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PALSGRAF, PUNITIVE DAMAGES, AND PREEMPTION

*Benjamin C. Zipursky**

INTRODUCTION

The standard One-L curriculum remains heavy on Torts, Contracts, and Property, presumably on the theory that these subjects will help students learn “to think like lawyers.” Ironically, however, these are the subjects in which leading scholars are most attracted to the opposite approach: they want to think like economists, philosophers, political scientists, and historians, not like lawyers. And so it is that a basic common law subject like Torts has turned into a battleground for “law-and-” scholars, with scholars of law and economics pushing efficiency theories on one side and legal philosophers pushing corrective justice theory on the other.

New Private Law theory is founded on the idea that legal scholars must do *both*: although we must avail ourselves of the sophistication of cognate fields of study, we must, in the end, think and theorize like lawyers. New Private Law theorists recognize 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. We insist, however, that understanding private law goes far beyond an appreciation of its salutary functions and its limits. The task requires understanding the concepts and principles entrenched in the law and the structures, institutions, and languages that implement these concepts through the practices of courts, legislators, and lawyers.¹ I have dubbed this view “pragmatic conceptual-

* Associate Dean for Research and James H. Quinn Professor, Fordham University School of Law. I am grateful to Laurence Abraham and Dennis Slater for their research assistance, and to Sheila Foster, John Goldberg, Keith Hylton, John Oberdiek, David Owen, Robert Rabin, Arthur Ripstein, Peter Schuck, Anthony Sebok, Catherine Sharkey, William Treanor, workshops at Fordham University School of Law, Harvard Law School, and Rutgers School of Law-Newark, and the editors of the *Harvard Law Review* for helpful comments on prior drafts.

¹ To a significant extent, New Private Law theory in torts has drawn from the work of corrective justice theorists. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). For the time being, I decline to address the question of whether these theorists' works should be considered part of, not simply generative of, New Private Law theory.

ism”² and, along with Professor John Goldberg, have applied it to a wide array of problems in tort law over the past fourteen years.³

This Article utilizes a pragmatic conceptualist methodology to solve three problems in tort law: one on *Palsgraf*, one on punitive damages, and one on federal preemption. In each case, pragmatic conceptualism allows us to cut through distracting features of the problem, to avoid the embarrassment of judicial paralysis, and to move forward with a coherent approach that identifies which decisions will need to be made by judges and what practical concerns those decisions will turn on. Indeed, in each of the sections that follow, I begin by showing that courts and commentators have been so badly confused by the problem before them that they have been incoherent, silent, or deadlocked. The confusion has been generated by a failure to recognize that — despite the many aspects of tort law that render it importantly public — there is something distinctively private about the common law of torts. Utilizing civil recourse theory, this Article alleviates the confusion and articulates solutions to all three problems.

Part I begins with the canonical case of first-year Torts, *Palsgraf v. Long Island Railroad Co.*⁴ The central point of Chief Judge Cardozo’s *Palsgraf* opinion is that a defendant’s failure to use due care must have been a breach of the duty of due care owed to the plaintiff; the breach and duty elements of the negligence claim must fit together in the right way. The opinion infers this requirement from the broader principle that a plaintiff may not sue in tort for a wrong to another, which itself flows from the idea that a tort claim is fundamentally a private right of action to redress a wrong to oneself. Chief Judge Cardozo utterly rejected the sort of private attorney general conception of tort law that has become prevalent in contemporary tort thinking. So long as scholars and students reading his *Palsgraf* opinion resist his private-law mindset, they are doomed to misunderstand what the opinion actually says.

Part II turns from the past to the present, from *Palsgraf* to the constitutional status of punitive damages. Over the past two decades, the United States Supreme Court has wrestled with the question of when, if ever, a state’s punitive damages law fails to live up to the standards of the Fourteenth Amendment’s Due Process Clause. The Court’s dif-

² Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 458–59 (2000).

³ See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) (causation and objective fault standard); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (emotional harm, risk of harm litigation); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) (duty in negligence law).

⁴ 162 N.E. 99 (N.Y. 1928).

facilities were dramatically revealed in *Philip Morris USA v. Williams*,⁵ in which the Court granted certiorari three separate times,⁶ only to concede defeat to a unanimous Supreme Court of Oregon in a per curiam dismissal.⁷ Civil recourse theory and the private/public distinction seen in *Palsgraf* point toward a clearer picture of the intersection of punitive damages and due process. At common law, a private plaintiff — even if he was seeking punitive damages — was not playing a private attorney general role; he was redressing a wrong to himself or herself. For reasons explained below, the Due Process Clause applies in a more relaxed manner to such claims. To the extent that Oregon and other states now wish to do something demonstrably different with their punitive damages law than permitting plaintiffs to redress wrongs to themselves, the process they provide to defendants must be more robust than that provided by the common law of torts.

Part III turns to federal preemption in products liability law. *Warner-Lambert Co. v. Kent*⁸ took up a circuit split on a nuanced but highly important question regarding federal preemption of products liability claims. In the past few years, several states have passed statutes that fully or partially insulate manufacturers from products liability claims based on products that have obtained safety approval from federal regulators. These statutes provide an exception that is applicable when the plaintiff is able to prove that the regulatory approval was obtained through intentional concealment from or misrepresentation to regulators. However, in *Buckman Co. v. Plaintiffs' Legal Committee*,⁹ the Supreme Court held that the plaintiffs' fraud-on-the-FDA claim was preempted, allocating all regulatory authority over wrongs

⁵ 549 U.S. 346 (2007).

⁶ In 2003, the United States Supreme Court granted Philip Morris's certiorari petition, vacated the judgment below, and remanded to the Court of Appeals of Oregon in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). See *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003). In 2006, the Supreme Court granted in part Philip Morris's subsequent certiorari petition from the Oregon Supreme Court's decision upholding Williams's jury verdict. See *Philip Morris USA v. Williams*, 547 U.S. 1162 (2006). In 2007, the Court issued a 5–4 decision written by Justice Breyer, vacating the judgment of the Oregon Supreme Court and remanding for “further proceedings not inconsistent with this opinion.” *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007). On remand, the Supreme Court of Oregon unanimously affirmed without reaching constitutional issues, on the ground that there was “an independent and adequate state ground for doing so.” *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1260 (Or. 2008) (citing *Osborne v. Ohio*, 495 U.S. 103, 123 (1990)). Philip Morris then petitioned for certiorari a third time, and the Court once again granted limited certiorari. See *Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008). The Court also held oral argument on December 3, 2008. See Transcript of Oral Argument, *Philip Morris*, 128 S. Ct. 2904 (No. 07-1216).

⁷ See *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009) (per curiam) (dismissing writ of certiorari as improvidently granted).

⁸ 128 S. Ct. 1168 (2008) (per curiam).

⁹ 531 U.S. 341 (2001).

against agencies to the federal government.¹⁰ The defendants in *Kent* and similar cases argued that the concealment or misrepresentation exception to state regulatory compliance statutes should be deemed preempted on the strength of *Buckman*.

There was something amiss in the defense's argument in *Kent*, but the Supreme Court was not able to recognize the problem. The Court in *Kent* ended in a 4-4 deadlock of ineffectual silence.¹¹ Part III shows that when the lessons of civil recourse theory are applied to *Buckman*, the problems become clear enough to resolve cases like *Kent* easily. When we recognize that the common law of torts is not a private attorney general system, we see that the preempted claim in *Buckman* was never an authentic tort claim to begin with; it was always based on the idea that a plaintiff should be able to recover by proving a wrong to the state, not to herself. It is no surprise that federal preemption applies to such a putative claim, but that provides no reason whatsoever for deeming the authentic common law claims in *Kent* to be preempted too.

It is tempting to read this Article as an argument that Chief Judge Cardozo's holding in *Palsgraf* supplies the authority for resolving contemporary problems of punitive damages and preemption. This would be quite a bizarre thesis, and it is certainly not mine. Rather, I am suggesting that the failure of the legal academy to grasp what Chief Judge Cardozo actually said in his *Palsgraf* opinion is illustrative of a much larger and ongoing problem in today's thinking about torts. If scholars, lawyers, or judges insist on treating the common law of torts as simply a form of public law that delegates enforcement to individual plaintiffs, they will be doing torts with their eyes shut and stumbling at every turn. The Supreme Court's failure to address punitive damages and preemption problems adequately is evidence that this scenario is just what has occurred. Conversely, when we reject a private attorney general model and take the structure of tort law as private law seriously, we will finally be able to see a clear path to the resolution of today's pressing problems in tort law.

I. THE TENETS OF *PALSGRAF*

A. Chief Judge Cardozo's *Palsgraf* Opinion, *Straight Up*

The sad fact pattern of *Palsgraf* is a drama with five players: two pairs of men and one woman.¹² Two men rushed to leap onto a train

¹⁰ See *id.* at 348.

¹¹ See *Kent*, 128 S. Ct. at 1168 (per curiam) ("The judgment is affirmed by an equally divided Court.").

¹² See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

as it was leaving a station for Rockaway, New York. Two guards employed by the Long Island Railroad Company (LIRR) assisted one of these scrambling latecomers as he was getting onto the moving train. Because of what the jury apparently believed was a negligent push by one of the guards, the latecomer dropped a package wrapped in newspaper, and the package fell onto the tracks. The dropped package actually contained explosives. When they hit the tracks, the explosives generated a huge explosion in the train station, although the train itself had left the station. A woman down the platform was standing near some heavy metal scales used by a train station vendor, and the explosion caused the scales to fall down upon this woman and injure her. The woman — Helen Palsgraf — brought a negligence claim against the LIRR. Her lawyer asserted that the guard's negligence caused the injury and that the LIRR therefore must compensate Mrs. Palsgraf. The jury found for Mrs. Palsgraf, a divided appellate court affirmed, and the LIRR took its case to New York's highest court.

Chief Judge Cardozo, writing the majority opinion in *Palsgraf*, rejected the jury verdict for Mrs. Palsgraf and ordered that the complaint be dismissed.¹³ His abstract analysis and clipped phrasing have drawn criticism, admiration, and a long stream of legal scholarship.¹⁴ Judge William Andrews's dissent for three members of the New York Court of Appeals' seven judges¹⁵ is among the most famous dissenting opinions in all of American law.

Palsgraf seems especially puzzling because Chief Judge Cardozo rejected Mrs. Palsgraf's cause of action as a matter of law even though he did not wish to contest any one of the four elements of a negligence claim. First, his opinion is unquestionably *not* about proximate cause. He says expressly: "The law of causation, remote or proximate, is thus foreign to the case before us."¹⁶ He saw proximate cause as an extent-of-damages issue, and plainly stated that liability issues come first.¹⁷ Judge Andrews's dissent *is*, of course, about proximate cause; indeed,

¹³ *Id.* at 101.

¹⁴ Two recent and extremely thoughtful examples of this genre are Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142 (2011); and W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873 (2011). Professor Cardi notes that there have been over 700 citations to *Palsgraf* in law journals "in the past decade alone." *Id.* at 1874.

¹⁵ *Palsgraf*, 162 N.E. at 101-05 (Andrews, J., dissenting).

¹⁶ *Id.* at 101 (majority opinion).

¹⁷ In fact, Chief Judge Cardozo approvingly cited *In Re Matter of Polemis*, (1921) 3 K.B. 560 (Eng.), and argued that if there were liability, proximate cause would be no obstacle to recovery. *Palsgraf*, 162 N.E. at 101.

it is central to his critique that Chief Judge Cardozo *should have* focused on proximate cause and did not.¹⁸

A closer question is whether *Palsgraf* should be read as a “no duty” opinion. Although some of what Chief Judge Cardozo said is indeed about the structure of the duty of care, and those comments do influence his overall analysis, the rejection of Mrs. Palsgraf’s claim was not predicated on any asserted absence of a duty of care running from the LIRR to her. Chief Judge Cardozo, more than any other judge in American legal history, is famous for holding that privity of contract is not necessary for the existence of a duty of care running from a defendant to a plaintiff.¹⁹ If the question were whether railroads have a duty to take care not to cause physical injury to their patrons or to those in their train stations, his answer would surely have been “yes.” Indeed, he expressly examined the *scope* of what he took to be Mrs. Palsgraf’s “*right*,” describing it as a right “to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue.”²⁰ For Chief Judge Cardozo, who treated rights and duties as correlative,²¹ this assertion was equivalent to a statement that the LIRR had a *duty* not to cause such an invasion. That is, the LIRR had a duty of reasonable care to Mrs. Palsgraf.²²

¹⁸ Cf. ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 79–80 (1963); William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 32 (1953); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 381–82 (1939). Nothing in this Article is intended to undercut the suggestions of Professor Keeton and Professor Seavey that it would have been justifiable for the New York Court of Appeals to have ruled against Mrs. Palsgraf utilizing a conception of proximate cause that incorporated a scope-of-the-risk criterion; the claim is that the opinion Chief Judge Cardozo actually wrote is not based on proximate cause, but is justifiable nonetheless.

