Foreseeability as Re-Cognition

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Abstract: In these pages, I seek to advance two arguments, a negative and a positive. The negative one is that leading accounts of foreseeability in duty-of-care-analysis fail to make sense of the requirement in question. And affirmatively, I shall argue that the foreseeability requirement reflects a concern for the distinctively social form of interaction between risk-creator and risk-taker, namely, that the former could form a respectful interaction with the latter. This reconstruction of the foreseeability requirement may express the view that its moral center may be a thin form of recognition between members of a liberal society.

Keywords: Negligence, Liability, Private Law

I. Introduction

Is the requirement of plaintiff foreseeability in negligence law pointless? The answer is “yes,” I shall argue, if one accepts the most familiar accounts of this requirement. The reason is that all such accounts, including even those developed by avid legal formalists, provide functional assessments of the value of the requirement in question. As I shall argue, however, this requirement may not be adequately explained in functional terms. Instead, the plaintiff foreseeability requirement can be rendered intelligible insofar as it is viewed non-functionally, in which case the requirement is in itself a form of respectful recognition of others. Or so I shall argue.

By way of introduction, a duty of care in negligence law may depend for its existence on several considerations.1 Key among them is that the defendant could

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1 The three-stage articulation of the duty analysis that characterizes contemporary English common law is the most elaborate among common law jurisdictions. See Caparo Industries Plc v. Dickman [1990] 2 A.C. 605 at 617. The argument I shall develop in these pages is not limited to any particular common law jurisdiction. The centerpiece of my argument—the analysis of the foreseeability requirement—applies to many common law jurisdictions, including those (e.g., most American states) which do not follow the three-part test articulated in Caparo as well as those (such as Canada in Cooper v. Hobart (2001) 206 D.L.R. (4th) 193) that develop an approach that lies somewhere in between Caparo and its predecessor approach to duty analysis, Anns v. Merton LBC [1978] A.C. 728. Indeed, the divergent articulations of the duty element among common law
reasonably foresee that her conduct risks harm (of a certain kind) to the plaintiff. Against the backdrop of courts’ self-conscious reluctance to elaborate the necessary content of these considerations in detail, it has been argued time and again that duty analysis is conclusory. These charges, it is important to note, are for the most part leveled at considerations other than foreseeability, such as the existence of “special relation” or “proximity” as well as other considerations of principle and policy.

By contrast, perhaps because it gives rise to an epistemic, rather than purely normative, inquiry, the requirement of foreseeability with respect to the plaintiff has not been challenged as powerfully and as radically as the other. In particular, two basic objections have been raised against this prong, none of which, I argue, poses a significant challenge to the doctrine of plaintiff foreseeability. First, there has been a serious onslaught of scholarship attacking the traditional view that foreseeability should inform the duty analysis (on which more below). This attack has even led the reporter of the latest Restatement of Torts to recommend the breach, rather than the duty, element as the proper place to tackle questions of foreseeability. The most dominant reason for this recommendation, however, has nothing specifically to do with the substantive law of negligence—it arises out of institutional concerns about the appropriate division of powers between the judge and the jury. To this extent, and unlike my argument in these pages, the debate is not about the morphology or the normativity of the requirement of plaintiff foreseeability. Rather, it concerns the doctrinal hook—duty or breach element—on which to hang the requirement in question. Accordingly, it does not, and cannot, challenge the requirement of plaintiff foreseeability itself, let alone its significance to the imposition of liability in negligence law.

The second challenge extends far beyond the institutional context within which the former challenge has been developed. It has been argued before that the requirement of plaintiff foreseeability can be notoriously vague. This charge is sound as far as it goes. However, it does not go far enough. To begin with, this form of suspicion about foreseeability is uninteresting; certainly, there exist any jurisdictions across the world notwithstanding, a requirement of foreseeability is widely (though not unanimously) recognized.

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3 As I explain more fully in note 14 below, the discussion focuses on the doctrine of plaintiff foreseeability only—that is, foreseeability with respect to the apparent zone of danger and, especially, to the apparent existence of persons (or their properties) within that zone. I do not discuss its doctrinal cousins, traditionally linked to the element of proximate cause, which are the requirements that the manner in which the injury occurred and the type of injury could have been reasonably foreseeable.


5 The argument I am about to develop in these pages focuses on the substantive common law of negligence and, for this reason, applies, mutatis mutandis, to the foreseeability requirement even when considered in connection with the “breach” element.

number of legal concepts that could become manipulable in the hands of a zealous court.\footnote{For example, determining whether the defendant has acted in conformity with the dictates of the \textit{reasonable} person or whether the injury is a \textit{proximate cause} of a negligent conduct are equally open-ended inquiries.}

Moreover, and more dramatically, I shall argue that this form of skepticism about the concept of foreseeability in duty analysis shows itself to be significantly shallow when compared to a far more radical, though much less familiar, form of skepticism about foreseeability—that this requirement may be redundant because it has no point. Whereas the former form takes stock of the \textit{limits} of foreseeability, the latter suspects the very necessity of applying the test of plaintiff foreseeability to determine whether the defendant owed a duty of due care to the plaintiff. Indeed, the trouble with foreseeability in negligence law does not arise merely from its indeterminacy, but rather from the suspicion that it lacks an adequate rationale to begin with. As I shall seek to show, the most prevailing theoretical accounts of this requirement fail adequately to explain its role in duty analysis.

More specifically, the first stage of the argument seeks to show that the existing rationales of the doctrine of plaintiff foreseeability fail to render the connection between the relational character of the duty of care and the doctrine in question sufficiently precise. Thus, celebrated decisions such as \textit{Heaven v. Pender} (1883) 11 Q.B.D. 503, \textit{MacPherson v. Buick} 111 N.E. 1050 (N.Y. 1916), \textit{Palsgraf v. Long Island Railroad} 162 N.E. 99 (N.Y. 1928), and \textit{Donoghue v. Stevenson} [1932] A.C. 562 indicate in different ways that there are certain persons so located that they ought to be in the range of apprehension of an actor engaging in a risky conduct. A duty of due care is owed toward these persons only, which is to say the duty is a relational one. At first glance, it might seem natural to suppose that the relational character of the duty also entails that the foreseeability of these persons (either \textit{qua} specified individuals or \textit{qua} members of one class of plaintiffs) is not only highly relevant, but rather \textit{necessary} to determine whether one is among those to whom one ought to be vigilant. As just mentioned, however, my ambition is to show that the most familiar theoretical accounts of the doctrine of plaintiff foreseeability fail to defend such a relationship of entailment. Thus, the critique I shall develop below seeks to make the novel claim of identifying a blind spot, as it were, in the theoretical literature concerning the role of plaintiff foreseeability in negligence law.

In the second stage of the argument, I shall reconstruct an alternative account of the role of foreseeability, emphasizing the special form of connection that exists between two persons when foreseeability of one by the other obtains. On the proposed account, the foreseeability requirement expresses both instrumental and non-instrumental value: First, discharging reasonable care cannot count as an act of respectful recognition of the cared-for unless foreseeability of \textit{this} cared-for obtains; second, foreseeability of the cared-for may in \textit{itself} be respectful, since it can transform the risk-creator’s deliberation toward action into a cognitive process of accommodating the vulnerability of the cared-for in her decision to proceed vigilantly.
II. Note on Method and Ambition

To forestall misunderstandings, one preliminary observation concerning the nature of the argument is in order before I start. My ambition in these pages is to develop an adequate explanation of the doctrine of plaintiff foreseeability as it figures in the common law of negligence. The challenge is to answer the question of what values and ideas, if any, are immanent in this doctrine. I therefore focus on the elaboration of “what is” rather than on “what should be.” Accordingly, the intended contribution of my argument is interpretive, rather than prescriptive. This is not to say that developing our understanding of the doctrine of plaintiff foreseeability is entirely unrelated to making judgments about the doctrine and the question of whether courts should adhere to it or, perhaps, reform it, including even to the point of abandoning it altogether. Of course, understanding the ideas underlying the doctrine of plaintiff foreseeability may lead to changes in that doctrine, as lawmakers and judges are expected to adjust their thinking about the doctrine in the light of how it should be understood. But their choice (whatever it is) depends on additional arguments, and especially on normative considerations of the value of the doctrine, of the duty of care within which it figures, of the law of negligence, of tort law as a whole, and so on. No such judgment, that is, can be fixed simply by an adequate understanding of the doctrine of plaintiff foreseeability. Rather, an adequate understanding of the doctrine in question is a prerequisite to any attempt to make a reasoned, evaluative judgment. Thus, whereas a successful development of this prerequisite cannot settle the question of the desirability of the doctrine, a failure to do so demands that we must abandon the doctrine, tout court. As I have noted above, however simple the requirement of plaintiff foreseeability might appear at first glance, even the leading theories of this doctrine have so far failed to help us understand it.

My ambition in the pages that follow, therefore, is: first, to argue that current leading theories of the doctrine of plaintiff foreseeability fail to produce the needed understanding; and second, to provide the requisite theory, one which allows us to at least begin to make sense of this doctrine.

III. Setting the Scene

I shall begin by explaining why foreseeability may be a prerequisite for a duty of care. By “foreseeability” I mean to refer only to foreseeability with respect to the apparent existence of persons (or their properties) within the apparent zone of

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8 The interpretive or reconstructive mode of analysis I refer to in the main text above (“as it figures in the common law of negligence”) should not be confused with descriptive or mechanical interpretation of legal content. Instead, I seek to take several canonical legal decisions and principles at face value and ask what ideas and values can possibly make sense of them.

9 I shall leave it to my future work to complete the inquiry by elaborating the normative considerations that could (arguably) support a legal order featuring the doctrine. As I explain below, the evaluation of this doctrine cannot be satisfactorily separated from related tort doctrines and categories (such as the ones pertaining to pure economic loss, negligent infliction of emotional distress, and the duty of care as a whole).
danger. As I explain below, there are good reasons not to bunch together the analysis of this kind of foreseeability with its doctrinal cousins, traditionally linked to the element of proximate or legal cause, which are the requirements that the manner in which the injury occurred and the type of injury could have been reasonably foreseeable. Moreover, for reasons that will become clear in due course, the argument self-consciously focuses on foreseeability in simple negligence cases resulting in physical injury only.

To set the scene, consider the impossibility of a duty purged of any requirement of foreseeability. In a recent article, Jonathan Cardi and Michael Green have sought to propose just that, advocating the imposition of a duty of care based on the "nature of the act itself—namely, an act that creates some risk of harm." Similarly, David Howarth has asserted that the tort of negligence need not be conditioned upon foreseeability, since "[d]efendants could have avoided liability completely [including for unforeseeable states of affair] by acting reasonably in the first place." But these propositions are hopelessly empty if there is no one person potentially falling within the ambit of this risk. Indeed, simply saying that one is driving at 40 MPH provides absolutely no indication about whether thus acting generates risk of some sort and of some (gross or trivial) measure to some other persons; nor can it provide us with any indication about whether thus acting is reasonable or not (however "reasonableness" is defined). An act can be characterized as "risky" and behavior as "reasonable" in virtue of the consequences (say, an accident) we may reasonably expect to flow from thus acting, not the other way around.

