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Recommended Citation

John C. Goldberg, & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 Md. L. Rev. 364 (2005)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol64/iss1/16>

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ACCIDENTS OF THE GREAT SOCIETY

JOHN C.P. GOLDBERG* & BENJAMIN C. ZIPURSKY**

INTRODUCTION

Although published in 1970, *The Costs of Accidents*¹ was written in the 1960s. The book reflects its times as much as its author's unrivaled talents. Unimpressed with the legal and scholarly status quo, it sets out to reinvent "accident law" so as to serve society's needs more effectively. Reasoning from first principles, it sketches the basis for a regulatory scheme that, according to the book's argument, will be superior in all important respects to the alternatives of command-and-control regulation and negligence suits. Underlying the entire project is the confident belief that rigorous analysis by the best and brightest, freed from the limitations and prejudices of earlier generations, will guide us to more efficient and more just institutional arrangements.

The Costs of Accidents, like its author, has earned its reputation. Indeed, to our minds, it mounts an impressive case for ceasing to treat unintentionally caused harms under the rubric of tort law (particularly negligence law) and instead handling accidents through a system of no-fault liability, insurance, and regulation. As such, it demands a response from scholars who do not share Calabresi's sense that negligence law is patently deficient.² Indeed, because *The Costs of Accidents*

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** Professor, Fordham University School of Law. Thanks to Professor Gifford for inviting us to participate in this conference honoring Judge Calabresi's landmark contribution to torts scholarship. Thanks for helpful comments to Jules Coleman, Don Herzog, Steve Hetcher, Bob Rasmussen, Tony Sebok, and Mike Vandenberg, as well as to our fellow Maryland conferees and to participants in the Vanderbilt Philosophy Department workshop series. Remaining errors are our own. Our research is supported, respectively, by Vanderbilt Law School and Fordham University School of Law.

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter *THE COSTS OF ACCIDENTS*].

2. This is a demand to which we are particularly sensitive. Most of our work in torts to date has been interpretive. In particular, we have argued that a nonreductive understanding of certain normative concepts—such as duty, breach, cause, and injury—are essential to understanding negligence law and tort law. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002) (arguing that unripened risks do not of themselves constitute injuries that would support a cause of action for negligence); John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001) (arguing against the elimination of the duty element of negligence); John C.P. Goldberg & Benjamin C. Zipursky, *Concern for Cause: A Comment on the Twerski-Sebok Plan for Administering Negligent Marketing Claims Against Gun*

is avowedly legislative in its orientation, it forces its readers to confront a basic normative question: Would the citizenry be well-advised to vote to replace negligence law with some other system for responding to unintentionally caused harms? If not, why not? Or, to frame the question in the more polemical cast of the book: If it is desirable to reduce the number and severity of unintentionally caused harms, to limit the collateral consequences suffered by victims of such harms, and to diminish the administrative costs associated with achieving these goals, what considerations could possibly counsel against moving to a system that seems to promise to do a better job of delivering these goods than negligence law?

The challenge of responding to these sorts of questions is made still more difficult by the subtlety of the book's argument. At least some instances of Great Society thinking can fairly be criticized for being statist. Calabresi's approach to accidents, however, is not as obviously vulnerable to that criticism. He imagines a post-negligence regime for regulating accidents that will involve significant government regulation. Still, because he is attuned to economic analysis and markets, he generally favors regulation through incentives, rather than command. Government officials will not solve the problem of accidents simply by telling citizens what they are and are not permitted to do. They will instead help determine the prices of different activities and leave individuals with meaningful choices as to what sorts of activities they wish to pursue, given that they will have to bear certain costs linked to those activities. For this reason, one cannot dismiss Calabresi's post-tort vision out of concern that government regulators,

Manufacturers, 32 CONN. L. REV. 1411 (2000) (analyzing the role of causation in negligence). More generally, we have supposed that the first step—but not the last—in analyzing tort law is to understand it from the “inside,” rather than by means of a reductively instrumental account that, on each occasion calling for the application of tort law, asks what result will serve some policy goal or goals, such as deterrence and compensation. See John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419 (1999) (reviewing ANDREW L. KAUFMAN, CARDOZO (1998)) (treating Cardozo as an exemplar of a legal analyst who took tort law to have substance independent of the policies it serves); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000) (articulating a pragmatic version of conceptualism that emphasizes content and meaning in tort law, to be understood from participants' points of view); cf. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001) (urging the application of pragmatic conceptualistic methodology in legal theory); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995) (arguing against reductive instrumentalism in tort theory). In making these claims, we have been overwhelmingly concerned to discuss how judges should analyze tort cases. This is because, in our view, common-law judges, although by no means the automatons imagined by a certain kind of formalist, operate under a *prima facie* obligation to work within the law. Thus, for judges, and hence for us, the question of whether there is an adequate normative justification for tort law has not been front and center.

rather than individuals, will be paternalistically defining the sorts of activities in which one may engage. Indeed, one of the chief attractions of his work's emphasis on "general deterrence" resides in its promise of a middle path between statism and libertarianism.