¹⁹ See *MacPherson v. Buick Motor Co.*, 110 N.E. 1050 (N.Y. 1916) (holding that manufacturer owes duty of care to consumer, regardless of whether there is privity of contract).

²⁰ *Palsgraf*, 162 N.E. at 99 (emphasis added).

²¹ See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 14–15 (1998); Ernest J. Weinrib, *The Monsanto Lectures: Understanding Tort Law*, 23 VAL. U. L. REV. 485, 494–526 (1989). Professor Weinrib’s interpretation of *Palsgraf* in this early article and in a subsequent book and article have continued to exert a significant influence on my own views of the case. See generally WEINRIB, *supra* note 1; Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 (2001).

²² The popularity of the contrary view (that Chief Judge Cardozo did not regard the LIRR as having a duty of reasonable care to Mrs. Palsgraf) is owed, in part, to the enormously influential *Torts Hornbook* by Prosser and Keeton. After taking some care to describe Chief Judge Cardozo as holding the view there must be “negligence toward the plaintiff,” W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 43 at 285 (5th ed. 1984), the *Hornbook* breezily describes the “view of the Palsgraf [c]ase” as one according to which “there is no duty, and hence no negligence, and so never any liability, to the unforeseeable plaintiff.” *Id.* The language just quoted is especially peculiar because it simultaneously attributes this view of what *Palsgraf* says to the Restatement (Second) of Torts § 281, cmt. c (1965), *id.* at 285 & n.36, which in fact says nothing of the sort, and does not even include the word “duty”:

Finally, Chief Judge Cardozo ended up displaying a willingness to assume that there was in fact some failure to use due care — there was some evidence of breach²³ — and that Mrs. Palsgraf did indeed suffer an injury.

In short, Chief Judge Cardozo's opinion is perplexing because he did not identify a fatal shortcoming in any of the four elements of a negligence claim — (a) duty, (b) breach (or negligence), (c) causation, and (d) injury²⁴ — but he rejected Mrs. Palsgraf's claim nonetheless. Why? The answer is that, in order for there to be a supportable negligence claim, the four elements must fit together in the right way, and they did not in *Palsgraf*. Chief Judge Cardozo thought that the plaintiff's lawyer was engaged in a verbal sleight of hand with the elements of a negligence claim. That is what he meant in saying “[t]he argument for the plaintiff is built upon the shifting meanings of such words as ‘wrong’ and ‘wrongful,’ and shares their instability.”²⁵ What was untenable, thought Chief Judge Cardozo, was that even if there was a duty owed to the plaintiff not to act “wrongfully” (negligently) toward her (under element (a)), the plaintiff's lawyer was picking the package-carrying passenger as the one to whom the guard had committed the “wrongful” (or negligent) conduct (under element (b)). But the whole tort of negligence, on Chief Judge Cardozo's view, required the same person (the plaintiff) to be threaded through both the “duty” element *and* the “breach” element. As he wrote in the very next sentence, “[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 some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.”²⁶ As applied to the tort of negligence, this means that the defendant's negligent conduct must have been a breach of the duty of due care *owed to*

c. Risk to class of which plaintiff is member. In order for the actor to be negligent with respect to the other, his conduct must create a recognizable risk of harm to the other individually, or to a class of persons — as, for example, all persons within a given area of danger — of which the other is a member. If the actor's conduct creates such a recognizable risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.

Restatement (Second) of Torts § 281, cmt. c. Illustration 1 to the comment is the fact pattern of *Palsgraf* itself.

John Goldberg and I have offered an extensive critique of Prosser on duty in negligence law at several places. See, e.g., Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 3, at 1752–66, 1807–11.

²³ *Palsgraf*, 162 N.E. at 100 (“If there was a wrong to [the passenger] at all, which may very well be doubted . . .”).

²⁴ KEETON ET AL., *supra* note 22, § 30, at 164–65.

²⁵ *Palsgraf*, 162 N.E. at 100.

²⁶ *Id.*

the plaintiff, not to someone else or to no one at all.²⁷ There must thus be the right sort of nexus between the duty and breach elements.²⁸

While Chief Judge Cardozo recognized the existence of a duty of care to Mrs. Palsgraf, he took a strong position on the *structure* of the duty of care in negligence law. Lying behind Chief Judge Cardozo's insistence that the defendant's negligence must have been a breach of the duty of due care owed to Mrs. Palsgraf is his view that duties of care within negligence law are *relational rather than simple* in their structure, and connectedly, that duties of care are *several rather than unified*. A person's legal duty not to litter, for example, is a simple duty; there is a mandatory obligation contained in the law demanding that one not litter. By contrast, there is a mandatory obligation in the law that one not commit a battery against others, but this is a relational duty, not a simple one. The nature of the act one is enjoined from doing is such that it is always an act as to some particular person (it may simultaneously be a wrong as to several persons, as when a grenade is thrown into a house with several persons in it).²⁹ Just as there is a duty to every person in the world not to commit a battery against her, so there is a duty to every person in the world to take reasonable care not to injure her through one's actions. It does not mean that the concept of duty in negligence law is lacking in an obligee; it means that there are innumerable individual obligees.³⁰ A person does not simply have a *general duty* to take care, she has *duties of care to persons or classes of persons*.³¹ If it is slightly misleading to say that the

²⁷ This interpretation of *Palsgraf* is developed in Zipursky, *supra* note 21, at 7–15; Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 3, at 1818–20; and 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) [hereinafter Goldberg & Zipursky, *The Restatement (Third)*].

²⁸ The “nexus” requirement is also discussed at Goldberg & Zipursky, *The Restatement (Third)*, *supra* note 27, at 709–12, which indicates that a number of courts house such determinations under the “duty” element.

²⁹ See Zipursky, *supra* note 21, at 59–63 (setting forth the distinction between simple and relational wrongs).

³⁰ Judge Andrews unequivocally rejected Chief Judge Cardozo's central claim that the duty of due care in negligence law is relational and offered several putative counterexamples to Chief Judge Cardozo's analytical claim: insurers' claims, wrongful death claims, and loss of consortium among them. *Palsgraf*, 162 N.E. at 103–04 (Andrews, J., dissenting). As I have argued in detail elsewhere, each of Judge Andrews's examples tends to show the opposite of what he was intending, for in each case where a cause of action is available to a person who was not herself wronged, the legal system found it necessary to supplement the common law negligence claim by statute, by contract, or by the law of equity. See Zipursky, *supra* note 21, at 37–40. Moreover, a great deal of negligence law far less controversial than *Palsgraf* itself can be understood only through the analytical apparatus of a relational duty. Indeed, it is Judge Andrews's nonrelational conception of the duty of care that stands in the way of grasping the structure of settled negligence doctrine. See generally Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 3; Goldberg & Zipursky, *The Restatement (Third)*, *supra* note 27.

³¹ The relationality of duty in negligence law, and the relationality of torts more generally, are themes that I have developed in conjunction with John Goldberg in numerous articles and in a

duty of due care is universal, that is not because it is correct to say that the duty of care is limited; it is because it is slightly misleading to speak of “the” duty of care at all, for there are *duties* of care owed to individual persons, respectively. In this sense, one might describe duties of care within negligence law as *several*, rather than *unified*.

Chief Judge Cardozo’s own articulation of the argument in *Palsgraf* probably focused more on breach than on any other element; again, his requirement of a breach-duty nexus commits him to a rather strong view of the nature and structure of the “negligence”³² element. His reasoning for thinking that there was not the right sort of negligence in this case was that the concept of negligence itself was intrinsically relational. “Negligence, like risk, is thus a term of relation.”³³ And so it was crucial for Chief Judge Cardozo that a plaintiff in a negligence case be able to prove that the defendant’s conduct was *negligent relative to her*. The requirement that the defendant’s conduct must have been negligent relative to the plaintiff is just another way of saying that the defendant’s conduct must have been *a breach of the duty of care owed to her*. The text of Chief Judge Cardozo’s *Palsgraf* opinion asserts — loudly and clearly — that Mrs. Palsgraf failed to satisfy the negligence-relative-to-plaintiff requirement. We can find in the opinion statements that “[r]elatively to her [the guard’s conduct] was not negligence at all,”³⁴ that a plaintiff may not recover for “breach of duty to another,”³⁵ and that “[t]he conduct of the defendant’s guard . . . was not a wrong in its relation to the plaintiff.”³⁶ The basic nexus between breach and duty was missing. And that is why he thought Mrs. Palsgraf’s claim failed.

The famous discussion of foreseeability in *Palsgraf* must be understood in connection with Chief Judge Cardozo’s view that Mrs. Palsgraf failed to establish negligence relative to herself. That is because a duty of care toward someone requires vigilance of foreseeable hazards to that person, but does not require vigilance of hazards that

recent book. See, e.g., JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 98–103 (2010); Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 3, at 1825–46; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 945–47 (2010).

³² For the most part, he did not call it the “breach” element. Instead (like many judges, lawyers, and laypeople), he principally referred to it as the issue of whether the defendant acted in a “negligent” manner; he opined on whether there was really *negligence* in this case. In so doing, he was referring to the small “n” negligence element, not the whole tort of “Negligence” (rather than, for example, the torts of Libel or Nuisance or Conversion). That is, he was examining the breach element to see whether it was satisfied, and more particularly, he was making the argument that the breach element needed to be satisfied in the right way.

³³ *Palsgraf*, 162 N.E. at 101 (citation omitted).

³⁴ *Id.* at 99.

³⁵ *Id.* at 100.

³⁶ *Id.* at 99.

only a person with extraordinary powers of foresight could anticipate. Chief Judge Cardozo meant just that when he said “the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”³⁷ And he thought that the risk of injury to Mrs. Palsgraf from the guard’s push was unforeseeable and extraordinarily low.³⁸ A fortiori, the LIRR guard did not fail to take precautions against foreseeable injury to Mrs. Palsgraf and did not breach his duty of care to her. Indeed, the case against foreseeability of any injury to Mrs. Palsgraf was so strong that Chief Judge Cardozo believed there was no negligence relative to the plaintiff as a matter of law. He expressly stated that “[t]he range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.”³⁹ Because the plaintiff conceded that “there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage in the station,”⁴⁰ he went on to argue, it was indisputable that the guard created no unreasonable risk to Mrs. Palsgraf.

Unsurprisingly, the very idea of an essential link between the negligent conduct (the breach) and the duty is the core of Chief Judge Cardozo’s pithiest quotation in *Palsgraf*: “The ideas of negligence and duty are strictly correlative.”⁴¹ The same idea is reiterated in his carefully selected quotation from the Maryland Supreme Court: “In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, *the observance of which would have averted or avoided the injury.*”⁴² There is no reason to think that Chief Judge Cardozo denied the existence of a duty to Mrs. Palsgraf, but he surely denied the existence of a duty *the observance of which would have averted the injury*. But that is just to say neither the LIRR guard’s allegedly negligent push nor any other act alleged by the plaintiff was a failure to observe the duty of care owed to Mrs. Palsgraf. The breach — the failure to observe a duty of care — was not a failure to observe any duty owed to Mrs. Palsgraf. It is as if our scholarly tradition’s incorrect contention that Chief Judge Cardozo denied the existence of a duty of care to Mrs. Palsgraf was generated by a failure to take note of the Maryland court’s critically important phrase qualifying the duty, above.⁴³

³⁷ *Id.* at 100.

³⁸ *See id.* at 99.

