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METHOD AND MORALITY  
IN THE NEW PRIVATE LAW OF TORTS

*John Oberdiek\**

INTRODUCTION

In Ernest Weinrib's famous and provocative words, "the purpose of private law is to be private law."<sup>1</sup> Weinrib's statement is provocative because it is a rejection of the instrumental theories that have long dominated private law, and tort law especially. Economic accounts of tort law, which in one prominent version describe and justify the law of torts as a means of maximizing wealth,<sup>2</sup> are of course the best known of these instrumental theories. Criticisms of such theories abound, alternately taking issue with the goal or goals that any economic account either imputes to tort law<sup>3</sup> or strives for through tort law.<sup>4</sup> Weinrib's, however, is a more fundamental and controversial criticism, rejecting the economic approach to torts not because of the goal or goals it has, but because it has any at all.<sup>5</sup> If tort law must be said to have a purpose, according to Weinrib, then it is simply to be tort law.

Weinrib champions formalism, a theory that gives pride of place to private law's (and by extension tort law's) distinctive concepts, institutional structure, and modes of reasoning.<sup>6</sup> Formal considerations like these take methodological priority over substantive considerations concerning whether, for example, tort law achieves the independently

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\* Professor of Law and Director of Faculty Research, Rutgers School of Law-Camden. Thanks to symposium organizers John Goldberg, Henry Smith, and Jeremy Newman; Ben Zipursky for discussion of his rich paper; and Dennis Patterson and Adam Scales for their comments.

<sup>1</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5 (1995).

<sup>2</sup> See, e.g., Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 206 (1981) ("[W]ealth maximization is the ultimate objective of the just state.")

<sup>3</sup> See, e.g., JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 13-24 (2001) (challenging the descriptive accuracy and explanatory power of economic accounts).

<sup>4</sup> See, e.g., RONALD DWORKIN, *Is Wealth a Value?*, in *A MATTER OF PRINCIPLE* 237, 237 (1985) (challenging the normative cogency and justificatory power of economic accounts).

<sup>5</sup> See WEINRIB, *supra* note 1, at 3-5.

<sup>6</sup> See *id.* at 5; see also Ernest J. Weinrib, *Why Legal Formalism?*, in *NATURAL LAW THEORY* 341, 351 (Robert P. George ed., 1992) ("Formalism is committed to the attempt to make sense of tort law's conceptual and institutional structure.")

specifiable goal of wealth maximization.<sup>7</sup> As Weinrib puts it, “formalism’s initial concern is not with a justification’s substantive merit, but with the minimal condition for its functioning *as* a justification — namely, that it fills its own conceptual space.”<sup>8</sup> Only after the formal aspects of tort law have been registered can any substantive legal determination be made. Above all, then, formalism is committed to making sense of tort law in its own terms as an internally coherent, mutually supportive set of concepts, structures, and doctrines, thus vindicating the “immanent intelligibility” of tort law.<sup>9</sup> To understand how to resolve a legal question, in short, formalism demands that we appeal to *the law*, not to some extralegal goal, whatever its merits are as a goal.

Yet despite Weinrib’s best efforts, instrumental accounts of tort law remain dominant. Though many theorists — and nearly all philosophers of law — dissent from the economic approach to torts, and most of them in turn favor some kind of corrective-justice account, few sign on to Weinrib’s particular defense of corrective justice: that corrective justice is “the unifying structure that renders private law relationships immanently intelligible.”<sup>10</sup> They thus deny that the purpose of tort law is to be tort law. Instead, they argue that effecting corrective justice is the goal of tort law. “Corrective justice,” in other words, is the proper answer, or is at least a crucial part of the proper answer, to the instrumentalist’s question “What is tort law for?”<sup>11</sup>

In this light, the just-christened New Private Law is especially intriguing, for it self-consciously aspires to draw insight from both instrumentalism and formalism. Consider how Benjamin Zipursky characterizes the commitments of the nascent theory in his ambitious and illuminating Palsgraf, *Punitive Damages, and Preemption*<sup>12</sup>: the New Private Law “recognize[s] the value of a pragmatism that is sensitive to which functions the law serves, critical as to how well it is serving those functions, and open-minded about how it might better serve them,”<sup>13</sup> but it also “requires understanding the concepts and principles entrenched in the law and the structures, institutions, and

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<sup>7</sup> See Ernest J. Weinrib, *Legal Formalism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 327 (Dennis Patterson ed., 2nd ed. 2010).

<sup>8</sup> *Id.* at 329–30.

<sup>9</sup> WEINRIB, *supra* note 1, at 18; see also Weinrib, *supra* note 7, at 336.