10 See below note 14.
11 While I do not deny the ex-post role of the duty element as a device for limiting liability (as, for instance, argued in Jane Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for deterrence," Law Quarterly Review 111 (1995): 301-45), the argument in the main text below insists that the duty is, first and foremost, a mandatory reason for action, operating ex-ante, that is, as a guide to conduct. See further the discussion in notes 51 & 67 below.
14 It should now become clear why foreseeability in connection with proximate cause—foreseeability with respect to the manner in which the injury occurred and the particular type of injury—is not on a par with the kind of foreseeability which stands at the center of my argument, namely, foreseeability with respect to the existence of the plaintiff (or plaintiff class) within the apparent zone of danger. Any inquiry concerning the former kinds of foreseeability presupposes that the latter obtains (which is just another way to say that any inquiry concerning the existence of proximate or legal cause presupposes the existence of a duty of care). Indeed, questions à-la The Wagon Mind, such as whether damage-by-fire to the claimants' wharf, as opposed to damage-by-fouling, was foreseeable, are unintelligible in the absence of foreseeability with respect to the apparent existence of the wharf within the zone of danger. Even less complicated questions à-la Re Polemís, concerning foreseeability of the broadly-conceived kind of damage, are meaningless without first presupposing the existence of foreseeability with respect to the existence of the person or property of the plaintiff within the zone of danger. For instance, inquiring whether the foreseeable type of harm was injury to the property, rather than to the person, of the plaintiff must proceed on the assumption that some interest—to physical or proprietary integrity—of the plaintiff was put in a foreseeable danger. Otherwise, the difference between the types of the injury is irrelevant. Against this backdrop, my
A way out of this embarrassment is to incorporate some facts about the world. In particular, these facts must concern the expected happenstance of other people nearby and their vulnerability to the activity in question. “Risk,” as Chief Justice Cardozo famously observed, “imports relation,”15 by which he meant that risk is by definition relational and, by implication, that a duty to moderate one’s risky activity can be intelligible only insofar as a sufficient measure of foreseeability with respect to potentially vulnerable others obtains.16

Against this backdrop, the most natural question that arises in connection to foreseeability’s relational character is that of foreseeability with respect to whom. At first glance, however, this question may not seem natural, but rather superficial, at best. For the foreseeability requirement in common law negligence singles out the would-be plaintiff (or the plaintiff class) as its object. Indeed, were the plaintiff (or plaintiff class) the only person standing within the zone of foreseeable danger, it would be odd to pose the question of “foreseeability to whom.” That said, it may well be the case that the foreseeable zone of danger be occupied by a person other than the would-be plaintiff (or plaintiff class). Moreover, it may well be the case—as case law actually confirms17—that while the risk-creator can reasonably foresee the presence of this other person within the zone of danger created by her risky act, no such foresight obtains with respect to the would-be plaintiff.

Accordingly, the move from the notion that foreseeability is necessarily relational to the conclusion that this requirement (of foreseeability) picks out the relation between a risk-creator and a would-be plaintiff is not analytically entailed. The question of foreseeability-to-whom can, therefore, give rise to at least another answer, which is to say foreseeability to someone other than the plaintiff (or plaintiff class).18 But in spite of this, the law (to repeat) single-mindedly focuses attempt to explore the freestanding idea that underlies the doctrine of plaintiff foreseeability can thus cast doubt on the notion that this doctrine reflects, with Hart and Honoré, a “technique” that courts conveniently deploy as an imperfect proxy for assessing foreseeability of harm (which is to say, foreseeability of the type of injury and the manner in which this injury was caused). H.L.A. Hart and A.M. Honoré, Causation in The Law, 2d ed. (Oxford: Clarendon Press, 1985), 271-3. Moreover, the hierarchy just mentioned between plaintiff foreseeability and foreseeability of harm fits well with the permissive attitude of courts toward foreseeability of the extent and type of the harm and of the manner of its infliction. On this last point, see Stewart v. West African Terminals Ltd. [1964] 2 Lloyd’s Rep. 371, 375 (Lord Denning M.R.). Plaintiff foreseeability, by contrast, is characteristically approached more stringently as the inquiry revolves around a yes/no type of question: whether or not the plaintiff is reasonably foreseeable.

By “sufficient measure” I mean to say that the facts about the world reasonably available to the risk-creator provide her with the amount of information necessary to discharge due care in the face of the foreseeable potential victims. For example, one who drives through a remote industrial area containing a number of chemical plants can be reasonably aware of the existence of adults nearby. On the basis of this input, the driver can proceed with due care, which is (for the sake of the argument) 40 MPH. Now suppose that two small children have sneaked into this area and that this event (again, for the sake of the argument) could not have been foreseen by reasonable drivers. The point that this hypothetical case seeks to emphasize is that driving at a speed of 40 MPH becomes too fast to accommodate the possibility of children suddenly and unexpectedly bursting onto the highway. For this reason, the necessity of foreseeability in duty analysis implies the necessity of a sufficient measure of foreseeability. I say more about this issue below.

See the next Section below.

The doctrinal expression of this alternative answer would be a requirement of foreseeability with regard to a person (the plaintiff or otherwise).
on foreseeability with respect to the plaintiff. It is far from obvious, as I shall argue presently, why this is so. Moreover, I shall seek to show that certain leading accounts of the foreseeability requirement in negligence law cannot make good on what may turn out to be a doctrinal puzzle. More specifically, it is not clear why plaintiff foreseeability is necessary, rather than merely sufficient, for the purpose of satisfying the foreseeability requirement in the duty analysis.

This puzzle is distinctively important and illuminating. It is important because the foreseeability requirement is, along with other considerations, a necessary element in the duty analysis; it becomes the single most important such element in the core case of negligence—that is, the commission of an act which generates a risk of physical injury (to the person or property) of another. And it is illuminating precisely because the foreseeability requirement has so far received little attention (except, recall, for generic accusations of indeterminacy), certainly immeasurably less than other elements of the duty analysis have received.

IV. Plaintiff Foreseeability: A Puzzling Doctrine?

The best place to begin is the celebrated case of Palsgraf. It is true that the case features an extraordinary factual situation that does not follow the normal circumstances of most negligence cases involving physical injury or property damage. Nevertheless, its exceptional character is a great asset precisely because it allows a laboratory-like examination of one feature—the defendant’s foresight with respect to the plaintiff—in isolation and therefore without the distorting effects characteristic of the ordinary negligence case. It can therefore provide illuminating insights with respect to the basic requirement of foreseeability in cases of physical injury simpliciter.

In Palsgraf, the defendant’s employee was acting carelessly by assisting a passenger to board a moving train. This careless act resulted in the dropping of an unmarked package of the passenger. The falling package, filled with fireworks, exploded, causing some scales to strike and injure the plaintiff who stood many feet away from the area of the interaction between the employee and the passenger. The innocent appearance of the package, the court observed, gave no notice that its dislodgement, let alone negligent dislodgement, could risk the person or property of anyone save those in its close vicinity.

Against the dissent’s broad characterization of duty as that which is owed to the “world at large,” the court (per Cardozo, C.J.) held that the railroad had no duty

19 Stephen Perry goes even further to argue that “[i]n ordinary misfeasance cases involving physical harm between strangers, reasonable foreseeability will generally be not just a necessary, but also a sufficient condition for the existence of a duty of care.” Stephen Perry, “The Role of Duty of Care in a Rights-Based Theory of Negligence Law,” in The Goals of Private Law, ed. A. Robertson and T.H. Wu (Oxford: Hart Publishing, 2009), 110.

20 See note 15.

21 Palsgraf, 101: “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.”

22 Ibid., 103.
of due care toward Mrs. Palsgraf with respect to this incident.23 And in the absence of a duty relative to Mrs. Palsgraf it must be true that, despite its failure to exercise reasonable care, the railroad incurs no duty to redress her injury (whatever it is).24 The debate between Justices Cardozo and Andrews features conflicting approaches to the place of foreseeability in the duty-of-care analysis. As I shall argue, contrary to its conventional depiction, this debate does not turn on whether foreseeability should figure in this analysis, tout court. Indeed, Andrews grants that “in an empty world negligence would not exist.”25 Rather, the debate concerns precisely the same question posed a moment ago, namely a question regarding the appropriate conception of foreseeability that is required for a duty to arise in physical injury cases. Whereas Cardozo insists on foreseeability with respect to the plaintiff (or plaintiff class), Andrews’s conception renders sufficient the existence of foreseeability to whomever is standing within the zone of danger:

Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not 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.26

Thus, the most charitably accurate way to articulate the challenge posed by Andrews to Cardozo’s insistence on foreseeability with respect to the plaintiff is not that foreseeability does not matter for the purpose of imposing a duty of care on the risk-creator—this mistaken characterization of Andrews’ view becomes a conventional wisdom.27 Instead, the challenge is that it is one thing to say that foresight is a prerequisite for a duty; quite another to refuse to extend this duty (to the boarding passenger) to other possible victims, including unforeseeable victims. Contemporary tort scholars often run afoul of this basic distinction.28 They tend to disagree over the question of whether foreseeability is or should be a necessary element of the duty analysis, but their disagreement is off the mark insofar as they

23 There are (at least) two other interpretations of Cardozo’s opinion. It seems that John Goldberg and Benjamin Zipursky have focused on the breach element, arguing that the fact that Mrs. Palsgraf was not foreseeable implied that the railroad’s employee did not breach the duty he owed her. See John C.P. Goldberg & Benjamin C. Zipursky, “The Moral of MacPherson,” University of Pennsylvania Law Review 146 (1998): 1819-20, 1821-4. Another interpretation of the case focuses on the remoteness (or proximate cause) element—it appears to be the most popular approach to Palsgraf among American commentators. It is beyond the scope of this paper to discuss these interpretations. In my view, questions involving the elements of breach and remoteness arise only insofar as the duty exists.

24 To be sure, the decision in Palsgraf does not turn on the distinction between harming the plaintiff’s person and damaging her property—that is, foreseeability with respect to the type of injury. For more see note 69 below.

25 Palsgraf, 102.

26 Palsgraf, 103 (italics are mine).

27 Thus, Allen Beever thinks that on Andrews’s view, since “the duty is owed to everyone, then it must be owed to any claimant.” And he later concludes: “Andrews J’s judgment is seriously deficient . . . [b]ecause it holds that the duty is owed to the whole world and therefore to all potential claimants.” Allen Beever, Rediscovering the Law of Negligence (Oxford: Hart Publishing, 2007), 125 and 128, respectively. As I explain in the main text below, however, this is not Andrews’ view.

argue for (or against) foreseeability tout court, overlooking the peculiar requirement of foreseeability that figures in duty analysis—that which concerns the plaintiff (or plaintiff class) in particular. Once again, foreseeability may be necessary at the get-go stage—to establish the existence of a duty to act cautiously with respect to the person or property of another. But it is an open question whether, once this stage obtains, the scope of the duty’s application is strictly fixed by reference to such foresight. This is because the extension of the duty to the likes of Mrs. Palsgraf requires absolutely nothing from the railroad’s employee that is not already contained in the duty he owes those standing within the zone of foreseeable danger.29

Indeed, this unforeseeable person (Mrs. Palsgraf) makes no practical difference with respect to the questions of whether the employee must exercise due care when assisting the boarding passenger and, if so, what the precise content of this duty might be, cast in terms of the degree of care owed by the employee to the passenger. All the materials needed in order to answer these questions are exhausted once they are considered with respect to the interaction between the employee and the boarding passenger. To accord them further influence (vis-à-vis the unforeseeable victim) would be to count them twice over, thereby giving them excessive effect. (Another way to put the matter, now switching to economic analysis, is to observe that taking additional precautions to ameliorate the risk of harm to the likes of Mrs. Palsgraf is tantamount to taking cost-unjustified precautions, since the costs required to meet the bar of due care with respect to the boarding passenger are necessary and sufficient to meet this bar with respect to Mrs. Palsgraf).30 Thus, for the purpose of imposing a duty of care on the employee, foreseeability with respect to the boarding passenger may render the requirement to establish foreseeability with respect to Mrs. Palsgraf redundant.

