
BOOK REVIEW

MODERN TORT LAW: PREVENTING HARMS, NOT RECOGNIZING WRONGS

RECOGNIZING WRONGS. By John C.P. Goldberg & Benjamin C. Zipursky. Cambridge, Mass.: Belknap Press of Harvard University Press. 2020. Pp. 380. \$45.00.

*Reviewed by Catherine M. Sharkey**

INTRODUCTION

When the U.S. Supreme Court faced a novel tort law issue in 2019 in *Air & Liquid Systems Corp. v. DeVries*¹ — namely, whether the manufacturer of a “bare-metal” product such as a turbine, blower, or pump has a duty to warn of dangers that arise from the later incorporation of asbestos-laden parts into the product² — the Justices turned to first principles from tort theory. In a 6–3 decision, Justice Brett Kavanaugh, drawing heavily from Judge Guido Calabresi’s “cheapest cost avoider” theory,³ held for the majority that the bare-metal product manufacturer did have a duty to warn, reasoning that “the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product.”⁴

* Crystal Eastman Professor of Law, New York University School of Law. I was honored to take part in a book launch/festschrift for Professors Goldberg and Zipursky at Fordham Law School on February 5, 2020. I celebrated them as generous colleagues and exemplary scholars — and herein offer what I hope is considered an even higher form of praise, namely, my sharpest critique. Thanks also to fellow panelist Professor Jed Shugerman for his comments and perspective and to Stephen Profeta (NYU 2021) for superb research assistance.

¹ 139 S. Ct. 986 (2019).

² *Id.* at 992.

³ See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 155 (1970) [hereinafter CALABRESI, COSTS] (“[T]he search for the cheapest avoider of accident costs is the search for that activity which has most readily available a substitute activity that is substantially safer. It is a search for that degree of alteration or reduction in activities which will bring about primary accident cost reduction most cheaply.”); see also Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84 (1975) (“[T]he chosen loss bearer must have better knowledge of the risks involved and of ways of avoiding them than alternate bearers; he must be in a better position to use that knowledge efficiently to choose the cheaper alternative; and finally he must be better placed to induce modifications in the behavior of others where such modification is the cheapest way to reduce the sum of accident and safety costs. The party who in practice best combines these not infrequently divergent attributes is the ‘cheapest cost avoider’ of an accident who would be held responsible for the accident costs under the market deterrence standard.”).

⁴ *DeVries*, 139 S. Ct. at 994 (citing CALABRESI, COSTS, *supra* note 3, at 311–18). Justice Kavanaugh elaborated further:

This type of reasoning on the part of the majority is a main target of Professors John Goldberg and Benjamin Zipursky (hereinafter GZ) in their new book, *Recognizing Wrongs*. Such bald instrumentalism, they argue, reflects the worst kind of “social engineering” (p. 215)⁵ on the part of judges.⁶ This “bad tort theory” (p. 318) is GZ’s call to arms.

GZ might instead endorse the *DeVries* dissent’s view that “the traditional common law rule still makes the most sense today.”⁷ But herein lies the rub. Justice Neil Gorsuch, for the dissent, likewise built his analysis around Judge Calabresi’s cheapest-cost-avoider theory, but reasoned that the subsequent part manufacturer “is in the best position to understand and warn users about its risks; in the language of law and economics, those who make products are generally the least-cost avoiders of their risks.”⁸

Thus, while the majority and dissent disagreed as to which party — the bare-metal product manufacturer or the subsequent parts manufacturer — was in fact the cheapest cost avoider, they were unanimous in using the lens of law-and-economics, incentive-driven tort theory.

The law and economics-inspired view of tort law is ascendant, not only in the legal academy but also in the decisions of influential state and federal courts, including the U.S. Supreme Court.⁹ So, at the outset,

The product manufacturer knows the nature of the ultimate integrated product and is typically more aware of the risks associated with that integrated product. By contrast, a parts manufacturer may be aware only that its part could conceivably be used in any number of ways in any number of products. A parts manufacturer may not always be aware that its part will be used in a way that poses a risk of danger.

Id.

⁵ The authors quote WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 15 (1941).

⁶ See also p. 208 (“[T]he wrongs recognized by tort law are, in their substance, drawn from everyday life rather than constructed de novo by judges in aid of some sort of social engineering project.”).

⁷ 139 S. Ct. at 997 (Gorsuch, J., dissenting).

⁸ *Id.* According to Justice Gorsuch, the duty to warn should be placed not on the bare-metal product manufacturer but instead on the subsequent parts manufacturer to “force it to internalize the full cost of any injuries caused by inadequate warnings.” *Id.* (citing STEVEN SHAPELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 17 (1987); CALABRESI, COSTS, *supra* note 3, at 135 & n.1; Italia Societa per Azioni di Navigazione v. Or. Stevedoring Co., 376 U.S. 315, 324 (1964)). Moreover, assigning liability to the bare-metal manufacturer “dilute[s] the incentive” of the product manufacturer. *Id.*

⁹ The U.S. Supreme Court is a relevant progenitor of products liability law. See Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193, 1197–98 (2002) (“Along with the highest courts of California, New Jersey, and New York and perhaps a couple of the federal courts of appeals, the United States Supreme Court is a products liability court.”).

An apt example is provided by the New York Court of Appeals decision in *Liriano v. Hobart Corp.*, 700 N.E.2d 303 (N.Y. 1998), where the court, reasoning in explicitly cheapest-cost-avoider terms, held that a manufacturer could be held liable even where its product had been substantially modified: “This responsibility derives from the manufacturer’s superior position to anticipate reasonable uses of its product and its obligation to design a product that is not harmful when used in

GZ face an uphill battle, given that their “civil recourse theory” self-consciously attempts to recalibrate tort theory as an apt description of how judges reason: “[W]e think recognizing wrongs is *what courts do*” (p. 257).¹⁰ Aspirationally, they proclaim that “[e]xponents of the view that tort law is about wrongs, duties, and rights are not the ones who should be on the defensive” (p. 108). But, notwithstanding their protestation to the contrary, GZ adopt a fairly defensive tone throughout, recognizing (time and again) that their ideas in tort go “against the grain” (pp. 52, 68); alas, perhaps a more apt metaphor would be “against the tide.”

Should they necessarily bemoan the current state of affairs? They lament that “the lawyerly capacity to recognize wrongs has atrophied” (p. 290). But might not modern tort law theory enable judges not only to recognize wrongs, but altogether *prevent* them? My claim in this Review is that economic deterrence-based “cheapest cost avoider” reasoning permeates judicial decisions, especially in the realm of products liability; moreover, this is cause for celebration given its ability to handle the most urgent modern torts issues concerning the interface between tort and federal regulation and widespread societal harms.

Part I reframes *Recognizing Wrongs* as, first and foremost, a sustained critique of the law-and-economics, deterrence-focused view of tort law, rather than (as GZ set forth) the affirmative case for the “wrongs and redress” account of tort law. “Cheapest cost avoider” tort theory (as my chosen stand-in for instrumentalist, deterrence-based theories) plays the role of an antagonist, against which GZ construct their theory of wrongs and redress. Part II inverts the role of “cheapest cost avoider” as the protagonist of some of the most significant developments in contemporary tort law, focusing on its central role in the rise of strict products liability in tort and especially its extension to cover bystanders. Part III argues that law-and-economics, deterrence-based theory holds the most promise for judges facing two primary challenges of modern tort law: (1) containing risks at the cutting edge of the regulatory state and (2) addressing widespread harms.

I. “CHEAPEST COST AVOIDER” AS ANTAGONIST: THE WORLD ACCORDING TO GZ

GZ’s “civil recourse” theory succeeds to some degree as both a descriptive and normative structural account of tort law based upon empowering plaintiffs to bring lawsuits against tortfeasors, but, in my view, does not present a viable generalizable theory of wrongs sufficient to guide judges wrestling with cases of first impression, especially those

that manner.” *Id.* at 306; *see also id.* at 307 (“Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use.”).

¹⁰ Emphasis has been added and emphasis in original has been omitted.

addressing modern risks at the cutting edge of the regulatory state and those that address widespread harms.

GZ set out their civil recourse structural theory of tort law in opposition to the paramount instrumentalist or functional accounts of tort law. They emphatically resist the notion that liability in tort may be appropriately “reverse-engineered from policy considerations” (p. 19) and equally oppose the “social welfare school” of tort law (pp. 44, 46). Thus, at the outset, they “maintain that critics of tort law have failed to understand its structure and its content, and have failed to see how it instantiates and furthers important values to which we generally profess allegiance” (p. 11). Moreover, throughout they insist that “tort law is structured such that it guides conduct and protects and empowers victims in a particular way that is not accurately captured by describing it as a scheme of deterrence and compensation” (pp. 29–30).

A. GZ's Theory of Wrongs and Redress

GZ expertly draw together and synthesize their decades-long theoretical and doctrinally oriented scholarship setting forth the “civil recourse” theory of tort law. More ambitiously, they attempt a subtle reformulation of civil recourse theory as a theory of “wrongs and redress” (*passim*).¹¹ This is a welcome move, given that civil recourse provides an apt descriptive theory of the structure of tort law, but fails to adequately articulate what constitutes a wrong. GZ admirably concede (as they must) that the “civil recourse principle does not itself provide an account of tort law’s wrongs” (p. 230).

They present “dual constructivism” as a “fresh attempt to theorize tort law’s wrongs” (p. 233). According to GZ, judges should (or rather do) construct or reconstruct a tort based on the idea of wrongs “explicitly or implicitly recognized in doctrine and in social norms” (p. 233) — that is, the scope of the tort is constructed based on existing, well-established moral judgments that derive from the origins of Anglo-American common law (p. 234).¹² Still, it is not entirely clear what civil recourse

¹¹ GZ clarify: “[T]hough our approach has quite understandably been labeled ‘civil recourse theory,’ that label is potentially misleading. Ours is a redress-for-wrongs (or wrongs-and-redress) theory” (p. 263).

¹² Dual constructivism, moreover, is equally defined by its departures from dual instrumentalism. According to GZ, dual constructivism “departs from [instrumentalism] in four fundamental and interrelated ways” (p. 238). First, torts are viewed as “integrative,” such that tort law does not identify conduct as compensable or deterrable but rather “generate[s] correlative duties and rights of noninjury” (p. 238) (emphasis omitted). Second, dual constructivism “direct[ly]” identifies wrongful conduct, “reject[ing] the thought that a decision to deem certain kinds of injurious conduct tortious rests primarily on the social benefit that stands to be achieved by imposing liability for such conduct” (pp. 238–39) (emphasis omitted). Third, dual constructivism is “normative or rectitudinal,” and “treats torts as sharing certain features with moral wrongs” as opposed to “reflect[ing] a judicial judgement that it is socially valuable that such conduct be so classified” (p. 239). Finally, the analysis is “elucidative” such that the recognition of new wrongs is accomplished through “elucidating

theory — even rebranded as a constructivist theory of “wrongs and redress” — has to say about what makes a “wrong,” particularly in areas of first impression.

