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## ON TORT LAW'S DUALISMS

*Guido Calabresi\** & *Spencer Smith\*\**

We read with interest Professors John Goldberg and Benjamin Zipursky's new book, *Recognizing Wrongs*;<sup>1</sup> Professor Catherine Sharkey's Book Review;<sup>2</sup> and Goldberg and Zipursky's Response.<sup>3</sup> Their exchange demonstrates that the field of tort law is alive. But is it well?

Goldberg and Zipursky (hereinafter GZ) and Sharkey put forward what are, at first glance, very different theories of tort law. GZ have updated their civil recourse theory to a theory of "wrongs and redress."<sup>4</sup> And that is good.<sup>5</sup> But Sharkey maintains that there is still something missing from GZ's theory: a convincing explanation of what constitutes a civil wrong.<sup>6</sup> Sharkey casts the "cheapest cost avoider" theory<sup>7</sup> as "protagonist," arguing that it and other instrumentalist theories of tort law are "paramount," at least when it comes to modern torts, such as products liability.<sup>8</sup>

We think both "sides" — if you want to call them that — miss something. At one level, tort law *is* about wrongs and redress. That is the private side of torts. And it is what courts do much of the time. At another level, tort law *is* about preventing harms or, if you like, about the regulatory needs of society. That is the public side of torts. And it is what courts do on occasion, and what legislatures and administrative agencies do very often. If you fixate only on one side or the other, you fail to appreciate the whole of tort law.

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\* Senior Judge, United States Court of Appeals for the Second Circuit; Sterling Professor Emeritus and Professorial Lecturer, Yale Law School.

\*\* Rill Fellow, United States Department of Justice. The views expressed here do not necessarily reflect those of the United States Department of Justice.

<sup>1</sup> JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020).

<sup>2</sup> Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) (reviewing GOLDBERG & ZIPURSKY, *supra* note 1).

<sup>3</sup> John C.P. Goldberg & Benjamin C. Zipursky, *Thoroughly Modern Tort Theory*, 134 HARV. L. REV. F. 184 (2021) (responding to Sharkey, *supra* note 2).

<sup>4</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 263–64.

<sup>5</sup> See generally Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449 (2013).

<sup>6</sup> See Sharkey, *supra* note 2, at 1426–27.

<sup>7</sup> GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 155 (1970) ("[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.").

<sup>8</sup> Sharkey, *supra* note 2, at 1426, 1435–44.

The exchange between GZ and Sharkey is full of dualisms: *ubi jus ibi remedium*,<sup>9</sup> “wrongs and redress,”<sup>10</sup> “‘private’ tort and ‘public’ regulation,”<sup>11</sup> Prosser’s “dual instrumentalism,”<sup>12</sup> GZ’s “dual constructivism,”<sup>13</sup> et cetera. At the risk of piling on, we would like to add two of our own: *First*, tort law operates at *dual levels*. There is the level of the case. And there is the level of structure. Once you see tort law in this way, GZ’s and Sharkey’s theories fit together. *Second*, tort law operates in *dual directions*. What constitutes a civil wrong most often derives from the regulatory needs of society, and hence often from a desire to place liability on the “cheapest cost avoider.” But what is “cheap” and what is “costly” itself derives from the tastes and values of society, which can be influenced by the current set of civil wrongs. This reverse link, which is sometimes missed, may well represent the future of tort law. And this is so precisely because tort law does need to respond to society’s regulatory needs.

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Sharkey begins her Book Review by discussing the Supreme Court’s recent decision in *Air & Liquid Systems Corp. v. DeVries*.<sup>14</sup> Given her argument that “economic deterrence-based ‘cheapest cost avoider’ reasoning permeates judicial decisions,”<sup>15</sup> one can see why: both the majority and dissenting opinions in *DeVries* embrace such reasoning.<sup>16</sup> Justice Kavanaugh, writing for the majority, held that a “bare-metal” product manufacturer has a duty to warn when the product requires incorporation of asbestos parts because “the product manufacturer will often be in a better position than the [asbestos] parts manufacturer to warn of the danger from the integrated product.”<sup>17</sup> Justice Gorsuch, in dissent, agreed that the legal rule that “makes the most sense today” is the one that places a duty to warn on the party “in the best position to understand and warn users about [the product’s] risks; in the language

<sup>9</sup> See GOLDBERG & ZIPURSKY, *supra* note 1, at 15, 82–110.

<sup>10</sup> See generally *id.* at 25–259.