Now, it may be thought that this conclusion is limited to the idiosyncratic factual pattern of Palsgraf or to other cases of freak accident, more broadly. But this suspicion is misplaced. As I mentioned above, the unique situation of Palsgraf is an asset, rather than a liability, because it renders more explicit a puzzling feature—the foreseeability requirement—whose presence permeates the duty of care in general.31 As such, the factual setting of Palsgraf merely helps to render more vivid a conceptual point about the doctrine of plaintiff foreseeability.

To see this, consider two factual settings that depart substantially from the fact pattern of Palsgraf: First, the plaintiff is the only foreseeable potential victim; and second, foreseeability with respect to a third person does not provide the

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29 A somewhat similar argument, applied to foreseeability in connection with the remoteness of damage element, appears in Petition of Kinsman Transit Co., 338 F.2d. 708, 724 (2nd Cir. 1964); Christianson v. Chicago St. P., M. & O., Ry. Co., 69 N.W. 640, 641 (Minn. 1896).

30 On the economic interpretation of the Learned Hand formula, cost-justified precautions are assessed by reference to the question, “[w]hat additional care inputs should the defendant have used to avoid this accident, given his existing level of care?” As I argue in the main text above, the answer in Palsgraf is none. The quoted question comes from William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (Cambridge, MA: Harvard University Press, 1987), 87.

31 And this puzzling feature, recall, is that while foreseeability with respect to the plaintiff may well be sufficient, it is not clear why it should also be deemed necessary for the purpose of establishing a duty of care.
defendant with sufficient information so as to discharge reasonable care successfully toward the plaintiff. I shall take each in turn, showing that the puzzle surrounding the doctrine of plaintiff foreseeability need not be the peculiar outgrowth of *Palsgraf's* extraordinary situation.

First, my analysis so far has sought to show that foreseeability of the plaintiff is not necessary, though it is sufficient, to ensure that a risk-creator is in a suitable position to act in ways that moderate any unreasonable imposition of risk of harm on the person or property of the plaintiff. This point holds even in the limiting case where the plaintiff is the only foreseeable person to exist in the case at hand. Indeed, the necessity of establishing foreseeability in this case need not be a response to the importance of being aware of the plaintiff qua plaintiff, but simply to the importance of furnishing the risk-creator with all the information germane to the task of moderating her risky activity. The presence of the plaintiff within the zone of foreseeable danger provides this information not of necessity, but as it happens. A case like *Palsgraf* merely helps in clarifying this point by showing that foreseeability with respect to the plaintiff is not, after all, necessarily required in order for the risk-creator to conduct himself vigilantly.

Second, there can be cases where foreseeability with respect to one person under-determines the case of another who is the unforeseeable plaintiff. More precisely, the amount of precautions necessary to meet the standard of reasonable care toward the foreseeable person is not sufficient for the purpose of discharging due care with respect to the unforeseeable one. The child-free industrial area mentioned above falls within this factual setting. Foreseeability with respect to those reasonably anticipated to use the road in a remote area where there are chemical plants suggests that drivers must adjust their driving plans, say, to the point of 40 MPH to reflect this possibility. But by traveling at this otherwise appropriate speed, drivers would probably hit unforeseeable small children rushing suddenly and unexpectedly onto the highway.

There are (at least) two different doctrinal ways to approach this case: duty and breach analysis. According to the first, no duty of care toward the children-plaintiffs can exist in the absence of foreseeability. In particular, foreseeability with respect to adults is not enough to meet the requirement of foreseeability as a

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32 In principle, the second factual setting can evolve into a *Palsgraf*-like factual setting. For it can always be the case that there exists another person (or class of persons) other than the foreseeable person and the unforeseeable plaintiff whose foreseeability is sufficient to comply with the standard of care appropriate to keep the unforeseeable plaintiff reasonably safe. Consider *Palsgraf* once more. Even if foreseeability with respect to the passengers already sitting on the moving train does not contribute to the employee’s ability to discharge due care toward Mrs. Palsgraf, there may be another person—here, the boarding passenger—whose foreseeability is sufficient for the purpose of protecting the person of the unforeseeable Mrs. Palsgraf.

33 See note 16 above.

34 Other doctrinal ways, such as legal or proximate cause and assumption of risk, may also be relevant (depending, in the case of the latter, on the age of the children). They are of less importance, however, for the purpose of showing that *Palsgraf* merely exemplifies a conceptual point about the doctrine of plaintiff foreseeability, more generally.
necessary condition for the existence of a duty to act cautiously in connection with the safety of the unforeseeable children. That is, the problem posed by the lacking foreseeability in this case is not so much that the presence of the children is unforeseeable, but rather that foreseeability with respect to the adults fails to provide the risk-creator with sufficient input in order to be responsive to children bursting onto the highway. In other words, a “no duty” judgment in this case does not reflect the notion that foreseeability with respect to the children is necessary for a duty to arise, but rather that foreseeability with respect to adults has proven unhelpful for the purpose of exercising due care toward the children-plaintiffs. As argued at the outset, the insistence on a sufficient measure of foreseeability with respect to someone (the plaintiff or otherwise) reflects the idea that otherwise it is simply unintelligible to say that one’s activity generates risk of harm that is relevant to the safety of the unforeseeable plaintiff. Nothing in this way of approaching the case need turn on the proposition that foreseeability with respect to the (children) plaintiffs is necessary. All that this case reveals is that plaintiff foreseeability can be sufficient just as much as a sufficient measure of foreseeability with respect to other persons (in this case, adults) can be.

According to the second doctrinal route, the class of potential victims is defined broadly to capture every sub-group of pedestrians, adults and children alike. Foreseeability with respect to members of one sub-group (adults) is sufficient for the purpose of establishing a duty of care toward both sub-groups. And the lack of foreseeability with respect to the children’s sub-group could weigh in only at the stage of analyzing the breach element. That is, the fact that drivers could not anticipate the presence of children may lead courts to find that drivers were not in violation of the duty to drive carefully, say, by speeding up to 40 MPH. Strictly speaking, it may be thought that this approach supports the conclusion that foreseeability with respect to the (children) plaintiffs is necessary, rather than merely sufficient. But this conclusion can be reached only because, and only insofar as, the definition of the plaintiff class bunches the class of children into the class of adults. However, it does not solve the puzzle that arises in and around the doctrine of plaintiff foreseeability. On the contrary, establishing foreseeability with respect to the children is not necessary; in fact, foreseeability with respect to the class of adults stands in for the requirement to establish foreseeability with respect to the children. Thus, the duty of care owed by drivers to children in the case at hand does not reflect, and so does not turn on, the necessary existence of foreseeability with respect to the plaintiff. Here, too, the conceptual point that Palsgraf helpfully illustrates remains intact—that is, foreseeability with respect to the plaintiff (the class of children) need not be necessary for the purpose of duty analysis.

Thus, the puzzle surrounding the doctrine of plaintiff foreseeability outlives Palsgraf. It presents a general difficulty that arises because the necessity of foreseeability is not the same as the necessity of plaintiff foreseeability. And in spite of this discrepancy, common law negligence in many jurisdictions insists on the latter. Palsgraf, once again, merely helps in elucidating this general point with unusual precision. I shall now seek to show that certain leading explanations of the foreseeability requirement in negligence law fail to resolve
that make sense of the requirement of plaintiff foreseeability is to argue, with Cardozo, that the unforeseeable plaintiff can sue only as the “vicarious beneficiary of a breach of duty to another,” rather than to her.36 Bluntly put, the plaintiff benefits by piggybacking a duty owed to another

35 Perhaps, however, the entire attempt to dissolve the so-called puzzle is misguided, because the foreseeability requirement demands reasonable, rather than actual, foresight. Applied to persons who suffer from insufficient caring skill, the requirement turns out to be a form of strict liability in disguise. Accordingly, it may be thought that requiring persons with insufficient caring skill to discharge due care expresses a move toward a conception of responsibility for the outcomes of their acts, rather than for their conduct (as famously argued with respect to the standard of reasonable care in Tony Honore`, “Responsibility and Luck: The Moral Basis of Strict Liability,” reprinted in Responsibility and Fault (Oxford: Hart Publishing, 1999), 14). I have criticized the moral plausibility of this conception of responsibility elsewhere. Very briefly, there exists an immense gap in the theory of this conception of responsibility: It does not follow from the fact that many aspects of our lives are evaluated by reference to our achievements or failures that this view should be extended to a moral evaluation of our practical affairs. See Avihay Dorfman, “Can Tort Law Be Moral?,” Ratio Juris 23 (2010): 218-20; Avihay Dorfman, “Reasonable Care: Equality as Objectivity,” Law & Philosophy 31 (2012): 380 n30.

36 Palsgraf, 100.
person. Thus, compensating this plaintiff is tantamount to bestowing a windfall on the plaintiff at the defendant’s expense. However, this approach merely re-states, rather than explains, that which calls for an explanation. Ideas such as “benefiting,” “piggybacking,” and so on carry no content except in connection with a baseline against which they could be measured. Cardozo’s assumed baseline picks out a duty of care to foreseeable plaintiffs only. But then the question is why? More specifically, to repeat, the question is why require foreseeability with respect to the plaintiff even when it is not necessary to provide the defendant with all the details needed in order to make the appropriate decision concerning the precautions he ought to take. I shall discuss below two theoretical attempts—structural and functional—to address that question. In the meantime, however, I seek to consider the pre-theoretical insight that may underlie the otherwise conclusory talk of piggybacking or benefiting.

The intuition that accounts for rejecting the grievance of the unforeseeable plaintiff has to do with a sense of arbitrariness that is built into the factual circumstances surrounding a case such as *Palsgraf*. The plaintiff’s claim depends entirely on the presence—happenstance, really—of another person within the zone of foreseeable danger (which is represented, in *Palsgraf*, by the boarding passenger). To this extent, the “doing” of the defendant can count as the “suffering” of the plaintiff only insofar as a third person bridges the epistemic gap—the lack of foreseeability—as between the defendant and the plaintiff. The coincidental nature of her claim for redress, the argument could go, warrants the pre-theoretical observation that compensating the unforeseeable plaintiff creates a windfall for her.

That said, the arbitrariness objection falls short of producing a knock-down argument against compelling the defendant to redress the unforeseeable injured plaintiff. To begin with, the charge of arbitrariness is so strong as to undermine its own plausibility. Indeed, the entire prima-facie case of negligence, rather than merely the duty element, is influenced at almost every turn by the mere happenstance of events, namely, the harm befalling others and its causal connection to the breach of the duty of care. For instance, persons with the exact same moral failing—a breach of a duty of due care—can be treated in diametrically opposite ways, depending on whether fortune has smiled (and no-harm results) or not (and harm ensues).

