legal—will often differ. Yet to appreciate this gap is not to deny that it is often the case that the law of tort contains moral concepts that judges are required to deploy sensitively in articulating the content of the legal obligations within tort law."); *see also* Cardi & Green, *supra* note 2, at 695 ("G&Z are clearly frustrated that the Third Restatement does not explicitly embrace their claims that 'duty as obligation' is central to negligence law and that duty doctrine reflects the 'twists and turns of the duties that are accepted within everyday morality. . . .'" (citing G&Z, *Moral of* Macpherson, *supra* note 31, at 1832)). *But see* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1586 ("Nevertheless . . . there will be times at which it is appropriate for legislatures and judges and jurors to decline to elevate certain moral norms to legal norms. Similarly, there are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.").

motivates their actor internally to act in conformity with her legal duties.[224]

By contrast, although Hart's internal view resembles G&Z's by taking legal duties seriously as internal obligations rather than external commands,[225] Hart emphatically rejects the idea that those legal obligations are based on moral ones,[226] asserting not just that morality is not a necessary condition of legal validity, but also that mere immorality is not on its own a sufficient basis for legal punishment absent a practical reason for doing so.[227] Instead, Hart's internal view requires only that

224. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1591 ("One can share, as we do, Holmes's sense that, notwithstanding its obvious connections to moral norms, tort law really is a distinctive enterprise. One can also share, as we do, his belief that tort law is 'created' rather than found in nature, and that its content has changed and will continue to change along with changes in the economic, intellectual, political, and social environment in which tort operates. And yet none of this entails that tort law is a law of liability rules, or that it is whatever judges say it is, or that it is what the occasion demands. The falsity of these sorts of supposed entailments was exactly what Hart set out to establish at a general or jurisprudential level. Thus, we have fastened on his response to Holmes's theory of law as a way of articulating our own responses to Holmesian accounts of tort law. Tort law is not a law of liability rules, nor is it an exercise in social engineering. It is a law of genuine duties of conduct. In this respect, we are fully on board with Hart as against Holmes."); *see also supra* notes 195, 220–223 and accompanying text.

225. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1591 ("Thus, we have fastened on his response to Holmes's theory of law as a way of articulating our own responses to Holmesian accounts of tort law. Tort law is not a law of liability rules. . . . It is a law of genuine duties of conduct. In this respect, we are fully on board with Hart as against Holmes.").

226. *See supra* notes 141 and accompanying text (Hart's positivism); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 604 (1957); *see also supra* note 52 and accompanying text (positivism more generally). This is not to say that G&Z do not hold themselves to be positivists, although they openly embrace a greater role for morality in their understanding of positivism than do other theorists. *See, e.g.*, G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1587–88 ("There are a variety of jurisprudential reasons for analyzing legal duties as analogous to moral duties, without seeing legal duties as simply a set of applied moral duties. And there are a variety of reasons, institutional and otherwise, why the content of these kinds of duties—moral and legal—will often differ. Yet to appreciate this gap is not to deny that it is often the case that the law of tort contains moral concepts that judges are required to deploy sensitively in articulating the content of the legal obligations within tort law."); *see also supra* note 51 (acknowledging G&Z's exceptionally morality-centered approach to legal positivism).

227. *See* Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 14–21 (1999) (discussing historical punishment on the basis of morality); *id.* at 14 ("[I]t is argued that regardless of any instrumental values served, the enforcement of

officials and subjects use and accept the rules that apply to them—secondary rules like the rule of recognition, for officials; and primary rules guiding conduct, for subjects.[228] Still, while Hart's actor accepts rules as valid and so obligation-imposing in the sense of motivating the actor internally, legal duties under a Hartian jurisprudence are independent of moral obligations and thus need not be concerned with quasi-moral questions of blameworthiness or plaintiff foreseeability.[229]

G&Z do not adequately appreciate this subtlety. Even when making a deliberate effort to acknowledge Hart's positivism, they mistakenly assert that he thinks of legal norms as "morally tinged."[230] They rightly see a similarity between their theory

morality is a good in and of itself. As demonstrated by Professor Hart over thirty years ago, however, none of these arguments sufficiently justify punishing an individual for immorality alone.").