I. Civil Recourse and the Structure of Tort Law. — GZ’s account of the structure of tort law stems from the *ubi jus* maxim: “[W]here there’s a right, there’s a remedy” (p. 15). Their “hermeneutic” or “interpretive” account “seek[s] to explain how the particulars of tort law — its institutional structure, its rules, and the concepts lawyers and judges use when reasoning about it — mesh with one another to form a reasonably coherent whole” (p. 10).

Their structural account has two key prongs. First, the relational aspect of tort law duties: “[w]ith regard to structure, torts are distinctive for being *legally recognized*, *injury-inclusive*, and *relational* wrongs” (p. 4). And second, the notion of empowering plaintiffs: providing an “entitle[ment]” for victims “to the assistance of a court in obtaining certain kinds of responsive action from the wrongdoer” (p. 60).¹³

(a) *Relational.* — The “relational” (as distinct from regulatory) aspect of tort law’s structure is key to GZ’s framework: “[W]e use the term ‘relational’ to identify conduct that involves mistreatment of another, as opposed to conduct that is antisocial without involving such a mistreatment” (p. 28 n.5).¹⁴ This gives rise to their distinction between simple and relational legal directives. “Simple legal directives require persons to perform certain acts or enjoin persons from committing certain acts. . . . Relational legal directives, by contrast, enjoin persons to treat or to refrain from treating other persons in a particular way” (p. 92).

Tort law directives, in some sense, “are all relational — they always enjoin certain actors from doing certain things *to* certain others, or to do certain things *for* certain others” (p. 93). But GZ insist:

The institutions and procedures of tort law make little sense on a view that deems tort law to be a taxation scheme or a pricing mechanism. Defendants (or their insurers) do not simply pay a tax or activity fee after the fact. . . . Courts hear tort cases because plaintiffs come to them seeking redress for wrongs committed upon them by tortfeasors. (p. 108)¹⁵

the norms of tort law,” rather than “announcing new rules so as better to achieve goals such as deterrence and compensation” (pp. 239–40) (emphasis omitted). At critical junctures when GZ are in the process of elaborating their affirmative theory, they revert instead to a refutation of instrumental tort theory. *See, e.g.*, pp. 238–39.

¹³ Emphasis has been omitted.

¹⁴ In slightly more analytic terms: “Where there are legal rules that specify certain kinds of duties owed to others and rights enjoyed by those others, and where such a duty has been breached and such a right violated, the right-holder is entitled to an avenue of civil recourse against the duty-bearer” (p. 83).

¹⁵ *See also* p. 108 (“It is not that our system incentivizes complainants to come to court so that risky activities are properly priced They are open to people who demand the state aid them in holding accountable someone who has wronged them.”).

The role of the court — namely, to hear cases brought by plaintiffs seeking redress — is closely bundled with the second key structural feature of tort law artfully described by GZ: its empowerment of plaintiffs.

(b) *Empowering the Plaintiff*. — According to GZ, “[g]overnment . . . provides tort law in fulfillment of a duty it owes to individuals to provide a law of wrongs and redress” (pp. 69–70). They elaborate: “It fulfills that duty by empowering them to hale alleged wrongful injurers into court for a certain kind of proceeding — one that aims in the first instance to vindicate certain of the putative victim’s interests, rather than those of the state or the public” (p. 70).

GZ make a strong case for *civil* recourse systems to empower plaintiffs. Their notion of civil recourse encompasses both a narrow view of a victim’s empowerment to use “the state’s dispute-resolution mechanisms” in place of other modes of self-help, and a broader notion of one’s “right to respond to or act against others civilly, through the exercise of a private right of action, in light of some predicament or problem one faces because of something another has done or failed to do” (p. 123).¹⁶

On GZ’s account, drawing from prominent philosophers including John Locke, John Rawls, and Arthur Ripstein, a just society has a responsibility to provide victims with an avenue by which they, acting in their capacity as private citizens, can hold their victimizers accountable.¹⁷ In soaring prose, GZ analogize such empowerment to the right to vote and claim that “[t]he principle of civil recourse sounds in liberal-democratic notions of equality, fairness, and individual independence and sovereignty” (p. 125).¹⁸ To GZ, the provision of a mode of civil recourse is “[p]art of what makes it reasonable to accept being subjected to laws and state control — and thus to be barred from doing many things one might wish to do, as well as from responding in certain ways to problems that one faces” (p. 127). Moreover, civil recourse not only establishes legal equality of a sort, but also promotes broader equality in our private affairs: “The state empowers each of us to use the court system as a way to protect against the private power that others might exercise over us, to some degree ameliorating pre-political inequalities

¹⁶ GZ argue that “[i]n a complex modern society — as opposed to a tight-knit, clan-based society, where informal modes of response may suffice to empower individuals to work through these predicaments — courts, lawyers, and the law provide the means through which individuals can vindicate their rights” (p. 123).

¹⁷ See, e.g., p. 120 (“Our claim is that, for individuals in a liberal-democratic political state such as ours, the justifiability of the state’s claim to authority depends, in part, on its recognition and implementation of the principle of civil recourse.”); p. 123 (“The right to be provided by the state with an avenue of civil recourse . . . arises from the unacceptability of leaving a person powerless, in various contexts, where the possibility of providing such a power exists.”); p. 134 (“[F]ollowing Arthur Ripstein, we maintain that the state, in providing [private individuals] with an avenue of civil recourse, affirms and affords a liberal notion of independence.”).

¹⁸ See also p. 10 (“More affirmatively, we will argue that tort law and the principle it embodies fit comfortably within a liberal-democratic framework of government.”).

and unfair terms of interaction” (p. 135). Drawing together and incorporating Rawls’s philosophical account to argue that avenues for civil recourse are an aspect of a just society’s basic structure is a signature contribution of the book.

2. *Torts as Wrongs*. — GZ provocatively claim that their conception of “torts as wrongs” comprises “fighting words, at least among torts scholars based in the United States” (pp. 181–82). While perhaps a bit of an exaggeration, it is certainly true that civil recourse theory has drawn attention (and indeed put GZ on the map as serious tort theorists), a fair share of which is withering criticism directed at the void at the core of civil recourse theory — namely, the absence of a theory of so-called “wrongs.”¹⁹ GZ are upfront that “Judges Calabresi and Posner have accused us of inviting judges to rely on unvarnished moral intuition” (p. 359), but they retort: “[W]e are not moralists about law, or at least not moralists in a way that leaves us vulnerable to criticisms of the sort that have been levelled against us” (pp. 359–60).

The relationship between their civil recourse theory and a theory of wrongs and redress, however, remains a bit mysterious:

We believe that civil recourse theory informs but does not determine the content of tort law, and that its content is not expressive of a particular moral or political theory, but instead derives from a set of well-established moral judgments that the courts have elaborated in both uncontroversial and controversial ways. (p. 234)

GZ agree that “[a] theory of torts must not only constrain the possible ways of fleshing out tort law’s wrongs, but also must capture and help guide judicial reasoning about what shall count as wrongs” (p. 231). They are keenly aware of the challenge to which they must rise; but, alas, none of the conceptions of wrongs they put forth ultimately delivers.

(a) *Mistreatment and Moral Wrongs*. — A first conception advanced by GZ comes perilously close to the “unvarnished moral intuition” that they are at pains to reject. At times, they seem to be engaged in an excavation project, referring to tort law’s “embedded moral principles” (p. 80). Indeed, they argue, judges themselves should jump right in: “[I]t is the job of the judge to put himself or herself ‘inside’ th[e] morality [in

¹⁹ See, e.g., Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 473 (2013) (“I have another question to put to civil recourse theorists: supposing that tort law is dedicated to providing ‘some sort of redress’ for people injured by ‘wrongful’ conduct, where do we go to find out what is a ‘wrong’? Without an answer to that question, the theory is at risk of collapsing into a tautology: tort law provides redress for wrongful injury; injury is wrongful if tort law provides redress for it.”) (quoted at pp. 256–57); Guido Calabresi, *Civil Recourse Theory’s Reductionism*, 88 IND. L.J. 449, 451 (2013) (“What I don’t think [GZ and their ilk] at all explain adequately is how or why something becomes a civil wrong.”).

the law itself] and recognize wrongs from that point of view, using precedents and principles embedded in the law as her principal guide” (p. 258).

Relatedly, they gesture toward theorizing about a particular kind of “mistreatment” that is at the core of wrongs: “A tort is a violation of a relational legal directive enjoining one person from mistreating another in a certain manner” (p. 181).²⁰ They state that courts have “constructed” and “curated” “a gallery of injurious wrongs” (pp. 237–38, 263–64),²¹ but this hardly suffices to give guidance to judges who (as GZ are keenly aware) are “called upon to apply the law of torts [and] need an understanding of *why* certain ways of treating others count as torts and why others do not” (p. 226).²² GZ’s constructivist theory of wrongs and redress based upon the inner morality of law has strong gravitational pull in certain torts, such as battery and assault, which they frequently invoke,²³ but it provides less guidance outside the band of morally blameworthy intentional torts.

(b) *Conduct Rules and Legal Directives*. — Nor is GZ’s attempt to pivot away from a morally grounded mistreatment conception of wrong to a more anodyne one of conduct rules and legal directives more successful. GZ claim that “[t]ortious wrongdoing involves the failure to meet certain standards of conduct set by law” (p. 165). Moreover, “[o]ne need not be particularly culpable or blameworthy (if at all) in order to have committed a tort” (p. 165).

GZ make a fatal concession, however, that “it is not even clear what criteria are to be used to ascertain the existence and content of such a directive” (p. 94).²⁴ They explain that “[t]he concept of a wrong is by no

²⁰ GZ further argue that acts are assessed directly for whether they constitute mistreatment, with the question: “[S]hall individuals be protected from such injurious actions or not” (p. 250)?

²¹ See also p. 238 (“One might imagine them, like artworks of similar genres, clustered together in thematically organized rooms (dignitary torts, property torts, tortious interference with one’s ability to interact with others, and so on). Occasionally new rooms are added to house new wrongs.”); p. 263 (“Our ‘gallery’ metaphor aims to capture the thought that, even though the various torts do not express a single substantive moral principle, they are not merely an ad hoc collection either.”).

²² Emphasis has been added.

²³ See, e.g., p. 26 (“Like battery, each of these torts sets a rule or rules specifying how one must refrain from mistreating others or, less frequently, identifying steps one must take to protect or rescue another from certain dangers.”); p. 111 (“For example, a long line of decisions addressing claims for battery, taken together, embody a directive specifying that a person must not intentionally touch another in an offensive or harmful manner. They thereby generate a right not to be so touched and a duty to refrain from so touching.”); p. 224 (“If the basic domain of tort law is to be understood conventionally, so as to include trespass to land, battery, assault, false imprisonment, defamation, fraud, and so on, then it is not tenable to view it as a system of shifting losses generally, or shifting losses resulting from accidents.”); pp. 246–47 (explaining the integrative nature of wrongs by reference to battery).