<sup>10</sup> WEINRIB, *supra* note 1, at 19. For criticism of this aspect of Weinrib’s view from a corrective justice perspective, see, for example, Stephen R. Perry, *Professor Weinrib’s Formalism: The Not-So-Empty Sepulchre*, 16 HARV. J.L. & PUB. POL’Y 597, 597–98 (1993).

<sup>11</sup> John Gardner, *What Is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 1 (2011).

<sup>12</sup> Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012).

<sup>13</sup> *Id.* at 1757.

languages that implement these concepts through the practices of courts, legislators, and lawyers.”<sup>14</sup> Zipursky could not be any more forthright here in combining instrumentalist and formalist themes — the New Private Law’s methodology is sensitive to *both* the functions *and* the concepts internal to law. Thus the New Private Law promises to be the elusive third way. And in Zipursky’s hands, it seems to me, the New Private Law of Torts makes good on that promise, offering a sound approach to the adjudication of vexing questions at the frontier of tort law. But Zipursky nevertheless falters in eschewing consideration of the approach’s moral foundations. In addition to explicating just what a commitment to the New Private Law of Torts comes to, then, it is the aim of this essay to assess where normative and specifically moral considerations do, should, and must come into play in the New Private Law of Torts.

### I. THE NEW PRIVATE LAW AND PRAGMATIC CONCEPTUALISM

At the outset, let me register some skepticism — or at least some confusion — about the equality of the marriage between instrumentalism and formalism that the New Private Law purports to arrange.<sup>15</sup> In the very next sentence following the text quoted above, Zipursky states, “I have dubbed this view ‘pragmatic conceptualism’ . . . .”<sup>16</sup> Given the relationship between the New Private Law and pragmatic conceptualism, whatever precisely it consists in, it seems clear that understanding the latter will shed light on the former and, more specifically, on the relative importance of instrumentalist and formalist ideas within the New Private Law.

A quick glance at Zipursky’s account of pragmatic conceptualism strongly suggests that the New Private Law privileges form over function. “Like formalism,” Zipursky maintains, pragmatic conceptualism “asserts that a theory that claims to account for what the law says must provide an account of the concepts and principles embedded in the law, and that an account of the *functions* served by the law will not necessarily capture the concepts embedded in it.”<sup>17</sup> The New Private Law thus owes a great deal, if it is not the outright heir, to for-

<sup>14</sup> *Id.*

<sup>15</sup> Whether this lends support to Jules Coleman’s (now-abandoned) annulment theory of corrective justice is another matter. See Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 365 (1992).

<sup>16</sup> Zipursky, *supra* note 12, at 1757–58.

<sup>17</sup> Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457, 459 (2000).

malism. It is certainly friendlier to formalist accounts of tort law than to economic accounts.<sup>18</sup>

Still, it does depart from formalism in two clear ways. First, pragmatic conceptualism does not depend upon the metaphysically baroque Kantian and Aristotelian foundations that Weinrib claims for his theory<sup>19</sup> (which is not to say that the holistic and inferentialist philosophical pragmatism of pragmatic conceptualism is milquetoast<sup>20</sup>). Second, and more importantly for present purposes, it invites inquiry into the law's goals and the law's success in achieving them.<sup>21</sup> On this score, Zipursky contrasts pragmatic conceptualism with Weinrib's formalism, which according to Zipursky "leaves insufficient room for the normative idea that *how well the law serves certain functions* is relevant to whether the law ought to be kept, or revised, and relatedly, for the potential relevance of the question *how well certain functions would be served were the law interpreted one way* (rather than another)."<sup>22</sup> In this way, pragmatic conceptualism and with it the New Private Law depart from formalism more substantively, as it were, creating more room for instrumental considerations. The New Private Law endorses what one might call a constrained instrumentalism — one constrained by the concepts embedded within and constitutive of private law. So while it endorses form over function, it does not endorse form to the exclusion of function. The theory is committed "to identifying the content of the law in a manner not wholly dependent on the functions served by the law."<sup>23</sup> As Zipursky makes clear in *Palsgraf, Punitive Damages, and Preemption*, it takes seriously the idea that legal problems call for distinctively legal analysis.

## II. THE PALSGRAF PERSPECTIVE ON PUNITIVE DAMAGES AND PREEMPTION

A theoretical third way proves its promise through the cogency of the analysis that it stimulates, and this is precisely the proof that Zipursky offers. His central claim is that taking up "the *Palsgraf* per-

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<sup>18</sup> See *id.* ("The failure to explain [the bipolar structure of tort law] in a nonfunctionalist manner is therefore a fundamental failure of law and economics, one that undercuts its claim to have an adequate account of what the tort law is.").

<sup>19</sup> See WEINRIB, *supra* note 1, at 19.