228. *See supra* notes 144–148.

229. *See supra* notes 141–142 and accompanying text; HART, THE CONCEPT OF LAW, *supra* note 60, at 209 (defining as law "all rules which are valid by the formal tests of a system of primary and secondary rules, even though some of them offend against a society's own morality or against what we may hold to be an enlightened or true morality").

230. *See, e.g.*, G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1581 ("This is because Hart helps us to see that there is no reason to equate being careful, hard-headed, or realistic about tort law with an effort to denude it of morally tinged, yet ultimately distinctively legal, concepts such as duty."); *id.* at 1591 (noting tort law's "obvious connections to moral norms" but also recognizing that "tort law really is a distinctive enterprise," adding that this perspective is "exactly what Hart set out to establish at a general or jurisprudential level"); *see also id.* at 1578 ("But Holmes's very un-Hartian instinct was to achieve this goal by stripping away from legal concepts any moral tincture, including any attribution to them of normativity or ought-ness."). *But see id.* at 1590 ("[I]t is in part the democracy-enshrining aspect of his entire theory that the status of law does not depend on the issuance of an imperative within a power relation any more than it depends on a connection with human nature or God's will."). Others have likewise been inclined to interpret Hart's internal theory as a suggestive of morality adorned in legal robes. *See, e.g.*, Perry, *supra* note 59. This is in part because Hart occasionally acknowledges the historical role moral discourse has played in shaping law, even if he only does so for the purpose of delineating the narrowness of that role. *See, e.g.*, HART, THE CONCEPT OF LAW, *supra* note 60, at 188 ("Sometimes what is asserted is a kind of connection which few if any have ever denied; but its indisputable existence may be wrongly accepted as a sign of some more doubtful connection, or even mistaken for it. Thus, it cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted. But it is possible to take this truth illicitly, as a warrant for a different proposition: namely that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey.").

and Hart's in their respective internal views of law,[231] but erroneously infer therefrom that Hart would probably have preferred a system of relational duties modeled on moral obligations with a view to foreseeability.[232]

However, Hart never speaks of tort duty doctrine or indicates any affinity toward limiting duty to foreseeable plaintiffs. Notably, although G&Z highlight similarities between Hart's internal view and their own internal view in the context of their relational theory of duty, they fail to persuasively point out ways in which the social theory is incompatible with the internal view. I argue that Hart's internal view is not incompatible with the social theory—indeed, the jurisprudential space opened up by Hart's internal view of law is no less hospitable to the social theory than to the relational one.[233]

At its core, Hart's internal view of law requires only that a good number of officials and subjects use and accept the laws applicable to them, which presupposes only that they recognize those laws as valid, normatively rich rules of conduct.[234] Nothing about the social theory renders the widespread adoption of the internal view less probable under that theory

231. *See supra* note 225 and accompanying text.

232. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1564 ("Hart's celebrated critique of Holmes's jurisprudential deconstruction of legal duties—particularly Hart's account of the 'internal aspect' of rules—provides a duty-accepting jurisprudence that is more satisfactory than its duty-skeptical counterparts, yet still sensitive to skeptics' legitimate worries about naïve accounts of legal duties. In short, Hart's critique of Holmes and his resuscitation of the notion of legal obligation undercuts much of the impetus for duty skepticism in tort, and conversely provides a basis for duty-accepting, guidance-rule theories of tort."); *see also* Perry, *supra* note 59, at 1180–81 ("We must be careful not to be misled by this formulation [of an 'internal' view of law], since, as Shapiro is careful to note, Hart did not think that adopting the internal point of view entails that one accepts the moral legitimacy of law; Hart was quite explicit in his view that one can adopt the internal point of view for many different reasons, including reasons of self-interest or a mere wish to conform." (citing Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in THE PATH OF LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 197, 200 (Steven J. Burton ed., 2000) Hart was quite explicit in his view that one can adopt the internal point of view for many different reasons, including reasons of self-interest or a mere wish to conform (citing HART, THE CONCEPT OF LAW, *supra* note 60, at 203))).

233. *See supra* notes 226–229 and accompanying text.