²⁴ P. 94 (“[W]e will concede that it is not always easy to decide whether a particular legal directive is simple or relational, that it is not always clear who the rights-holders are under such

means empty, but it is capacious and nuanced” (p. 183). GZ’s conception of a wrong is so capacious that it could simply be a violation of a standard of conduct incorporated into a legal directive. Given this alternative formulation, however, it is difficult to understand why GZ insist on ruling out the failure to take cost-justified safety precautions as the most fruitful (or even viable) definition, or path to a definition, of a “wrong.”

(c) *Issues of First Impression.* — GZ’s conception of wrongs, moreover, provides little guidance to judges in deciding cases of first impression, when looking to a “constructed and curated gallery of wrongs” (p. 238) may provide a starting point but nonetheless an incomplete “model for reasoning to new results” (p. 256).

GZ respond:

Courts in cases of first impression typically have the opportunity to *elucidate* the law. By this we mean that they have the opportunity to cover a range of issues that were not covered before simply by fleshing out the relational norms of conduct, customs, and precedents that are before them. (p. 255)²⁵

GZ are correct that courts often determine cases of first impression through reconstructions of existing doctrine. But that is not all courts do. It is still not clear why one must necessarily reject, as GZ do, that “considerations of policy play[] a major role in [courts’] choice” whether to hold a defendant liable in tort (p. 255).²⁶ Indeed, as Judge Calabresi has noted, GZ’s civil recourse theory seems especially narrow-minded in the realm of products liability (as discussed further below in Part II) with its focus on the “relational interests between the manufacturer and victim”²⁷ at the expense of the “larger policy issues”²⁸ at play.

What becomes increasingly clear is that GZ provide less by way of affirmatively staking out the metes and bounds of tort law “wrongs,” and more by way of a steadfast consistent rejection of the ascendant law-and-economics, incentive-based deterrence theory.

directives, and that it is not even clear what criteria are to be used to ascertain the existence and content of such a directive.”).

GZ respond: “None of these concessions undermines the plausibility of our claims that (i) there is a cogent distinction to be drawn between simple and relational directives, and (ii) there is a cogent notion of legal rights and duties that can be derived from the notion of a relational directive” (p. 94).

²⁵ It is worth noting that reliance on customs and norms is by no means antithetical to an economic deterrence theory approach. GZ suggest that their intellectual adversaries Professor Ronald Dworkin and Judge Richard Posner have “[s]omething close to contempt for custom and social mores” (p. 259). But Professor Richard Epstein is a powerful counterexample, as his scholarship increasingly draws from law and economics or functionalist accounts of tort law while giving great deference to custom. See, e.g., Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 1–2 (1992).

²⁶ Emphasis has been omitted.

²⁷ Calabresi, *supra* note 19, at 460.

²⁸ *Id.* at 460 n.40.

B. Law-and-Economics Deterrence Theory as Foil

Throughout the book, GZ deride law and economics for bucking their framework of elucidative judicial reasoning. Justice Oliver Wendell Holmes is GZ's "principal foil" (p. 83), but their true target is his modern incarnation in Professor Steven Shavell and Judges Guido Calabresi and Richard Posner (p. 86) and, more broadly, the highly influential law-and-economics movement that has swept the field of torts.²⁹

In *The Path of the Law*, Justice Holmes famously argued that a legal duty is merely "a prophecy that if [a man] does certain things he will be subjected to disagreeable consequences" (pp. 84, 90).³⁰ Judge Calabresi (along with co-author Douglas Melamed) carried this idea forward in a seminal article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, in which he reasoned, as GZ put it, that tort law is "overwhelmingly a scheme of liability rules," under which "*ubi jus* [where there is a right, there is a remedy] is rendered circular" (p. 86).³¹

As Professor Gary Schwartz recounts, "[i]n the early 1970s, the work of Guido Calabresi and Richard Posner precipitated what has proved to be an explosion of scholarship analyzing tort law in economic terms and emphasizing deterrence as a primary tort objective."³² Drawing the link from Justice Holmes to Judge Calabresi, Schwartz explains:

[F]or economic purposes what is important is not the burden of liability *ex post* but rather the prospect of liability *ex ante*. So long as the defendant can anticipate bearing liability for the range of injuries his tortious conduct foreseeably can produce, this prospect can induce in him an appropriate deterrence response.³³

²⁹ See p. 45 (suggesting that Judge Calabresi and others in the law-and-economics school "treat[] Holmes's skeptical comments about legal duties as the foundation of a social-scientific approach to torts"); p. 86 ("Leading tort scholars within the law-and-economics movement, including Guido Calabresi, Richard Posner, and Steven Shavell, all adopt frameworks descended from Holmes's, and their frameworks all lead to the same place, jurisprudentially.")

³⁰ The authors quote Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

³¹ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

³² Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1803 (1997) (footnotes omitted).

³³ *Id.* at 1816–17; see also *id.* at 1804 (noting "prefigurings of the modern economic approach in Holmes's chapters on tort law" (quoting WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 4 (1987))); see also Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 88 (2005) ("Following Holmes, we find another long dry spell up to the roughly simultaneous publications of Calabresi's *Costs* and [Professor Gary] Becker's article on crime."); Richard A. Posner, *Guido Calabresi's The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 13 (2005) ("It is remarkable how late in the history of legal thought this insight emerged. Bentham and Holmes, who had so clear a grasp of the deterrent, that is, the allocative effect of criminal punishment, failed to see, or at least to remark, that civil sanctions might also have a deterrent effect.")

In his seminal book *The Costs of Accidents*, Judge Calabresi locates the search for the “cheapest cost avoider,” which seeks to minimize the total costs of accidents (including not only the costs of harms, but the costs of preventing harms, as well as the administrative costs), at the heart of the deterrence goal of tort law.³⁴ Goldberg has aptly located Judge Calabresi’s cheapest cost avoider at the helm of the modern economic deterrence theory of torts: “[F]rom the standpoint of economic analysis, the goal of tort law is to minimize the sum of three factors: the costs of accident prevention, the costs resulting from accidents, and the costs of administering the tort system.”³⁵

GZ resist this conception of tort law’s regulatory dimension, and steadfastly reject the idea that “the court’s job is to articulate what shall count as sanctionable conduct and what shall count as compensable harm based on instrumental considerations” (p. 215).³⁶ However, during the twentieth century many courts came to understand this as central to their function.

Tarasoff v. Regents of the University of California,³⁷ one in a progression of cases that GZ present as prime counterexamples to their theory (pp. 215–16),³⁸ is a telling example. In *Tarasoff*, the court addressed new risks presented by modern, industrialized society. Front and center in the judges’ minds was “containment of . . . risks” resulting from a therapist’s knowledge of specific threats made by his patient given modern technology:

Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to

³⁴ See generally CALABRESI, COSTS, *supra* note 3.

³⁵ John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 545 (2003); see also *id.* at 549–50 (“Once transaction[] costs are reintroduced into the analysis — for example, it surely will not be costless for drivers to identify the relevant biking equipment nor to convince cyclists to use it — a critical question for economic analysis comes into focus: Who among possible bearers of liability is in the best position to identify and implement the efficient precaution? In Calabresi’s terminology, the economic deterrence analyst will want to know not only what precautions are efficient to take, but who is the ‘cheapest cost avoider’ — the actor in a position to implement those precautions most cheaply.”).

³⁶ Emphasis has been omitted. GZ term this Prosserian “dual instrumentalism” of compensation and deterrence (p. 210). They likewise rule out the so-called “singular instrumentalism” of deterrence of Judges Posner and Calabresi (pp. 225–28).

³⁷ 551 P.2d 334 (Cal. 1976).

³⁸ Additional prime targets include *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (pp. 216–17), and *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (p. 219).

notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.³⁹

It is evident that “the policy of preventing future harm” held sway with the judges.⁴⁰

Curiously, according to GZ, instrumentalism may provide a propitious model for judicial reasoning in patent cases where “it is plausible that the interests that provide the principal grounds for having patent protection are the benefit to members of society that will inure to a system that incentivizes scientific and engineering breakthroughs by granting something akin to property rights in certain inventions” (p. 236 n.3). But while they embrace this societal perspective with respect to patent law, they claim to reject it in tort overall.

At the same time, however, they acknowledge the powerful pull of deterrence in tort: “Having consequences for committing legal wrongs is important for deterrence reasons, and an argument can be made that wrongs do not count as legal wrongs unless the legal system attaches negative consequences to their commission” (p. 142). They even go so far as to admit that “[c]ourts are sometimes in the situation of needing to craft tort law with an eye on the aggregate consequences of its operation” (p. 72).

GZ are critical of *Tarasoff* presumably because the judicial reasoning is upfront that the concept of duty “is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁴¹ It would be possible to reinterpret the new legal directive in the case as fashioning a “new wrong.” Namely, in *Tarasoff*, the court fashioned a legal directive that expanded the “special relationship” of psychotherapist to patient to include a duty to warn.⁴²

³⁹ *Tarasoff*, 551 P.2d at 347–48.

⁴⁰ *Rowland*, 443 P.2d at 564; see *Tarasoff*, 551 P.2d at 347–48. Moreover, the reasoning of the California Supreme Court — “a leading practitioner of dual instrumentalism” (p. 240) — was followed in nearly every state, with the *Tarasoff* rule widely adopted (p. 215).

⁴¹ *Tarasoff*, 551 P.2d at 342 (“The assertion that liability must . . . be denied because defendant bears no ‘duty’ to plaintiff ‘begs the essential question — whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct. . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” (quoting *Dillon*, 441 P.2d at 916 (alteration and omissions in original))); see also *Dillon*, 441 P.2d at 916 (“The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards.”); p. 294.

⁴² Perhaps this explains why GZ waffle a bit on their view of *Tarasoff*: “Although different parts of the court’s opinion emphasize different reasons for this result (and while its result might ultimately be defensible even from within a constructivist rather than an instrumentalist approach to legal reasoning), some parts quite clearly bear the hallmarks of dual instrumentalism” (pp. 215–16).

Nonetheless, I would certainly agree that *Tarasoff* strains to a breaking point GZ's interpretive theory that courts invoke instrumentalist concerns only "to justify the recognition of a new redressable wrong" (p. 153). The problem for GZ is that it is not just an isolated example. Instead, it fits the paradigm of modern tort law's efforts to regulate risks in order to prevent future harms. But, they maintain: "Still we see no reason to suppose that an inquiry into such consequences is *central* to the adjudication of tort cases, much less exhaustive of it" (p. 72).⁴³ Contrary to GZ, and as elaborated in the following Part, I believe that deterrence theory, and in particular cheapest-cost-avoider functional accounts, are "central" to the real world of torts.