<sup>11</sup> Sharkey, *supra* note 2, at 1445.

<sup>12</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 210–21 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941)).

<sup>13</sup> *Id.* at 232–59.

<sup>14</sup> 139 S. Ct. 986 (2019).

<sup>15</sup> Sharkey, *supra* note 2, at 1425.

<sup>16</sup> *But see* Goldberg & Zipursky, *supra* note 3, at 196 (arguing that Justice Gorsuch does not embrace cheapest cost avoider analysis but instead uses it to “parry” Justice Kavanaugh’s “thrust” (quoting Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950))).

<sup>17</sup> *DeVries*, 139 S. Ct. at 994 (citing CALABRESI, *supra* note 7, at 311–18).

of law and economics, . . . the least-cost avoider[.]”<sup>18</sup> But he and the other dissenters disagreed with the majority about *which* party — the bare-metal product manufacturer or the asbestos parts manufacturer — was the least cost avoider.<sup>19</sup> Still, both the majority and the dissent asked the same basic question: Who is in the best position to reduce the risk of harm? No wonder Sharkey describes that approach as “ascendant” or even “paramount.”<sup>20</sup>

GZ counter that *DeVries* not only does not support Sharkey’s position<sup>21</sup> — it supports theirs.<sup>22</sup> They say, “Aha!” The fact that both the majority and the dissenting opinions in *DeVries* deploy cheapest cost avoider analysis yet reach opposite conclusions shows that the concept lacks “substance” and “determinacy.”<sup>23</sup> Moreover, both the majority’s and the dissent’s economic reasoning is “entirely conclusory.”<sup>24</sup> “Neither Justice Kavanaugh nor Justice Gorsuch applies economic analysis of law in a manner that explains or justifies the result . . . .”<sup>25</sup> This, GZ claim, bolsters their broader point that courts are not competent to engage in such reasoning.<sup>26</sup>

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<sup>18</sup> *Id.* at 997 (Gorsuch, J., dissenting). GZ are correct that Justice Gorsuch’s cheapest cost avoider argument is just one of several he gives in support of the traditional common law rule. *See* Goldberg & Zipursky, *supra* note 3, at 196 (citing *DeVries*, 139 S. Ct. at 997–99 (Gorsuch, J., dissenting)). At the same time, Justice Gorsuch’s appreciation of the relevant economics went even further than the majority’s:

By placing the duty to warn on a product’s manufacturer, we force it to internalize the full cost of any injuries caused by inadequate warnings — and in that way ensure it is fully incentivized to provide adequate warnings. By contrast, we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs.

*DeVries*, 139 S. Ct. at 997 (Gorsuch, J., dissenting) (citing STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 17 (1987); CALABRESI, *supra* note 7, at 135 & n.1; Italia Societa per Azioni di Navigazione v. Or. Stevedoring Co., 376 U.S. 315, 324 (1964)).

<sup>19</sup> *See DeVries*, 139 S. Ct. at 996–97 (Gorsuch, J., dissenting).

<sup>20</sup> Sharkey, *supra* note 2, at 1424, 1426.

<sup>21</sup> *See* Goldberg & Zipursky, *supra* note 3, at 195–96.

<sup>22</sup> *See id.* at 196–98.

<sup>23</sup> *See id.* at 195 n.67, 196. This is compounded by Justice Kavanaugh’s “hedge,” *id.* at 196 n.68, that the bare-metal “product manufacturer will *often* be in a better position than the parts manufacturer to warn of the danger from the integrated product,” *DeVries*, 139 S. Ct. at 994 (emphasis added); *see also id.* at 994 n.2 (“We do not rule out the possibility that, in certain circumstances, the parts manufacturer may also have a duty to warn.”).

<sup>24</sup> Goldberg & Zipursky, *supra* note 3, at 195.

<sup>25</sup> *Id.* at 196.

<sup>26</sup> *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 1, at 296–97; Goldberg & Zipursky, *supra* note 3, at 190 n.45. Contrast this position of GZ with that of Robert Bork, who argued for a consumer welfare standard in antitrust in part because he believed it was the *only* standard that courts were competent to apply. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 72–89 (2d ed. 1993). We believe that both positions, either that courts are competent to do only this kind of analysis, or that courts are not able to do it, are wrong, both in theory and as a representation of what courts actually do.