The salience of luck has generated critical attacks on the fairness and, in particular, the moral aspirations of negligence law. However, it does not matter for the present purpose whether these attacks are persuasive (and I believe that they are not). What matters is that insofar as the underlying concern that motivates the pre-theoretical argument from piggybacking is that of arbitrariness, it fails to explain why arbitrariness in this particular respect is qualitatively different from the many other manifestations of arbitrariness across the tort of negligence. This is

38 Doing and suffering are, of course, Weinrib’s terms for describing the bipolar structure of liability relations in private law. I return to Weinrib’s attempt to explain the requirement of plaintiff foreseeability below.
especially true in light of the high stakes to which a case such as Palsgraf gives rise: Extending the duty of care to unforeseeable victims of careless conduct is harmless, perhaps even beneficial, because while it makes no difference to the kind of conduct demanded from the injurer, it may foster desired goals including, in particular, fairness with respect to an unforeseeable but innocent victim of careless conduct. Against this backdrop, it would also be appropriate to turn the pre-theoretical argument from piggybacking on its head and ask who piggybacks whom—after all, denying liability to the unforeseeable plaintiff in a case such as Palsgraf benefits the defendant in the sense that the latter does not bear the true costs of his carelessness. It will, therefore, be apt to consider the question of why plaintiff foreseeability by drawing on contemporary theories of foreseeability in the negligence law context.

B. Structural Arguments

Tort theories that begin with the bipolar structure of private law will naturally be led to argue that the requirement of plaintiff foreseeability reflects the relational structure of private law rights and duties. Thus, a duty of care takes a relational form and so owed to a particular class of person, rather than to the world at large. And since foreseeability is a key element of this duty, perhaps even an “intrinsic and necessary feature,” the foreseeability requirement must also take a relational form. Or so the structural argument goes.

As I shall argue, however, the structural explanation cannot, on its own, explain the requirement of plaintiff foreseeability. The reason is that it does not explain the epistemic work that the requirement of plaintiff foreseeability does. Another way to understand the difficulty of the structural argument to explain “why plaintiff” is to say that whatever it is that makes our private law rights and duties relational, rather than general, need not turn on foreseeability being relational too. Thus, in contrast to deeming plaintiff foreseeability as an “intrinsic and necessary feature,” a duty of care that is owed to a particular plaintiff (or plaintiff class) is not inconsistent with foreseeability being established with respect to someone other than the plaintiff. For instance, the defendant in Palsgraf can owe a duty of care to both the boarding passenger and some unforeseeable persons, rather than to the world at large. Formally speaking, this is a relational duty in the sense that it does not extend to cases of under-determination, as when the amount of precautions necessary to meet the standard of reasonable care toward the foreseeable person is not sufficient for the purpose of discharging due care with respect to certain unforeseeable persons. Arguably, a relational duty of this sort exists in practice: At one point, the Supreme Court of Wisconsin has rejected Cardozo’s view in Palsgraf, but not in the sense that the duty of care is now owed

43 Recall the discussion in infra text accompanying notes 31-5.
to society in general. Rather, the duty of care “is established when it can be said that it was foreseeable that [the defendant’s] act or omission to act may cause harm to someone.” Accordingly, negligent behavior can count as one “when some harm to someone is foreseeable.” And it may, therefore, require the defendant to account for “unforeseeable plaintiffs” as well.\(^{44}\) This possibility—or any other variation on this theme—shows that any attempt to claim that the relational character of rights and duties \textit{analytically entails} the plaintiff foreseeability requirement in duty analysis is bound to fail.

To be sure, it may well be the case that my revisionist articulation of a relational duty (one that makes plaintiff foreseeability a sufficient, rather than a necessary condition) introduces a different conception of relational duty from the one presupposed by Cardozo in \textit{Palsgraf}. However, proponents of the structural argument develop their theories of the duty of care by reference to the distinction between a relational and a general duty of care, rather than between two conceptions of the concept of relational care. Indeed, they argue that by selecting a relational duty, the law of negligence repudiates a general duty of care (owed to the world at large).\(^{45}\) As I have argued above, the repudiation of the latter does \textit{not} entail the \textit{Palsgraf} conception of relational duty and, so, does not entail the necessity (as opposed to the sufficiency) of the plaintiff foreseeability requirement.

By implication, the resort to the relational character of private law rights and duties to derive the necessity of the requirement in question merely restates that which calls for explanation, namely, \textit{why} plaintiff foreseeability is necessary, rather than merely sufficient, for the purpose of satisfying the foreseeability requirement in the duty analysis. Moreover, this difficulty might plague leading structural explanations of foreseeability in the context of negligence law.

Consider the following, most prominent exemplar of the structural approach. According to Weinrib, “[o]nly if the plaintiff is among [the foreseeable] class does the reason for thinking of the defendant’s action as wrongful pertain to the plaintiff.” And the reason is that “risk is not intelligible in abstraction from . . . a set of persons imperiled,” in which case the “imperiling of the foreseeably affected class of persons is the reason for considering the defendant’s act negligent . . .”\(^{46}\) There are two possible ways to understand this reason—one is structural and the other is functional. The former has to do with the relational structure of the defendant/plaintiff nexus. The argument on this front is that “[b]ecause [in \textit{Palsgraf}] the defendant’s conduct was not wrongful toward the plaintiff . . ., the defendant was held not to be under a duty with respect to the plaintiff’s loss.”\(^{47}\) The question, then, is \textit{why}? At this point, merely saying\(^{48}\) that private law features a relational structure of rights, duties, and liability becomes conclusory. In addressing the question, one must explain \textit{why} plaintiff foreseeability is necessary.

\(^{44}\) \textit{A. E. Inv. Corp. v. Link Builders, Inc.}, 214 N.W.2d 764, 766 (Wis. 1974) (italics are mine).

\(^{45}\) See, e.g., Stevens, \textit{Torts and Rights}, 95; Beever, \textit{Rediscovering the Law of Negligence}, 125, 128.

\(^{46}\) Weinrib, \textit{Corrective Justice}, 46.

\(^{47}\) Ibid., 50.

\(^{48}\) For instance, Stevens defends the plaintiff foreseeability requirement by saying that “[o]ur duties in private law are not owed to society or persons in general, but to specific individuals.” Stevens, \textit{Torts and Rights}, 95.
foreseeability is necessary and not just sufficient for the defendant’s action to count as wrongful toward the (unforeseeable) plaintiff and, so, to prompt a duty of care toward the same plaintiff. The structural argument, therefore, must take the back seat to allow the interests or the values underlying the requirement of plaintiff foreseeability to illuminate the relational structure that this requirement exhibits.

Thus, the second way to approach the structural argument has to do with the epistemic function of foreseeability with respect to the plaintiff. Although he uses such expressions as “intelligible”49 and “contemplation,”50 Weinrib does not develop an account of the function served by the requirement of plaintiff foreseeability. In particular, Weinrib does not explain, in his analysis of Palsgraf, what makes plaintiff foreseeability functionally necessary, rather than merely sufficient, for the purpose of satisfying the foreseeability requirement in the duty analysis. In the next Section, I take stock of a functional account of foreseeability developed by another prominent corrective justice theorist. This account could fill in the missing, functional argument (although ultimately, I shall argue, without success). Indeed, a charitable reading of the structural argument could proceed under the assumption that it presupposes (but does not fully flesh out) a functional account that seeks to establish a firm connection between the epistemic value of the plaintiff foreseeability requirement and the bipolar structure of rights and duties in negligence law.51

C. Functional Arguments

I shall not explore every theoretical account ever offered in the service of vindicating the function of foreseeability in determining whether a duty of due care should arise. Instead, I consider three articulated accounts of foreseeability to provide a sense of the doctrinal puzzle in question: foreseeability as a check on one’s own effective agency; foreseeability as a check on one’s rightful means; and

49 Weinrib, Corrective Justice, 46.
50 Ibid., 45.
51 Perhaps, however, my critique fails because I have misconstrued Weinrib’s characterization of the tort duty of due care. It may be argued that the duty of due care is not a duty to exercise reasonable care toward the person or property of another. Rather, it is purely a duty of redress, having nothing to do with the character of the conduct of the defendant, let alone with providing him or her with reasons for action (i.e., reasons to moderate his or her conduct in the face of another). My argument, however, is not that the duty of care has no ex-post role, including that of a mere duty of redress (whatever this may mean). Rather, I insist that the duty cannot be reduced to a duty of redress. It is, in part, a requirement to be vigilant of the person or property of others (and it is the role of the standard of due care, the “breach” element, to specify precisely how much vigilance is due under the circumstances). I submit that this is the best way to make sense of the traditional separation between the “duty” and the “injury” elements of the prima facie case of negligence (viz., both are jointly necessary and, together with causation, sufficient to prove the prima facie case). And while I cannot offer here an exegesis of Weinrib’s complete work on this matter, a strong case can be made that the most sympathetic reconstruction of his view does indeed acknowledge the conduct-guiding function of the duty of due care. For instance, in his most recent and elaborate discussion of the duty of care, Weinrib quotes with approval Lord Diplock’s speech in Home Office v. Dorset Yacht [1970] A.C. 1004, 1058 saying that an adequate duty analysis is such that “the judge must ‘know what he is looking for; and this involves his approaching his [duty] analysis with some general conception of conduct and relationships which ought to give rise to a duty of care.’” Weinrib, Corrective Justice, 75.
foreseeability as a check on the optimal minimization of negative externalities. In these cases, foreseeability is deployed in the service of connecting the tortfeasor with a certain principle (such as responsible agency) that the imposition of a duty of care seeks to sustain, rather than with the plaintiff tout court. I shall argue that they fail to dissolve the puzzle of the foreseeability requirement, since the only way to make sense of the law’s peculiar preference for foreseeability with respect to the plaintiff must elaborate—as I propose in the next stage of the argument—the distinctive connection between the tortfeasor and the plaintiff that the duty of care presumably seeks to engender. It is important to note from the outset that the connection I shall emphasize is not reducible to that of the relationship of doer and sufferer along the Kantian account of tort law as the law of formal freedom. Rather, it involves a form of respectful recognition that far exceeds what a commitment to formal freedom could possibly allow, let alone require.

1. Foreseeability and Effective Agency

The idea that moral responsibility depends, in part, on epistemic considerations pertaining to the agent’s ability to anticipate the state of the world in which she acts is a familiar theme. Indeed, it figures in the writings of prominent jurists, and it also pervades contemporary moral philosophy. It has been further developed in Stephen Perry’s account of tort law as, most importantly, an embodiment of a moral duty of repair, grounded in the idea of outcome-responsibility. For obvious reasons, my discussion of Perry’s account will focus on the idea of outcome-responsibility in the context of negligence law. Now, the account developed by Perry does not specify the necessary and sufficient conditions for the imposition of a duty of due care and for its content (by which I mean the level of care needing to be discharged). However, because it seeks to determine the necessary conditions upon which a duty of due care may arise, it must constrain the considerations upon which a duty of due care arises in the first place.