II. "CHEAPEST COST AVOIDER" AS PROTAGONIST: THE REAL WORLD OF PRODUCTS LIABILITY

A pillar of GZ's theory of wrongs and redress is their perception of judges (or courts) as "law articulators" (p. 70). They highlight judges' role in "crafting" law (p. 106) and insist that a sound tort theory must be consonant with "what the common law of torts purports to do and why it purports to be doing it" (p. 151).⁴⁴ More specifically, they emphasize that "[t]o understand tort law requires understanding the nature and justifiability of the process through which courts expand, curtail, and refine the rights, wrongs, and duties to which they will give legal effect" (p. 182).

GZ criticize instrumentalist theories such as deterrence for their "fail[ure] to provide a theory of wrongs even remotely consonant with the contours of tort law, and fail[ure] to capture judicial reasoning about tort law" (p. 217). But judicial reasoning as to products liability centers around deterrence and the "cheapest cost avoider" intuition that the manufacturer, rather than the unwitting consumer, is in the best and most knowledgeable position to minimize the losses that arise out of the general use of its product.⁴⁵

⁴³ Emphasis has been added.

⁴⁴ See also p. 227 (noting how tort theory must "explain[] what it is that courts are reasoning about in the common law when they are deciding what should count as tortious conduct").

⁴⁵ Nor is it unfair to shine the light on this particular area of tort law, for GZ themselves delve into the field of products liability, pushing their view (against the tide) notwithstanding that the adoption of strict products liability "was canonically defended on instrumental, policy-driven grounds" (p. 152).

Nonetheless, GZ's theory is on perhaps its weakest footing in the terrain of products liability. Or — another way of putting it — even those who reject law-and-economics deterrence theory as a single, unifying concept typically see its strength in the realm of products liability. See, e.g., Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 TEX. L. REV. 1605, 1631 (1997) ("[P]roducts liability jurisprudence has been explicitly instrumental and has invoked deterrence from its early days. The triumph of a risk-benefit standard may reflect the 'invisible hand' of economic evolution at work, moving tort law more explicitly toward an efficiency-targeted risk-benefit standard." (footnote omitted)).

GZ even acknowledge that “instrumental reasoning about deterrence and compensation certainly played a role in convincing judges and jurists to change the rules pertaining to product-related injuries,” but insist that “those changes took place *within* traditional tort notions of wrongs and redress” (p. 153). But how falsifiable is this claim?

At each juncture in its development — from the initial creation of strict products liability to its expansion to bystanders — judges relied explicitly on deterrence rationales. GZ respond that such deterrence rationales “were invoked to justify the recognition of a *new redressable wrong*” (p. 153). But to borrow GZ’s favored approach, let us examine and take the rationales invoked in judicial reasoning at “face value” (p. 47) — as will become clear, in this realm of products liability, judges invoke deterrence to *prevent harms*, and in doing so, recognize and/or expand tort liability.

*A. Rise of Strict Products Liability:
From MacPherson to Escola to Greenman*

The rise and expansion of modern products liability law has resulted in “a profound shift in the orientation of legal doctrine,” away from addressing product-related harms via contract between parties in privity of contract to recognition of the direct regulation of defective products as an appropriate judicial function.⁴⁶ In their attempts to deter harmful

⁴⁶ RICHARD A. EPSTEIN, TORTS 395 (1999); *see id.* at 394–95, 398. GZ should be commended for taking on the realm of products liability, for it presents a tough row to hoe to take this judicial transformation based explicitly on instrumental public policy–based rationales and reformulate it instead, as GZ attempt, as the recognition of new relational wrongs. *See, e.g.,* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 17 (1995) (“Legal economists have taken a particular interest in products liability, and law-and-economics has become such an accepted part of discourse that it is impossible to participate in most conversations about products liability without being at least somewhat conversant with the language of law-and-economics.” (footnote omitted)); Ugo Mattei, *Efficiency as Equity: Insights from Comparative Law and Economics*, 18 HASTINGS INT’L & COMPAR. L. REV. 157, 171–72 (1994) (“In the United States, law and economics is already deeply influencing the methods of reasoning of a new generation of lawyers, and its impact on the applied law is already a reality. . . . Products liability . . . is a good example.”).

Nor is products liability the only area that presents formidable difficulties for GZ’s conception. Nuisance law is another. Whereas GZ suggest that rules against polluting are “simple” legal directives distinct from a regulatory or taxation scheme (p. 92), nuisance law in practice functions to regulate and tax polluters in a way that renders relationality somewhat perfunctory. *See* Calabresi & Melamed, *supra* note 31, at 1115–24; *see also* Brief of Professor Catherine M. Sharkey as Amicus Curiae in Support of Plaintiff-Appellant at 4–10, *City of New York v. BP P.L.C.*, No. 18-2188-CV (2d Cir. Nov. 15, 2018) (discussing the economic justifications for nuisance law).

GZ are on much stronger ground showcasing *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), where Judge Cardozo insisted upon relational duties: “What the plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.” *Id.* at 100. Here, Judge Cardozo is an apt poster child for GZ’s theory: “Negligence, like risk, is thus a term of relation. . . . Negligence is not a tort unless it results in the commission of a wrong, and the commission of a

conduct, courts often sought to identify the party for whom an assignment of liability would result in the most efficient reduction in the accident costs — namely, the cheapest cost avoider.

In *MacPherson v. Buick Motor Co.*,⁴⁷ where the plaintiff was injured when a defective wheel of his Buick automobile collapsed, Judge Cardozo certainly framed the question presented in GZ terms: “The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser,”⁴⁸ and held that “the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers” could be held liable in negligence.⁴⁹

However, in the course of his reasoning, Judge Cardozo distinguished between the days of the horse-drawn carriage and the automobile age, so as to unchain proximate cause from the limitations of privity:

Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.⁵⁰

Guided by this societal change, Judge Cardozo reasoned that “[t]he wheel was not made by [Buick]; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted.”⁵¹ Judge Cardozo was thus persuaded that Buick was the cheapest cost avoider vis-à-vis the consumer. “It is enough that the goods ‘would in all probability be used at once . . . before a reasonable opportunity for discovering any defect which might exist.’”⁵²

wrong imports the violation of a right . . .” *Id.* at 101. And in sharp contrast, Judge Andrews in dissent articulated a broader notion of negligence: “Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B, or C alone.” *Id.* at 102 (Andrews, J., dissenting). I find myself among those who have a difficult time believing that the same judge penned the majority decisions in *Palsgraf* and *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). See p. 200 n.32 (“Some have suggested that *Palsgraf* revealed an older and chastened Cardozo looking to close the floodgates opened by his famous opinion twelve years earlier in [*MacPherson*].”).

⁴⁷ 111 N.E. 1050.

⁴⁸ *Id.* at 1051.

⁴⁹ *Id.* at 1053.

⁵⁰ *Id.*

⁵¹ *Id.* at 1051.

⁵² *Id.* at 1052 (quoting *Heaven v. Pender* (1883) 11 QBD 503 at 510 (Eng.) (omission in original)). GZ acknowledge the “progressive reading” of *MacPherson*, whereby “[w]hat had previously been understood as a private-law duty running horizontally to other persons was transformed into a vertical public-law duty owed to no one in particular, or to government, or to the world” (p. 68 & n.26). GZ rightly insist that Judge Cardozo in *MacPherson* “regarded this duty as running from one person (or firm) to another” (p. 71). But the “key breakthrough” GZ see in *MacPherson* — namely, that “relationality in the requisite sense is present as between an actor and a potential victim when physical injury to the victim is a sufficiently foreseeable consequence of an actor’s careless

Similarly cognizant of the impact of revised societal risk was Justice Traynor in his concurrence in *Escola v. Coca Cola Bottling Co.*⁵³ There, he identified newly emergent risks “[a]s handicrafts have been replaced by mass production with its great markets and transportation facilities.”⁵⁴ In this brave new world of mass production, “[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark.”⁵⁵ In *Escola*, where a waitress was injured by an exploding Coke bottle, Justice Traynor doubled down on instrumentalist grounds in justifying the move from negligence-based liability to strict products liability:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.⁵⁶

Indeed, he expressly invoked cheapest-cost-avoider language: “Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.”⁵⁷

Justice Traynor’s concurrence in *Escola* became law a generation later in *Greenman v. Yuba Power Products, Inc.*⁵⁸ The plaintiff was injured by a Shopsmith combination power tool being used as a lathe, which was built with inadequate screws that could not withstand the pressure of ordinary use.⁵⁹ Justice Traynor, for the majority, held that

actions” (p. 71) — lacks import without an analytic framework capacious enough to consider the instrumentalist imperatives guiding judicial reasoning. Judge Cardozo did not merely mine the inner morality of “duty” to expand liability; rather, he chose that allocation of liability that would best prevent harm.

⁵³ 150 P.2d 436 (Cal. 1944).

⁵⁴ *Id.* at 443 (Traynor, J., concurring).

⁵⁵ *Id.*

⁵⁶ *Id.* at 440–41. Justice Traynor also set forth an insurance or loss-spreading rationale:

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.

Id. at 441. Unlike the cheapest-cost-avoider rationale, this insurance rationale is historically contingent, given the absence of widespread first-party insurance at the time. See Jeffrey O’Connell & John Linehan, *Neo No-Fault Early Offers: A Workable Compromise Between First and Third-Party Insurance*, 41 GONZ. L. REV. 103, 120–21 (2005) (describing the expansion of first-party coverage).

⁵⁷ *Escola*, 150 P.2d at 441 (Traynor, J., concurring); see also Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439, 462 (1972) (arguing that, given the manufacturer’s “knowledge of, and access to, the intricacies of alternate product designs and production techniques,” “[i]f he is forced to bear all accident costs, the businessman will have an incentive to find the optimal accident level for his product” (footnote omitted)).

⁵⁸ 377 P.2d 897 (Cal. 1963).

⁵⁹ *Id.* at 898–99.

“[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”⁶⁰ Justice Traynor emphasized that the purpose of strict products liability was “to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”⁶¹ As shown in *Escola* and *Greenman*:

[Justice Traynor, i]n his activist conception of judging . . . was one of the pioneers of his time and one of the precursors of a “policymaking” role for judges in tort cases [Justice Traynor] was committed to using his powers as fully as possible to promote social policies in which he believed and to reorient the common law of California in directions he thought rational and desirable.⁶²

Justice Traynor’s cheapest-cost-avoider deterrence rationale was, moreover, widely embraced by courts and academic commentators, as strict products liability swept the nation. In the words of the New York Court of Appeals: “A casting of increased responsibility upon the manufacturer, who stands in a superior position to recognize and cure defects, for improper conduct in the placement of finished products into the channels of commerce furthers the public interest.”⁶³ Torts scholars also agreed. Professor Keith Hylton explains:

⁶⁰ *Id.* at 900.

⁶¹ *Id.* at 901.