Put aside the obvious answer that the fact that some judges disagree about how to implement a principle that tort law should minimize the costs of accidents and safety does not mean that the concept lacks substance or determinacy. (The same is true of every other approach to tort law, including those based on moral responsibility.<sup>27</sup>) Our broader point is this: It is a mistake to think of the search for the cheapest avoider of accident costs as requiring in most cases, let alone all cases, a cost-benefit analysis. If it did, GZ would be right to worry about the feasibility — or, well, costs<sup>28</sup> — of such a system. The game would not be worth the candle. Instead, the law thinks in categories. For example, dynamite blasting is abnormally dangerous and thus subject to strict liability.<sup>29</sup> Driving a car is not so deemed — whether correctly or not.

GZ are right that civil recourse, or “wrongs and redress,” is what courts do in the mine run of cases. We take seriously GZ’s calls for candor<sup>30</sup> and for a “practical and practice-based” approach, one that takes tort law “at face value.”<sup>31</sup> And so we agree: yes, that is what courts do a lot of the time.<sup>32</sup> (Though, with insurance, it is often less relational than GZ insist.<sup>33</sup>) That is the *private* side of torts.

But there are also the “great” cases that make the law, as well as the more common cases in which courts, in dialogue with other cases, other courts, and legislatures and administrators, shape where the law is going. All these cases indicate that: for instrumental reasons, this category is here, and that category is there. (Think, to mention just a few, of *MacPherson v. Buick Motor Co.*,<sup>34</sup> *Greenman v. Yuba Power Products*,

<sup>27</sup> E.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995). The same is also true of most law theories, including every theory of statutory interpretation. See, e.g., Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020).

<sup>28</sup> See CALABRESI, *supra* note 7, at 28 (describing this “tertiary” goal of tort law).

<sup>29</sup> See, e.g., *Spano v. Perini Corp.*, 250 N.E.2d 31 (N.Y. 1969).

<sup>30</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 11, 80; Goldberg & Zipursky, *supra* note 3, at 198.

<sup>31</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 6, 47; see also *id.* at 5–6, 76–81 (describing their “pragmatic conceptualist” approach).

<sup>32</sup> See, e.g., *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 94–95 (2d Cir. 2006).

<sup>33</sup> The great torts scholar, Professor Fleming James, Jr., believed that the coming of insurance made the private law arrangement of tort law obsolete and focused his tort theories on the public law aim of holding the best “loss spreader” liable. See Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). For a full discussion of James’s approach to tort law, see Guido Calabresi, *Professor Fleming James Jr (1904–1981)*, in *SCHOLARS OF TORT LAW* 259 (James Goudkamp & Donal Nolan eds., 2019). See also, e.g., Steve Hedley, *Corrective Justice — An Idea Whose Time Has Gone?*, in *LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* 305 (Maksymilian Del Mar & Michael Lobban eds., 2016). But see GOLDBERG & ZIPURSKY, *supra* note 1, at 274–76 (attempting to rebut this criticism).

<sup>34</sup> 111 N.E. 1050 (N.Y. 1916); see *id.* at 1053 (“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.”).

*Inc.*,<sup>35</sup> and *Dillon v. Legg*.<sup>36</sup>) That is what courts — and, of course, legislatures and administrative agencies — do and not just rarely. Moreover, common law courts, when they reason instrumentally to make tort law, are often very open about it.<sup>37</sup> As one of us has, not infrequently, said: “I’ve done it myself.” That is the *public* side of torts.

This is what we mean by tort law’s *dual levels*. There is the microlevel — that is, the level of the case — which is often, though not always, “private” in some sense, and which is often, though not always, explained by civil recourse or “wrongs and redress.” Then there is the macrolevel — that is, the level of structure — which is often, though not always, “public” in some sense, and which is often, though not always, explained by various instrumentalist considerations, such as the distribution of risk or loss. We see no reason why GZ’s and Sharkey’s accounts of tort law cannot fit together within this dual-level structure.

Occasionally, judges attempt to build steps between the levels. They push in the direction of the public while deciding a case on the basis of the private, namely, whether there was a wrong that requires redress. Here, we take as an example *Palsgraf v. Long Island Railroad Co.*,<sup>38</sup> in part because GZ and Sharkey differ in their interpretations of the case.

<sup>35</sup> 377 P.2d 897 (Cal. 1963); see *id.* at 901 (“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 who are powerless to protect themselves.”).

<sup>36</sup> 441 P.2d 912 (Cal. 1968); see *id.* at 916 (“[D]uty’ 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 WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 333 (3d ed. 1964))).