Among these constraints is foreseeability—that is, foreseeability becomes a necessary element in the imposition of a duty of due care (because it is a necessary element in demarcating the class of candidates for incurring a duty of repair for a

52 See e.g. Oliver Wendell Holmes, Jr., The Common Law (Boston: Little, Brown, 1881), 95; Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1964), 39.
55 While the theory of outcome responsibility developed by Perry did not address the duty directly, certain proponents of this account have subsequently done so, arguing that the foreseeability requirement reflects similar concerns for effective agency at the duty level. See e.g., Witting, “Duty of Care: An Analytical Analysis,” 36. There is a reason to believe that Perry may endorse this view. See Perry, “The Role of Duty of Care in a Rights-Based Theory of Negligence Law,” 111-2 and n102; and especially, Stephen Perry, “Torts, Rights, and Risk,” in Philosophical Foundations of Torts, ed. John Oberdiek (Oxford: Oxford University Press, 2014), 60 (asserting that “unless I can foresee the possibility that I might injure you, there is no way that I can take steps to avoid injuring you”) (italics are mine).
In short, this account of tort law means that moral responsibility for repairing a loss can arise when an injury is an outcome for which the defendant is responsible through faulty conduct.\textsuperscript{57} And the attribution of outcome responsibility turns, in part, on foreseeability: the epistemic considerations pertaining to the defendant’s (actual or constructive) knowledge of the normal causal regularities that commence with her action and culminate in the plaintiff’s injury.\textsuperscript{58} Simply put, foreseeability comes down to a measurement of the agent’s control over the chain of events that, again, begins with her conduct and eventuates in an injury to another person.\textsuperscript{59} In negligence law, a person can justifiably incur a duty to redress a loss he (among other possible agents) caused only insofar as he had control over his course of action such that he could have avoided the faulty aspect of this course.

It therefore seems that the precise role foreseeability plays in this account of the morality of tort law is that of serving as a guarantee for effective agency. In other words, Perry’s ambition is to explain why an adequate conception of moral responsibility can extend the defendant’s agency to account for an outcome for which the plaintiff seeks redress. However, the extension of agency is not unlimited in the context of negligence law (as well as for strict tort liability).\textsuperscript{60} Only persons who can control their activity and avoid, to some extent, its consequences can be said, as Perry puts it, to be making a difference in bringing about a certain state of affairs in the world and, accordingly, can be the proper object of judgment of responsibility for this state.\textsuperscript{61} On this account, foresight insures (among other things) against imposing a duty of due care on a person whose agency made no difference in bringing the bad consequences to the victims—that is, foresight secures that the duty of due care will be predicated on control over one’s practical affairs and the effects they ensue. Simply put, foresight is fundamentally about connecting the potential tortfeasor with her agency, not so much with the particular plaintiff.\textsuperscript{62}

\textsuperscript{57} Perry, “The Moral Foundation of Tort Law,” 499 (arguing that “among those persons who have a normatively significant connection with a given loss, it is morally preferable that it be borne by whoever acted faultily in producing it”).
\textsuperscript{58} Perry, “The Role of Duty of Care in a Rights-Based Theory of Negligence,” 111; Perry, “The Moral Foundation of Tort Law,” 505 (“If action generally produced outcomes that conformed to no specifiable regularities, so that we could never or almost never predict what the result of an action would be, then we would have no sense that agency was in any way meaningful, either for ourselves or with respect to its “effects” on others; there would be no sense of making a difference”).
\textsuperscript{59} See Perry, “The Moral Foundation of Tort Law,” 507.
\textsuperscript{60} It can be argued that foreseeability is not just a precondition for considering the outcome responsibility of an agent, but also a sufficient condition for matching between the agent and an outcome. I doubt that this is Perry’s own view. In any case, the point I pursue at present does not turn on whether foreseeability is a necessary or a necessary and sufficient condition. All that I am interested in is the significance of the foreseeability of the plaintiff’s injury in the process of imposing a duty of due care.
\textsuperscript{61} See Witting, “Duty of Care: An Analytical Analysis,” 36: “The focus is upon one person—... the defendant.”
But when the group of victims features, as in the case of Palsgraf, both foreseeable and unforeseeable potential victims, foreseeability, understood as a check on effective agency, may not be necessary in considering the imposition of a duty of due care to the unforeseeable victims. Indeed, the concern for ineffective agency, which informs Perry’s theory of torts, loses momentum under these circumstances, because awareness as to the presence of Mrs. Palsgraf adds nothing to the practical powers of the railroad employee qua agent. These powers of control and avoidability are put to full use, so to speak, once the employee has foresight of the possible harm to the boarding passenger. Nor need it affect his practical deliberation toward action: all the (epistemological) input the employee must have in order to pursue his course of action in a manner that reduces the risk of physical injury, to the passenger and to Mrs. Palsgraf, too, can be fixed by foreseeability with respect to the passenger. This foreseeability, in other words, exhausts the extent to which his agency can be effectively manifested in the world.

2. Foreseeability and Rightful Means

The next explanation of the foreseeability requirement proceeds from a theoretical account of torts as an institutional elaboration of the principle of equal freedom. The baseline against which to measure the equal exercise of freedom is fixed by social primary goods or rightful means. Negligence law is called for to preserve

63 The argument in the main text above also applies to a recent development of the effective agency thesis of the foreseeability requirement. Peter Benson has argued for the necessity of plaintiff foreseeability in duty analysis (including specifically in the case of Palsgraf) on the basis that in its absence, “a defendant would be under a duty not to do anything” which is tantamount to violating the defendant’s “equal status” as a person. Peter Benson, “The Problem with Pure Economic Loss,” South California Law Review 60 (2009): 877. Benson’s argument fails, however. The absence of plaintiff foreseeability does not imply an absolutist duty of forbearance, since, as explained in the main text above, the defendant could meet the demand to discharge reasonable care toward the plaintiff even when the latter is unforeseeable. This is so insofar as foreseeability with respect to another person (such as the boarding passenger in Palsgraf) exhausts all there is to know or do in order for the defendant to be vigilant of the person or property of the (unforeseeable) plaintiff.

64 Arthur Ripstein, Equality, Responsibility, and the Law (Cambridge: Cambridge University Press, 1999). Ripstein has since then further elaborated on the foreseeability requirement as part of a reciprocal conception of responsibility (which is then contrasted with the agency conception of responsibility). See Arthur Ripstein, “Justice and Responsibility,” Canadian Journal of Law & Jurisprudence 17 (2004): 374-7. In the torts part of the latter essay, Ripstein emphasizes the intimate connection between foreseeability and the scope of liability (which is to say, remoteness of damage). Ripstein also mentions the duty’s foreseeability requirement, saying that “you can’t have a duty to avoid injuring people in ways that you can’t take account of in your actions.” Ibid., 374. While Ripstein is surely right to note this, he does not explain why foreseeability with respect to the plaintiff is necessary, rather than merely sufficient, in order for a duty to arise. It seems that this missing piece of explanation is to be found in his Equality, Responsibility, and the Law and, as I shall explain in a later footnote, in his more recent work on Kant’s theory of political legitimation.

65 Primary goods are, in short, all purpose means. John Rawls defined them as “things which it is supposed a rational man wants whatever else he wants.” These goods consist of “rights and liberties, opportunities and powers, income and wealth [and self-respect],” John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971), 92. More recently, Ripstein has moved from a Rawlsian idea of social primary goods to the Kantian notion of allowable or rightful means to exercise one’s freedom to set and pursue ends based on natural right to one’s person and property. See Arthur Ripstein, Force and Freedom: Kant’s Legal and Political Theory (Cambridge, MA: Harvard University Press, 2009). Although this move is significant in many respects, it is of less importance to the account.
this baseline, first, by imposing duties to prevent cases in which individuals make excessive employment of primary goods at the expense of others’ capacity to employ their given primary goods; and second, by imposing a duty to repair the deprivation of the victim’s primary goods when unlawfully destroyed by the tortfeasor. Negligence law provides this service by holding persons who risk harm to others responsible for this risk if materialized in an injury. Thus, tort law revolves around the idea that one is responsible for the risks of one’s activity—and therefore for the injuries one may cause in the appropriate way—when one excessively—and therefore faultily—exploits primary goods at the expense of the ability of other persons to employ their assigned goods.66 Failure to take appropriate care is an instance of this faulty conduct and it, therefore, justifies the imposition of a remedial duty (to rectify the resulting injury). By contrast, discharging appropriate care vindicates an interaction predicated upon fair terms—each party to the interaction (the potential tortfeasor and potential victim) exercises their freedom, equally. Note that the approach under consideration does not reduce the operation of tort law to that of remedying a prior wrong; nor does it cast the duty of care in the ex-post terms of a duty of redress.67

Now, the possibility of determining whether a person has violated the duty of care’s restriction on allowable means depends, in part, on epistemic considerations. This is because the capacity of a person to moderate her conduct in light of the equal claims of others to employ their respective primary goods presupposes (reasonable) foresight of this very situation.68 Accordingly, only if the class of potential victim and the kind of injury may be reasonably foreseen can a duty to take appropriate care arise.69 Foresight, then, is a precondition of a duty of foreseeability under discussion. In particular, the argument concerning the place of foreseeability in mediating between an actor and equally distributed primary goods can be cast in terms of mediating between an actor and her means.

66 Ripstein, Equality, Responsibility, and the Law, ch. 3.
67 As I have argued above with respect to Weinrib’s characterization of the duty of due care (see note 51 above), there are compelling reasons to believe that Ripstein takes the duty of care to be giving reasons for action, namely, to moderate risky activity in the face of the person or property of another. See Ripstein’s discussion of the intimate connection between the duty of care, on the one hand, and the notion of fair terms of interaction, on the other, in Ripstein, Equality, Responsibility, and the Law, 105 (noting that “fair terms of interaction require publicity. That is, agents need to be able to know which actions can be performed without fear of legal sanction, and, more to the point, the interests of others of which they must take account.”).
68 Ibid., 104-8.
69 Ripstein actually argues that his account of risk ownership captures the no-duty holding in Palsgraf. See ibid., 66-70, esp. 66-7. But it does not. Ripstein observes that the defendant’s shortcoming (namely, pushing a passenger into a moving train) is the failure “to show appropriate care for his parcel.” Ibid., 66. Accordingly, he concludes, failing to discharge care with respect to this risk, risk to property damage, does not bear on Mrs. Palsgraf’s interest in bodily integrity. However, this conclusion remains a dictum in Cardozo’s opinion. See Palsgraf, 101 (“There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act . . . .We do not go into the question now. The consequences to be followed must first be rooted in a wrong”). Palsgraf, therefore, does not turn on this distinction between property and bodily security. Instead, it turns on the fact that the plaintiff was standing outside the foreseeable zone of danger (to either property or person) created by the defendant’s carelessness. And Cardozo clearly observes that even if the risk created by the defendant was risk of injury of the same type inflicted on Mrs. Palsgraf, it would make no difference with respect to the reasoning or the outcome reached by the court. See
of due care, providing the necessary background beliefs against which an agent can moderate her conduct in the face of others.\footnote{Ripstein, \textit{Equality, Responsibility, and the Law}, 106.}

As with the account of foreseeability that emphasizes effective agency, Ripstein’s account can make sense of the necessity of foreseeability. However, once again, it is one thing to establish that foresight is necessary; quite another to say that it must be uniquely satisfied with respect to the plaintiff (or plaintiff class). Indeed, the latter requirement may be sufficient, but the argument from equal freedom does not explain why it is also necessary. Consider \textit{Palsgraf} once again. The foreseeable passenger provides the railroad’s employee with the requisite epistemic basis on which he could conduct his practical affairs in conformity with the general scheme of fairly distributed primary goods. Any encroachment on the unforeseeable person’s goods (or on her capacity to exploit them freely) is already implicated, and indeed \textit{completely subsumed}, in the activity of the employee as it relates to the foreseeable person. Discharging due care toward the boarding passenger secures the person of Mrs. Palsgraf, while a failure to discharge such care toward the former translates immediately, as in \textit{Palsgraf}, to endangering the latter. Thus, foresight of the plaintiff, rather than foresight of a potential victim, is not necessarily required by this account of tort law as a domain that constrains the exploitation of primary goods on equal or reciprocal grounds. To the contrary, it may even hinder the full realization of the underlying principle in whose service tort law (according to Ripstein) operates: equal freedom. This is so insofar as the risk-creator, being \textit{fully} aware of the demand to moderate his or her activity here and now, carelessly destroys other persons’ primary goods.