<sup>20</sup> See Zipursky, *supra* note 17, at 459 ("[Pragmatic conceptualism's] deployment of a conceptualistic approach is entirely rooted in practices, and in this sense is metaphysically modest."). Zipursky is clear that the pragmatism of his pragmatic conceptualism is not pragmatism colloquially understood, but philosophical pragmatism, with roots in Wilfrid Sellars's philosophy of language and now championed by Robert Brandom. See *id.* at 470–71.

<sup>21</sup> See *id.* at 469.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 482 n.70.

spective”<sup>24</sup> — a perspective opened up by the pragmatic conceptualist methodology of the New Private Law — makes it possible to see one’s way clear of the morass of recent Supreme Court jurisprudence on punitive damages and federal preemption in torts suits.<sup>25</sup> Just what the so-called “*Palsgraf* perspective” is will be familiar (if controversial) to those who know Zipursky’s work, often coauthored with John Goldberg.<sup>26</sup> It is the vantage available when one subscribes to “civil recourse” theory, which Zipursky especially has pioneered and developed as an alternative rights-based account to corrective-justice theories of torts.<sup>27</sup> Very briefly — because what is new here is what the perspective illuminates about punitive damages and preemption, not the perspective itself — the *Palsgraf* perspective takes seriously, first, that negligence law is a branch of private law, whereby private individuals seek civil recourse and the vindication of their rights through tort law against those who have carelessly harmed them, and second, that the duties correlative with the rights that negligence law recognizes are relational.<sup>28</sup>

According to this view, which I find convincing, these two elements came together in *Palsgraf* itself to support Chief Judge Cardozo’s judgment that Mrs. Palsgraf ought not to recover against the Long Island Railroad (LIRR) for her injuries.<sup>29</sup> While the LIRR owed Mrs. Palsgraf a duty of care, and while the LIRR was in breach of its duty of care *as to someone*, the reason that Mrs. Palsgraf had to lose was that *the LIRR’s breach was not of the duty it owed to Mrs. Palsgraf*.<sup>30</sup> The harm that befell Mrs. Palsgraf was not reasonably foreseeable to the admittedly careless LIRR — the LIRR was careless (only) as to those whose possible injuries were the reasonably foreseeable consequence of its conduct. One cannot, on this view, stand in the shoes of another when bringing a negligence claim. In Cardozo’s famous

<sup>24</sup> Zipursky, *supra* note 12, at 1792.

<sup>25</sup> See *id.* at 1758–60.

<sup>26</sup> This perspective is especially salient in John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1819–20 (1998). See also Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 3 (1998); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 685–86 (2001); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636 (2002).

<sup>27</sup> See, e.g., Zipursky, *supra* note 26, at 82–86; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697–98 (2003); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 402–03 (2005). As Stephen Perry notes, it is more accurate to characterize the family of tort theories opposing economic ones as rights-based than as corrective justice-based because the former classification captures what is common to them all. See Stephen R. Perry, *Tort Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 7, at 64, 82.

<sup>28</sup> See Zipursky, *supra* note 12, at 1769–71.

<sup>29</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>30</sup> See Zipursky, *supra* note 12, at 1763–69.

words, “[t]he victim does not sue derivatively . . . to vindicate an interest invaded in the person of another.”<sup>31</sup> Or again, “[w]hat the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to someone else . . . .”<sup>32</sup> Duty is relational in this way according to the *Palsgraf* perspective by virtue of the privacy of private law. Cardozo makes clear that individuals lack plenary authority to enforce tort-based rights generally, as a legislature might; people can stand only on their own private law rights.<sup>33</sup> This is what makes tort law private law, according to the *Palsgraf* perspective.

Zipursky contrasts this perspective with the “private attorney general conception of tort law” whereby individuals are entitled to enforce rights generally, in the way that a legislature creates good public policy.<sup>34</sup> And it is this private attorney general model, according to Zipursky, that is to blame for much of what afflicts contemporary tort law — including the knots that the Supreme Court has tied itself in when confronting recent cases of punitive damages and preemption. Taking up the *Palsgraf* perspective, on the other hand, reveals quite elegant solutions to the seemingly intractable problems presented by these cases.<sup>35</sup>

Zipursky first considers the Supreme Court’s recent punitive damages jurisprudence in *Philip Morris USA v. Williams*,<sup>36</sup> which held that the Fourteenth Amendment’s Due Process Clause barred punitive damages from being awarded for injuries caused to third parties,<sup>37</sup> thus articulating “the nonparty-harm rule.”<sup>38</sup> He quite accurately depicts a Court mired in confusion: on the one hand, the punitive nature of punitive damages counsels in favor of a robust procedural review of such awards, just as criminal punishment cannot be meted out without due process (Justice O’Connor); on the other, because punitive damages awards are tort-based, no due process is required at all (Justice Scalia).<sup>39</sup> Clearly, someone is mistaken, and Zipursky actually thinks neither O’Connor nor Scalia even understands the problem. The problem, Zipursky argues, is in determining “why tort law’s punitive damages might, historically, have been shielded from [such due pro-

<sup>31</sup> *Palsgraf*, 162 N.E. at 101, quoted in Zipursky, *supra* note 12, at 1768.