³⁹ *Id.* at 101.

⁴⁰ *Id.*

⁴¹ *Id.* at 100 (quoting *Thomas v. Quartermaine*, (1887) 18 Q.B.D. 685 at 694 (Eng.)).

⁴² *Id.* at 99–100 (emphasis added) (quoting *W. Va. Cent. & P. Ry. Co. v. State*, 54 A. 669, 671 (Md. 1903)) (internal quotation marks omitted).

⁴³ Interestingly, the first page of Chief Judge Cardozo’s *Palsgraf* opinion in the North Eastern Reporter ends with the clause “back of the act must be sought and found a duty to the individual

Chief Judge Cardozo did not merely assert his holding that the plaintiff must prove a *breach of the duty of care owed to her*; he offered a justification for it. One part of Chief Judge Cardozo's justification implicitly argued that this case was an instance of the ancient principle of *damnum absque injuria*;⁴⁴ that is what he meant in stating that "[n]egligence is not a tort unless it results in the commission of a wrong Affront to personality is still the keynote of the wrong."⁴⁵ The defendant's failure to take heed of the risk of injury to the plaintiff — his breach of duty to her to be careful not to injure her — would qualify as a failure to take her seriously as a person, and would in that sense count as an affront to personality, but simply causing the injury would not.

The idea that harm itself does not generate a right of action without a legal injury and a legal wrong — *damnum absque injuria* — was a basic principle of Baron Rolfe's opinion in *Winterbottom v. Wright*,⁴⁶ defending the privity requirement in negligence law. Chief Judge Cardozo's famous opinion in *MacPherson* rejecting privity is sometimes depicted as a rejection of the whole mindset associated with *damnum absque injuria* in favor of a broad and pragmatic fault principle.⁴⁷ As Goldberg and I argued more than a decade ago, that line of thought demonstrably misreads Chief Judge Cardozo.⁴⁸ His *MacPherson* opinion absolutely agreed that a duty of care was necessary, and conceived of that duty in a way that meshes well with the concept of "affront to personality." His very point in *MacPherson* was that a negligent manufacturer breaches a duty of care owed *to the consumer*, because the manufacturer knows that the consumer will not be doing his or her own safety check, and will thus be relying upon the manufacturer's check, without which the consumer will be imperiled by a potentially dangerous product.⁴⁹ The failure to heed the risks to the consumer is the affront; the duty to a person whom one knows to be potentially imperiled is a basis for finding *injuria*, not simply *damnum*. But this works only if the negligence causing physical damage to someone was itself a failure to take reasonable care toward that per-

complaining," *id.* at 99; the qualifying phrase "the observance of which would have averted the injury" does not appear until the next page, *id.* at 100.

⁴⁴ Cf. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51–53 (1st Cir. 1985) (Breyer, J.) (grouping *Palsgraf* with pure economic loss cases, and recognizing that, in such cases, "[o]ne could also appeal to historic legal terminology, and describe plaintiffs as suffering *damnum absque injuria*," *id.* at 53); Weinrib, *The Passing of Palsgraf?*, *supra* note 21, at 807 ("In the old language of the law, the case is then one of *damnum sine iniuria*.").

⁴⁵ *Palsgraf*, 162 N.E. at 101.

⁴⁶ (1842) 152 Eng. Rep. 402 (Exch.) 405.

⁴⁷ See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY OF REPUTATION* 92 (1990).

⁴⁸ Goldberg & Zipursky, *The Moral of MacPherson*, *supra* note 3, at 1812–17.

⁴⁹ *Id.* at 1815.

son. Like Mr. MacPherson and every potential plaintiff, Mrs. Palsgraf did not have a right against bodily injury; she had *a right not to suffer bodily injury stemming from another's failure to take care not to injure her*.

Chief Judge Cardozo saw that it was not enough to justify the claims that: (a) a tortfeasor could not be held responsible for harm alone; and (b) a plaintiff must prove that the person harmed was harmed by the defendant's breach of a duty of care. He appears to have realized that *damnum absque injuria* left open a possibility that Mrs. Palsgraf's lawyer was trying to exploit by "shifting meanings." If the plaintiff proves she was harmed and proves that the harm was caused by the negligent conduct, it might still be possible that the defendant did not breach a duty of care owed to the plaintiff. If — as Chief Judge Cardozo believed — negligence law also requires that: (c) the breach of the duty of care causing the harm was the breach of the duty of care owed to the plaintiff, then a further piece of the justification is needed.

The further piece turns out to be the one that has most frustrated commentators: the statement that "[t]he victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another. Thus to view his cause of action is to ignore the fundamental difference between tort and crime. He sues for breach of a duty owing to himself."⁵⁰ This passage is admittedly confusing, for he seems to be reiterating the conclusion he is trying to establish — that the breach in the tort of negligence must be a breach of the duty of due care owed to the plaintiff. The key to understanding it is to see that Chief Judge Cardozo was defending this relationality requirement within the tort of negligence by placing the tort of negligence within the broader domain of tort law as a whole and the deeper history of the subject. Torts like trespass to land and battery recognize individual rightholders whose rights are violated, and correlatively recognize duties not to interfere with a right of exclusive possession and duties not to invade another's bodily security. It is clear that these duties have kinds of beneficiaries — the possessor and the person whose bodily security is invaded by an intentional act or its equivalent — and that only those beneficiaries may bring a tort claim against someone violating that right. Chief Judge Cardozo was arguing that it is and has always been a basic requirement of tort law that the plaintiff in a tort claim must be asserting that the putative tortfeasor breached that tort duty *as to her*.

The argument that *in the tort of negligence, the plaintiff must prove there was a breach of the duty of care owed to her* is thus being depict-

⁵⁰ *Palsgraf*, 162 N.E. at 101 (citations omitted).

ed as a special case of a more general requirement in tort law that “[w]hat the plaintiff must show is ‘a wrong’ to herself.”⁵¹ And as to the latter claim, the argument is at once historical and interpretive. Insofar as there is a right of action in tort, Chief Judge Cardozo reasoned, it is a legal power that is derived from having been among those to whom the tort duty in question was breached; it is not a free-standing or delegated power to enforce a law prohibiting wrongs of a certain kind. The need for a rightholder whose right was violated in order for there to be liability in the wrongdoer constitutes a critical difference between tort liability and criminal liability. Satisfying this condition within the tort of negligence requires that the plaintiff prove that the defendant breached the duty of care that was owed to her.

B. Civil Recourse and Relationality

Chief Judge Cardozo’s *Palsgraf* opinion ultimately relies upon a doctrinal requirement that a tort plaintiff may only sue for a wrong to herself; she may not sue for a wrong to another or for a wrong to no one at all. I have elsewhere documented a vast body of tort law that supports the doctrinal claim that this general requirement exists, arguing that Chief Judge Cardozo was in fact correct that tort doctrine does not permit claims based on wrongs that are not wrongs to the plaintiff herself.⁵² Indeed, I have even given this general requirement a label: the “substantive standing” requirement.⁵³

The substantive standing requirement makes sense if one begins with a default rule that no one is entitled to have the courts create a liability in a defendant running to her. The default rule itself derives from a liberal principle of individual right: each of us is *prima facie* entitled to be free of the state-enforced demands of others. The law’s ground for providing plaintiffs with rights of action against defendants notwithstanding the presumption of nonactionability is that the plaintiff was wronged by the defendant — that is to say, given that there are rules governing how to treat others that are laid out by the law, the defendant’s misconduct was a *violation of those rules as to the plaintiff*. The overall theoretical sketch I have offered suggests that tort plaintiffs are provided with private rights of action so that they have some avenue of recourse against the wrongdoer. Through tort law, the state provides aggrieved persons with a right of action against those who wronged them. The state does so out of the recognition that the state should not completely cut off a victim’s ability to respond to having been wronged. A person who has been wronged is entitled to some

⁵¹ *Id.* at 100.

⁵² Zipursky, *supra* note 21, at 15–40.

⁵³ *Id.* at 4.

avenue of recourse against the wrongdoer; that is what is meant by the principle articulated in the phrase *ubi jus, ibi remedium* — “where there’s a right, there’s a remedy.” Tort law recognizes that entitlement by empowering the victim of a wrong to exact a remedy from the wrongdoer civilly, through the courts. In tort law, it offers the courts as an avenue of civil recourse.⁵⁴

Civil recourse theory helps get behind the distinction between crime and tort, for it helps one to see why it is basic to tort law that the plaintiff herself was wronged. In criminal law, a defendant’s vulnerability to the power of the state turns on whether the defendant can be shown to have acted a certain way that the law prohibits. Tort law — although in one important sense “wrongs-based” — is not like that. The vulnerability of the defendant to the state does not turn simply on whether the defendant committed a wrong; it also turns on who is bringing the lawsuit. Liability is *liability to someone*, because the liability is correlative to a power and the power is, in a deep sense, a *private power*. Civil recourse theory gives an explanation of why these private powers to exact remedies from those who have committed wrongs exist at all — what ground the state has for rendering individuals vulnerable to the demands of others. They exist to afford civil recourse to those who have been wronged by the wrongdoers: an individual is only afforded a private power in light of her right to redress the wrong to her. That is why a defendant’s liability in tort is only liability to one whom he or she has wronged.

Chief Judge Cardozo’s insistence on the need for a wrong to the plaintiff herself in *Palsgraf* suggests why many contemporary scholars view his famous opinion as irrelevant or misguided. Most of today’s legal scholars are impatient with those commentators who would insist upon a divide between public and private law. And many of the most important legal scholars of the past hundred years — be they critics or defenders of tort law⁵⁵ — think it critical that tort law is, in the deepest sense, a matter of public law. At the core of a wide variety of tort thinking today is the assumption that a plaintiff in a tort case is, at least in part, performing a private attorney general role. Yet when Chief Judge Cardozo reached the “Q.E.D.” moment of his famous

⁵⁴ I introduced civil recourse theory in Zipursky, *supra* note 21, and have developed it, both individually and in conjunction with Professor John Goldberg, in several articles. See, e.g., Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005). GOLDBERG & ZIPURSKY, *supra* note 31, utilizes civil recourse theory in providing a theoretical and doctrinal overview of all of American tort law.

⁵⁵ See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (explaining the value of tort law as a system for reducing the costs of accidents); A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010) (questioning the value of products liability law by reference to public law values).

opinion in *Palsgraf*, he was saying that this is exactly what should not happen in a tort suit; the plaintiff should not be able to proceed based on a demonstration that the defendant acted antisocially or wrongfully in some general sense or to some third person.⁵⁶

The remainder of this Article shows how the recognition of this very private aspect of tort law illuminates contemporary problems in ways that are suitably nuanced for complex legal issues. It should be said in advance, however, that my emphasis on the importance of this *private* aspect of tort law must itself be qualified. First and foremost, as the brief discussion of *MacPherson* intimates, civil recourse theory takes relational duties as an equally central idea, and argues that tort theorists of the twentieth century underappreciated a critical *public-law* aspect of tort law as a system of court-articulated, conduct-guiding rules that meshed with social norms.⁵⁷ Second, the assertion that states are empowering private parties in tort law, not deputizing private plaintiffs, is fundamentally an interpretive one, not a normative one; as is indicated below, it is considerably qualified as an interpretive claim by changes in state tort law and even by pockets of traditional doctrine that do not quite fit.⁵⁸ Relatedly, the analysis put forward is not intended to foreclose the possibility of persuasive arguments of policy or principle that tort law should, all considered, be transformed out of the private mode of common law into a more private attorney general mode.

II. PUNITIVE DAMAGES, DUE PROCESS, AND THE DISTINCTION BETWEEN PRIVATE REDRESS AND NONCOMPLIANCE SANCTIONS

This Part depicts a major problem in recent decisions on the constitutional law surrounding punitive damages and argues that the problem derives from a proclivity of the Justices of the Supreme Court to see punitive damages as a private attorney general mechanism for delivering punishment and deterrence. The Court has failed to appreciate the ways in which punitive damages might once have fit into a conception of tort law as private law, and that failure has contaminated its entire approach to the subject. What follows is an argument that punitive damages awards in state tort law today have actually taken on a compound nature, often blending private law and public law features. The applicability of due process norms varies, I argue, according to the extent to which the award remains purely private. This analytical framework permits a resolution of the Court's dilem-

⁵⁶ *Palsgraf*, 162 N.E. at 101.