<sup>37</sup> See, e.g., *Lauer v. City of New York*, 733 N.E.2d 184, 187 (N.Y. 2000) (“While the Legislature can create a duty by statute, in most cases duty is defined by the courts, as a matter of policy. Fixing the orbit of duty may be a difficult task. Despite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings . . . .”); *Waters v. N.Y.C. Hous. Auth.*, 505 N.E.2d 922, 923–24 (N.Y. 1987) (“The common law of torts is, at its foundation, a means of apportioning risks and allocating the burden of loss. While moral and logical judgments are significant components of the analysis, we are also bound to consider the larger social consequences of our decisions and to tailor our notion of duty so that the ‘legal consequences of wrongs are limited to a controllable degree.’” (quoting *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969))).

<sup>38</sup> 162 N.E. 99 (N.Y. 1928). For the uninitiated, GZ provide this helpful summary of the facts of *Palsgraf*:

A man leapt onto the open space at the end of a train car as the train was pulling out of the defendant railroad’s station. Two conductors employed by the railroad tried to steady him by pushing and pulling him onto the train. In the process, they dislodged a newspaper-wrapped package he was carrying under his arm. The conductors did not know — and had no reason to know — that the package contained powerful fireworks, which fell onto the tracks, exploding upon impact. The explosion was powerful enough to blow away a chunk of the railway platform and to cause reverberations around the station. As a result, a large metal scale, located on the platform perhaps thirty feet away from the point where the package fell, toppled onto Mrs. Palsgraf, a ticketed customer who was waiting for a different train. She sued the railroad for negligence.

GOLDBERG & ZIPURSKY, *supra* note 1, at 199.

GZ argue that the “key lesson” of *Palsgraf* concerns tort law’s “substantive standing” requirement or proper-plaintiff principle.<sup>39</sup> Sharkey simply finds it difficult to believe that the same judge, Chief Judge Benjamin Cardozo, authored the majority opinions in both *Palsgraf* and *MacPherson*.<sup>40</sup>

We understand *Palsgraf* differently. And we think GZ’s and Sharkey’s understandings of the case demonstrate the problem with trying to define torts as exclusively private or exclusively public. GZ emphasize *Palsgraf*’s relational aspects.<sup>41</sup> And that is understandable, given the majority opinion’s strong language to that effect.<sup>42</sup> And Sharkey cannot believe that the Cardozo of *Palsgraf* was the same Cardozo who wrote the majority opinion in *MacPherson*.<sup>43</sup> In *MacPherson*, Cardozo was expressly instrumentalist, even going as far as to say: “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.*”<sup>44</sup> Moreover, Cardozo’s *MacPherson* opinion reasoned in cheapest cost avoider terms.<sup>45</sup> But in *Palsgraf*, Cardozo saw fit to let loss lie where it fell — on Mrs. Palsgraf, who was *not* the cheapest cost avoider.

So what *was* Cardozo doing in *Palsgraf*? First, Cardozo was the Great Manipulator. He knew that he was using concepts and words, such as foreseeability and relation, that are meaningless. Everything is foreseeable, and nothing is foreseeable enough. Everyone is related, and no one is related enough. Second, we think you have to understand *Palsgraf*, as in so much of the law, as showing that people (here, Cardozo) are both products of an existing legal system and, at the same time, developing and understanding a new one.

The structure and long-term effect of the holding of *Palsgraf* is, it seems to us, a dramatic example of a court in a particular case pursuing a public law result, and one directly linked to the search for the cheapest cost avoider. Cardozo is saying three things.

First, when the issue is the extent of damages, whoever is the bearer for small damages is likely to be the best bearer for big damages.<sup>46</sup>

<sup>39</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 198–204 (quoting Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998)).

<sup>40</sup> Sharkey, *supra* note 2, at 1436 n.46. *But see* Goldberg & Zipursky, *supra* note 3, at 189 n.36 (noting that if you adopt their theory of *MacPherson*, the two decisions fit together).

<sup>41</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 200–04.

<sup>42</sup> *See, e.g., Palsgraf*, 162 N.E. at 100 (“The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”); *id.* at 101 (“Negligence, like risk, is thus a term of relation.”).

<sup>43</sup> *See* Sharkey, *supra* note 2, at 1436 n.46.

<sup>44</sup> *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (emphasis added).

<sup>45</sup> Sharkey, *supra* note 2, at 1437 (citing *MacPherson*, 111 N.E. at 1051–52).