<sup>32</sup> *Id.* at 100.

<sup>33</sup> Zipursky calls this the “substantive standing” requirement. Zipursky, *supra* note 12, at 1769.

<sup>34</sup> *Id.* at 1758.

<sup>35</sup> *Id.* at 1760.

<sup>36</sup> 129 S. Ct. 1436 (2009) (dismissing writ of certiorari as improvidently granted); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Full (sheepish) disclosure: the author worked at a law firm on matters for Philip Morris, though not on anything concerning the litigation discussed here.

<sup>37</sup> *Philip Morris USA*, 549 U.S. at 353.

<sup>38</sup> Zipursky, *supra* note 12, at 1787.

<sup>39</sup> See *id.* at 1774–75.

cess] scrutiny on vagueness and notice grounds.”<sup>40</sup> The answer to that question? Tort law is, at least historically, fundamentally private.<sup>41</sup>

Zipursky distinguishes between two conceptions of punitive damages: “private redress” and “noncompliance sanction.”<sup>42</sup> Historically, punitive damages were conceived as private redress, albeit more fulsome private redress, for egregious and willful wrongs.<sup>43</sup> That remains the dominant conception.<sup>44</sup> Punitive damages thus mesh nicely with the *Palsgraf* perspective’s civil recourse theory.<sup>45</sup> One seeks punitive damages in order to vindicate one’s own (especially pressing) tort claims. No constitutional due process is called for on this conception of punitive damages because the state is not punishing anyone.<sup>46</sup> Rather, a private individual is standing on his or her own rights and suing for personal redress.<sup>47</sup> The nonparty-harm rule makes sense on this conception of punitives because, from the *Palsgraf* perspective, one should not be permitted to recover for a wrong done to another.

Over time, however, as the private attorney general model of understanding torts has seeped into legal consciousness, Zipursky explains, some punitive damages rules have been changed. In Oregon, for example, which generated the case at the center of *Williams*, plaintiffs are only able to keep a portion of “their” punitive damages award — most of it goes into state coffers.<sup>48</sup> Zipursky quite rightly recognizes that this cannot be squared with civil recourse theory; rather, it reflects the private attorney general model of torts and the noncompliance sanction conception of punitive damages that flows from it. For in seeking punitive damages, one is effectively suing partly on behalf of the state. Strikingly, then, where the noncompliance sanction conception of torts is in effect, Zipursky argues that the nonparty-harm rule cannot be sustained without constitutionally sufficient due process.<sup>49</sup> And ironically, it is the *Palsgraf* perspective that allows Zipursky to see this so clearly. For that perspective is sensitive to both the private/public law distinction and the relational/nonrelational duty distinction — distinctions that have been ignored by the modern regulatory approach to tort law in which all law is public and all duties non-relational. The New Private Law, it seems to me, fulfills its promise here.

<sup>40</sup> *Id.* at 1777.

<sup>41</sup> *See id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* at 1778–79.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.* at 1779.

<sup>46</sup> *See id.* at 1779–80.

<sup>47</sup> *See id.*

<sup>48</sup> *See id.* at 1781.

<sup>49</sup> *See id.* at 1785.

Zipursky shows that the New Private Law delivers on its promise in the realm of federal preemption as well. Here, following Zipursky's lead, I will be briefer. Zipursky discusses *Warner-Lambert v. Kent*,<sup>50</sup> which ended in a 4–4 split, letting stand the Second Circuit's determination<sup>51</sup> that the plaintiffs' tort claim against a pharmaceutical manufacturer was not preempted simply because the manufacturer was subject to federal regulation.<sup>52</sup> The manufacturer had engaged in fraud to get its product approved, the Second Circuit noted in *Desiano*, thus triggering an exception to the otherwise effective preemption.<sup>53</sup> It held this notwithstanding the Supreme Court decision in *Buckman v. Plaintiffs' Legal Committee*<sup>54</sup> that state tort claims centered on fraud on the FDA are federally preempted.<sup>55</sup> Zipursky argues that the Second Circuit got it right here and, interestingly, that the *Buckman* Court did too. The *Palsgraf* perspective again reveals why: the plaintiffs in the Second Circuit case were suing for harm personal to them, while the plaintiffs in *Buckman* were effectively suing as private attorneys general, standing on the FDA's rights, not their own.<sup>56</sup> In Zipursky's words:

[W]hile the putative power of the plaintiffs in *Buckman* derived from a latter-day regulation (prohibiting fraud on the FDA) applicable to dealings between regulated parties and the FDA, the putative power of the plaintiffs in *Kent* derived from a common law negligence or products liability action against a defendant whose product injured *those plaintiffs*.<sup>57</sup>

The two cases should come out differently from each other, as they did, because they are relevantly different: namely, along private/public and relational/nonrelational dimensions. Once again, then, the New Private Law demonstrates its promise as a sound approach to the adjudication of tort claims.