⁵⁷ Zipursky, *supra* note 21, at 92–93.

⁵⁸ See *infra* section II.C, pp. 1786–1787.

mas regarding punitive damages and the reconstruction of a framework that fits with current doctrine.

A. *The Supreme Court's Failure to Come to Terms with Punitive Damages and Due Process*

1. *An Arc of Incoherence.* — Whatever else one says about the Roberts Court, it seems to be quite sure-footed, clear, and confident of its own authority. Not so in torts. Consider the strange arc of *Philip Morris USA v. Williams*,⁵⁹ a smoker's case from Oregon. Notwithstanding a punitive damages verdict that was almost one hundred times as large as the compensatory damages verdict, and almost certainly in violation of the Rehnquist Court's aggressive 6–3 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*⁶⁰ (which set out a presumptive limit of ten to one⁶¹), the Court declined even to reach the question of whether the verdict was grossly excessive.⁶² While Justice Breyer managed to scrape out a 5–4 majority by gaining the votes of then-new Court members Chief Justice Roberts and Justice Alito, he did so by avoiding any discussion of the size of the punitive damages award.

Williams involved a widow's claim on behalf of her husband that Philip Morris had fraudulently caused him to become addicted to nicotine and to purchase and consume its product, which killed him.⁶³ After deciding to award the plaintiff \$821,000 in compensatory damages, the jury was invited by the plaintiff's lawyer to impose punitive damages upon Philip Morris because of its willful and injurious fraud and the many lives of other Oregonians that had been taken by Philip Morris over the years.⁶⁴ The jury imposed a \$79.5 million verdict upon Philip Morris, and the verdict was affirmed by the Oregon Supreme Court.⁶⁵ At the U.S. Supreme Court, Philip Morris argued that the award was grossly excessive under *BMW of North America, Inc. v. Gore*⁶⁶ and *State Farm*. Here, the tobacco company reiterated an argument about the trial court's jury instructions. Philip Morris asserted

⁵⁹ 129 S. Ct. 1436 (2009) (per curiam) (dismissing writ of certiorari as improvidently granted). The 2009 disposition of the case was in response to a third petition for certiorari. The Court's only actual opinion was written in response to the second certiorari petition. See *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). Unless otherwise stated, references in the text to *Williams* refer to the 2007 decision.

⁶⁰ 538 U.S. 408 (2003).

⁶¹ See *id.* at 425.

⁶² *Williams*, 549 U.S. at 358 (“[W]e shall not consider whether the award is constitutionally ‘grossly excessive.’”).

⁶³ See *id.* at 349–50.

⁶⁴ See *id.* at 350–51.

⁶⁵ See *id.* at 351–52.

⁶⁶ 517 U.S. 559 (1996).

that the trial judge should not have allowed the jury — in deciding upon a punitive damages verdict — to punish Philip Morris for having injured or killed Oregonians other than Mr. Williams.⁶⁷ To allow the Oregon court to take money from Philip Morris based on injuries allegedly done to individuals not part of the litigation was to permit the court to deprive Philip Morris of property without due process of law.⁶⁸

Justice Breyer accepted this argument in an opinion joined by Chief Justice Roberts, Justice Kennedy, Justice Souter, and Justice Alito.⁶⁹ He announced what I have elsewhere called “the nonparty-harm rule”⁷⁰: the state may not punish a defendant through punitive damages for harm it inflicted on persons who are not even party to the litigation. Justice Breyer advanced two justifications to support this rule: first, that due process requires that a defendant be able to challenge the plaintiff’s assertions about the harm allegedly justifying the extra punishment, and such challenges were not procedurally feasible if the putative victims were not parties before the court;⁷¹ and second, that the dimensions and magnitude of the class of putative victims were too vague and nonspecifiable to permit defendants like Philip Morris adequate notice of the magnitude of liability they would face.⁷²

Four members of the Court dissented — a quartet that notably included Justice Stevens, the author of *BMW*. His sharp opinion articulated a conceptual problem that gripped Justice Ginsburg and Justice Scalia and has caught the attention of many academics commenting upon the case:

While apparently recognizing the novelty of its holding, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant’s conduct — which is permitted — and doing so in order to punish the defendant “directly” — which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant — directly — for third-party harm.⁷³

⁶⁷ See *Williams*, 549 U.S. at 350–51.

⁶⁸ See *id.* at 351.

⁶⁹ *Id.* at 348.

⁷⁰ Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 CT. REV. 134, 135 (2007–2008).

⁷¹ *Williams*, 549 U.S. at 353–54.

⁷² *Id.* at 354.

⁷³ *Id.* at 360 (Stevens, J., dissenting) (citations omitted).

Justice Stevens was not exaggerating: the majority opinion does indeed draw the distinction indicated by the passage above, and Justice Breyer's efforts to explain it are extremely weak.⁷⁴

What happened after the Court's 2007 *Williams* decision was quite remarkable. On remand, the Court directed the Oregon Supreme Court to ascertain whether the jury instructions as a whole adequately informed the jury that it was not to impose punishment for nonparty harm.⁷⁵ Yet, in a striking display of recalcitrance, a unanimous Oregon Supreme Court simply adhered to its prior rulings and affirmed the lower court.⁷⁶

Evidently dismayed by the Oregon Supreme Court's seeming insubordination, the Supreme Court granted certiorari a third time, this time on the issue of whether there was an adequate and independent nonfederal ground for affirmance, and more generally whether the Oregon Supreme Court should be reversed for failure to consider the directions the Court had given.⁷⁷ A few months after oral argument, however, the Justices threw up their hands in exasperation and dismissed the petition as one in which certiorari was improvidently granted, permitting Williams's \$79.5 million punitive damages verdict to stand.⁷⁸

2. *A Brief History of Due Process and Punitive Damages.* — How did the Supreme Court get itself into this mess? The short answer is that while the Rehnquist Court was long fractured by the question of whether due process jurisprudence has any applicability to punitive damages, a tentative equilibrium among a majority of the Justices had been reached by the early 2000s in *State Farm*. The replacement of Chief Justice Rehnquist and Justice O'Connor by Chief Justice Roberts and Justice Alito appears to have disrupted that equilibrium, and left the Court in a position where there is such confusion and dissensus that they can no longer find a way to address these questions. A bit more history is needed if we are to work ourselves out of the tangle.

The Supreme Court first addressed the permissibility of a punitive damages award under the Due Process Clause in *Pacific Mutual Life Insurance Co. v. Haslip*,⁷⁹ in 1991. The majority's opinion was flanked by two extreme and categorical views. In her dissent, Justice O'Connor articulated a clear and powerful due process critique found-

⁷⁴ See *id.* at 355 (majority opinion); see also Zipursky, *supra* note 70, at 141 (criticizing Justice Breyer's response to Justice Stevens's critique).

⁷⁵ *Williams*, 549 U.S. at 356–58.

⁷⁶ See *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1264 (Or. 2008).

⁷⁷ See *Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904, 2904 (2008).

⁷⁸ See *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436, 1436 (2009).

⁷⁹ 499 U.S. 1 (1991).

ed on void-for-vagueness doctrine⁸⁰ (as well as a distinct *Mathews v. Eldridge*⁸¹ argument⁸²):

Alabama's common-law punitive damages scheme . . . permits a jury to decide whether or not to impose punitive damages "without imposing a single condition, limitation or contingency" on the jury. . . . As in *Giaccio*, this grant of unchanneled, standardless discretion "does not even begin to meet th[e] constitutional requirement."

The vagueness question is not even close.⁸³

Not to be outdone on confidence, Justice Scalia, concurring in the judgment, wrote:

Since it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury; and since in my view a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes "due" process; I would approve the procedure challenged here without further inquiry into its "fairness" or "reasonableness."⁸⁴

In his majority opinion in *Haslip*, Justice Blackmun rejected both extremes. With regard to Justice O'Connor's position that Alabama's punitive damages scheme categorically violates due process standards, he responded that in view of its long and "consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."⁸⁵ But he hastily rejected Justice Scalia's categorical approach in the other direction, adding that "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."⁸⁶

By way of putting forward an affirmative approach, Justice Blackmun said precious little:

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.⁸⁷

Indeed, by landing upon nothing more than "general concerns of reasonableness," the Justices in the majority simply dropped the ball

⁸⁰ See *id.* at 44 (O'Connor, J., dissenting).

⁸¹ 424 U.S. 319 (1976).

⁸² See *Haslip*, 499 U.S. at 53 (O'Connor, J., dissenting).

⁸³ *Id.* at 45–46 (third alteration in original) (citations omitted) (citing *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966); and *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

⁸⁴ *Id.* at 24–25 (Scalia, J., concurring in the judgment).

⁸⁵ *Id.* at 17 (majority opinion).

⁸⁶ *Id.* at 18 (citing *Williams v. Illinois*, 399 U.S. 235, 239 (1970)).

⁸⁷ *Id.* (citation omitted).

on the *concept* of due process. Justice Stevens's plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*⁸⁸ followed the same approach, and affirmed an enormous punitive damages verdict under the highly deferential excessiveness approach that traveled under the name "due process."⁸⁹ The Court still seemed to be waiting for a case to come along in which the award was just too high to tolerate, even under a deferential reasonableness analysis.

Two years later, *BMW of North America, Inc. v. Gore* proved to be the right case. The Court declared, in a 5–4 opinion written by Justice Stevens, that the magnitude of the award itself showed that the Due Process Clause was violated, even if the majority could not indicate any particular aspect of state process that was unacceptable.⁹⁰ The Court announced a three-guidepost test to determine whether a particular punitive damages award is grossly excessive: courts are to consider, first, the reprehensibility of the defendant's conduct; second, the ratio of the punitive damages to the actual or potential damage inflicted (typically involving consideration of the ratio of punitive to compensatory damages); and third, the comparable civil and criminal penalties in the jurisdiction under legislative or regulatory regimes for similar conduct.⁹¹ The Rehnquist Court subsequently issued *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁹² in 2001 and *State Farm*⁹³ in 2003, solidifying the due process–based framework of *BMW*.

Although *BMW* is plainly the Supreme Court's most important punitive damages decision, it exposed the weakness at the base of Justice Blackmun's putative "due process" opinion in *Haslip*, as Justice Scalia's scathing dissent in *BMW* pointed out: while "due process" is the label, *excessiveness* is really the inquiry. The Roberts Court's treatment of the constitutionality of punitive damages suggests that Chief Justice Roberts and Justice Alito are deeply uncomfortable applying *BMW* as a due process decision, but are not ready to abandon it. The Roberts Court has only once struck down a punitive damages verdict as too large, and even then, it deliberately did so on statutory grounds that were paper-thin rather than utilizing the well-established doctrine of *BMW*.⁹⁴ The Court in that case — *Exxon Shipping Co. v. Baker* —

⁸⁸ 509 U.S. 443 (1993).

⁸⁹ *Id.* at 453, 461 (finding an award of \$10 million in punitive damages — more than 526 times compensatory damages — not grossly excessive based on the record before the Court).

⁹⁰ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996).

⁹¹ See *id.* at 574–75.

⁹² 532 U.S. 424, 431 (2001) (holding that the standard of appellate review for excessiveness under *BMW* is *de novo*).

⁹³ 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

⁹⁴ See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2630–34 (2008). While Chief Justice Roberts participated in *Baker*, Justice Alito did not.

pointedly declined to discuss constitutional issues.⁹⁵ Indeed, *Williams* is the only case on the constitutionality of punitive damages that the Roberts Court has ever decided.

Our current legal intellectual culture, with its focus on the private attorney general model of what tort law is, has prevented judges and scholars from grasping why tort law's punitive damages might, historically, have been shielded from scrutiny on vagueness and notice grounds. In this way, I shall suggest, the failure to appreciate the private nature of the common law of torts has led our highest Court to flounder in one of the few areas of tort law in which it has tried to play an active role: punitive damages.