In any event, even if one could raise against Calabresi a broad libertarian objection—e.g., that government in principle should not establish and operate the sort of regulatory and redistributive schemes that he seems to suppose might be needed to supplant tort law—we are not the right people to raise it. We accept a version of egalitarian liberalism that presumes that government would not overreach its authority, nor necessarily err as a matter of policy, in establishing broader compensation systems and more aggressive regulation. Thus, we are left to explain why, as egalitarian liberals, we believe that there is something to be said for negligence law, even though many of our ilk share Judge Calabresi's sense that it is obsolete, wasteful, and regressive.

In what follows, we review Calabresi's efforts to provide a death-blow to negligence law and argue that he fails. As compared to the lofty, reformist goals of *The Costs of Accidents*, our goal is thus quite modest. For example, even if we succeed in demonstrating flaws in his critique, that will hardly suffice to make a compelling affirmative case for retaining negligence law. That sort of undertaking is beyond the scope of this Article, and not one we would in any event endorse without significant qualifications.³ Still, by pointing out weaknesses in his argument, we do hope to establish that there is a good deal more for liberal egalitarians to say on behalf of negligence law, and tort law generally, than *The Costs of Accidents* suggests. In particular, we outline two sets of reasons that would support the retention of negligence law, whatever else may count against it. First, we maintain, contra Calabresi, that negligence law, by articulating and enforcing norms of responsible behavior, may well serve as an integral part of a system that does function to promote safety. Second, we argue that it indirectly serves a host of other important values to which a liberal democracy is committed.

The major defect in *The Costs of Accidents* is not that it offers weak arguments that fail to undercut the reasons we identify as weighing in favor of the retention of negligence. Rather, it simply ignores those

3. At a minimum, we believe that negligence law has benefited, and will continue to benefit, from significant procedural and substantive reforms at the hands of judges and legislators. We are also quite open to the idea that tort law may be relatively ill-equipped to handle a particular type of accident—e.g., 9/11—and thus ought to be replaced by an alternative legal framework.

reasons. To our eyes, at least, these are glaring and undefended omissions that need to be explained. We posit that they are traceable to the book's adoption of a surprisingly simplistic picture of how legal rules of conduct intersect and interact with individuals' actual conduct—one that sees law as attempting to steer the conduct of actors who adjust their behavior only in response to prices or threats. Given a richer and more commonsensical picture of how law interacts with social life, one can more readily suppose that a body of law that deems individuals obligated to others to avoid injuring them through faulty conduct will deter accidents and contribute to the attainment of various goods, including the maintenance of social cohesion and the vindication of individual rights.

Part I of this Article provides the context and the main contours of the argument of *The Costs of Accidents*. In Part II, we ask whether that argument succeeds in establishing that negligence law is as ill-suited as Calabresi supposes to the task of reducing accident costs by deterring accidents. Our claim is that it does not, because it unjustifiably excludes from consideration a particular form of accident deterrence that negligence law stands to achieve and often does achieve. This form of deterrence we label "internal deterrence." Negligence law achieves internal deterrence by articulating and reinforcing, through concrete applications, obligations to act carefully that tend already to be observed by individuals in various social settings as a result of habit, indoctrination, education, and moral and prudential judgment. By defining legal duties of care that accompany standard types of social interaction—business-customer, host-guest, doctor-patient, neighbor-neighbor, driver-pedestrian, manufacturer-consumer—negligence law identifies recurring situations in which actors are expected to conduct themselves with reasonable care for the interests of others (typically the interest in physical well-being). In doing so, it stands to promote safe conduct in a manner that Calabresi fails to consider.

In Part III, we address the concluding sections of *The Costs of Accidents*. Here Calabresi considers and rejects the possibility that the fault system can be justified on a ground other than efficient deterrence—namely, its conformity to the demands of justice. By way of critique, we argue that, just as the book's dismissal of negligence law as an inept form of deterrence excludes without justification any consideration of an obvious way in which law can promote safe behavior, its discussion of how negligence fails to serve the alternative "goal" of "justice" proceeds in a manner that again unfairly stacks the deck

against negligence by adopting an impoverished conception of what negligence law is and how it operates to achieve various goods.