### III. MORAL FOUNDATIONS OF THE *PALSGRAF* PERSPECTIVE AND NEW PRIVATE LAW OF TORTS

Zipursky convincingly shows how the New Private Law, encompassing civil recourse theory's *Palsgraf* perspective and underwritten by pragmatic conceptualism, allows us “to move forward with a coherent approach that identifies which decisions will need to be made by

<sup>50</sup> 128 S. Ct. 1168 (2008).

<sup>51</sup> *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85 (2d. Cir. 2006).

<sup>52</sup> *See id.* at 98.

<sup>53</sup> *See id.* at 94–96.

<sup>54</sup> 531 U.S. 341 (2001).

<sup>55</sup> *See id.* at 344.

<sup>56</sup> *See* Zipursky, *supra* note 12, at 1795–96.

<sup>57</sup> *Id.* at 1795.

judges and what practical concerns those decisions will turn on.”<sup>58</sup> Zipursky is right that from the dominant regulatory tort theory perspective, where all law is public and all duties nonrelational, the coherence of the nonparty-harm rule of punitive damages articulated in *Williams* and the possibility of limiting preemption to make space for a viable state tort claim in *Kent* is “difficult even to articulate,”<sup>59</sup> while from the *Palsgraf* perspective those options are illuminated. Thus the theory can indeed identify the content of the law largely independently of its functions.<sup>60</sup> But it seems to me that Zipursky aims to establish more than that perspective’s epistemic virtue. In the remainder of this discussion, then, I aim to assess just where normative and, specifically, moral considerations do, should, and must come into play in the New Private Law.

It is clear that Zipursky does not believe that the New Private Law’s *Palsgraf* perspective is normatively superior full stop, but merely interpretively so.<sup>61</sup> It captures, one might say, private law’s inner logic made manifest in case law. This is where the New Private Law is most obviously formalism’s next of kin. But Zipursky should not, and I think would not, abjure the normative purchase of the *Palsgraf* perspective, even though he claims only to be interpreting the law of torts.<sup>62</sup> This is because the “moderate”<sup>63</sup> position that the third way of the New Private Law illuminates is not important chiefly as an epistemic matter. We do not value it because it imparts theoretical knowledge of logical space that has too often been obscured by brazenly instrumental theories of tort law. We value it because the logical space and the position it illuminates are *worth occupying and defending*.

Zipursky seems to recognize this fact, but not to embrace it. In his conclusion, he writes that “one cannot deny the importance of avoiding unjustifiable extremes,”<sup>64</sup> asserting that both “[t]he unconstrained use

<sup>58</sup> *Id.* at 1758.

<sup>59</sup> *Id.* at 1796.

<sup>60</sup> See *supra* text accompanying note 23.

<sup>61</sup> See *id.* at 1771 (“[T]he assertion that states are empowering private parties in tort law, not deputizing private plaintiffs, is fundamentally an interpretive one, not a normative one . . .”).

<sup>62</sup> This is not merely because all theory choice in legal philosophy is normative (for example, explanatory power is itself a normative virtue), as Zipursky is well aware and as the methodology debate in general jurisprudence makes clear. See, e.g., Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117 (2004); John Oberdiek & Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudence Methodology*, in 10 LAW AND PHILOSOPHY 60 (Michael Freeman & Ross Harrison eds., 2007). Nor is this merely because, as Zipursky would readily concede, interpretation is itself necessarily normative. See, e.g., Ronald Dworkin, *Law as Interpretation*, in ARGUING ABOUT LAW 127 (Aileen Kavanagh & John Oberdiek eds., 2009); RONALD DWORKIN, LAW’S EMPIRE 45–113 (1986).

<sup>63</sup> Zipursky, *supra* note 12, at 1796.

<sup>64</sup> *Id.*

of evidence of nonparty harm to set punitive damages in individual tort litigation” and a “categorically impenetrable regulatory compliance defense in products liability” would be extreme,<sup>65</sup> and that these are “the kinds of issues where we expect the Justices to be able to weigh in and do the (legally) right thing.”<sup>66</sup> Surely Zipursky must think that the positions the *Palsgraf* perspective illuminates are attractive not just by virtue of avoiding “extremes.”<sup>67</sup> And equally surely he must think that doing “the (legally) right thing” is, at least in the present context, related to doing the morally right thing. Why the caution about coming out and stating this?