B. Two Conceptions of Punitive Damages

In this section, I will use civil recourse theory and the understanding of tort law drawn from *Palsgraf* to depict two conceptions of punitive damages: the private redress conception and the noncompliance sanction conception.⁹⁶ Section C suggests that contemporary state punitive damages law in the United States is a compound of the private redress and noncompliance sanction conceptions.⁹⁷

1. *The Private Redress Conception of Punitive Damages.* — Civil recourse theory offers a distinctive account of the place of punitive damages in the common law of torts. Unlike Posnerian economic analysis and other private attorney general conceptions of tort law, civil recourse theory says that tort law is not about sanctioning defendants for wrongful conduct; it is about respecting the rights between the private parties. But unlike corrective justice theory, civil recourse the-

⁹⁵ *Id.* at 501–02.

⁹⁶ See generally Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (describing two aspects of punitive damages law, one more squarely in private law, and one more regulatory).

⁹⁷ Prior works by myself and others in the past decade (especially others in a “New Private Law mold”) have developed somewhat similar themes, in each case recognizing that some conceptions of punitive damages are almost purely private, while others are almost purely public, and that state law typically presents a *mélange*. See, e.g., Guido Calabresi, *The Complexity of Torts — The Case of Punitive Damages*, in EXPLORING TORT LAW 333 (M. Stuart Madden ed., 2005); Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623 (Jules Coleman & Scott Shapiro eds., 2002); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) [hereinafter Colby, *Beyond*]; Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008) [hereinafter Colby, *Clearing the Smoke*]; John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1 (2004); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

ory does *not* say that the point of tort law is to make the plaintiff whole and does *not* say that the point of tort law is to enforce wrongdoers' duties of repair to those they have injured. Rather, it says that tort law empowers individuals who have been wronged to seek redress through the courts for having been wronged. Its point is to provide victims of relational legal wrongs with rights of action against those who have wronged them.

The decision that one person is entitled to proceed against another in light of the other person's having wronged her *is not a decision about what remedy the plaintiff is entitled to obtain*. To be sure, the usual remedy is damages, but it is not the only remedy; in nuisance actions, for example, the plaintiff is typically entitled to obtain an injunction against the defendant as a remedy. Within damages, the usual remedy is compensatory damages. Put differently, the common law of torts has a normal rule that self-restoration, or "make-whole," is the limit of the damages that the plaintiff may exact.

Nevertheless, in a range of cases in many jurisdictions, courts have decided that a make-whole limit is unduly restrictive. They have decided in some cases to empower the plaintiff who seeks to do more than recoup her losses from the defendant for the damage he caused. Such plaintiffs are plausibly depicted as seeking to be "punitive"; punitive damages are also sometimes referred to as "vindictive damages," "exemplary damages," or "smart money." The availability of such extracompensatory damages turns on whether the defendant was oppressive, willful, or wanton in his wronging of the plaintiff or his infliction of injury upon her.

A plaintiff seeking to redress a willful injury may deliberately act with intentions beyond self-restoration; she is entitled to act with the intention of inflicting injury upon the defendant, just as the defendant did to her, so long as this is done within the civil legal system. She may do so simply on the impulse of tit for tat, and she may do so to assert a power dynamic in a manner that is palpable to the defendant and highly visible to others contemplating such wrongdoing — the plaintiff may want to "show who's boss." In this sense, a plaintiff may be acting on retributive and deterrent impulses. Of course, a plaintiff may act from similar motivations even where the defendant's conduct cannot be shown to have been willful, wanton, or oppressive (for example, when a wealthy surgeon negligently causes a plaintiff to be paralyzed for life), and these motivations may be normal or understandable. The question is why, under our tort law, the state might sometimes empower plaintiffs to carry through with the punitive intentions and in other cases not do so: why is a showing of willfulness or wantonness required, and why is it often sufficient?

The short answer is that in a system that empowers individuals to act against others out of a recognition of an entitlement to do so, the proper dimensions of the empowerment (or power) to act against the

tortfeasor depend on the dimensions of the entitlement (or privilege) to act against the tortfeasor. And where the existence of the entitlement to act against another stems from having been wronged by the other party, the scope of the entitlement varies with the magnitude and nature of the wrong. Our legal system judges the entitlement to some form of action against the defendant in light of what the defendant did to the plaintiff. In particular, it judges that the scope of the response entitlement may reach beyond the self-restorative to the injury-inflicting where the underlying wrong was itself a willful or wanton infliction of injury. When a court awards punitive damages in a tort action, the state is not itself delivering a punishment; it is empowering a private tort plaintiff to be punitive.

I shall refer to the model laid out above as “the private redress” conception of punitive damages. It comes close to capturing the original role of punitive damages in English tort law,⁹⁸ in which the prototypical punitive damages case involved the defendant’s in some manner insulting the plaintiff.⁹⁹ Fulsome redress for the high-handed manner in which the defendant wronged the plaintiff meant that the jury was not limited by a make-whole target. To be sure, many courts expressly recognized that such awards would help to deter wrongful conduct by the defendant and others. But the principal idea was that even if the benefits of such a right to punish might have inured to the community, the ground for the damages was not the need for deterrence, but the plaintiff’s right to redress the wrong that she had endured, and to do so in a manner that went beyond compensation in any straightforward sense.¹⁰⁰

There is no conflict between the private redress conception of punitive damages and the understanding of tort law laid out in *Palsgraf*. The plaintiff who is seeking punitive damages because of the defendant’s willful wronging of her is suing in her own right, not on behalf of the state.

The civil recourse model does not simply accept Justice Scalia’s irrebuttable “bow to history” ground for respecting the due process bona fides of punitive damages or Justice Blackmun’s presumptive historicism; it actually *explains* why due process applies differently to tort law. Liability imposition is not an exercise of the same state power as that involved in criminal or regulatory liability. It is not an exercise of the power to sanction a rule breaker inherent in laying down enforceable legal rules of conduct. It is an exercise of the state power to grant

⁹⁸ See Zipursky, *supra* note 96, at 158–59.

⁹⁹ See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 14–15 (1982) (depicting the importance of insult cases in early punitive damages law).

¹⁰⁰ Zipursky, *supra* note 96, at 151–52.

individual legal powers to those seeking redress for legal wrongs done to them. Conversely, the vulnerability is not a vulnerability to state sanctioning or punishment for rule breaking. It is a vulnerability to private individuals' exacting of damages for legal wrongs done to them.

Our legal system has never insisted on principle-of-legality virtues in the common law of torts; we have always — and self-consciously — permitted a common law, nonlegislative, and incremental approach to the articulation of legal wrongs that will expose a defendant to liability, just as we have always delegated the job of selecting damages to a jury. This is for three reasons¹⁰¹: First, because liability is rooted in a particular injuring of the plaintiff, that injury itself provides an anchor for the determination of the magnitude of deprivation the defendant may face. Second, the doctrine of stare decisis and the foundation in customary social norms of conduct that together characterize the common law of torts circumscribe possible duties in tort law in a way that is not true of positive legislation, which has a much wider ambit. Third, in private law, the state must attend not only to the rights of the defendant to the property shielded by the state's adjudication, but also to the rights of the alleged victim of the wrong, whose right to redress will be diminished to the extent that the defendant is more stringently shielded; due process yields different structures for private-private contests than for state-private contests.

The foregoing thus provides a justification for the defense of the Court's decision in *Haslip* that the common law method of dealing with punitive damages in torts cases should not be deemed per se unconstitutional. An undefended premise lies at the base of the antivagueness attack so nicely laid out in Justice O'Connor's *Haslip* dissent: that punitive damages in the common law of torts are essentially public law sanctions, akin to those of criminal or regulatory law. If they function as private redress and not as public law sanctions, punitive damages do not necessarily need to live up to standards suggested by the antivagueness critique.

2. *The Noncompliance Sanction Conception in Modern Punitive Damages.* — As a wide range of scholarship has now documented, a completely different — and much more public law — conception of punitive damages is alive and well in American tort law today.¹⁰² Many jurisdictions straightforwardly declare that the plaintiff is playing the role of a private attorney general by bringing the defendant's

¹⁰¹ See Benjamin C. Zipursky, *Snyder v. Phelps, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473, 496–99 (2011) (explaining why due process norms in our constitutional tradition apply differently to the common law of torts than to regulations or criminal statutes).

¹⁰² See Colby, *Beyond*, *supra* note 97, at 603–06.

wrongful conduct to the attention of a jury, which is then supposed to select a financial penalty that will send a strong deterrent message to the defendant about the wrongfulness of his conduct. Far from thinking that a plaintiff is entitled to a fulsome recovery because of the willfulness of the defendant's conduct, many jurisdictions have expressed the view that the plaintiff will obtain a windfall if she is permitted to keep the proceeds of the punitive damages awards. Indeed, some states — like Oregon — have altered their law so that a plaintiff is only permitted to keep a fraction of the punitive damages award.¹⁰³ This is a strong indication that private redress does not capture the overall understanding of what the punitive damages are for. Whether conceived as criminal or regulatory — or a legal form distinct from both, with some attributes of each — punitive damages are understood in part as a sanction for failure to comply with binding legal rules. I will call this “the noncompliance sanction” conception of punitive damages.

It would be inaccurate to say that the punitive damages law of prior centuries was wholly focused on private redress; even at the introduction of punitive damages in tort law, courts commented on their public, deterrent value.¹⁰⁴ Nevertheless, an entirely different conception of the meaning of punitive damages has taken center stage in many jurisdictions over the past several decades, as revealed by substantial changes in their law of punitive damages. These changes help to explain why courts and scholars have perceived a due process issue more acutely than in prior years. They have occurred along several dimensions.

To begin with, early cases often utilized a conception of insult and social hierarchy distant from today's sensibilities. In innumerable cases of defamation, seduction of a betrothed, and other sorts of tortious indignities, punitive damages were understood to restore a certain kind of equilibrium of honor between the parties. In such cases, punitive damages occupied a role distinct from compensating subjective harm of the plaintiff on the one hand, and sanctioning the defendant on the other. Perhaps they play such a role in some of today's punitive damages cases, but there is no doubt that much of this way of thinking has been left in the past. The form of remedy has continued to exist even as this aspect of its underpinnings has been disappearing; it is unsurprising that substantial new functions have entered the space that was left.

Second, “punitive damages” covered a vast array of damage types in the eighteenth, nineteenth, and early twentieth centuries that are

¹⁰³ See ORE. REV. STAT. § 31.735(1) (2003) (only thirty percent of a punitive damages award is allocated to the prevailing plaintiff).

¹⁰⁴ See *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.).

now covered in part under other headings.¹⁰⁵ While some of these damage types — “lost dignity,” for example — do not have clear matches today, the concept of compensatory damages over the past forty years has become cavernous. Not only does it include a variety of nonpecuniary categories — pain and suffering, loss of affections, loss of enjoyment of life, grieving, emotional distress — but some of these categories are themselves also defined in a remarkably broad manner. For example, the Restatement (Second) of Torts comments: “Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.”¹⁰⁶

Third, punitive damages are now available in a wide variety of tort cases; at their inception, they were available in a narrower range of cases that typically involved what courts called “oppressive” or “malicious” conduct that frequently involved humiliation.¹⁰⁷ By the beginning of the twentieth century, the prominent damages scholar Arthur Sedgwick (an advocate for a broad doctrine of punitive damages) wrote that punitive damages were in principle available in all types of tort actions, so long as the act complained of displayed “circumstances of aggravation.”¹⁰⁸ Around that time, punitive damages were becoming available in actions against railroad companies and other common carriers in a range of situations that bespoke an abuse of power against vulnerable patrons.¹⁰⁹

It appears that, during the 1960s and 1970s, the reach of punitive damages extended further.¹¹⁰ In part, that is because tort litigation generally expanded during that time,¹¹¹ the development of products

¹⁰⁵ See, e.g., Calabresi, *supra* note 97; Colby, *Beyond*, *supra* note 97; Redish & Mathews, *supra* note 97. The Supreme Court in *Cooper* commented on this historical change of the availability of a broader range of compensatory damages. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n.11 (2001). Professor Anthony Sebok criticizes the Court’s discussion of this point in *Cooper*, but his principal point is that the Court is seriously oversimplifying the historical changes in a manner that distorts its Seventh Amendment analysis — a point not relevant to this discussion. See generally Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

¹⁰⁶ RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

¹⁰⁷ See, e.g., CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 281 (1935) (noting that the word “malice” is the “word most frequently used to describe [the] element of conscious wrongdoing” required for punitive damages).