3. Foreseeability and Efficiency

The last account that I shall take up casts the point of foreseeability in terms of promoting efficient allocation of resources through liability imposition.\footnote{Strictly speaking, lawyer economists almost never mention foreseeability in connection with the \textit{duty} element of the prima-facie case of negligence, partly because they are reluctant in general to acknowledge the existence of a legal duty—a mandatory reason for action—and of a duty of due care, in particular. However, a substantively similar economic analysis of foreseeability’s role in negligence law (including, in particular, plaintiff foreseeability) has been developed with respect to either remoteness of damage or breach.} On the economic view, foreseeability is necessary for making socially optimal decisions about the efficient level of care the defendant should exercise when engaging in a risky activity. Accordingly, tort law can generate incentives toward safety only insofar as risk-creators have available to them the information that is constitutive of deciding the optimal level of care.

As explained above, foreseeability is indeed necessary, but the question is not why foreseeability \textit{as such} is necessary, but rather foreseeability with respect to the plaintiff (or plaintiff class) in particular. The economic argument against holding the defendant liable to the unforeseeable victim (in a case such as \textit{Palsgraf}) elaborates the precise connection between the foreseeability requirement and the promotion of efficiency through liability imposition. The argument is that

\textit{ibid.}, 100 (“a like result would follow if the interests were the same. Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty”).
merely imposing tort liability for the unforeseeable consequences of one’s act cannot affect the incentives (or reasons) to discharge more (or less) care. Indeed, the economic account of foreseeability insists that holding the defendant accountable for the harm done to an unforeseeable victim is economically superfluous—it can make no practical difference in curbing inefficient behavior on the part of the defendant. And for this reason enlisting tort law in the service of compelling the defendant to compensate the unforeseeable victim is economically unwarranted because the administrative—litigation—costs involved. A duty to make compensation to an unforeseeable victim, because it does not generate any more efficient allocation of resources, would be tantamount to a costly transfer of money.

From an economic perspective, the efficiency argument fares better than the ones regarding effective agency and rightful means. That is, there is no knock-down argument that can be marshaled against the economic logic of this account. That said, there are reasons to believe that it is far less compelling than it purports to be, including from an economic point of view. The reason is that it is wrong to suppose, as the economic account seems to be doing, that the foreseeability requirement could save the entire administrative costs of adjudicating negligent cases in which payment of compensatory damages to unforeseeable plaintiffs is economically superfluous. This is because the very possibility of determining whether a plaintiff was, in fact, unforeseeable is typically costly. Indeed, it often takes a judicial process to determine whether foresight with respect to the plaintiff is lacking in the first place. After all, can we reach the outcome of Palsgraf (or, for this matter, the opposite outcome) without deciding the Palsgraf case? Thus, the only live question concerns the additional administrative costs of deciding a case where foreseeability with respect to the plaintiff happens to be lacking. The inefficiency that these additional costs reflect is certainly less troubling than the economic justification of no-liability for unforeseeable plaintiffs. (Needless to say,

72 It is important not to confuse the argument in the main text with a different claim, namely that liability for unforeseeable victims may over-deter risk-creators who are loss-averse. In a factual setting of the kind presented in Palsgraf, the worry picked up by the latter claim does not arise. All that a duty toward the unforeseeable Mrs. Palsgraf requires is that the railroad’s employee be reasonably vigilant of the boarding passenger.


74 External assessment of the economic argument invites several familiar charges—both normative and positive—against the economic analysis of tort law in general. But there is also (at least) one particularly relevant objection that should be raised: According to the commonly held view among lawyer economists, there is no such thing as a duty of care. On this view, the so-called duty is none other than a “de-facto liability rule,” rather than a mandatory reason for action. See Ariel Porat, “Private Production of Public Goods: Liability for Unrequested Benefits,” (2009) 108 Michigan Law Review 108 (2009): 199-200.

75 Lawyer economists would answer this question in the affirmative, however, speculating that situations of unforeseeable plaintiffs are readily apparent to the plaintiff even prior to the trial process. In such a world, unforeseeable plaintiffs will not sue their respective injurers. That said, it is not clear what, beyond the point of sheer speculation, could justify the belief that we inhabit a world of this sort.
these costs would be fully justified, economically speaking, in case the court finds 
that, in fact, the plaintiff does fall within the class of foreseeable victims.)

* * *

The three functional accounts just discussed make perfectly good sense in 
explaining why foreseeability is generally a prerequisite for duty. However, the 
foreseeability requirement in negligence law takes a particularly demanding ap-
proach—mere foreseeability (with respect to someone) does not suffice. For in-
stance, merely saying, as Perry has recently asserted, that “unless I can foresee the 
possibility that I might injure you, there is no way that I can take steps to avoid 
injuring you”\textsuperscript{76} fails to take seriously what the law insistently presents as the 
necessity, rather than merely sufficiency, of plaintiff foreseeability.

It is important to note the source of their respective shortcomings; that is, to 
show that these shortcomings are no mere coincidence. A more successful account 
of the foreseeability requirement could, then, be sought. As I have asserted above, 
while the three theories just considered proceed from substantively divergent 
theoretical approaches to tort law, they all seek to connect the tortfeasor with a 
certain principle that the imposition of a duty of care is sought to sustain, rather 
than with the plaintiff tout court. Thus, the first account emphasizes the connec-
tion between the tortfeasor and her agency, the second emphasizes that which 
exists between the tortfeasor and rightful means, and the third links the tortfeasor 
(through the concept of social welfare) to society as a whole. In that, and here I 
arrive at the source of the trouble, they are of a piece in (implicitly or explicitly) 
holding that the plaintiff \textit{as such} is a mere medium through which these respective 
connections of agent/agency, agent/rightful means, and agent/social-welfare may 
be made. In that case, foreseeability \textit{with respect to} the plaintiff is deployed in-
strumentally, that is, in the service of functions (such as ensuring effective agency, 
righful means, or efficiency) that are not intimately related to the presence of the 
vulnerable plaintiff in particular.\textsuperscript{77} This shortcoming returns me to the point 
registered above—the key to divining the foreseeability requirement in negligence 
law, as I seek to show presently, must begin from the distinctive form of respectful 
recognition that a duty of care may (arguably) engender between risk-creator and 
risk-taker and which the foreseeability requirement is but an expression thereof. 
The argument going forward, therefore, bears the burden of making sense of the 
foreseeability requirement in duty analysis, realizing—as the preceding argument 
demonstrated—that failing to do so implies the repudiation of this requirement.

\section*{VI. Making Sense of Plaintiff Foreseeability: Duty and Re-Cognition}

The first step in making sense of the foreseeability requirement lies in solving the 
mystery of explaining why this requirement insists on the plaintiff being

\textsuperscript{76} Perry, “Torts, Rights, and Risk,” 60.
\textsuperscript{77} I do not claim, however, that the \textit{overall} theory of torts developed, separately, by Perry and 
Ripstein is instrumental (whatever this means). The argument in the main text above focuses on 
foreseeability in duty analysis only.
foreseeable for the sake of her being foreseeable. In other words, the question is whether the foreseeability requirement is intelligible, quite apart from its effects on the ability of the risk-creator to meet the demand of exercising reasonable care (whatever that is) successfully. On the account I shall develop, the requirement can be cast into sharp relief by elaborating the existence and content of an idea of respectful recognition of persons that captures the moral center of the requirement. In particular, the argument going forward seeks to render vivid the two senses in which the foreseeability requirement makes possible the connection between exercising due care and recognizing the cared-for: First, the requirement figures as an enabling device, by which I mean that foresight is a threshold condition for the duty of care to become in the first instance a norm that calls for respectful recognition of others; and second, the requirement is in itself a form of interpersonal recognition, in virtue of the relation that it can engender between the risk-creator and the foreseeable risk-taker, namely, a relation of re-cognition. I take each in turn.

Before I commence, it is important to make three clarifications. First, the notion that exercising due care may be a form of interpersonal respect and recognition can be articulated in any number of ways. It is important, therefore, to be clear about the qualitative difference between the conception of respectful recognition that I shall develop and the one presupposed by modern Kantian theorists, including, in particular, Weinrib and Ripstein. This difference also explains why the theory of plaintiff foreseeability that I shall seek to sketch below is irreducible to their respective Kantian theories of tort law. The point is that our respective reconstructions of the requirement of plaintiff foreseeability differ not just in the sense that they need not be coextensive. Rather, for the reason I mention in a moment, their Kantian reconstructions must be hostile to an attempt, such as the present one, to cast the morality of the plaintiff foreseeability requirement in terms of practical attitudes of respectful recognition.

As I explain in due course, the duty to discharge due care should be understood as providing the risk-creator a reason for action, namely to respect another person by recognizing, in some sense and to some extent, his or her potential vulnerability. Recognition, as reflected in its Latin origin re-cognoscere or “recall to mind,” expresses a practical attitude according to which one person acknowledges another, and in the case of the risk-creator, acknowledges the possible existence of another as a reason for accommodating her own course of action in ways that pass the legal bar of reasonableness (whatever it means). Modern Kantians, by contrast, develop an entirely different conception (or conceptions) of interpersonal respect in tort law, one which can be called a juridical conception of respect to signify its exclusive orientation to external conformity with the law. Such an austere conception of interpersonal respect and recognition in private law is the outgrowth of their interpretation of the Kantian distinction between right and virtue, an interpretation that allows for a suspiciously narrow understanding of the character and scope of the special morality of private law.78 For them, “respectful recognition”

78 Both Weinrib and Ripstein interpret Kant’s metaphysics of morality (in his Metaphysics of Morals) as developing a sharp dichotomy between right and virtue (or legality and ethics or, to give a concrete
has nothing to do with attitudes or with having a reason to acquire certain practical attitudes toward the right-holder. Furthermore, they even reject the view that it can be the legitimate business of the special morality of law—viz., the justificatory considerations that underlie private law—to generate a reason on the part of risk-creators to acquire an attitude of recognition. To this extent, the reconstruction of the plaintiff foreseeability requirement that I shall develop presently rejects the view that the morality of private law is, and must be, reducible to the protection of “outer [formal] freedom” so that the only legitimate reasons for action this law can give parties to an interaction must be “limited to the governance of their external relations.”