I believe it is because Zipursky, despite his best efforts, harbors an assumption fundamental to the economic approach to torts. That approach’s consequentialism commits it to assessing the morality of any arrangement, including any framework of tort law, only in terms of its judicial outcomes. And Zipursky probably does not want to defend Philip Morris, which is what he effectively does in concluding of *Williams* that the nonparty-harm rule has its place. So, I am suggesting, he abstains from defending the *Palsgraf* perspective on straight moral grounds. But Zipursky’s assumption isn’t safe. There are more, and perhaps more important, ways to evaluate morally a framework for understanding tort law than to look first or only to the judicial outcomes that it leads to.

Consequentialist evaluation strikes many as inevitable, and that inevitability gets transmitted to economic accounts of tort law. How else, the thought goes, might one evaluate different frameworks of tort law but by evaluating the judicial outcomes that they produce — that is, their consequences? This way of thinking involves a subtle but important error, and Zipursky apparently commits it: eliding the distinction between consequences and normative reasons. Of course, one must assess the reasons for and against adopting some legal framework, but the consequences of doing so, understood here as the judicial outcomes generated by such a framework, are at best only one subset of the reasons one could marshal for or against doing so. What reasons, then, might one have to adopt the *Palsgraf* perspective if the judicial outcomes to which it leads are tabled for the moment? I would suggest that the central reason is that the *Palsgraf* perspective

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<sup>65</sup> *Id.* at 1796–97.

<sup>66</sup> *Id.* at 1797.

<sup>67</sup> Though he rejects Weinrib’s formalism in part because of its overreliance on Aristotle, Zipursky comes perilously close to relying on Aristotle’s doctrine of the mean. See ARISTOTLE, NICOMACHEAN ETHICS 1106a25–b30 (Terence Irwin trans., Hackett Publ’g 2d ed. 1999) (arguing that virtue consists in occupying an intermediate disposition between the extremes of excess and insufficiency).

manifests a model or structure of relations between people that is morally attractive.

Consider the pattern of relations between people that any economic account of torts instantiates. The content of anyone's tort-based rights and duties on such an account answers to the impersonal goal of something like wealth maximization. People justify their conduct to one another by reference to that goal — the ideal of wealth maximization mediates the normative relationship between persons. What we might call the justificatory relationship that holds between persons on this view is therefore indirect. Everyone is to promote the impersonally good state of affairs of wealth maximization, and that aim then regulates how individuals should relate to one another; for example, if a certain precaution protecting another's well-being would not be strictly efficient, one ought not to take it.

It is possible, though, to conceive of a very different, direct justificatory relationship. On this alternative model, the content of tort-based rights and duties is a function of what could be justified between individuals, full stop. Through that direct form of justification, to be sure, another kind of "supervalue" emerges — what we might call, following T.M. Scanlon, "mutual recognition"<sup>68</sup> — but what is doing the work in fixing the content of the rights and duties, in contrast to a consequentialist approach, is not the supervalue but the direct justificatory relationship itself. On this picture, morality has an aim, but it is not the external and impersonal one represented in consequentialist moral theories and economic tort theories. Rather, "the basic social function of morality," as Warren Quinn puts it, "is to define our proper powers and immunities with respect to each other, to specify the mutual authority and respect that are the basic terms of voluntary human association."<sup>69</sup> Cardozo's concern in *Palsgraf* with relational duty makes sense in light of this nonconsequentialist conception of morality's aim. If morality is fundamentally about defining appropriate interpersonal powers and immunities, and a duty of care with the scope imagined by Judge Andrews in dissent would all but disregard or run roughshod over such considerations,<sup>70</sup> then the kind of "prevision" that Mrs. Palsgraf was expecting of the LIRR would indeed be "extravagant."<sup>71</sup>

<sup>68</sup> T.M. SCANLON, WHAT WE OWE TO EACH OTHER 162 (1998).

<sup>69</sup> WARREN QUINN, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, in MORALITY AND ACTION 149, 173–74 (1993); see also SCANLON, *supra* note 68, at 162 (arguing that the "ideal of acting in accord with principles that others . . . could not reasonably reject is meant to characterize the relation with others the value and appeal of which underlies our reasons to do what morality requires").

<sup>70</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.E. 99, 102 (N.Y. 1928) (Andrews, J., dissenting).

<sup>71</sup> *Id.* at 100 (majority opinion).