<sup>46</sup> *See Palsgraf*, 162 N.E. at 100–01; *see also* RESTATEMENT (FIRST) OF TORTS § 435 (AM. L. INST. 1934).

(Even here, remember that assumption of risk might come in to allow us to exclude cases where that is not so — but rarely because the invocation of a different doctrine is required.)

Second, when the *risk* is unexpected, one can usually trust a jury to decide on the cheapest cost avoider, given the expectations of the parties and the public.<sup>47</sup>

But, third, when the *plaintiff category* is unexpected, the question whether that category is the best bearer or not is completely open. The fact that as to another set of plaintiffs the defendants were the best bearers does not tell us much of anything as to which category is the best bearer in this “unexpected” case. For that reason, Cardozo wants that to be a question that the courts decide first. So, he makes it a question of “duty.”<sup>48</sup> And, not surprisingly, that is what the New York Court of Appeals then takes to be its job.<sup>49</sup>

But having done that, why does Cardozo decide against the plaintiff, Mrs. Palsgraf, who cannot possibly be the best bearer? The answer is actually easy. Cardozo lived in a world in which negligence, not strict liability, was dominant. And it is obvious that the Long Island Railroad Company was not negligent. There was nothing negligent in helping the firework holder get onto the already moving train by pushing him. Cardozo, the Great Manipulator, “assumes negligence” in order to use the case to make his public law point without violating any private law principle. The unfortunate Mrs. Palsgraf did not have a right to recover from the Railroad Company under any then-current tort principles because the Company was not negligent.

*Palsgraf* is a wonderful example of this public law–private law dynamic. There are (even) older and newer examples. Take *Holmes v. Mather*,<sup>50</sup> in which Baron Bramwell for expressly utilitarian public law principles establishes that fault is required for recovery, even in cases of direct injury. Before propounding this dramatic nineteenth-century “cheapest cost avoider” principle, Bramwell does exactly what Cardozo did in *Palsgraf*. He assumes that the defendant was a direct injurer when, in fact, as a master being sued for a servant’s negligence, he was not. The plaintiff was bound to lose in *Holmes* and that made the case a perfect one for the creation of a new public law principle.<sup>51</sup>

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<sup>47</sup> *Palsgraf*, 162 N.E. at 101.

<sup>48</sup> *Id.* at 99–100.

<sup>49</sup> See, e.g., *Lauer v. City of New York*, 733 N.E.2d 184, 187 (N.Y. 2000).

<sup>50</sup> [1875] 10 LR Exch. 261 (Eng.).

<sup>51</sup> See *id.* *Holmes* is perhaps best known for Baron Bramwell’s instrumentalist words: “For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid.” *Id.* at 267.

Or take *Nelson v. Metro-North Commuter Railroad*,<sup>52</sup> in which Judge Calabresi said that “immediate risk of physical harm” is not a purely temporal prerequisite for recovery for negligent infliction of emotional distress under the Federal Employers’ Liability Act. But he then held that the plaintiff did not, under any relevant definition of “immediate,” suffer such a risk of physical harm.<sup>53</sup>

*Holmes, Nelson, and Palsgraf* are all examples of a judge pushing the law in a public law direction, while preserving the presently established private law result. They build steps conscious of both the private and the public needs of the law. At some point, a judge will on occasion find herself at the top of a staircase “constructed”<sup>54</sup> by her and her siblings, leaving her at the macrolevel — and with an opportunity to reshape the law. Then, it is back to the microlevel.

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Finally, we cannot resist mentioning tort law’s “reverse link.” As we have said, what constitutes a civil wrong often derives from the regulatory needs of society, and hence often from a desire to place liability on the cheapest cost avoider, broadly defined. But what is “cheap” and what is “costly” derives from the tastes and values of society, which can be influenced by the current set of civil wrongs. In that way, tort law operates in *dual directions*.<sup>55</sup>

GZ’s “gallery” metaphor helps to make this point:

The judges who have made tort law . . . started with a small collection of basic wrongs . . . and then from time to time have refined, and revised the collection. This collection features both “classics” and important new works. 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

<sup>52</sup> 235 F.3d 101 (2d Cir. 2000).

<sup>53</sup> See *id.* at 107–13; see also *id.* at 114 (Jacobs, J., concurring).