Part of the problem is that Calabresi is content to ask if negligence law promotes the achievement of a defined goal, whether deterrence or justice, on the assumption that it should be viewed like a wrench of a particular style, size, and shape. The question, he supposes, is whether policymakers have selected the right tool for the job of deterring unsafe conduct or delivering justice. In doing so, he ignores the fact that subdivisions of law, although they are oriented around discrete subjects and problems, connect up with one another in a way that tools do not. As a result, he fails to appreciate that negligence law fits within a broader body of tort law, which in turn fits into a still broader scheme of law. There is simply no recognition on Calabresi's part that tearing out negligence from our tort law will have implications for our legal system by, for example, diminishing the opportunity for individuals to seek redress for wrongs done to them—whether this is a good or bad thing is not addressed. Calabresi's atomistic isolation of negligence law is in turn related to, and rendered more problematic by, the simplistic picture of regulation we describe and criticize in Part II. Indeed, we argue that these commitments lead him impermissibly to exclude from consideration a variety of ways in which law might deliver social goods through education, guidance, and norm reinforcement.

Tort law is first and foremost a law of responsibilities and redress. It identifies what we will call "loci of responsibility." These loci consist of spheres of interaction that come with, and are defined (in part) by relational duties: obligations that are owed by one person to others when interacting with those others in certain contexts and in certain ways. Beneficiaries of this special class of duties enjoy a concomitant privilege or power; they are entitled to seek legal redress if injured by the breach of one of these duties. Negligence law in turn forms one part of tort law: the part that focuses on loci of responsibility that feature obligations to act with care for certain interests of others. Thus, it identifies relationships (e.g., doctor-patient, host-guest, school-student, common carrier-passenger, manufacturer-consumer, law enforcement official-suspect, etc.), as well as activities (e.g., driving), that generate duties to take care not to cause injury to others. Likewise, it generates in beneficiaries of those duties a right to sue for damages if they are injured by breaches of those duties.

Once one appreciates what negligence law is and does, one can begin to gauge more accurately what is at stake in a decision to replace negligence law with a scheme such as the one imagined by Cala-

bresi. Not only is there a risk, discussed above, of missing opportunities to promote internal deterrence, there is also a risk of disserving a host of values that go hand-in-hand with maintaining a department of law that is devoted primarily to articulating relational obligations and empowering victims injured by breaches of those obligations to sue for redress. These include the values of holding persons responsible to members of identifiable classes of other persons; encouraging citizens to conceive of themselves as bearers of obligations to others; maintaining, reinforcing, and revising practices that inculcate particular sorts of obligations; and identifying individual citizens as bearers of rights against certain forms of mistreatment and as persons who are entitled to demand redress through the legal system for mistreatment.

Calabresi does notice in passing some of these features of negligence law. Yet, like Holmes before him, he dismisses them as remnants of primitive notions of vengeance that somehow continue to captivate (misguided) popular sentiment. In fact, these values are hardly foreign to our modern liberal polity. Rather, they link up in deep ways to basic principles of liberty and democratic equality. Thus, we suggest, by functioning as a law of responsibilities and redress, tort law contributes to the maintenance of social cohesion within a dynamic and generally individualistic culture. It also helps to legitimate our legal system and institutions of government in the eyes of citizens. It helps define and vindicate individual rights such as the rights to bodily integrity, to freedom of movement, and to property ownership. And it affirms the notion that each of us is equal in owing and being owed various obligations by others. Finally, by placing the power to seek legal redress in the hands of victims, tort law reinforces ideals of limited and accountable government.⁴ Our point is not that tort law as a feature of a liberal, egalitarian democracy is logically necessary or practically indispensable. Nor is it that negligence law or tort law is immune to improvement or revision. Rather, the point is that—not surprisingly, given its longstanding place in Anglo-American law—the institutions, practices, and rules of tort law tend to gibe well with many of the core ideals of our system of government, and hence deliver goods in ways that Calabresi seems never to have considered. To sum

4. To say that tort law serves these and other values is not to say that each tort case is an occasion for judge and jury to fashion a result that will best serve those values, as opposed to following the rules and principles contained within tort law. Nor is it to say that tort law always operates so as to promote these values, or that it consistently serves these values better than any conceivable alternative arrangements. Finally, it does not entail denying that tort law can generate socially undesirable consequences, such as litigiousness and waste.

up in advance, our assessment of the critique of negligence law in *The Costs of Accidents* is that it fails because it never fully engages the object of its critique.