⁶² G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 208 (2003). Justice Traynor had a thirty-year tenure on the California Supreme Court (twenty-four years as an associate justice and six years as a chief justice). According to White, the Traynor years were marked by “a strong interest in academic literature as source material; [and] an effort to preserve where possible, the lawmaking power of courts” in the face of “an increasingly detailed legislative apparatus.” *Id.* at 181–82. Moreover, “[t]he basis for Traynor’s faith in the judiciary as a lawmaking force . . . was his conviction that rationality could be achieved through enlightened judging.” *Id.* at 188. Nor was Justice Traynor, who “never departed from his belief that rationality was an achievable judicial goal,” disturbed by “[t]he charge of being an activist judge.” *Id.*

⁶³ *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976); *see id.* (“To this end, we hold that a manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended.” (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 28.3 (1956)); *Butler v. Pittway Corp.*, 770 F.2d 7, 11 (2d Cir. 1985) (“Strict liability is based on the premise that a manufacturer is in the best position to insure that its products are safe and to bear the cost of liability by spreading it among its customers.” (citing *Greenman*, 377 P.2d at 901)); *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 671–72 (Ohio 1995) (“The first and foremost objective of strict liability is to promote product safety. The doctrine of strict products liability provides manufacturers a strong incentive to design, manufacture, and distribute safe products.”); *Malcolm v. Evenflo Co.*, 217 P.3d 514, 520 (Mont. 2009) (“Strict liability recognizes that the seller is in the best position to insure product safety. Design defect liability therefore places the risk of loss on the manufacturer. This imposition of risk provides an incentive to design and produce fail-safe products which exceed reasonable standards of safety.” (citation omitted)).

The deterrence rationale holds that strict products liability provides an incentive for the party best able to control product accidents to take steps to minimize their occurrence. The modern law and economics literature has introduced a more sophisticated version of this rationale, one that emphasizes the role strict products liability plays in controlling excessive consumption of risky products. Under strict liability, the price of the risky product would reflect its level of risk, so that consumers would shift their purchases from risky products toward comparatively safe products.⁶⁴

Indeed, it is hardly an overstatement that, in the post-*MacPherson* shift to strict liability, judges and academics “focused their attention solely on finding the ‘cheapest cost avoider.’”⁶⁵ And markedly absent is any trace of the civil recourse or “wrongs and redress” rationale.⁶⁶

⁶⁴ Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2463 (2013) (footnote omitted); see also Bruce Feldthusen, Michael D. Green, John C.P. Goldberg & Catherine M. Sharkey, *Product Liability in North America*, in PRODUCT LIABILITY 345, 350 (Helmut Koziol et al. eds., 2018) (“For example, insofar as negligence law’s placement of the burden of proving carelessness on the plaintiff produces ‘false negatives,’ a rule of strict liability may be preferable from a deterrence perspective. With a lessened ability to fend off claims for product-related injuries, manufacturers should invest more in safety, other things being equal.” (footnote omitted)).

⁶⁵ Robert G. Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U. L. REV. 285, 309 (1988); see Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1294–95, 1374 (1992) (recognizing “the cheapest cost-avoider criterion[’s] . . . overt use in Anglo-American tort law . . . [in] liability for abnormally dangerous activities and some aspects of products liability law,” *id.* at 1294, and arguing further that “the cheapest cost-avoider criterion can be (and has been) deployed in a variety of indirect ways . . . and provides a powerful descriptive explanation for central doctrines of the common law, including not only causation but also some conceptions of negligence,” *id.* at 1294–95); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 89 (2002) (“Strict products liability is an ‘attempt to minimize the costs of accidents and to consider who should bear those costs.’ The underlying rationale of strict liability is to place the burden of precaution on the manufacturers because they have superior information about the product that makes them the ‘cheapest cost avoider.’” (footnote omitted) (quoting *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 151 (N.J. 1979))).

⁶⁶ See, e.g., *Pierce v. Pac. Gas & Elec. Co.*, 212 Cal. Rptr. 283, 291 (Cal. Ct. App. 1985) (“This court has identified four main policy grounds for the doctrine [of strict products liability]: (1) to provide a ‘short cut’ to liability where negligence may be present but is difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product.”); see also *Jimenez v. Superior Ct.*, 58 P.3d 450, 452–53 (Cal. 2002) (explaining the development of strict products liability based on the principle that “the manufacturer is best able to reduce the risks of injury caused by product defects,” *id.* at 452, and justifying the extensions of liability to retailers “as an added incentive to safety,” *id.* at 453, and to developers of mass-produced homes, who are “in a better economic position to bear the resulting loss than the consumer,” *id.*, on similar grounds); *Potter v. Chi. Pneumatic Tool Co.*, 694 A.3d 1319, 1328 (Conn. 1997) (highlighting “several policy justifications” for strict liability including that “manufacturers could readily absorb or pass on the cost of liability to consumers as a cost of doing business” and “manufacturers would be deterred from marketing defective products” (citing *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring))); *Samuel Friedland Fam. Enters. v. Amoroso*, 630 So. 2d 1067, 1070 (Fla. 1994) (arguing that holding commercial lessors strictly liable “places the risk of loss associated with the use of defective products on one who created and assumed the risk and on one who can

Against this backdrop, GZ strain to argue that “[t]he reasons or grounds that support a rule of tort law are, of course, distinct from the rule itself” (p. 195).⁶⁷ They then attempt a revisionist take: “Decisions such as *Greenman* certainly broke new ground. *But they did so by fashioning a new legal directive and with it, a new wrong*” (p. 193).⁶⁸ In this same vein, they claim that “*Greenman* and *Escola* both mark sensible efforts to construct a new legal wrong out of existing legal materials” (pp. 309–10). They explain:

The *wrongfulness* at the core of the warranty-based tort claim recognized in *Greenman* is the marketing of a defective product. This is a breach of a duty of noninjuriousness — it is conduct that generates an unacceptable risk of injury. When that risk ripens into an actual injury, the conduct becomes a breach of a duty of noninjury. (p. 310)

Rather than acknowledge the judicial instrumental reasoning plainly set forth in *Greenman* and its progeny,⁶⁹ GZ claim these cases recognized a “new legal wrong”: the act of “injuring another through the sale of a dangerously defective product” (p. 196).⁷⁰ But such a “wrong” was at

implement procedures to avoid the distribution of defective products in the future” (quoting *Kemp v. Miller*, 453 N.W.2d 872, 879 (Wis. 1990)); *Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 683 (Iowa 1970) (arguing that the “purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons,” whom the manufacturer knows will use the product “without inspection for defects” (quoting *Greenman*, 377 P.2d at 900–01)); *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 364 (Mo. 1969) (adopting strict products liability “to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such products on the market rather than by the injured persons who are powerless to protect themselves” (quoting *Greenman*, 377 P.2d at 901 (alteration in original))); *Ritter v. Narragansett Elec. Co.*, 283 A.2d 255, 262 (R.I. 1971) (same).

⁶⁷ GZ provocatively ask: “[W]hat is one to make of the fact that the law of products liability was ushered in on the strength of instrumental rationales emphasizing loss-spreading, compensation, and deterrence” (p. 195)? GZ concede, as they must, that Justice Traynor (and other proponents) argued for a new regime of strict products liability on “avowedly instrumentalist” grounds (p. 192).

⁶⁸ See also p. 153 (“[A]lthough instrumentalist reasoning about deterrence and compensation certainly played a role in convincing judges and jurists to change the rules pertaining to product-related injuries, those changes took place *within* traditional tort notions of wrongs and redress. Deterrence and compensation rationales were *not* invoked to justify loss-spreading irrespective of wrongdoing. Instead, they were invoked to justify the recognition of a *new redressable wrong* — namely, the wrong of a commercial seller injuring a consumer by sending a dangerously defective product into the world.”).

⁶⁹ See pp. 267–68 (“To be sure, in defining a certain type of wrong and providing victims with an opportunity for redress, tort law indirectly advances other values. . . . [I]t goes too far to say that tort law is a scheme for the advancement of these goals, or that *its purpose* is to advance them.”).

⁷⁰ It is likewise telling that GZ disparage *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), as a follow-on to *Dillon* and *Tarasoff* (p. 218), see *supra* pp. 1434–35, without acknowledging *Sindell*’s explicit nod to Justice Traynor’s *Escola* concurrence when recognizing that modern society creates “fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs.” *Sindell*, 607 P.2d at 936. *Sindell* likewise embraces Justice Traynor’s instrumentalist reasoning:

issue long before *MacPherson* and indeed acknowledged by Judge Cardozo (the only difference in his mind now being the question of a direct versus indirect sale).⁷¹ But even GZ do not try to assert that this aspect is what renders the “wrong” “new.” Ultimately, GZ’s attempt to recast these decisions as the creation or recognition of “a new wrong,” rather than an effort to pin liability for the very same wrong on the actor best poised to prevent it, falls short.⁷²

B. Bystander Liability

Even as they try to downplay the role of instrumentalist reasoning in the history of the rise of strict products liability, GZ hold fast to the domain of relational wrongs: “[T]he very point of decisions such as Cardozo’s in [*MacPherson*] and Traynor’s in [*Greenman*], is to identify the rights and responsibilities that attend th[e] relation” of a “manufacturer of a mass-produced product to users of the product” (p. 348).⁷³

But to do so, they must also turn a blind eye to the extension of strict liability of a manufacturer for injuries to bystanders, who stand fully outside this relation of manufacturer to the user of its product. Thus, a theory of relational wrongs must strain to embrace bystander strict liability, whereas the instrumental policies underlying strict liability control of the risk (and spreading of losses) are applicable regardless of the “user or consumer” limitation.⁷⁴ In fact, the bystander’s case for strict liability in tort is even stronger than the user’s from a “cheapest cost

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. . . . The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. These considerations are particularly significant where medication is involved, for the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Id. (citations omitted).

⁷¹ See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

⁷² In other words, in these cases, the courts “fashion[] a new legal directive” by placing liability on the cheapest-cost-avoider manufacturer in order to minimize future harms (p. 193) (emphasis omitted). If GZ can simply reinterpret the target of the new legal directive as “a new wrong” (even if driven by cheapest-cost-avoider instrumental reasoning), the theory is not only nonfalsifiable but also does not provide necessary guidance to judges. Moreover, if this legerdemain works here, then why not in *Tarasoff*, too? See *supra* p. 1434.

⁷³ Footnotes have been omitted.

⁷⁴ See Karen A. Jordan, Note, *Delimiting the Manufacturer’s Liability: An Examination of Loss of Consortium Recovery in Strict Products Liability Actions Under Section 402A of the Restatement (Second) of Torts*, 22 IND. L. REV. 821, 839 (1989) (“Of course, all jurisdictions extended section 402A to include physically injured bystanders. Yet a strict products liability ‘bystander’ is a ‘non-user’ of the product. Thus, allowing bystander recovery is in conflict with the black letter of section 402A. The courts therefore made a *policy determination* that a bystander deserves the same protection as the consumer.” (emphasis added) (footnotes omitted)).

avoider” perspective.⁷⁵ As the California Supreme Court reasoned in the seminal *Elmore v. American Motors Corp.*⁷⁶ case:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.⁷⁷

In 1965, section 402A of the Restatement (Second) of Torts originally covered all consumers and users of products, but hesitated in extending protection to bystanders.⁷⁸ However, the tort approach, which stresses the protection of strangers, eventually prevailed.⁷⁹ Today the liability of the manufacturer or seller to the bystander is universally allowed.⁸⁰ Moreover, as judges across the country embraced bystander strict liability, they did so on cheapest-cost-avoider grounds.⁸¹ Drawing explicitly from the instrumental language of *Greenman*, the Texas Supreme Court opined: “The reason for extending the strict liability doctrine to innocent

⁷⁵ See RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 697 (12th ed. 2020) (“As with abnormally dangerous activities, the bystander has been hurt by a process that was in no sense her making because she never used the product at all.”).