¹⁰⁸ ARTHUR SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES 85 (2d ed. 1909).

¹⁰⁹ Sebok, *supra* note 105, at 189–90.

¹¹⁰ See, e.g., *Walker v. Sheldon*, 10 N.Y.2d 40 (1961) (rejecting New York rule that punitive damages are unavailable in fraud actions).

¹¹¹ See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 46–59 (2001) (describing the “Progressive Era” of tort law).

liability being the most notable example. By the early 1980s, however, punitive damages were available in a wide range of areas against large corporate enterprises, for torts utterly unlike those which had characterized punitive damages in the first half of the twentieth century. Apart from the consumer fraud area,¹¹² punitive damages developed a significant place in American products liability law involving failures to warn and design defects.¹¹³ The best known example is perhaps *Grimshaw v. Ford Motor Co.*,¹¹⁴ the notorious Ford Pinto case in which a jury awarded \$125 million in punitive damages on top of a \$550,000 compensatory damages award; the California Court of Appeal affirmed the availability of punitive damages awarded, but reduced the award to \$3.5 million.

It is instructive to examine the rationales of two academic commentators during this period. Professor David Owen, in advocating the imposition of punitive damages in products liability cases,¹¹⁵ and Professor David Rice, in advocating greater use of punitive damages in consumer fraud cases,¹¹⁶ both emphasized several rationales, but wound up emphasizing one above all. Where large commercial actors engage in wrongful conduct that could be or is criminalized, the state frequently fails to act and large numbers of innocent consumers suffer serious losses; private plaintiffs can fill this regulatory void if courts are willing to let juries impose punitive damages.¹¹⁷

Finally, and in some ways most importantly, state punitive damages law during the past quarter century has undergone important structural and procedural changes at a formal level, all pointing in the same general direction. Many states, as indicated, have split-recovery statutes.¹¹⁸ Most states now utilize a clear-and-convincing evidence standard for punitive damages,¹¹⁹ apparently indicating that punitive

¹¹² See generally David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 IOWA L. REV. 307 (1969).

¹¹³ The uncertain status of punitive damages in this area is well depicted in David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257 (1976). Owen's article advocated for the availability of punitive damages in products liability law. See *id.*

¹¹⁴ 174 Cal. Rptr. 348 (Ct. App. 1981).

¹¹⁵ Owen, *supra* note 113.

¹¹⁶ Rice, *supra* note 112.

¹¹⁷ *Id.* at 322 (objecting to the argument that punishment is for the criminal law, by noting "[t]he abstract theory of this argument may be impeccable, but its view of reality is myopic to the extent that such criminal cases are rarely prosecuted despite the ever-increasing evidence of common resort to criminally unlawful sales").

¹¹⁸ See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 375–80 (2003) (describing split-recovery statutes).

¹¹⁹ Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. ST. THOMAS L.J. 1, 3 (2009).

damages are something different and closer to criminal law.¹²⁰ Many states now bifurcate or trifurcate trials involving a claim for punitive damages,¹²¹ separating the punitive damages phase of the trial from all of the rest. All three of these changes indicate a change in perspective: a tendency to regard a punitive damages verdict as a sanction for the defendant's failure to comply with a mandatory legal norm, rather than as an expansive damages remedy for a private plaintiff seeking redress for a willful wrong personal to her.

Let us suppose, for the purposes of our analysis, that a given jurisdiction's law has so evolved — functionally, and to some extent, procedurally — that it is best analyzed as utilizing solely a noncompliance sanction conception of punitive damages. Within such a jurisdiction, Justice O'Connor's procedural due process critique in *Haslip* would look quite different and would be entirely apt. The defendant is sanctioned by the state for failure to comply with the legal norms of the state. The plaintiff serves as a private attorney general who brings the defendant to court to be sanctioned. *If* the law is indeed operating in this manner, declining to require the same procedural due process standards as for nontort actions would seem to elevate form over substance. And if a state has expressly altered the structure of the law so that one cannot even claim that the form of the law remains the same, then it would be worse than elevating form over substance. The fact that the same phrase — “punitive damages” — once referred to a kind of legal liability that was not a noncompliance sanction would be irrelevant. If this is what the state is doing, then it must do a better job setting forth the range of possible sanctions, it must provide juries with greater guidance, and it must give defendants greater notice of the kind of conduct that will subject them to punitive damages.

C. *Palsgraf and the Compound Nature of Punitive Damages Law Today*

What does modern punitive damages law look like from the perspective of Chief Judge Cardozo's *Palsgraf* opinion? The easiest thing to say is that modern state punitive damages law now lies partly within the conceptual framework of the common law of torts, by focusing on private redress, and partly outside that framework, by focusing on noncompliance sanctions. Notwithstanding a major change of direction in modern punitive damages law, the private redress conception continues to play a significant role. Many aspects of the current system are consonant with the private redress conception. For example,

¹²⁰ Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297 (2005).

¹²¹ *Id.* at 1322–23.

willful or wanton conduct is required for there to be punitive damages at all — a standard we do not require in criminal law and certainly not in regulatory law. Moreover, there is no possibility of punitive damages without a predicate compensatory damages award, to which the punitive damages are supposed to bear some rational relation. Although many jurisdictions have split-recovery statutes, most do not. Among those jurisdictions that do, the plaintiff is still able to keep a large portion of the award. Punitive damages remain discretionary — something the juries may decide not to award at all, even if they think there is liability and even if they think there was willful or wanton conduct. In all of these respects, the private redress conception remains very much a part of the law, even as the noncompliance sanction conception will often play a significant role, too. In this sense, punitive damages in today's tort law are a compound of the private redress conception and the modern, noncompliance sanction conception. That is why the question of punitive damages' constitutional status is so difficult. Because contemporary legal thinkers — including the Supreme Court Justices — tend to see all of tort law on the private attorney general model, they are unable to identify the private redress model as the prototype of common law punitive damages, unable to appreciate the compound nature of punitive damages in today's law, and unable to respond clearly and confidently to the due process questions about punitive damages that now demand to be answered.

When a jurisdiction's punitive damages law is compound, in the sense described above, different verdicts may embody quite different proportions (so to speak) of the two models, and some do so quite clearly while others remain quite ambiguous. In light of the analysis offered in section B, the constitutional status of the award turns on whether the imposition of punitive damages should be understood as a matter of private redress or as a noncompliance sanction. If the state is simply empowering a private plaintiff to exact greater damages in order to recognize a heightened level of redress, there is no ground for altering the process to which the defendant is entitled from that which state tort law ordinarily provides. However, if the state treats the plaintiff's lawsuit as in part a vehicle for the state to impose its own noncompliance sanctions, irrespective of plaintiff's entitlement to redress, then greater procedural safeguards are constitutionally required, at least in theory.

The framework just elaborated raises a critical question in a wide swath of cases: is the verdict in part a state-imposed noncompliance sanction? If it is, and the state supplies only its usual process for tort plaintiffs, then the process is constitutionally inadequate. If not — if the entire verdict could plausibly be understood as simply private redress — then there is no need, as a constitutional matter, for better defined constraints on conduct definition or sanction levels. The answer

to this question therefore determines whether there is a procedural due process problem.

There is no straightforward or constitutionally mandated method for arriving at an answer to the interpretive question articulated above. For now, let us note that there are at least four different kinds of frameworks that a court thinking in these terms about constitutional review of punitive damages might adopt. The simplest would be to assume, in a spirit of deference to state courts and anxiety about drawing constitutional distinctions too finely, that *all* punitive damages awards should be treated as, basically, versions of what was contemplated in the common law of the nineteenth century as a part of individual private redress. The polar opposite approach would be to assume that *no* punitive damages awards in today's legal system are fairly characterized as being of the private redress type. On the former approach, there would be virtually no special due process scrutiny of punitive damages awards today (approximating the view of Justice Scalia's *Haslip* concurrence). On the latter approach, virtually all punitive damages awards today would be in need of greater due process controls (approximating the view of Justice O'Connor's *Haslip* dissent).

One plausible intermediate position would be to take stock of concrete changes that have been made in various jurisdictions in the structure of their punitive damages law, as possible grounds for an across-the-board recategorization of the awards in that state. Thus, for example, a state's decision to funnel punitive damages awards to the state revenue would be a strong basis for inferring that all of the awards in that state are conceived of as, at least in part, public sanctions; in this scenario, all awards should be subject to void-for-vagueness scrutiny.¹²²

A different intermediate position would aim to evaluate the evidence and narrative presented to the jury, the instruction of the jury by the court, and the verdict, and to ascertain whether the jury's damages award is plausibly understood as simply a judgment by the jury of what the plaintiff was entitled to exact from the defendant as a matter of private redress for the wrong done to him, or whether it must be understood, at least in part, as the delivery of a noncompliance sanction. If the latter, then the award violates due process because the tort process fails, on void-for-vagueness grounds, to comply with what the Constitution requires of noncompliance sanctions. Obviously, this sort of intermediate position would require the Supreme Court to articulate

¹²² Cf. Paul B. Rietema, Recent Development, *Reconceptualizing Split-Recovery Statutes*: Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), 31 HARV. J. L. & PUB. POL'Y 1159 (2008) (noting ways of reinterpreting split-recovery statutes so as to avoid an inference of unconstitutionality, but indicating a strong argument for unconstitutionality after *Williams*).

a criterion or criteria for determining whether a given award should be understood as, at least in part, a noncompliance sanction. Let us call this a “noncompliance sanction detection test.”

The nonparty-harm rule of *Williams* may be seen as a clean and quite principled component of a noncompliance sanction detection test. Where the jury is asked to punish the defendant for harm to a person who is the plaintiff or is represented by the plaintiff, it is prima facie permissible for the court to allow punitive damages, because they empower the plaintiff to redress the injury to herself (or, in some cases, the deceased person she represents). Conversely, where the jury is asked to punish the defendant for harm to a person who is neither the plaintiff nor someone represented by the plaintiff, the punitive damages award is not provided as redress for an injury to the one the defendant wronged. Thus, we must infer that the award is intended in part as a noncompliance sanction. But if this is so, then tort process is not enough, and there is a procedural due process¹²³ violation.¹²⁴

I have elsewhere indicated how the nonparty-harm rule might be clarified and operationalized for practicing lawyers and judges when modeled as a noncompliance sanction detection test.¹²⁵ For now, let us note that the model offered here can easily handle Justice Stevens’s important criticism of the Court’s ruling in *Williams*. Recall his objection that the Court was drawing a distinction without a difference when it prohibited the augmentation of punitive damages as punishment for harm to nonparties, but permitted harm to nonparties to be used as a basis for inferring greater reprehensibility and then permitted the augmentation of punitive damages for greater reprehensibility.¹²⁶ Justice Stevens was right at one level and wrong at another: it all depends on which of a defendant’s wrongs are being evaluated for

¹²³ In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), seven of the nine Justices — including Justice Scalia — were willing to recognize a due process violation that plainly sounded in *procedural* due process.

¹²⁴ The reconstruction of *Williams* offered here avoids several of the shortcomings that bedevil the account put forward in Colby, *Clearing the Smoke*, *supra* note 97. Colby’s account, like the one presented here, relies upon a distinction between an older, more private conception of punitive damages and a newer, more public conception of punitive damages that permits nonparty harm, and it also asserts that constitutional requirements are greater for the latter than for the former. The similarity ends there, however. For example, Colby contends that the older, more private conception still involves the infliction of punishment, but for a private wrong, and cannot explain why such punishment does not trigger heightened constitutional protection or why such a remedy belongs in the law of torts. By contrast, the account in the text of this Article treats the older conception of punitive damages as an expanded form of private redress, not as punishment for a private wrong; through civil recourse theory, it explains why such a remedy is part of tort law, and it explains why due process concerns sounding in vagueness apply to noncompliance sanctions in a manner that does not attach to private actions for redress.

¹²⁵ See Zipursky, *supra* note 70, at 144.