Second and relatedly, I do not argue that, upon assessing the “duty” element, courts do or should consider the motives, psychological states, or actual intentions of the defendant—that is, whether or not her action expresses genuine respect for and recognition of the plaintiff. Rather, my argument is that the duty of care, by virtue of being a duty grounded in interpersonal recognition, purports to provide potential defendants with reasons for action, namely, to proceed by taking others seriously in the precise sense explained below.

Thus, my account is critical, rather than descriptive or psychological. I do not argue that people who comply with the duty of care in fact orient themselves toward others out of goodwill—it is possible that some are disposed to be vigilant of another out of a purely instrumental motivation (such as fear of liability) or non-instrumental motivation (such as respect for the rule of law) or both. But even given the conceptual separation between the act of and motivation for exercising care toward others, displaying it implicates the care-discharger in acquiring a pro-social attitude. That is, an implicit or explicit willingness to recognize another as meriting accommodation simply by virtue of his being a person.

example, between complying with the demands of a legal duty of care and with a categorical imperative). See below notes 80-1. The distinction is at bottom between two forms of reason for action. The private law picks out a relational form of duty, the justification of which shuns all considerations that draw on the attitudes and intentions of the duty’s addressee. Whereas, an ethical duty is at bottom owed to one’s own humanity (sometimes in addition to the humanity of others) and must be fulfilled out of the Kantian notion of goodwill. However, I reject the strict dichotomy with which the right/virtue distinction is presented here. To forestall misunderstandings, I do not challenge (at least for the moment) the exegesis of Kant. Moreover, I do not reject the very distinction in question. Rather, my objection is focused on the thought that this distinction exhausts the universe of morality so that all moral duties must fall into either Kant’s notion of a relational legal duty or Kant’s notion of an ethical duty. It is beyond the scope of this paper to develop my critique of the right/virtue strict dichotomy.

82 Throughout, I use “reason” (as in generating a reason) as a justification of action. That is, a reason for action seeks to provide persons with a justification as to why it is rational, and indeed necessary, to act in this or that way. Thus understood, there exists a critical distance between the normative grounds of and the motivation for conforming to the demands of a given reason. To begin with, the former can only purport to influence persons to acquire the latter, rather than actually produce it. Furthermore, the possibility of a particular reason to influence behavior by way of providing justification will ultimately depend on its normative weight in our all-things-considered practical deliberations. Finally, the critical distance between reason and actual motivation is particularly important within the overwhelmingly coercive character of law.
The good of respectful recognition of others cannot, of course, produce the needed motivation for respectful recognition to arise; instead, this good purports to give us a reason for acting as respecting persons ought to do. Accordingly, the account I shall develop below seeks to illuminate our understanding of plaintiff foreseeability not necessarily in connection with a requirement actually to have the plaintiff in the defendant’s conscious purview, but rather in viewing the duty of care as giving a reason for action, according to which the defendant ought to recognize the plaintiff while contemplating her course of action.

Third, as the discussion in Part II makes clear, the ambition of the argument is not to show that the best way for tort law to address the grievances of the likes of Mrs. Palsgraf or any other injured person is to place a requirement of plaintiff foreseeability as a bar for the existence of a duty and, consequently, of liability. Perhaps, tort law ought to settle on plaintiff foreseeability as a sufficient, rather than necessary, condition. This sort of challenge can only be resolved by reference to grand and basic questions such as what counts as tort law’s “best way,” which is to say what underlying rights, ideals and purposes tort law should aspire to advance.83 Indeed, it would be preposterous to suppose that any theory of the requirement of plaintiff foreseeability, standing alone, could contain sufficient normative resources to solve such questions.84

A. Plaintiff Foreseeability as an Enabling Device

To begin with, a person who adjusts her risky course of action so as to allow another to pursue his activity (reasonably) safely may, by so doing, display concern for the latter.85 As one court observes, a motorist cannot use the highway “in disregard of the right of the [pedestrian] to use it,” by which the court means that the motorist “must accommodate his movements to the other’s lawful use of [the highway].”86 The requirement to make accommodations in the light of the vulnerability of another person expresses the moral importance of discharging due care—the importance of recognizing another person as worthy of respectful consideration.

83 Certainly, this inquiry would also have to consider more concrete normative questions. In the case of Palsgraf, for example, it would be necessary to ask whether it is appropriate to require train companies to check any packages they agree to carry for explosive devices and whether it is reasonable for the owner of the package to bear the cost of the devices exploding.

84 Nor does the argument going forward seek to show that the duty of care is, all things considered, necessary in a liberal society. Doing so requires, among other things, an account of the moral underpinning of the other elements of the duty. Any attempt to derive definite conclusions concerning the necessity of the duty of care simply by reference to a theory of plaintiff foreseeability presupposes (wrongly, in my view) that the other elements of the duty are devoid of all moral content.


86 The complete passage reads:
The rights of one operating a vehicle and a pedestrian on a public highway are mutual, reciprocal, and equal. Neither may use it in disregard of the right of the other to use it, and each must accommodate his movements to the other’s lawful use of it, each must anticipate the other’s possible presence, and each must recognize the dangers inherent in the manner in which it may lawfully be used by the other. Mahan v. State, to use of Carr et. al., 191 A. 575, 581 (Md. 1937).
To be sure, the demand to act toward another person with some measure of consideration, to make the appropriate accommodations, need not give rise to any affective attitude on the part of the care-discharger toward the cared-for. Nor might it lead the former to make the acquaintance of the latter. After all, the accommodation of his movements to the latter’s need not presuppose any engagement between them over and above the exercise of appropriate care. The identities of the two, their respective names and faces, may remain unknown to each other. That said, the very idea of a risk-creator adjusting his course of action in order to allow another person to pursue his is, once again, morally important even in a humdrum case such as the one just mentioned.

Thus, by requiring the motorist to accommodate his movements to the pedestrian’s, the court asks the motorist to recognize the latter as a constraint on his own practical affairs. And this form of attending to others by way of discharging care represents a potentially respectful act—that of recognizing others as independent sources of claims to the moderation of one’s course of action, including, when necessary, the abandonment of this course altogether. This is most strikingly apparent in our lived experience when the motorist, while deeply disagreeing with the judgment of the pedestrian (concerning her decision to cross the street here and now), nevertheless accommodates his driving plan to meet this judgment as such. In that way, the duty of care effectively puts forward a demand that the motorist suppress his judgment and incorporate into his plan of action the judgment of the pedestrian even though the former judgment is correct and the latter is, on his view, flatly mistaken.

On this view, discharging reasonable care can express respectful recognition of the person put in danger by the conduct that calls for vigilance. But no such recognition can feature if the presence of a person within the relevant zone of danger is not reasonably anticipated. More specifically, it is a transcendental condition of the possibility of recognizing another person by way of discharging due care that this other (or the class to which this other belongs) is foreseeable. To this extent, the foreseeability requirement is an enabling device without which the connection between a duty to exercise due care and respectful recognition of the plaintiff is impossible to begin with.

Thus, foreseeability with respect to the plaintiff is necessary, rather than merely sufficient, because in its absence, the exercise of due care cannot possibly be characterized as an act of recognizing this plaintiff.

B. The Non-instrumental Value of Plaintiff Foreseeability: Foreseeability as Re-Cognition

Although it makes some progress in comparison to the leading accounts of foreseeability discussed above, the argument does not capture yet a far deeper sense in which the foreseeability requirement features an idea of respectful recognition of

87 Of course, the respect for and recognition of the pedestrian is no less real when the motorist is in agreement with the latter’s judgment to cross the street.
88 The Mahan court indicates that in addition to the requirement to make accommodations, the motorist is also required to “anticipate the other’s possible presence.” Mahan, 581.
persons. To begin with, one may suspect that there is nothing in the argument from enabling device that casts the foreseeability requirement, rather than the duty of care, in moral terms of respect. Foreseeability is merely enlisted in the service of an account of the morality of the duty of care grounded in the ideal of respectful recognition of others. Thus, even if certain elements of the duty of care (such as the special relation element) may plausibly establish the intimate connection between duty and recognition, the foreseeability requirement conceived of as an enabling device certainly is not one of them. In other words, on the enabling device theory, the doctrine of plaintiff foreseeability merely provides the substrate upon which the exercise of due care can express respectful recognition of the cared-for in the first place.

Furthermore, one may also suspect that the connection that the requirement of plaintiff foreseeability can establish between discharging care and recognition may turn out to be incidental. Perhaps the point of this requirement is to form a connection between discharging care and acting efficiently. In principle, the enabling device theory of plaintiff foreseeability provides a structural account of this doctrine without making an essential reference to the good of recognition in particular. It merely shows that plaintiff foreseeability helps forge a connection between discharging care and any value (respectful recognition or otherwise), the realization of which depends on the possible awareness by the care-discharger of the plaintiff.

That said, I shall argue that both suspicions can be defeated. Indeed, a more precise analysis of the foreseeability requirement reveals the intrinsically valuable idea it expresses, which is to say respectful recognition of persons, including even in the purest—viz., non-instrumental—sense. The reason is that the requirement in question does no more, but no less, than seeing to it that the cared-for could figure in the deliberation made by the risk-creator in connection with determining the precautions that must anyway be taken as a matter of duty of care. In that, the idea of respectful recognition is inherent, rather than merely incidental, to the plaintiff foreseeability requirement. Or so I shall argue.

Consider Palsgraf by way of illustration. In addressing this requirement, the court does not seek to ascertain whether foreseeability of the plaintiff can make a difference by influencing the conduct of the railroad’s employee—this is, recall, because it does not do anything. Instead, the inquiry purports to ascertain whether the railroad’s employee could have been cognizant of the possibility that his act of assisting the boarding passenger, if carelessly done, put the person of the plaintiff at risk of harm. Indeed, the foreseeability requirement features an epistemic inquiry that reflects a somewhat symbolic concern about whether the risk-creator could have the plaintiff in contemplation as he goes about acting the way he did. This question carries symbolic overtones because, once again, having the plaintiff in contemplation does no practical work

89 I do not argue that this connection in fact holds. Rather, it is a conjecture made for the purpose of developing a conceptual point.

90 Whether the employee could have responded properly to the risk of harm his activity projects on the plaintiff implies a qualitatively different inquiry; namely, whether foreseeability of harm to the person or property of the boarding passenger—or, for that matter, any other person—suffices.
(and certainly none of the sort considered by the accounts of foreseeability, such as effective agency, discussed above).

Against the backdrop of this illustration, I can now return to the notion, asserted above, that the foreseeability requirement expresses an idea of respectful recognition of persons in its purest sense. This is so because it requires that the would-be plaintiff—the cared-for—could figure in the deliberation of the risk-creator toward action even when thus figuring need not affect the outcome of the deliberation, namely, the appropriate amount of precautions taken in compliance with the duty of care.91 By taking him into account in this manner, the risk-creator engages the cared-for by according him the consideration he deserves qua person, simply in virtue of being a person (rather than as being a medium through which conditions of effective agency or fairness could be sustained). Thus, having the cared-for in one’s head at the time one acts might not improve one’s compliance with the pre-existing duty of care, but it still is an act of embracing the cared-for as a free-standing person whose mere presence in a position of vulnerability demands the deliberational effort of being mindful of him, too. And this effort is, at bottom, an expression of respectful recognition precisely because it cannot be explained nor justified by reference to the (instrumental) value it produces to the deliberating agent (such as ensuring her effective agency or knowledge of rightful means). Its relation to respect stands out when taken for what it literally means—once again, that the risk-creator has the plaintiff in contemplation when directing her mind to the activity in which she engages in. Accordingly, the foreseeability requirement gives doctrinal voice to the question of whether this mental state of affairs could obtain.