⁷⁶ 451 P.2d 84 (Cal. 1969).

⁷⁷ *Id.* at 89. The court further reasoned that resistance to bystander liability “is only the distorted shadow of a vanishing privity which is itself a reflection of the habit of viewing the problem as a commercial one between traders, rather than as part of the accident problem.” *Id.* (quoting HARPER & JAMES, *supra* note 63, at 1572 n.6).

⁷⁸ RESTATEMENT (SECOND) OF TORTS § 402A caveat (1) (AM. L. INST. 1965).

⁷⁹ EPSTEIN & SHARKEY, *supra* note 75, at 697 (“The initial hesitation regarding bystander cases rested in part on the uncertainty of whether any implied warranty or misrepresentation theory could hold the defendant accountable to anyone outside the chain of contracts. The bystander is not lured into using the product by the defendant’s representations. Neither is she an immediate or ultimate beneficiary of any seller or manufacturer warranty.”).

⁸⁰ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. L. INST. 1998) (imposing liability for harms to “persons” without limiting its application to users or customers).

⁸¹ See *Piercefield v. Remington Arms Co.*, 133 N.W.2d 129, 134–35 (Mich. 1965) (agreeing “with the developing weight of authority . . . that the manufacturer is best able to control dangers arising from defects of manufacture,” *id.* at 134, and holding that “an innocent bystander injured . . . should have a right of action against the manufacturer on the theory of breach of warranty as well as upon the theory of negligence,” *id.* at 135); see also Dix W. Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1, 6 (1970) (providing a contemporaneous account of the state of bystander strict liability based on cheapest-cost-avoider principles, characterizing *Piercefield* as a case “where it is said that the essence of that court’s earlier strict liability decisions ‘is that the manufacturer is best able to control the dangers arising from defects of manufacture’” (quoting *Piercefield*, 133 N.W.2d at 134)).

bystanders is the desire to minimize risks of personal injury and/or property damage.”⁸² The New York Court of Appeals likewise further elaborated this cheapest-cost-avoider rationale for imposing liability on manufacturers for harms to bystanders in order to incentivize manufacturers to develop safer products and thus minimize future harms:

In today’s world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. . . . Pressures will converge on the manufacturer . . . who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production; and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection.⁸³

GZ try to reinterpret *Elmore* to fit their theory: “[B]ystanders who are fully outside of any version of an extended distributional chain are still *foreseeable* victims of defective products, and in [*Elmore*], an important post-*Greenman* decision, the California Supreme Court permitted bystanders to bring strict products liability claims” (pp. 310–11).⁸⁴ GZ find *Elmore* “sensible when understood as an aggressive application of the negligence version of the wrong of injuring someone by manufacturing a defectively designed product, at least when the bystanders are (as in *Elmore* itself) foreseeable” (pp. 317–18). They thus try to refashion bystander liability — which courts (including *Elmore* itself) explicitly adopt on cheapest-cost-avoider grounds — as an “aggressive” version of the “new wrong” uncovered in *Greenman*, a version now divorced from the relational connection between manufacturer and user.

III. MODERN TORT THEORY

GZ reiterate: “We argue for taking tort law at face value” (p. 47). Indeed, it is the thrust of their attack on the instrumentalist, cheapest-cost-avoider mode of analysis: “Notwithstanding its elegance, its resonance with a practical mindset, and its role in encouraging mid-twentieth-century courts to modernize certain areas of tort doctrine, dual instrumentalism fails to provide a theory of wrongs even remotely consonant with the contours of tort law” (p. 217).

The centrality of instrumental deterrence reasoning to the rise of strict products liability (explored above in Part II) refutes this central claim. Now, in Part III, I consider how cheapest-cost-avoider reasoning has taken off especially in the realm of modern torts, in particular those

⁸² *Darryl v. Ford Motor Co.*, 440 S.W.2d 630, 633 (Tex. 1969) (citing *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963)).

⁸³ *Codling v. Paglia*, 298 N.E.2d 622, 627–28 (N.Y. 1973).

⁸⁴ Footnote has been omitted.

that address modern risks at the cutting edge of the regulatory state and those that address widespread harms.

GZ invoke the Vioxx litigation to illustrate the application of their civil recourse theory at the cutting edge of tort law (pp. 280–92).⁸⁵ Vioxx is a perfect exemplar of challenges facing modern tort theory — namely, the interface between “private” tort and “public” regulation in the realm of widespread harm. On its face, the Vioxx example, involving an FDA-approved drug that nonetheless allegedly caused harm leading to tort lawsuits, defies GZ’s insistence on maintaining a rigid private law/public law divide (p. 65), and instead calls out almost instinctively for viewing tort as a regulatory substitute. More generally, in their discussion of Vioxx, GZ focus exclusively on the courts’ insistence on individual causation, and essentially miss the forest for the trees. GZ center their discussion on procedural issues relating to the \$4.85 billion settlement (pp. 283–84, 286–87), responding to objections raised by Professors Samuel Issacharoff and John Witt that “tort law today often involves the aggregation of individual claims and their resolution through settlement processes that operate on a bureaucratic model” (p. 273).

But they miss the broader point, which is that, in applying and reconsidering tort doctrine, especially in the realm of mass torts, courts consider the foremost role of deterrence in terms of preventing harms.⁸⁶ While they concede that an “interesting policy question[]” is “how such settlements might contribute to policy goals such as deterrence and compensation” (p. 285), they nonetheless reject such a functional understanding of the Vioxx litigation as “unsound” (p. 291).⁸⁷ But the centrality of deterrence to class actions and other forms of aggregated claims as a response to widespread harm can hardly be gainsaid.⁸⁸ As Judge

⁸⁵ GZ claim that Vioxx “demonstrates the value of our approach as applied to pressing contemporary cases and controversies” (p. 264).

⁸⁶ Instead, GZ have it exactly backwards, with their charge that “decades of Holmesian thinking about tort law [as internalized by sophisticated defense attorneys] contributed to the problem” — namely, “that the firm was engaging in conduct that might amount to the wrongful injuring of thousands” (p. 290).

⁸⁷ Their dismissal of deterrence is especially bold in the realm of pharmaceutical drugs, where there is an elaborate FDA regulatory structure, combined with the viability of tort causes of action, explicitly invoked in the name of preventing harms. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 578–79 (2009) (“The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. . . . Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.” (footnote omitted)).

⁸⁸ *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (explaining that the “policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *Gascho v. Glob. Fitness Holdings, LLC*, 822 F.3d 269, 287 n.6 (6th Cir. 2016) (providing citations to secondary literature

Fallon, overseer of the Vioxx multidistrict litigation case, put it: “Consumer class actions . . . have value to society . . . both as deterrents to unlawful behavior — particularly when the individual injuries are too small to justify the time and expense of litigation — and as private law enforcement regimes that free public sector resources.”⁸⁹

In fact, Vioxx is just one example, the tip of the proverbial iceberg, with respect to the primary concerns of modern torts (which pass by GZ with nary a mention): containing risks alongside federal regulators and addressing widespread harms.

*A. Containing Modern Risks at the Cutting Edge
of the Regulatory State*

Courts are increasingly utilizing instrumentalist, deterrence-based reasoning to “operate at the leading edge of the regulatory state” (p. 73),⁹⁰ and much of my work probes the interaction between tort and federal regulation. A prime example is the interaction of tort law and FDA regulation for containing risks arising from brand name and generic drugs.⁹¹

The California Supreme Court’s *T.H. v. Novartis Pharmaceuticals Corp.*⁹² decision provides a striking illustration. When faced with a tort law issue of first impression, the justices’ main preoccupation was with “preventing harms” not “recognizing wrongs”: “[T]he overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.”⁹³ Moreover, the justices reasoned that if state tort law and “the policy of preventing harm has special relevance to any particular endeavor, surely prescription

establishing the deterrent value of consumer class actions); *In re Am. Rsrv. Corp.*, 840 F.2d 487, 492 (7th Cir. 1988) (noting that Bankruptcy Rules allow class actions because “[s]uits for very small stakes may hold out little prospect of either compensation or deterrence”); *Chambers v. Moses H. Cone Mem’l Hosp.*, 843 S.E.2d 172, 175 (N.C. 2020) (“Moreover, courts have also recognized the deterrent effects of class action lawsuits, which hold defendants accountable for conduct that may be unlawful and widespread but difficult to address when the conduct does not harm any single individual enough to make it economically expedient to bring a lawsuit.”).

⁸⁹ *In re: Vioxx Prods. Liab. Litig.*, No. 1657, 2018 WL 4613941, at *8 (E.D. La. Sept. 26, 2018) (quoting *Gascho*, 822 F.3d at 287).

⁹⁰ GZ instead suggest that “preoccupation with tort law’s potential to perform public-law functions is today not so much a sign of progressivism as a symptom of nostalgia for a moment when courts might operate at the leading edge of the regulatory state” (p. 73).

⁹¹ But this applies more generally throughout products liability. See generally Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008).

⁹² 407 P.3d 18 (Cal. 2017).

⁹³ *Id.* at 31 (quoting *Kesner v. Superior Ct.*, 384 P.3d 283, 295 (Cal. 2016)). “We will not recognize a duty of care even as to foreseeable injuries ‘where the social utility of the activity concerned is so great, and avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.’” *Id.* (quoting *Merrill v. Navegar, Inc.*, 28 P.3d 116, 140 (Cal. 2001)).

drug labeling is one.”⁹⁴ With that overarching goal in mind, the court held that a brand-name drug manufacturer could be held liable for failure to warn the consumer of the generic version of the drug,⁹⁵ given that federal regulations mandate that the label of the generic drug must be a carbon copy of the brand-name drug’s label.⁹⁶

The court embraced *Tarasoff*’s reasoning (and thereby rejected the GZ conception of duty) by reiterating: “The conclusion that a duty exists in a particular case ‘is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.’”⁹⁷ Chief among those policy considerations was “the policy of preventing future harm.”⁹⁸ The court was unanimous in its view that “a duty of care on behalf of all those who consume the brand-name drug or its bioequivalent ensures that the brand-name manufacturer has sufficient incentive to prevent a known or reasonably knowable harm.”⁹⁹

Justice Cuéllar, writing for the majority, reasoned from cheapest-cost-avoider first principles:

A brand-name drug manufacturer is in the best position to discover and cure deficiencies in its warning label, to bear cost of injury resulting from its failure to update and maintain the warning label, to insure against the risk of liability, and to spread any increased cost widely among the public.”