234. *See supra* notes 144–146 and accompanying text.

than under the relational one: Officials and subjects of a social-theory system, like their relational-theory counterparts, are perfectly capable of using and accepting the rules applicable to them.[235] While it may be the case that social duty theorists have traditionally tended toward the Holmesian external view,[236] that association is mere historical accident—some social duty theorists show no concern whatsoever for the stakes in the internal-external view debate.[237]

It is true that the internal springs motivating the actors adopting Hart's internal view of law partake of the same model as do those motivating the actors of G&Z's relational theory, insofar as relational duty rules are seen as obligation-imposing and so galvanizing, rather than merely coercive and so compelling.[238] However, Hart's actor experiences those rules as obligation-imposing because she accepts them as valid and so deserving of obedience,[239] whereas the defendant under G&Z's relational theory experiences those rules as obligation-imposing for a different reason: because she believes their substance accurately reflects moral norms regarding fault and subjective blameworthiness for unintentionally caused harm.[240] Hart's internal view takes him so far as to understand duties as obligation-imposing, but does not take him the further steps necessary to suggest that it is likely Hart would embrace the relational theory's push to exclude from duty unforeseeable plaintiffs who were injured by conduct that, while unreasonably dangerous to some person(s), did not foreseeably pose any danger to the plaintiff at hand. Indeed, far from clearly

235. *Id.*

236. *E.g.*, Prosser, *supra* note 11, at 12–16.

237. *See, e.g.*, Palsgraf v. Long Island R.R., 162 N.E. 99, 102 et. seq. (N.Y. 1928) (Andrews, J., dissenting).

238. *See* G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1572–75.

239. Perry, *supra* note 59, at 1180–81 ("Hart did not think that adopting the internal point of view entails that one accepts the moral legitimacy of law; Hart was quite explicit in his view that one can adopt the internal point of view for many different reasons, including reasons of self-interest or a mere wish to conform." (citing HART, THE CONCEPT OF LAW, *supra* note 60, at 203)).

240. *See supra* notes 223–224 and accompanying text.

supporting the relational theory, Hart's internal view of law—insofar as it offers a jurisprudence for understanding social duties as obligation-imposing, rather than just coercively compelling—conduces to the social theory's potential popularity among those who would otherwise be persuaded by G&Z to prefer the relational theory on account of its supposedly more profound normativity relative to the merely coercive duties traditionally associated with the social theory.[241]

As for G&Z's additional argument that Hart's view is favorable to their relational theory not only because they share with him an internal view,[242] but also because Hart sought to understand legal concepts like duty in an "ordinary" sense,[243] that argument simply takes for granted that "ordinary" people think of legal duties as "morally tinged" obligations running from negligent actors to foreseeably at-risk persons.[244] That assumption is dubious. Instead, as Cardi notes, it may be the case that ordinary people think about duty in an act-centered, not relational, way, and so might find the relational theory's foreseeability requirement off-putting, preferring instead the social theory's broader concern for negligent conduct generally.[245] If so, Hart's tendency toward "interpreting" rather

241. *See supra* note 238 and accompanying text.

242. *See supra* notes 194–200, 223–224, 231–232 and accompanying text.

243. G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1575; *see id.* at 1591 ("Hart seemed to have been moved equally by a desire to give law more credit as a partly autonomous social practice than did certain skeptics, and to endow it with less majesty than might a certain kind of natural lawyer. Our goals are very much the same. We have sought here and elsewhere to make sense of tort law on its own terms, rather than to reduce it to other terms that some have supposed to be more 'real' or fundamental, or to fall back on facile claims that tort law's complexities render it incoherent."); *supra* notes 198–199 and accompanying text.

244. *See supra* notes 198–200 and accompanying text.