¹²⁶ See *Philip Morris USA v. Williams*, 549 U.S. 346, 360 (2007) (Stevens, J., dissenting).

reprehensibility. Admitting evidence of nonparty harm will generally be quite different from punishing for harm to nonparties when the court admits evidence of nonparty harm for its relevance to the reprehensibility of the *defendant's wrong to the plaintiff herself*, but it will be virtually the same (as punishing for harm to nonparties) if admitted for its relevance to the reprehensibility of *the defendant's wrongs to nonparties*.

III. A CONUNDRUM OF FEDERAL PREEMPTION

A. Regulatory Compliance and Preemption

Preemption, like punitive damages, has become a hot torts issue in the Supreme Court over the past two decades.¹²⁷ In this Part, I will focus upon one particular sort of preemption argument that was made to the Supreme Court by the company Warner-Lambert in the case *Warner-Lambert Co. v. Kent*.¹²⁸ Warner-Lambert's argument was not the most important or broad-ranging preemption argument that has been made to the Court in pharmaceutical cases, nor was it the most radical. It was, however, the cleverest, the most elegant, and the most divisive.¹²⁹ In fact — as in the final disposition of *Williams* — the members of the Supreme Court were not actually able to decide the issue put before them. With Chief Justice Roberts recusing himself, eight Justices remained, and they split evenly at 4–4.¹³⁰ As a practical matter, this deadlock meant that the Supreme Court effectively made no decision whatsoever; the petitioner, Warner-Lambert, lost the case, and the Second Circuit decision against it stands as good law. A circuit split continues to exist on this issue, and new cases continue to arise.¹³¹

Kent involved several Michigan residents who claimed that Warner-Lambert's diabetes drug Rezulin caused serious injury or death.¹³²

¹²⁷ Notably, the Supreme Court's decision last Term in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011), recognized a valid preemption defense to state failure-to-warn claims against manufacturers of generic prescription drugs. This conclusion surprised many in light of the Court's decision two years earlier in *Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009), by a 6–3 majority, that failure-to-warn claims against manufacturers of brand name pharmaceuticals were not preempted.

¹²⁸ 128 S. Ct. 1168 (2008) (per curiam).

¹²⁹ See generally Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 NW. U. L. REV. 841 (2008) (discussing courts' conflicting approaches to preemption in this context).

¹³⁰ *Kent*, 128 S. Ct. at 1168 (per curiam) (“The judgment is affirmed by an equally divided Court.”).

¹³¹ See *infra* note 158 and accompanying text. While this Article was in production, a Fifth Circuit panel decided in favor of preemption in a case involving a Texas regulatory compliance statute. *Lofton v. McNeil Consumer & Specialty Pharm.*, No. 10-10956 (5th Cir. Feb. 22, 2012).

¹³² Joint Appendix at 37, *Kent*, 128 S. Ct. 1168 (No. 06-1498), 2007 WL 4189496, at *37.

The complaint — in a case earlier denominated *Desiano v. Warner-Lambert & Co.*¹³³ — alleged that Rezulin caused severe liver toxicity and that Warner-Lambert, by marketing the drug and failing to provide warnings of possible liver toxicity, had negligently injured the plaintiffs.¹³⁴ The *Kent* plaintiffs sought to have Warner-Lambert held liable for injuring them or (in the case of deceased patients) causing their wrongful deaths.¹³⁵ Citing both publicly available reports and material produced in the litigation, the plaintiffs also argued that Warner-Lambert was aware of evidence that its product caused liver toxicity and that it deliberately concealed or misrepresented these facts in its communications with the FDA.¹³⁶

In a pretrial motion in the United States District Court for the Southern District of New York, Warner-Lambert availed itself of a manufacturer-protective Michigan statute that is aimed at shielding manufacturers who comply with all federal regulations. Since Warner-Lambert had in fact received FDA approval for its product, and its warning labels complied with what was demanded of it by the FDA, it argued that it should not face any liability under a products liability or negligence claim. Warner-Lambert recognized, however, that Michigan's regulatory compliance statute contains an exception — M.C.L. section 600.2946(5)(a)¹³⁷:

[The statute's protection of the defendant] does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:

(a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug that is required to be submitted under the federal food, drug, and cosmetic act, chapter 675, and the drug would not have been approved, or the United States food and drug administration would have withdrawn approval for the drug if the information were accurately submitted.¹³⁸

The plaintiffs in *Kent* asserted that they had evidence that Warner-Lambert had in fact engaged in intentional withholding and misrepre-

¹³³ 467 F.3d 85 (2d Cir. 2006). For reasons unrelated to the substance of this Article, the certiorari petition and subsequent filings and decisions at the Supreme Court went under a different case name — *Warner-Lambert Co. v. Kent*. When referring to the Second Circuit opinion in that case, this Article will use the case name “*Desiano*.” When referring to the litigation at the Supreme Court, and to the multidistrict litigation for Rezulin generally, this Article will use the case name “*Kent*.”

¹³⁴ Joint Appendix, *supra* note 132, at 29–36.

¹³⁵ *Id.* at 39.

¹³⁶ See Brief for Respondents at 5–8, *Kent*, 128 S. Ct. 1168 (No. 06-1498), 2008 WL 157174, at *5–8.

¹³⁷ MICH. COMP. LAWS § 600.2946(5)(a) (2004); see also Brief of Petitioners at i, *Kent*, 128 S. Ct. 1168 (No. 06-1498), 2007 WL 4205142, at *1.

¹³⁸ MICH. COMP. LAWS § 600.2946(5) (citation omitted).

sentation of important safety information about Rezulin.¹³⁹ Anticipating this claim, Warner-Lambert put forward a deft counterargument derived from the Supreme Court's 2001 decision in *Buckman Co. v. Plaintiffs' Legal Committee*.¹⁴⁰ In *Buckman*, plaintiffs brought a products liability claim against the manufacturer of orthopedic bone screws and further alleged that Buckman assisted the manufacturer in making false statements to the FDA in violation of federal regulations.¹⁴¹ The Supreme Court reversed the Third Circuit's denial of Buckman's preemption defense and held that any state tort claim against Buckman for fraud on the FDA was impliedly preempted.¹⁴² Chief Justice Rehnquist's opinion for a unanimous Court reasoned that any fraud on the FDA must be regulated exclusively by the federal government, and therefore any such claim fashioned as a state tort cause of action must be impliedly preempted.

Warner-Lambert drew on *Buckman* to complete its argument for dismissal in the Southern District of New York litigation.¹⁴³ The *Kent* plaintiffs had to admit that Michigan law foreclosed their products liability claims *unless* the concealment/misrepresentation exception to the statute could save them. But any claim under that section of the statute, Warner-Lambert argued, was basically a fraud-on-the-FDA claim and was therefore preempted under *Buckman*.¹⁴⁴ So fraud or no fraud, the *Kent* plaintiffs had no claim. The Sixth Circuit embraced a nearly identical argument in *Garcia v. Wyeth-Ayerst Laboratories*,¹⁴⁵ which declared that the fraud exception to Michigan's regulatory compliance statute was preempted under *Buckman*.¹⁴⁶ District Judge Kaplan granted Warner-Lambert's motion, following *Garcia*.¹⁴⁷

When the *Kent* plaintiffs appealed Judge Kaplan's decision, however, the Second Circuit panel hearing the case included Judge Guido Calabresi,¹⁴⁸ one of the pioneers of left-leaning tort theory and progressive products liability law. Writing for a unanimous panel, Judge Calabresi reversed.¹⁴⁹ He reasoned that the Rezulin case differed from *Buckman* in three respects.¹⁵⁰ First, because products liability is within a domain (health and safety) in which states have traditionally en-

¹³⁹ See Brief for Respondents, *supra* note 136, at 4–8.

¹⁴⁰ 531 U.S. 341 (2001); see Brief of Petitioners, *supra* note 137, at 2–3.

¹⁴¹ 531 U.S. at 343–47.

¹⁴² *Id.* at 348.

¹⁴³ See *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 88 (2d Cir. 2006).

¹⁴⁴ *Id.* at 93.

¹⁴⁵ 385 F.3d 961 (6th Cir. 2004).

¹⁴⁶ *Id.* at 966.

¹⁴⁷ *Desiano*, 467 F.3d at 88–89.

¹⁴⁸ *Id.* at 86.

¹⁴⁹ *Id.* at 87.

¹⁵⁰ *Id.* at 93.

joyed the power to regulate, the presumption against preemption applies.¹⁵¹ In *Buckman*, the fraud-on-the-FDA claim was not within such a traditional domain, so no presumption against preemption had applied.¹⁵² Second, because negligence and products liability are traditional common law claims, involving traditional duties running from manufacturers to consumers (unlike the fraud-on-the-FDA claims in *Buckman*), precedents like *Silkwood v. Kerr-McGee Corp.*¹⁵³ counseled against preemption.¹⁵⁴ Third, in *Desiano*, fraud on the agency simply provided an exception to a legislatively enacted affirmative defense, while in *Buckman* it was actually the ground of the cause of action.¹⁵⁵ Accordingly, Judge Calabresi rejected the applicability of *Buckman* and vacated the grant of the motion to dismiss.¹⁵⁶

Warner-Lambert petitioned the Supreme Court to hear its appeal from the *Desiano* decision in light of the split between the Sixth and Second Circuits.¹⁵⁷ As indicated above, the Court did not resolve the split, and the results in lower courts today are all over the map.¹⁵⁸

The pharmaceutical company's brief to the Supreme Court reiterated the elegant argument at the core of the litigation. With regard to Judge Calabresi's analysis, Warner-Lambert wrote (in part): "Nothing in the Second Circuit's analysis alters why *Buckman* is controlling here. The claims in both cases share the same essential attribute: they demand proof of fraud-on-the-agency as a prerequisite to a finding of liability."¹⁵⁹

B. Palsgraf, *Buckman*, and *Kent*: A Principled Resolution

What does the *Kent* dispute look like from the perspective of Chief Judge Cardozo's *Palsgraf* opinion? The obvious starting point is that Chief Judge Cardozo would happily have voted along with Chief Justice Rehnquist in *Buckman*. The plaintiffs in *Buckman* were trying an argument quite similar to Mrs. Palsgraf's: they were identifying an act by the defendants that the legal system in some sense regards as a legal wrong, tacking together a causal path from that act to the plaintiffs'

¹⁵¹ *Id.* at 93–94.

¹⁵² *Id.* at 93.

¹⁵³ 464 U.S. 238 (1984).

¹⁵⁴ *Desiano*, 467 F.3d at 94–95.

¹⁵⁵ *Id.* at 96.

¹⁵⁶ *Id.* at 98.

¹⁵⁷ Petition for a Writ of Certiorari at 13–23, *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (No. 06-1498), 2007 WL 1420562, at *13–23.

¹⁵⁸ Compare, e.g., *Yocham v. Novartis Pharm. Corp.*, 736 F. Supp. 2d 875, 885 (D.N.J. 2010) (following *Desiano*), with *In re Trasylol Prods. Liab. Litig.*, 763 F. Supp. 2d 1312, 1325 (S.D. Fla. 2010) (following *Garcia*). The Fifth Circuit recently followed *Garcia* in *Lafton v. McNeil Consumer & Specialty Pharmaceuticals*, No. 10-10956 (5th Cir. Feb. 22, 2012).

¹⁵⁹ Brief of Petitioners, *supra* note 137, at 46.

injuries, and then asserting that they had a cause of action in tort for which they should be able to recover. That is simply not how tort law works, in Chief Judge Cardozo's view. The plaintiff must seek recovery for a wrong to herself, not for a wrong to another or a wrong to no one at all. The plaintiffs suing Buckman alleged that Buckman's wrong to the FDA could support a tort claim running to them. Such claims are not viable tort claims, under the common law conception of torts.