Justice Corrigan, concurring in this aspect of the majority opinion, was likewise emphatic that “[p]lacing a duty of care on brand-name manufacturers . . . allocates the costs of compensating drug-related injuries on the party that is best-situated to prevent the harm.”¹⁰¹

⁹⁴ *Id.* (citing *Sindell v. Abbott Lab’ys*, 607 P.2d 924 (Cal. 1980)).

⁹⁵ *Id.* at 47.

⁹⁶ Federal regulations mandate that generic drugs have the exact same label as their brand-name equivalent. *See id.* at 23 (explaining that, while “the brand-name manufacturer . . . bears responsibility for the accuracy and adequacy of its label ‘as long as the drug is on the market,’” the generic manufacturer is responsible for “ensuring that its warning label is the same as the brand-name manufacturer’s” (quoting *Wyeth v. Levine*, 555 U.S. 555, 571 (2009))).

⁹⁷ *Id.* at 28 (quoting *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968)).

⁹⁸ *Id.* at 31 (quoting *Kesner*, 384 P.3d at 295).

⁹⁹ *Id.* at 32; *SEE ID.* at 49 (Corrigan, J., concurring in part and dissenting in part). In particular, imposing liability on the brand-name manufacturer would provide an additional incentive for it to comply with its duties under federal regulations “once the patent expires and generic manufacturers enter the market, since the market share for the brand-name drug at that point ‘may drop substantially.’” *Id.* at 31 (majority opinion) (quoting Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67,985, 67,988 (Nov. 13, 2013) (codified at 17 C.F.R. pt. 314, 601)).

¹⁰⁰ *Id.* at 34. In fact, the “brand-name drug manufacturer is not only in the best position to warn of a drug’s harmful effects: It is also the *only* manufacturer with the unilateral authority under federal law to issue such a warning for the brand-name drug or its generic bioequivalent.” *Id.* at 31 (citing *Sindell v. Abbott Lab’ys*, 607 P.2d 924, 936–37 (Cal. 1980)).

¹⁰¹ *Id.* at 49 (Corrigan, J., concurring in part and dissenting in part).

The court in *Novartis* thus “conclude[d] that warning label liability is likely to be effective in reducing the risk of harm to those who are prescribed (or are exposed to) the brand-name drug or its generic bioequivalent.”¹⁰² Contrary to GZ’s skepticism of the role of tort liability in the administrative state (p. 72),¹⁰³ the *Novartis* court championed “the pivotal role of state tort actions ‘as a complementary form of drug regulation’” aimed at preventing harms.¹⁰⁴

B. Preventing Widespread Harms

A second key feature that must be addressed by modern tort theory is the paradigmatic shift from “attending to individual misconduct” (p. 69) — which is readily addressed by GZ’s theory of wrongs and redress — to addressing widespread societal harms — about which GZ have little to say (beyond commenting on the Vioxx litigation and settlement) but to which law-and-economics deterrence theory is highly attuned.

Punitive damages provide fertile ground in which to probe this dimension, given the changing nature of cases in which punitive damages are awarded. Historically, punitive damages accompanied a fairly narrow category of malicious, intentionally wrongful conduct that called out for a form of individualized retributive punishment. And, per GZ,

¹⁰² *Id.* at 32 (majority opinion).

¹⁰³ GZ remark:

Today, however, it is unlikely that these are the most effective routes to expand compensation for accidents or to incentivize safe practices. We now have in place elaborate regulatory, market-based, and blended mechanisms for insurance and regulation. While each has its share of problems, it is widely agreed that tort law tends to be a particularly inefficient and haphazard device for achieving these goals by itself, though in operation it may sometimes complement (and may at other times impede) these other mechanisms. (p. 72–73)

¹⁰⁴ *Novartis*, 407 P.3d at 31 (quoting *Wyeth v. Levine*, 555 U.S. 555, 578 (2009)). For elaboration on tort law as harm-reducing regulation, see Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1739 (2016) (“Judicial oversight of the administrative state holds promise, too, for encouraging ‘tort-agency partnerships’ in health and safety regulation. Under this approach, the administrative state and the common law can operate, in certain contexts, as regulatory complements — and courts must solicit input from regulatory agencies.” (footnote omitted)); see also Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 1020 (2014) (“In contrast to portrayals of administrative regulation and tort law that ‘increasingly cast the two less as complementary regimes than as institutional rivals,’ the principle of common-law deference shows that the tort system has opted to be a complementary component of the modern administrative state.” (footnote omitted) (quoting Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L., no. 1, 2006, art. 4, at 3)); and Kyle D. Logue, *Coordinating Sanctions in Tort*, 31 CARDOZO L. REV. 2313, 2337 (2010) (“This scenario, then, obviously suggests an important complementary ex post deterrence role for tort law. Although the agency regulation may give all potential injurers the incentive to make the minimally efficient care-level investments, only the threat of ex post tort liability would induce the low-avoidance-cost potential injurers to make that efficient additional \$25 safety investment. Thus, compliance with a minimally efficient regulatory standard of care should not, from a regulatory perspective, be preemptive of state tort law claims.”).

notions of societal deterrence seem out of place in private law focused on bilateral interactions between the parties involved in the litigation.

But a newer generation of punitive damages cases has arisen, where punitive damages attach to a tortfeasor's "reckless" widespread conduct, performed with lack of attention to the consequences for the health and safety of others in society.¹⁰⁵ Punitive damages awarded against corporations are emblematic of this evolutionary paradigm shift. In the United States today, and in keeping with the goal of deterrence that predominates,¹⁰⁶ plaintiffs seek and are awarded punitive damages more often against businesses than against individuals.¹⁰⁷ This is not so in other countries; for instance, in the United Kingdom and Australia, such damages are most frequently justified as an effort to regulate intentional bad acts between individuals.¹⁰⁸ Punitive damages is thus a key realm in which the debate regarding the "individualistic" versus "societal" nature of tort law plays out;¹⁰⁹ moreover, the legitimate state interest in punitive damages in the United States is not only historically contingent, but also evolving in light of judicial reasoning and litigation practices.

The predominant law-and-economics rationale for punitive (or supra-compensatory) damages is based upon optimal deterrence or loss internalization and focuses on the underenforcement problem: supra-compensatory damages are needed when underdetection of harms or

¹⁰⁵ See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 357–58 (2003) [hereinafter Sharkey, *Societal Damages*]; Catherine M. Sharkey, *Punitive Damages Transformed into Societal Damages*, in PUNISHMENT AND PRIVATE LAW (Elise Bant, Wayne Courtney, James Goudkamp & Jeannie Paterson eds.) (forthcoming June 2021) (manuscript at 1) (on file with the Harvard Law School Library) [hereinafter Sharkey, *Punitive Damages Transformed*].

¹⁰⁶ Professor Samuel Buell has argued persuasively that corporations cannot be retributively punished. See Samuel W. Buell, *Retiring Corporate Retribution*, 83 LAW & CONTEMP. PROBS. (forthcoming 2021) (manuscript at 22) (on file with the Harvard Law School Library) ("Because corporations cannot experience such pain, suffering, or deprivations, they cannot be punished on retributive grounds.").

¹⁰⁷ According to the most recent comprehensive data collected from state courts across the United States, individuals sought punitive damages in ten percent of cases against individuals as compared to sixteen percent against businesses. THOMAS H. COHEN & KYLE HARBACEK, PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 3 tbl.3 (2011), <https://www.bjs.gov/content/pub/pdf/pdasco5.pdf> [<https://perma.cc/EJ5H-47FN>]. And where businesses are plaintiffs, they sought punitive damages in seven percent of cases against individuals as compared to thirteen percent of cases against businesses. *Id.* Punitive damages were also awarded more frequently in cases that individuals won against businesses (seven percent) than against individuals (four percent). *Id.* at 4 tbl.7.

¹⁰⁸ For elaboration, see Sharkey, *Punitive Damages Transformed*, *supra* note 105 (manuscript at 7–8).

¹⁰⁹ See Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25, 51–53 (2009) (staging a federalism clash between the Supreme Court's "fulsome equation of punitive damages and individual retributive punishment," *id.* at 52, and "states that define a legitimate non-retributive[, societal] purpose for punitive damages," *id.* at 53).

other factors leads to inefficiently low expected liability, which is insufficient to induce optimal care.¹¹⁰ In other words, in situations where compensatory damages alone will not adequately deter, supra-compensatory damages are necessary to force the actor to internalize the full societal costs inflicted by its conduct.¹¹¹ The notion of supra-compensatory damages for societal deterrence purposes injects a public regulatory purpose into private law.

There is increasing judicial recognition that this dimension is significant where there are third-party effects or externalized harms onto others stemming from bilateral interactions between defendants and plaintiffs. Judge Posner leaned heavily on the optimal deterrence rationale for punitive damages in *Mathias v. Accor Economy Lodging, Inc.*,¹¹² reasoning:

The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away."

And Judge Calabresi reasoned in his concurrence in *Ciraolo v. City of New York*¹¹⁴: "Punitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence."¹¹⁵

¹¹⁰ See, e.g., Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 135 (1982) ("[T]o the extent that punitive damages are designed to deter, economic issues move emphatically into the forefront. If punitive damages do indeed deter, it is due to the economic principle that adding to the cost of an activity necessarily decreases its frequency. Additionally, what society evidently seeks is not deterrence as such, but rather 'optimal' or efficient deterrence; as an initial matter, the 'overdeterrence' of excessive damage awards seems disadvantageous.")

¹¹¹ For many reasons, tortfeasors may not internalize the full costs of the harms they inflict on people, property, and publicly held resources: not only underdetection, but also undercompensation and other imperfections in the litigation system such as false negatives in adjudication and the prohibitive cost of adjudication. Sharkey, *Societal Damages*, *supra* note 105, at 365–67.

¹¹² 347 F.3d 672 (7th Cir. 2003).

¹¹³ *Id.* at 677; see also Posner, *supra* note 19, at 473 ("[T]he main point in the *Mathias* opinion is that the smaller the award of compensatory damages, the higher the ratio of punitive to compensatory damages needs to be to provide an adequate remedy."); Catherine M. Sharkey, *Federal IncurSIONS and State Defiance: Punitive Damages in the Wake of Philip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 467–68 (2010) (characterizing Judge Posner's reasoning in *Mathias* as "an inchoate attempt at effectuating what I have called 'societal compensation' — namely, the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case" (footnote omitted)).

¹¹⁴ 216 F.3d 236 (2d Cir. 2000).

¹¹⁵ *Id.* at 243 (Calabresi, J., concurring). Judge Calabresi continued, noting that "[i]n some circumstances, compensatory damages alone will be enough to promote an adequate cost-benefit analysis. In other cases, however, compensatory damages will not come close to equaling all the costs

GZ say relatively little about punitive damages.¹¹⁶ They suggest that civil recourse theory enables them to pull apart the authentic common law function of punitive damages — that is, “constitut[ing] a special kind of redress available to the victims of torts involving highly culpable wrongdoing” — from the regulatory conception of punitive damages, which according to GZ is “alien to tort law” (p. 170). They conclude, moreover, that civil recourse theory provides “constitutional concepts and principles that can provide guidance to courts” that is “far superior to that of economic theorists of law, who, as theorists, acknowledge that there are probably many appropriate occasions for extra-compensatory damages, yet who, as market-oriented lawyers, tend to side with business interests committed to shearing them away” (p. 173).