245. Cardi & Green, *supra* note 2, at 718 ("G&Z's relational duty theory is based on what is either a strictly moral or empirical claim about how people actually think about their day-to-day obligations. G&Z provide no social-scientific basis for the latter claim, and we find none to the contrary. Nevertheless, we are unconvinced by their premise. In our view, people think about their daily actions in a way that is act centered, not relational."); *see also, e.g.*, Palsgraf v. Long Island R.R., 162 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting) ("The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. Such is the language of the street. Such the language of the courts when speaking of contributory negligence. Such again and again their language in speaking of the duty of some defendant. . . .").

than "philosophizing" legal concepts[246] would presumably have led him to embrace the social theory of duty. More to the point, however, absent evidence of how "ordinary" people conceive of legal duties, G&Z's conclusion that Hart's non-philosophical interpretive method probably would have caused him to favor the relational theory of duty is unsupported.[247]

Furthermore, consideration of other features of Hart's understanding of the relations among law, morality, and instrumentalism—features not addressed by G&Z—likewise prove inconclusive as to whether Hart would prefer one or another duty theory. For example, Hart's lukewarm stance on the functionalist treatment of law as a means of policy—analyzing law teleologically with a view to the needs of the society by and for which it was posited,[248] but nevertheless resisting the thoroughly instrumentalist, concept-skeptical urge to disregard legal rules' existing meanings and reduce them to mere vehicles of policy[249]—offers little indication as to his probable preference between the relational and social theories of duty.

Similarly, while nothing Hart says suggests a particular affinity toward or repulsion from the general rules of either theory, it is unclear whether R3's heavy reliance on judicially-declared exceptions to its general rule—declarations that function as a sort of adjudicative legislation, insofar as they have precedential effect and must be expressly stated and categorically applicable—is consistent with the parameters of Hart's rules of change and of adjudication.[250] Hart explains that his "secondary rules of change and adjudication . . . provide for

246. *See supra* notes 156–157 and accompanying text.

247. Cardi & Green, *supra* note 2, at 718.

248. HART, THE CONCEPT OF LAW, *supra* note 60, at 188–96.

249. Michael S. Moore, *Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism*, 69 CORNELL L. REV. 988, 1007 (1984) ("[In Hart's view,] a good theory of interpretation should blend ordinary meaning, purpose, and moral knowledge. Rather, the instrumentalist literature often ended in a kind of functionalism that ignored *any* preexisting meaning (ordinary or otherwise) of legal standards, and instead *assigned* such standards a meaning in light of the desirable consequences attainable by that assignment.").

250. *See* Perry, *supra* note 59, at 1187–88.

legislature and courts," and his discussion of these rules sometimes hints at an institutional separateness between them.[251] If, indeed, the powers provided under those rules are institutionally exclusive—such that those empowered to adjudicate are precluded when doing so from simultaneously legislating pursuant to the rules of change—this would suggest that Hart may be disinclined toward the judicial declaration of policy-based exceptions permitted under R3.

However, although Hart recognizes the overarching trend toward the institutional separation of the powers of adjudication and of change as crucial to civilization's progress,[252] he never expressly proscribes the occasional contemporaneous exercise of those powers. Indeed, given that judicial precedent can be recognized as a valid source of law under a Hartian legal system, Hart appears to authorize judges to legislate from the bench to the extent that their new precedential rulings may alter subjects' normative situations.[253]

Additionally, even assuming Hart unequivocally frowned upon adjudicative legislation such as the judicial declaration of policy-based exceptions to the general duty rule, that still would not clearly reveal on which side of the duty war Hart would have fought. Not all social duty theorists assign the power to declare policy exceptions to the court, instead endorsing a more fact-sensitive role for policy in the jury's assessment of proximate causation.[254] Furthermore, while R3 advances a social theory that does permit judicially-declared policy exceptions, relational duty theorists like G&Z advocate a similar judicial function of declaring categorical duty

251. HART, THE CONCEPT OF LAW, *supra* note 60, at 214.

252. *Id.* at 41–42 ("[T]he introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel.").

253. Perry, *supra* note 59, at 1186 ("Since precedent is a source of law in this legal system it follows that courts have certain lawmaking powers, so it is at least conceivable that the validity of the legislative rule could be traced to a lawmaking act on the part of the courts. But this does not help us very much, theoretically speaking, since the source of the courts' own lawmaking powers is presumably itself a rule of change . . . .").