On the proposed account, therefore, the foreseeability requirement can be cast into sharp relief by emphasizing the connection it may establish between the duty of care and a relation of respectful recognition between risk-creator and -taker. This connection can be elaborated on the basis of foreseeability’s extrinsic and intrinsic goods: First, discharging reasonable care cannot count as an act of recognizing the cared-for unless foreseeability of this cared-for obtains92; second, foreseeability of the cared-for may in itself be respectful, since it transforms the risk-creator’s deliberation into a mental process of accommodating the vulnerability of the cared-for in her decision to proceed vigilantly.

That said, the preceding argument is incomplete in three increasingly concrete ways. At the highest level of abstraction, there arises the suspicion that my emphasis on respectful recognition opens up an awesome gap between the foreseeability requirement and recognition. This is so because the former can be met successfully by establishing the foreseeability of any one person, rather than the actual plaintiff, who is considered to be a member of the plaintiff class. Respect, it may be suspected, operates on a far less impersonal basis than that. At a more

91 As I explained above, taking in this case additional precautions to ameliorate the risk of harm to the (unforeseeable) plaintiff is tantamount to taking cost-unjustified precautions. See text accompanying above notes 29-30.

92 Foreseeability is thus a necessary, rather than a sufficient, condition for the exercise of due care to display respect for the plaintiff.
concrete level of analysis, the argument is incomplete because it does not (and, as I shall explain below, cannot) specify the conception of respectful recognition that underwrites the account of the foreseeability requirement developed in these pages. And most concretely, since my argument self-consciously neglects the other prongs of the duty analysis, it remains an open question whether the duty of care is ultimately consistent with, let alone champion of, an idea of respectful recognition of persons.

As will be made clear in due course, I shall focus on the most abstract suspicion, leaving the other two for another occasion. Accordingly, the current argument necessarily remains incomplete, though not in any troubling way. For the incompleteness can be set right by elaborating the recognition-based grounds of the special relation requirement of the duty analysis.

VII. Foreseeability and Impersonal Respectful Recognition

As I have noted from the outset, the foreseeability requirement sets out a rather weak epistemic demand—that is, it does not insist on the foreseeability of the actual plaintiff as an identified individual. Rather, the requirement in question addresses the question of whether the plaintiff falls within the class of person whose existence inside the zone of danger is reasonably anticipated. Accordingly, a possible objection to the proposed account stems from the alleged gap between an idea of respectful recognition and the foreseeability requirement, properly conceived. This gap, it may be thought, plagues the proposed account because recognizing others by engaging them in deliberation toward action cannot apply without implicit or explicit identification of a specific person as the actual object of the deliberation.

The trouble with this objection, however, is that it confuses epistemological concerns with moral ones. The morality of respectful recognition of persons as such does not turn on the actual identity—face and name—of the person who is the object of the respect.93 To see that, consider a clear case of (dis)respect; that is, intentional conduct. An intentional wrong such as a serious instance of assault and battery may not only be harmful to the victim, but, as Rousseau powerfully observes, also a source of “contempt for [this] person, often more unbearable than the harm itself.”94 This observation strikes an intuitive cord. Indeed, intentionally choosing to engage in immoral conduct clearly involves disrespect for the victim, because the wrong in question is in part that of singling out, and thus identifying, the victim as the object of misconduct. The objection to the proposed account mentioned a moment ago seems to deny that the foreseeability requirement, and negligence liability more generally, involve the disrespectful characteristic of the morally wrong conduct of identifying or singling out a particular victim as an object for mistreatment.

But this objection fails and with it the suspicion that the foreseeability of the plaintiff class cannot be grounded in respectful recognition of the plaintiff. This is because engaging in unreasonable risk imposition does pick out an object: the specific class of persons falling within the ambit of the risk imposed. In other words, those persons who form the plaintiff class are, one by one, the logical object of a careless act on the part of the risk-creator. To the extent that unreasonable risk creation can count as morally wrong, the risk-creator displays disrespect to those standing within the zone of foreseeable danger by failing to moderate her conduct appropriately. The fact that the actual identity of each and every person belonging to the plaintiff class may not be available to the risk-creator in advance does not render the connection between foreseeability and respectful recognition redundant. More broadly, the morality of respect for persons as such takes consideration of actual identity to be purely contingent. Thus, respectfully recognizing persons as such requires the acknowledgement that, for any given act which is reasonably known to be risky, there is someone, whoever she is, who may be affected; that she is a person; and that she commands respectful recognition simply by virtue of being a person. The foreseeability requirement demands no more, but no less, than that.

VIII. From Foreseeability to Special Relationship (or Proximity)

Even given that the foreseeability requirement may plausibly both be understood and justified (only) by reference to some idea of respectful recognition of persons as such, it is not clear precisely what idea that is. In particular, respect for persons may be seen as a concept that picks out the normative question of how—in what ways—free and equal persons should attend to one another. The argument I have developed is incomplete in part because it does not specify which conception—viz., which theory—of this concept underwrites the foreseeability requirement. The most important implication of this shortfall is that the object of the recognition displayed by the risk-creator for the risk-taker remains mysterious. (Merely saying that the legal rights of others fix the requisite respect (whatever that is) begs the question, for rights are conclusions of a prior argument concerning, among other things, the conception of respect that is at stake). In the familiar parlance of tort theory, it is not clear whether the foreseeability requirement expresses concern for the well-being or interest of the cared-of or, alternatively, for this person’s formal freedom, by which I mean the rational capacity to set and pursue self-determined objectives.

95 Note that my argument does not deny that intentional wrongdoing occupies a higher rung on the moral ladder, as it were. Rather, the argument in the main text takes stock of the suspicion that negligence (and the foreseeability requirement in particular) need not involve disrespect for others at all.

96 This assumption is the target of the third suspicion mentioned in the main text above.

97 In many cases, the dependency of respect on the actual identity of the respected person is also inconsistent with an ideal of respect for persons as such. This is clearest in norms of respect that apply among persons who happen to be members of the same clan.
ends without being constrained by the choice of another. \(^9\) It is of course possible that neither interest nor formal freedom informs the true object of respectful recognition in and around the foreseeability requirement. Perhaps recognition’s object is the personality (including the sense and the actual sensibilities) of the risk-taker, in which case the risk-creator reasonably accommodates in her own course of action some of the choices and circumstances of the risk-taker. \(^9\) Be that as it may, the foreseeability requirement does not provide sufficient normative materials, as it were, with which to infer its underlying conception of respect. Indeed, a requirement that sees to it that the risk-creator could incorporate the vulnerability of another person into her deliberation concerning care-discharging may be of a piece with the importance of this person’s well-being, formal freedom, or personality. To this extent, the proposed account of the foreseeability requirement remains incomplete.

To be sure, the fact that my account cannot yield any definite conception of respectful recognition does not prove that it bears no connection to the concept of respect for persons. Rather than a liability, the account’s compatibility with a variety of different conceptions of respect may, in fact, be an asset. It suggests that the foreseeability requirement lies at the moral center of the concept of respectful recognition—that the most familiar conceptions of this concept hold in common the notion that respect for persons can be had only insofar as these others figure (in the appropriate way) in the respecting person’s deliberation toward action. \(^1\) On this view, the foreseeability requirement features basic respect so that even (intensionally) divergent conceptions of respect appear (extensionally) equivalent when applied in this context.

This result pushes the argument toward its next natural stage; other duty considerations and, especially, the “special relation” requirement. At this stage, it would be possible to identify which conception of respectful recognition grounds the duty of care. \(^11\) Indeed, whereas the foreseeability requirement is sufficiently thin to render otherwise competing conceptions of respect extensionally equivalent, the special relation requirement bears the heavy burden of selecting, among all the cases satisfying the former requirement, those categories of cases in which defendant and plaintiff stand in “special relation” to each other (whatever that means). To illustrate, plaintiff foreseeability obtains straightforwardly in many cases of negligent infliction of pure economic loss, which is to say a financial loss without antecedent harm to the plaintiff’s person or

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100 Recall that including a person in one’s deliberation does not yet form an argument concerning the motives that move one to deliberate about and, ultimately, discharge due care toward this other person.

101 It may also be the case that different conceptions of respect underwrite different areas of the duty of care.
Nevertheless, common law generally, though not absolutely, denies the existence of a duty of care in these cases, in part because the perfectly foreseeable victim does not stand in a special relation of proximity to the injurer. Thus, if anything, the precise connection between the duty of care and respectful recognition of persons could be cast into sharp relief by looking beyond the foreseeability requirement toward that of special relationship (and, perhaps, also to other considerations).

This attempt to develop an account of the special relation requirement merits a separate, comprehensive study of its own; and as I shall then seek to demonstrate, the key to a successful reconstruction of the requirement in question is the demands put forward by a conception of respect that emphasizes the moral importance of respecting persons as such by recognizing their distinctive personalities as independent constraints on one’s own conduct.

IX. Conclusion

In these pages I have sought to identify and solve the seemingly mysterious doctrine of plaintiff foreseeability. The mystery arises from common law’s insistence on foreseeability with respect to the plaintiff, rather than to anyone whose presence (in time, place, etc.) provides sufficiently adequate input to enable the defendant to exercise due care toward the plaintiff (the unforeseeable plaintiff included). The proposed account emphasizes the crucial role of the foreseeability requirement in engendering respectful recognition of a risk-taker by a risk-creator. Foreseeability of the plaintiff is, first, instrumental, though essential, to turning an act of discharging due care into a display of respectful recognition of another person; and second, it expresses a freestanding ideal of taking other persons seriously—recognizing them in particular—by addressing their vulnerabilities in one’s deliberation toward discharging due care.


103 In the famous pure economic loss case of *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 309 (1927) Holmes J. emphasizes the (lack of) juridical proximity between defendant and plaintiff, saying that “justice does not permit that the [defendant-wrongdoer] be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner [plaintiff-victim].” There may be other reasons apart from special relation that support a similar conclusion of no-duty. As I shall argue in future work, however, the special relation requirement (properly conceived) plays and should continue playing a far more substantial role in explaining the rule against recovery for pure economic loss.

104 Thus, attempts to reduce the special relation (or proximity) test into foreseeability might fail in the face of “no-duty” cases such as those pertaining to pure economic loss and negligent infliction of emotional distress where plaintiff foreseeability typically obtains. For a reductive account of this sort, see Beever, *Rediscovering the Law of Negligence*, 184 (arguing that “if proximity is not identified with reasonable foreseeability, then...proximity is meaningless”).

105 I have elaborated on this conception in connection with the “breach” element of the tort of negligence in Dorfman, “Negligence and Accommodation: On Taking Others as They Really Are”; Dagan & Dorfman, “Just Relationships.”