Of course, it does not follow from the fact that a kind of claim would fall outside of the common law of torts in most states' tort law that the Supreme Court should declare that it is impliedly preempted under federal law. It does, however, put a special cast on the issue facing the Court by raising the question of where the power of the plaintiff to sue the defendant under such a theory would come from, if not from state common law itself. In other words, why should a defendant be vulnerable to this sort of claim, if her vulnerability does not derive from having committed a common law wrong against the plaintiff (or a common law or legislative extension of such a wrong)? The obvious answer is that the plaintiff is asserting that the existence of a federal law forbidding fraud on the FDA impliedly endows plaintiffs with a right to have liability imposed upon the defendant for the harmful consequences of its lawbreaking act. The plaintiff is essentially claiming she can perform the role of a private attorney general, enforcing the federal law that requires nonconcealment and truthfulness in communication with the FDA. When Chief Justice Rehnquist rejected the plaintiffs' claims in *Buckman*, he was rejecting both the alleged prerogative of private plaintiffs to play that role and the alleged suitability of state courts to host such enforcement actions in tort suits. That rejection is exactly why he emphasized the importance of the exclusivity of federal enforcement.

From the *Palsgraf* perspective, the key question in *Kent* is whether the Rezulin plaintiffs suing Warner-Lambert alleged a right akin to that which was rejected in *Buckman*: were those tort claims built upon an alleged prerogative to play a private attorney general role with respect to noncompliance with FDA truthfulness regulations? There is an alternative, according to the *Palsgraf* perspective. It is possible that the *Kent* plaintiffs asserted causes of action predicated upon wrongs to themselves, not upon wrongs to the FDA. If so, then recognizing a right to try to prove that information was withheld or misrepresented would not be tantamount to recognizing a power to enforce federal laws prohibiting fraud on the FDA, and there would be little reason to think that recognition of a state right of action interferes with federal enforcement exclusivity.

How can one distinguish between these two models and tell whether the power sought by the plaintiff is a power to redress the common law wrong, conditioned on the proof of intentional concealment or

misrepresentation, or a private attorney general power, derived from the state qua executive and geared to sanctioning violations of federal law? In order to interpret a regulatory compliance statute, a court must understand why it was put there and why it tends to glean substantial support. A remarkable and generally very pro-plaintiff aspect of the common law is that the standard of due care might be breached even by a defendant otherwise in compliance with all laws and regulations.¹⁶⁰ Just as, under the famous rule in *The T.J. Hooper*,¹⁶¹ jurors and judges are able to decide whether a whole industry has fallen behind, such that industry custom no longer meets the standard of reasonable care,¹⁶² so jurors and judges are able to decide that compliance with the rules put forward by legislators and regulators is not enough for due care, under certain circumstances. Lawmakers may, of course, have made a mistake, or alternatively, they may not have been thinking of their statutes and regulations as a ceiling on the state's creation of legal requirements. Put differently, the due care we exercise toward others not to hurt them in various circumstances is in a sense more fundamental than the statutes and regulations that govern broad domains of commerce.¹⁶³

In an era of increasingly sophisticated products, defendant business enterprises are understandably critical of tort law's willingness to permit decisions by juries to trump expert regulatory decisions, and tort reformers have become increasingly fond of this critique.¹⁶⁴ Reversing this traditional policy is one of the central aims of regulatory compliance statutes, including the Michigan statute at issue in *Kent*.¹⁶⁵ These statutes alter the common law so that the regulator's judgment about safety trumps the jury's; if a regulator has determined that a

¹⁶⁰ See RESTATEMENT (SECOND) OF TORTS § 288C (1965); KEETON ET AL., *supra* note 22, § 36, at 233.

¹⁶¹ 60 F.2d 737 (2d Cir. 1932).

¹⁶² See *id.* at 740.

¹⁶³ The most famous American tort case stating this proposition is, like *Kent*, a case from the Supreme Court involving Michigan tort law. See *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 427 (1892) (recognizing the duty "not only to comply with all statutory requirements in the matter of signals, flagmen and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment").

¹⁶⁴ For an excellent discussion of the altered nature of the debate over the regulatory compliance defense, see generally Robert L. Rabin, *Keynote Paper: Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000).

¹⁶⁵ See MICH. COMP. LAWS § 600.2946(5) (1979). The legislative history of this law indicates that a central supporting argument for it was the contention that "[l]ay jurors should not be permitted to second-guess a standard that has been developed by government experts." SENATE FISCAL AGENCY, REVISED ENROLLED ANALYSIS, S.B. 344, H.B. 4508, at 11 (1996).

product was safe, the jury may not impose liability for a company's failure to do something else.¹⁶⁶

A regime that treats regulatory expertise as a decisive reason for putting aside any jury decision is based on an implicit premise that the regulators and the jurors are assessing roughly the same informational set in making their evaluations of the safety of the product. If the regulators were not actually provided with the relevant safety information about the product, and made their decision based on a seriously incomplete informational set, then the regulatory compliance-inspired critique of the tort system would not make sense.¹⁶⁷ Under such circumstances, confidence in the regulatory decision would be misplaced.

The concealment/misrepresentation exception to regulatory compliance statutes makes perfect sense in this light. They tell courts that deference to the regulatory decision should be withheld if the regulators were given a seriously flawed informational package upon which to base their decision.¹⁶⁸ Unsurprisingly, because the regulatory compliance statutes were designed by lawyers and lobbyists who represent repeat defendants, the statutes have typically nested what is hoped to be a narrow concealment/misrepresentation exception within a remarkably pro-defendant framework. Thus, the exception is drafted to put the burden on the plaintiff to prove what really happened — that the regulators approved products or warning labels for products based on a seriously incomplete or false set of information. The exception does not allow the plaintiff to succeed in undermining the regulatory compliance defense if the flaws in the informational package were irrelevant to the decision the regulators made. And it is not enough that the defendant in fact made misrepresentations or concealed information; the plaintiff must prove that the defendant did so intentionally, deliberately, or knowingly. If the plaintiff actually establishes that the regulatory decision was made based on deliberate misrepresenta-

¹⁶⁶ See, e.g., Carl Tobias, *FDA Regulatory Compliance Reconsidered*, 93 CORNELL L. REV. 1003, 1027 (2008) (noting that changing views of institutional competence have led to increased receptiveness to regulatory compliance defenses).

¹⁶⁷ See Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 481 (1997) (arguing that, because FDA approval decisions depend on information provided by drug manufacturers, any regulatory compliance defense must be contingent on the defendant's having supplied information as required); Tobias, *supra* note 166, at 1037 (arguing that any regulatory compliance defense should be conditioned on the defendant's having provided timely disclosure of relevant information to regulators).

¹⁶⁸ See HOUSE LEGISLATIVE ANALYSIS SECTION, FIRST ANALYSIS, S.B. 344, H.B. 4508, at 3 (1995) (explaining that the regulatory compliance defense would not apply if a defendant "intentionally withheld from or misrepresented to the F.D.A. information concerning the drug that must be submitted"). This analysis — unlike the revised analysis, SENATE FISCAL AGENCY, *supra* note 165, and the statute ultimately passed — does not mention the need for the plaintiff to establish that the FDA would have decided differently if there had not been concealment or misrepresentation.

tions and concealments, the reasons for enshrining the regulatory decision with insurmountable weight are defeated, and the safety question in the negligence or products liability claim can indeed go to the jury, as under the common law.

It should be clear that we are now very far from *Buckman* in at least one important respect. The plaintiff's power to bring a claim for negligence or products liability has virtually nothing to do with the defendant's alleged violation of federal law. The plaintiff is in no sense appearing as a private attorney general in order to enforce legal rules regarding communication with federal agencies. The plaintiff is simply there to win his negligence or products liability claim, or what is left of it after a major tort reform agenda cleared away much of what would have been available at common law. The putative right to have liability imposed upon the defendant does not arise from a state legislative decision to empower the plaintiffs to punish the defendants for lying to the FDA. The putative right to have liability imposed derives from what it has always derived from under the common law of torts: the right of civil recourse against one who has wronged the plaintiff. For the reasons explained above relating to changing norms concerning comparative institutional competencies, states have curtailed the right to redress against a putative wrongdoer out of the belief that the costs of allowing lay juries to second-guess the agency are too high. But the curtailment of the right left a sliver of potential liability at the heart of traditional tort liability at common law, where the regulatory competence of the agency would not merit such deference.

It is true that the exception to the statute identifies the region of nondeference by using intentional withholding of information or misrepresentation as a criterion, and it is true that such conduct would qualify as a violation of federal law. But the violation of federal law is not itself the ground for the exception; it is just that federal law prohibits such conduct, too.

The foregoing account explains why Judge Calabresi was right about all three of the distinctions from *Buckman* he enumerated. Unlike *Buckman*, *Kent* involved a claim and a power well within the traditional domain of state law, and therefore was presumptively not preempted. Second, unlike the *Buckman* plaintiffs, the *Kent* plaintiffs asserted a standard common law tort claim that did not involve the imposition of a new kind of duty. Third, unlike in *Buckman*, fraud on the FDA was used in *Kent* to defeat an affirmative defense, rather than standing as a separate claim. All of these distinctions can be merged into one basic point: while 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*. This residual power to

sue defendants in Michigan may operate, functionally, something like the fraud-on-the-FDA claim, but that is, in the most important respects, a coincidence. It is not because there is supposedly a regulatory or enforcement power in the state plaintiff.

The relevance of Judge Calabresi's observations that the *Kent* plaintiffs were asserting common law causes of action for products liability now becomes clear. The plaintiffs' powers were not coming from FDA regulation or any conception of a private attorney general role. They were claiming the defendant wronged them by negligently selling them a dangerously defective product. The plaintiffs were, in this way, suing for wrongs to themselves, seeking recourse for having been the victims of a common law wrong committed by the defendant. The assertion that the defendant misrepresented or concealed information from the FDA was not an instrument for empowerment to exact a remedy from a person who committed a wrong to the FDA. To find preemption in *Kent* would have been to cut off a common law power that the state legislature had decided to reserve. To find preemption in *Buckman* was to decline to permit a state to use federal legal norms as a predicate for empowering a plaintiff to play a private attorney general role. Constitutionally, and in connection with the Supremacy Clause, there is a vast chasm between the two decisions.

From the most popular modern tort-theoretic perspective, it is difficult even to articulate this position. Since all of torts is a matter of empowering private parties with private rights of action to sanction those who have committed a wrong, the private right of action under the common law is not so distinct from the private right of action under the federal law governing communications with the FDA. Judge Calabresi's distinctions plainly make a good deal of sense from a lawyerly point of view, but so does Warner-Lambert's functionalist counterargument. It is therefore not surprising that the Court deadlocked in *Kent* and that it essentially became a political vote, one on which all of the Justices seemed content to issue no opinion.

CONCLUSION

The enterprise of seeking a moderate position in law — if it is a coherent enterprise at all — is surely a dangerous one, as my critique of the Court's *Haslip* opinion and the ensuing confusion attest.¹⁶⁹ And yet one cannot deny the importance of avoiding unjustifiable extremes. The unconstrained use of evidence of nonparty harm to set punitive damages in individual tort litigation — a plaintiff's dream — is one such extreme; the categorically impenetrable regulatory compliance de-

¹⁶⁹ See *supra* pp. 1774–1777.

fense in products liability — a defendant's dream — is another. The Supreme Court has dealt poorly with both of these issues, and yet these are exactly the kinds of issues where we expect the Justices to be able to weigh in and do the (legally) right thing (or, if they do not, to explain the special reasons why not).

The capacity to identify unjustifiable extremes and to explain his sense that the legal system had gone off track was one of Chief Judge Cardozo's gifts. He was able to exercise this capacity in *Palsgraf* and elsewhere because he had a genuine grasp of what tort law was for and why its functions went hand in hand with a certain set of structures, which could be molded and supplemented over time, but never wholly abandoned. Today's judges and scholars — including those who are sitting on the Supreme Court — cannot be expected to spot the problems in the extreme cases that lie before them without a vivid sense of how tort law operates as a kind of private law. Civil recourse theory aims, above all, to provide just that sort of understanding.

The mystery surrounding Chief Judge Cardozo's *Palsgraf* opinion, the struggle to explain how due process applies to punitive damages, and the sharp controversy over preemption of claims alleging fraud against the FDA all stem from the same shortcoming in contemporary thinking about tort law. In all three, there is a problem when a private plaintiff seeks redress for a wrong to someone other than herself. Having abandoned a conception of tort law as private law and embraced a private attorney general conception of tort claims, contemporary legal thinkers are flummoxed by these three problems. Civil recourse theory permits clear thinking by allowing us to understand how and why tort law is rooted in wrongs to private persons.