<sup>54</sup> We use this term deliberately. See GOLDBERG & ZIPURSKY, *supra* note 1, at 232–59 (explaining their “dual constructivist” approach). We agree with GZ that judges “construct” wrongs “using precedents and principles embedded in the law as [their] principal guide.” *Id.* at 258. Where we differ with GZ is in our recognition that a judge, in an appropriate case, often does reach “a decision to deem certain kinds of injurious conduct tortious” based “primarily on the social benefit that stands to be achieved by imposing liability for such conduct,” *id.* at 239, and does so both properly and manifestly.

<sup>55</sup> See GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS* 158 (2016) (“Torts . . . affects our values, and it does so with respect to things as crucial as safety, the environment, the duty to look after each other, and life itself.”). The effect of law on values is by no means limited to the domain of torts. See *id.* at 157–58 (giving as examples the effects of law on attitudes toward race, same-sex marriage, and abortion, and crediting the critical legal studies movement for this insight).



new rooms are added to house new wrongs. . . . Tort law is [thus] a constructed and curated gallery of wrongs.<sup>56</sup>

Indeed. And just as a curator selects works *based on* the tastes and values of society, so too does the curator, in selecting works, *shape* society's tastes and values. The "gallery" of civil wrongs is thus a reflection — and a foundation — of our collective values.

Consider, for example, punitive damages in tort law.<sup>57</sup> Punitive (or more accurately extra-compensatory) damages may well reflect a desire to multiply damages such that the expected sanction for tortious conduct equals its social cost.<sup>58</sup> Such damages may also reflect a desire to make it more difficult to shift legal entitlements, so as to approach a property rule instead of a liability rule, in certain contexts.<sup>59</sup> Whatever the reason, it seems possible to us that, by awarding punitive damages for certain tortious conduct, people — over time and perhaps even case by case — will come to believe and to hold the conduct to be more costly, and hence its avoidance more valuable. And this will come to be, quite apart from the damages awards themselves and from the costs of administering the tort system. That is, certain behavior will, as a result of its treatment in ordinary torts cases and of people's expectation of redress, come to be viewed as more costly. And this in turn will affect who are properly deemed the cheapest avoiders of these costs.

A similar story can be told about emotional damages, on which tort law imposes substantial limitations.<sup>60</sup> Such damages are frequently not compensated. Why is that? Could it be because the sufferer of such damages is deemed to be the cheapest cost avoider?<sup>61</sup> If so, it must be

<sup>56</sup> GOLDBERG & ZIPURSKY, *supra* note 1, at 237–38; *see also id.* at 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.”).

<sup>57</sup> For GZ's and Sharkey's most recent takes on punitive damages, *see id.* at 168–74 (citing John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J.L. & PUB. POL'Y 3 (2004); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005); Benjamin C. Zipursky, *Punitive Damages After Philip Morris USA v. Williams*, 44 CT. REV. 134 (2007–2008); Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 HARV. L. REV. 1757 (2012)); and Sharkey, *supra* note 2, at 1448–54.

<sup>58</sup> *See generally* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003). *See also, e.g.*, *Ciraolo v. City of New York*, 216 F.3d 236, 242 (2d Cir. 2000) (Calabresi, J., concurring).

<sup>59</sup> *See* CALABRESI, *supra* note 55, at 120–21, 125; Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS. 1 (2014); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124–27 (1972).

<sup>60</sup> *See* 2 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 381, at 534, § 383, at 538–45 (2d ed. 2011).

<sup>61</sup> *See* GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 72–76 (1985).

so primarily because the award of such damages is thought to increase their size. That is, the more a society compensates people for purely emotional harms, the more people — again, over time and perhaps even case by case — will come to *feel* emotionally harmed, and will, in a sense, experience them more.<sup>62</sup> To be clear, we do not mean to suggest that purely emotional harms are not real. They are real! And they should be recognized, or attended to, in some way. But in deciding whether and how *legally* to recognize emotional wrongs, a society may well be considering also what effect, if any, doing so will have on their occurrence. Some, such as the anguish one feels at seeing a close loved one killed, society may well not wish to diminish. Others, the feeling of distress we all have when we see an ugly traffic accident, society may prefer to reduce, by denying any recovery rights. Redress affects costs which in turn affect the right to redress.

It is this back and forth between the private — my right to seek redress for a wrong — and the public — a wrong is what society decides should be redressed and how — that makes tort law the fascinating field that it is. And it makes both GZ and Sharkey well worth attending to!

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<sup>62</sup> See *id.* at 77–79.