A concern with the structure, scope, and conditions of moral duties — not merely the outputs of such duties — is a long-standing feature of nonconsequentialism. It shows up in well-known form in the nonconsequentialist resistance to consequentialism's "demandingness," and explaining the basis of that resistance helps to illuminate the case for the *Palsgraf* perspective in torts.<sup>72</sup> That consequentialism underwrites extremely demanding moral duties, criticism in this vein goes, is evidence that it fails to account for the moral importance of self-regarding personal prerogatives, insulated to an extent from other-regarding concerns.<sup>73</sup> A refined version of this criticism argues that the kind of standing reason anyone on a consequentialist theory has to assist others mistakenly denies the value of a system of interpersonal relationships that makes space for people to lead independent and worthwhile lives — a system in which there are powers but also robust immunities.<sup>74</sup>

Any moral theory will of course entail the possibility that one may, in some circumstances, have to drop everything and sacrifice a great deal to do the right thing. Consequentialism, however, entails that this will happen as a matter of course. For it does not attend to (nor can it motivate consideration of) what could be directly justified between individuals — it instead requires the "erosion of effective control over one's life."<sup>75</sup> Nonconsequentialist theories with a direct justificatory relationship built into their bricks, conversely, take seriously the value of the pattern of relationships that different packages of rights and duties support. They are therefore predisposed to favor those packages that accord people with only some, and not total, authority over each other.

A parallel story can be told about *Palsgraf*. The ways that people relate to one another — what "our proper powers and immunities with respect to each other"<sup>76</sup> are — vary depending on whether the duties to which they are subject are relational or nonrelational. If one is liable to others for harms that one could not have reasonably foreseen causing them, as Mrs. Palsgraf alleges and Judge Andrews favors, then to avoid liability one would have to be so vigilant of others' well-being

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<sup>72</sup> See generally Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229 (1972) (arguing that the affluent must contribute all their wealth to the needy); SHELLY KAGAN, *THE LIMITS OF MORALITY*, at xi–xii (1989) (highlighting and defending the demandingness of consequentialism); LIAM B. MURPHY, *MORAL DEMANDS IN NONIDEAL THEORY* (2000) (denying the force of the so-called demandingness objection).

<sup>73</sup> See generally SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (1982).

<sup>74</sup> See generally Rahul Kumar, *Defending the Moral Moderate: Contractualism and Common Sense*, 28 PHIL. & PUB. AFF. 275 (1999).

<sup>75</sup> *Id.* at 299.

<sup>76</sup> QUINN, *supra* note 69, at 174.

that, as Judge Cardozo puts it, “life [would] have to be made over.”<sup>77</sup> Nonrelational tort duties are demanding not merely because of their content, but also because of the expectations of proper treatment and care that they support and the intrusion into the normal lives of people that those expectations entail. Cardozo recognizes that unless one’s tort-based duties are sensitive to what anyone can reasonably expect of another, those duties would be unjustifiable and even perverse because they are incompatible with a valuable, recognizably human life that is not simply given over to the protection of others. There is more that hangs in the balance in *Palsgraf* than whether the innocent plaintiff gets compensated for her injury.

The pattern of interpersonal relations underwritten by the *Palsgraf* perspective yields another virtue as well, which Judge Cardozo was also clearly alive to, concerning its characterization of wrongness. Judge Cardozo famously contends, “What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.”<sup>78</sup> What makes the relational conception of duty described here so attractive is that it captures the moral significance of the carelessness treatment of people: there are *victims* of moral carelessness who have a *claim* to better treatment. In this regard, careless treatment is very different from, say, careless arithmetical reasoning.<sup>79</sup> Claims are based upon one’s maltreatment and can only arise in the context of interpersonal relations. One who is wronged by careless conduct stands in a special relation to the person who has wronged her, and the relation gives rise to a claim on behalf of the wronged person against the wronging person.<sup>80</sup> The relational conception of duty is the only one that takes this feature of interpersonal relations seriously.

Reconsidering the different justificatory relationships underlying consequentialist and nonconsequentialist approaches to torts shows why. The indirect justificatory relationship embedded within any economic approach renders people’s duties to each other derivative. They fall out of the basic duty anyone under such an approach has to maximize wealth. If a plaintiff is injured because the defendant failed to take efficient precautions, the defendant has made a mistake and done the wrong thing, to be sure, but they have not wronged anyone. Their

<sup>77</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

<sup>78</sup> *Id.*

<sup>79</sup> In an episode of *Happy Days*, Fonzie chastises one of his admirers for doing something wrong. The latter apologizes with “I made a mistake!” The Fonze replies, “No. ‘Two plus two equals five’ is a mistake. What you did was *mean*, downright *mean*.” *Happy Days: Bringing Up Spike* (ABC television broadcast February 17, 1976).