254. *See supra* notes 138–139 and accompanying text.

exceptions based on policy.[255] Moreover, even absent adjudicative legislation of categorical policy exceptions to duty, Hart provides a place for the consideration of policy in the judicial interpretation of the penumbral regions of established law,[256] although he circumscribes that discretion within certain unavoidable limits of the meaning of the primary rules to be applied.[257]

Like the doctrinal arguments to which Cardi responded,[258] G&Z's jurisprudential argument[259] is not persuasive. Hart's internal view combines elements of both the relational and the social theories of duty and is compatible with the duty rules of either[260]: Hart never mentions limiting duty to foreseeability or moral blameworthiness—the absence of which limitation is the defining characteristic of social theories—although that may be true simply because Hart never addresses the issue in detail.[261] Nevertheless, Hart's ideal actor does feel the pull of law's obligation internally as do relational duty theorists, although for Hart that internal motivation results from an emphasis on obedience to recognized authority and on societal functioning, whereas under the relational theory duties obligate subjects internally due to those duties' moral correctness.[262] Furthermore, Hart's view is consistent with the judicial-

255. *See supra* notes 208–212 and accompanying text.

256. Hart, *Separation of Law and Morals*, *supra* note 88, at 612 (critiquing attempts at legally formal applications of law, emphasizing instead the "the rightness of deciding cases by reference to social purposes" in "penumbral" cases where formal logic does not resolve the question); G&Z, *Seeing Tort Law from the Internal Point of View*, *supra* note 13, at 1574 ("[I]n the domain where obligations are imposed by rules, the rules 'are believed to be necessary to the maintenance of social life or some highly prized feature of it.'" (quoting HART, THE CONCEPT OF LAW, *supra* note 60, at 87)).

257. *See* Moore, *supra* note 249, at 1007 ("[In Hart's view, a] good theory of interpretation should blend ordinary meaning, purpose, and moral knowledge. Rather, the instrumentalist literature often ended in a kind of functionalism that ignored any preexisting meaning (ordinary or otherwise) of legal standards, and instead assigned such standards a meaning in light of the desirable consequences attainable by that assignment.").

258. *See supra* notes 185–193, 201–217 and accompanying text.

259. *See supra* notes 194–200 and accompanying text.

260. *See supra* notes 233–257 and accompanying text.

261. *See supra* note 233 and accompanying text.

262. *See supra* notes 222–240 and accompanying text.

declaration of policy-based exceptions to duty, thereby avoiding a possible source of conflict with either theory, but most notably with social theories—which are the ones most closely associated with instrumentalism—such as that of R3.[263] Relatedly, Hart also demonstrates an attraction toward the instrumentalism characteristic of many social theories, while at the same time rejecting radical concept-skepticism's thorough reduction of duty to a mere means of policy.[264]

Thus, G&Z's jurisprudential critique of R3 is misplaced: R3's rules and underlying social duty theory are consistent with the normatively rich positivism of Hart's internal view of law.[265]

CONCLUSION

By redrafting duty, R3 reanimated a debate far older and more complex than that between the *Palsgraf* opinions alone. Indeed, R3 sparked the most recent stage in the evolution of duty—over the trajectory of which a war has rumbled since the earliest days not just of the American Law Institute, but of our common law more generally.[266] In that war, R3 took the side of the social duty theory, reversing course from earlier editions.[267]

Excluding considerations of foreseeability from the analysis of duty,[268] R3 has little hope of converting committed relational duty theorists over to the social duty theory, although the advent of Hart's internal view makes the social theory philosophically more welcoming to soul-searching relational duty theorists and so increases the chance of such

263. *See supra* notes 251–257 and accompanying text.

264. *See supra* notes 248–249 and accompanying text.

265. *See supra* Part IV.

266. *See supra* notes 83–88 and accompanying text.

267. *Compare* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 (AM. L. INST. 2010), *with* RESTATEMENT (FIRST) OF TORTS § 281 (AM. L. INST. 1939), *and* RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1979).

268. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(a); *id.* cmt. j ("Despite frequent use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.").

conversions.[269] Still, G&Z's doctrinal and jurisprudential critiques of R3 are not persuasive: The points that can be made against R3 do not clearly prevail over those in its favor, although neither side suffers from a shortage of arguments worth voicing.[270] To the contrary, the duty war rages on, and it shows no sign of stopping.

269. *See supra* note 241 and accompanying text.
270. *See supra* notes 185–193, 201–217 and accompanying text.