Here, their inherent bias is laid bare. Moreover, this view is refuted by the numerous examples (not only involving Judges Posner and Calabresi!) in which the law-and-economics deterrence view of punitive damages argues in favor of supra-compensatory damages for widespread societal harms, particularly in the context of corporate misconduct. Thus, in *Dardinger v. Anthem Blue Cross & Blue Shield*,¹¹⁷ a case involving a woman whose cancer death was accelerated by her insurance company’s “pervasive” corporate policy of bad faith denial of authorization for chemotherapy treatments,¹¹⁸ the Ohio Supreme Court directed two-thirds of a \$30 million punitive award to a cancer research fund established by the court.¹¹⁹ The judge reasoned from the premise that “[t]he purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, *deter future misconduct*, and to demonstrate society’s disapproval”¹²⁰ to conclude that diverting a significant portion of the punitive award to a court-established charity was warranted

properly attributable to the activity.” *Id.* In such cases, “additional damages . . . may be an appropriate way of making the injurer bear all the costs associated with its activities.” *Id.* at 244.

¹¹⁶ In the book, that is. They have nonetheless attempted to fit punitive damages into their civil recourse theory in prior writings. See, e.g., Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 110 (2005) (applying civil recourse theory to Supreme Court punitive damages decisions); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 961–62 (2010) (discussing the failure of prevailing theories to account adequately for when punitive damages are awarded and in what amount); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757, 1758 (2012) (adopting a conceptualist approach to explore problems arising in punitive damages law).

¹¹⁷ 781 N.E.2d 121 (Ohio 2002).

¹¹⁸ *Id.* at 142.

¹¹⁹ *Id.* at 146. The court did not hesitate to affirm that the “jury could easily [have] [found] that a pervasive corporate attitude existed with the defendants to place profit over patients.” *Id.* at 142 (quoting the trial court). Moreover, the court was cognizant of the fact that defendants’ health insurance industry played a “central role in the lives of so many Ohioans.” *Id.* at 144. In fact, the court explicitly relied on this fact in justifying a punitive award of significant magnitude. *Id.* at 144–45.

¹²⁰ *Id.* at 145 (emphasis added) (quoting *Davis v. Wal-Mart Stores, Inc.*, 756 N.E.2d 657, 661 (Ohio 2001) (Sweeney, J., concurring in part and dissenting in part)).

given that “[a]t the punitive-damages level, it is the *societal element* that is most important.”¹²¹ Therefore, according to the judge, the bulk of the punitive award “should go to a place that will achieve a *societal good*, a good that can rationally offset the harm done by the defendants in this case.”¹²²

Picking up this thread in *Sundquist v. Bank of America, N.A.*,¹²³ California Bankruptcy Judge Klein awarded an eye-catching \$45 million in punitive damages against Bank of America for actions the judge characterized as egregious corporate misconduct.¹²⁴ Further, Judge Klein indicated that the misconduct was illustrative of a wider pattern and practice of abuse and deceit on the part of the mega-bank directed at vulnerable and out-classed victims, including but reaching far beyond the one couple who sued for abuse suffered during a foreclosure proceeding.¹²⁵ Invoking the “governmental and societal interests” in punishing and deterring unlawful conduct,¹²⁶ after awarding \$5 million to the couple, Judge Klein directed the remainder of the punitive award to entities that fight financial abuse and champion vulnerable victims.¹²⁷

Recently emergent class action settlements include what I have termed “embedded societal punitive damages.” A signature example is the classwide settlement in the consolidated BP oil spill lawsuits. In the wake of large-scale devastation to the affected communities, the environment, and society at large, the plaintiffs pressed societal justifications for punitive damages based on both punishment and societal economic deterrence rationales.¹²⁸ After months of negotiation, plaintiffs and BP agreed to a classwide settlement. Although the settlement provided in strict terms only for compensatory damages to claimants, it incorporated

¹²¹ *Id.* (emphasis added).

¹²² *Id.* at 146 (emphasis added).

¹²³ 566 B.R. 563 (Bankr. E.D. Cal. 2017), *vacated in part In re Sundquist*, 580 B.R. 536 (Bankr. E.D. Cal. 2018).

¹²⁴ *Id.* at 618, 620.

¹²⁵ *Id.* at 612–13.

¹²⁶ *Id.* at 613–14.

¹²⁷ *Id.* at 618–19. Judge Klein proposed a punitive damages scheme whereby plaintiffs were awarded \$45 million in punitive damages, with a remittitur of the damages to \$5 million if, and only if, Bank of America contributed \$7.5 million to the National Consumer Law Center, \$7.5 million to the National Consumer Bankruptcy Rights Center, and \$3 million to each University of California law school to be used for “education in consumer law.” *Id.*; see also Sharkey, *supra* note 109, at 53 (explaining that “split-recovery statutes, which direct a portion of punitive damages judgments to the state or state-run fund, could be reformulated to embody a non-retributive, societal purpose for punitive damages”).

¹²⁸ Class Action Complaint at ¶ 35, 3G Fishing Charters LLC v. Kirby Inland Marine, LP, No. 14-cv-00107 (S.D. Tex. Mar. 24, 2014) (“[P]iecemeal adjudications may under-deter Defendants’ misconduct by failing to account for the full scope or total social costs, thereby frustrating the purpose of punitive damages — the vindication of society’s interests in deterrence . . . that is fully and fairly proportionate to . . . its harm to society as a whole.”).

“risk transfer premiums” (RTPs), or supra-compensatory multipliers applicable to certain claimants, which (I have argued previously) incorporated an embedded societal punitive damages award.¹²⁹ RTPs thus represent a form of societal damages given to classes of claimants eligible to receive punitive damages.¹³⁰

The May 2019 Purdue Oklahoma opioid settlement may augur a new model whereby the defendant proposes to resolve a mass tort case in the public interest, transforming a significant portion of the recovery into a form of societal damages. To settle a public nuisance lawsuit brought by the state of Oklahoma,¹³¹ Purdue created a fund in recognition of a broader societal remedial goal “to improve the lives of individuals in Oklahoma and across the nation that are affected by pain and substance use disorders.”¹³² Purdue agreed to pay \$102.5 million to fund the National Center for Addiction Studies and Treatment, “dedicated to addiction studies, treatment and education, including education to eliminate the stigma associated with addiction and treatment,” housed at Oklahoma State University’s Center for Health Sciences.¹³³ Purdue also agreed to “use reasonable efforts to encourage the provision of additional funds for the National Center in any other settlements it may enter into regarding the sales and promotion of Purdue Opioids.”¹³⁴ With its express aim to resolve societal harm, the Purdue class settlement (no less than the BP Oil settlement that preceded it) defies GZ’s conception of tort law as redressing individualized, relational wrongs.

In each of these high-profile cases, the courts and/or parties explicitly recognized that the defendant had inflicted widespread harm beyond the parties before the court and created a fund, either from diverted punitive damages or settlement proceeds, to acknowledge the societal

¹²⁹ Catherine M. Sharkey, *The BP Oil Spill Settlements, Classwide Punitive Damages, and Societal Deterrence*, 64 DEPAUL L. REV. 681, 697 (2015).

¹³⁰ As is typical in mass tort settlements, the parties’ attorneys negotiated a claims grid that compensated class members based on the relative strength of their claims. The RTPs are a striking feature of the compensation grid; they essentially mimic a complex multiple damages statute, providing various supra-compensatory multipliers for different types of claims. The compensation grid provides for varying RTPs based on the relative strength of claims, including eligibility for punitive damages. As my prior analysis demonstrates, the RTPs for punitive damages-eligible claimants (primarily those in commercial fishermen categories) are much higher than those for other claimant categories. *See id.* at 699–702.

¹³¹ In *Oklahoma ex rel. Hunter v. Purdue Pharma L.P.*, the state of Oklahoma sued opioid manufacturer Purdue, seeking punitive damages for acting “with reckless disregard for the rights of others” and penalties under Oklahoma’s consumer protection statute. Original Petition at ¶¶ 103, 129, *Purdue Pharma*, No. CJ-2017-816 (Okla. Dist. Ct. June 30, 2017). The Oklahoma Attorney General dropped all claims except those for equitable relief under a public nuisance theory cause of action. Summary Order, *Purdue Pharma*, No. CJ-2017-816 (Okla. Dist. Ct. Apr. 16, 2019).

¹³² Settlement Agreement at 6, *Oklahoma ex rel. Hunter v. Purdue Pharma, L.P.*, No. CJ-2017-816 (Okla. Dist. Ct. Mar. 26, 2019).

¹³³ *Id.* at 6–7.

¹³⁴ *Id.* at 14.

harm. In so doing, they recognized the defendant as the “cheapest cost avoider” who must internalize the full societal costs of its actions in order to prevent future harms. Civil recourse theory, with its emphasis on redressing relational wrongs, is orthogonal to such important shifts in modern tort law development.

CONCLUSION: THE CHALLENGE OF “CHEAPEST COST AVOIDER”

The deterrence-driven “cheapest cost avoider” theory drove the development and expansion of products liability. It remains a powerful driving theory for modern tort cases that tackle torts at the cutting edge of the regulatory state and address widespread societal harms.

Its invocation by the U.S. Supreme Court facing a novel failure-to-warn issue in *DeVries* is testament to its ascendancy in the firmament of tort law, as well as its power to guide judges in issues of first impression. The challenge going forward is how to refine and apply the “cheapest cost avoider” framework in novel areas of tort law.¹³⁵ GZ sound a dire warning that “[m]ultifactor balancing is less a matter of forthrightness than avoidance: vague talk of balancing mostly gives courts room to fudge and to speculate rather than to reason rigorously” (p. 295). To be sure, identifying the cheapest cost avoider can be a tall task. But it is time to recognize that it is in fact the task at hand and move forward with modern tort law’s project of preventing harms.

¹³⁵ Two such areas are the economic loss rule and public nuisance. See, e.g., Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1881 (2016) (“Whereas manufacturers are almost always in a better position to control and insure risks in the manufacturing production process, . . . the conclusion flips with respect to considerations of economic risks for which the end user often possesses an informational advantage over the seller . . .”); *id.* at 1883 (“Seen in this light, the citadel’s last bastion — the economic loss rule in products cases — is justified as a means to induce the putative victims, here, the parties with superior information regarding risk of financial loss, to protect themselves.”); Catherine M. Sharkey, *In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule*, 85 U. CIN. L. REV. 1017, 1019 (2018) (arguing that cheapest-cost-avoider paradigms provide a “unifying theoretical justification for the economic loss rule”); Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. (forthcoming 2021) (manuscript at 11) (on file with the Harvard Law School Library).