<sup>80</sup> See JOHN BROOME, *Fairness*, in *ETHICS OUT OF ECONOMICS* 111, 114–19 (1999).

failure is a failure to promote the impersonal goal of wealth maximization — it is “‘wrongful’ because unsocial.”<sup>81</sup> The direct justificatory relationship intrinsic to the *Palsgraf* perspective, however, entails that when one fails to discharge one’s duty of care to others, one wrongs them. Plaintiffs have claims; they are not in court to correct an inefficient impersonal state of affairs.

A further attraction of Cardozo’s position in *Palsgraf*, and Zipursky’s position on *Williams* and *Kent*, then, is the conception of duty at its heart, for it alone makes sense of the distinctiveness of moral wrongdoing. That is a reason to endorse the notion of relational duty and the *Palsgraf* perspective more generally, and it is a fundamentally moral reason. It should be no surprise, then, that the concept has a rich philosophical underpinning in contractualist moral theory.<sup>82</sup> It is worth noting, moreover, that I would be attracted to this conception of duty even if Judge Andrews had won the battle in *Palsgraf* and not just the scholarly war that it started. So Zipursky, and the rest of us, *should* endorse the *Palsgraf* perspective at least in part on moral grounds. That it might leave Mrs. Palsgraf without compensation and Philip Morris richer is dispositive of nothing.

Zipursky’s reticence is misplaced for another reason: namely, that we *must* morally evaluate and indeed endorse the legal-methodological frameworks that we deploy. This is a delicate point for a couple of reasons. First, I grant that laying bare the internal structures and coherences of, for example, tort law is worthwhile in its own right. There is always value in simply understanding salient features of our world. The value in acquiring knowledge cannot be reduced to its practical payoff. Second, if one simply wanted to understand what latent theory seemed to generate the content of the law of torts, one could no doubt espouse some descriptive theory without thereby endorsing it. Nothing in what I am arguing here should be construed to contradict any of legal positivism’s central tenets. Zipursky, though, is not merely trying to understand how the Supreme Court has approached tort law or how Cardozo approached torts. He is of course trying to do that, too. But he is certainly also advocating an approach — Cardozo’s. And though Zipursky may wish to base his advocacy of that approach on purely interpretive grounds, he cannot successfully do so.

One cannot justifiably sign on to a methodology of tort law and deploy it to resolve cases just because of its theoretical, explanatory, and more broadly interpretive virtues. For law purports to guide ac-

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<sup>81</sup> *Palsgraf*, 162 N.E. at 100.

<sup>82</sup> See, e.g., STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT* (2006); SCANLON, *supra* note 68, at 147–88; Kumar, *supra* note 74.

tion and even be authoritative.<sup>83</sup> In any case, we use law to guide and to bind. The law pervasively affects people and their interests, often coercively. If one is to endorse anything that has an effect on people, whatever one endorses must pass some threshold of moral acceptability. Any legal methodology must be at least morally acceptable before it can be deployed to resolve cases.

This claim is founded on the general moral truth that anything that we might do is subject to moral scrutiny.<sup>84</sup> We can assess any potential course of conduct on moral grounds. This alone is not enough to reach the conclusion that anything anyone does must *pass* that inescapable test, of course. To reach that conclusion, one has to add the claim that no one may with reason act immorally. I trust that once it is recognized that the morality that is relevant here is not the “positive” or conventional (and often conservative) mores that many people take some glee in upsetting, but rather the “critical” morality one relies on in criticizing such mores, this claim will not be especially controversial.<sup>85</sup> “We ought not do the morally wrong thing,” while not a tautology,<sup>86</sup> should be easy to accept. But this is what is important: *deciding cases* is *doing* something. A framework of tort law, like the *Palsgraf* perspective and the New Private Law generally, that entails deciding cases in one way rather than another, then, can be morally evaluated and ought to be employed only if it is morally defensible. Once again, though Zipursky favors denying Mrs. Palsgraf’s claim and enriching Philip Morris’s coffers, his approach to those problems nevertheless has much to recommend it — and on moral grounds. This is all to say that Zipursky should have the courage of his methodological convictions.

These are early days for the New Private Law. I have argued here that the approach must clarify and take much more seriously its moral foundations. Still, between the novelty, perspicacity, and moral attractiveness of its approach to tort law, its future seems bright.

<sup>83</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23–109 (1986).

<sup>84</sup> See SAMUEL SCHEFFLER, *HUMAN MORALITY* 25 (1992) (arguing that morality is “*pervasive*” such that “no voluntary human action is in principle resistant to moral assessment”).

<sup>85</sup> See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 20 (1963) (distinguishing between “positive” and “critical” morality).

<sup>86</sup> Any moral theory, such as a Hobbesian one, that takes seriously the question “Why be moral?” must leave open the possibility that doing the morally wrong thing may yet be rational. See generally, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).