I. OUTLINE OF THE ARGUMENT OF *THE COSTS OF ACCIDENTS*

A. *The General Outlook: Systemic Problems, Engineering Solutions*

The Costs of Accidents expresses a view, characteristic of the Great Society period, that sound legal analysis requires the analyst to grasp that undesirable events, such as accidents, are particular instances of a set of broader or systemic phenomena. By doing so, the analyst enables herself to devise rational, systemic solutions to those problems.

Indicative of this mindset are the remarks of President Johnson upon the passage of the National Traffic and Motor Vehicle Safety Act in 1966.⁵ As observed in Mashaw and Harfst's outstanding book, *The Struggle for Auto Safety*,⁶ that law was but one of hundreds of pieces of legislation enacted by the Great Society Congress of 1964-66.⁷ (It also produced the Civil Rights Act of 1964 and the first modern environmental statutes.⁸) Of the Act, President Johnson remarked:

For years, we have spent millions of dollars to understand polio and fight other childhood diseases. Yet until now we have tolerated a raging epidemic of highway death which has killed more of our youth than all other diseases combined. Through the Highway Safety Act, we are going to find out more about highway disease—and we aim to cure it.

In this age of space, we are getting plenty if [sic] information about how to send men into space and how to bring them home. Yet we don't know for certain whether more auto accidents are caused by faulty brakes, or by soft shoulders, or by drunk drivers, or by deer crossing the highway.

There is nothing new or radical at all about [the Act]. Every other form of transportation is covered by federal safety standards . . . [Safety] is no luxury item, no optional extra: it must be a normal cost of doing business.⁹

As this quotation indicates, and as Mashaw and Harfst explain, the assertion of federal regulatory authority over automobile safety was

5. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101-30170 (2000)).

6. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

7. *Id.* at 59.

8. *Id.* at 59-60.

9. *Id.* at 58 (alterations in original) (quoting remarks of President Johnson at the signing of the Highway Safety Act and the Traffic Safety Act, Sept. 9, 1966).

justified in part by characterizing passenger-car driving as a public rather than a private phenomenon—akin to transportation by common carriers such as buses and railroads.¹⁰ Equally important was an emphasis on a notion of equality among persons of disparate incomes: the purchaser of an economy car was no less entitled to safety than the purchaser of a luxury car, and the government would ensure that each would enjoy an equal right to security against injury.¹¹ This disposition was accompanied by a functionalist disdain for an industry focused on frills and prestige rather than “real” qualities such as safety.¹²

Finally, and most importantly, the Act presupposed the need for a fundamental shift in how car accidents should be understood. Instead of treating them as isolated episodes traceable to individual errors, they had to be grasped as a systemic problem admitting of systemic solutions. The former understanding was taken to bear the hallmarks of pre-modern—indeed primitive or childish—thinking, in which accidents are treated as one-off events traceable to the blameworthy acts of particular actors. In the context of critiquing efforts by state police to deal with the problem of highway accidents, Daniel Patrick Moynihan, then Assistant Secretary of Labor, conveyed this point with typical acerbity:

The entire pattern of State Police management of the automobile complex is derived directly from the model of prevention, detection, and punishment of—crime. From the cowboy hats, to the six gun, to the chase scene, the entire phenomenon is a paradigm of the imposition of law on an unruly and rebellious population. This involves intense concentration on the guilt of individuals . . . and of the efficacy of punishment, either threatened or carried out, as a means of social regulation.¹³

Moynihan noted with equal disdain that police had made no attempt to study systematically whether this approach to enforcement was efficacious:

[I]t is clear that the Connecticut State Police do not, in any meaningful sense know [if they have had any success in

10. *See id.* at 60.

11. *Id.* at 60-61.

12. *Id.* at 61-62.

13. *Id.* at 2 (quoting *National Traffic and Motor Vehicle Safety Act: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong. (1966) (statement of Daniel Patrick Moynihan, Assistant Sec’y, U.S. Dep’t of Labor) [hereinafter Moynihan statement]).

cracking down on speeding drivers], and do not intend to find it out. Their response to the gentlest criticism is simply wholesome Hibernian apoplexy.¹⁴

He concluded that the effort to deal with car accidents in terms of a search for responsible parties was not only pointless but unjust, in that it essentially turned hapless ordinary citizens into felons by convicting them of traffic offenses that were likely preventable by the appropriate deployment of technology:

[W]e have been making a nation of felons of ourselves while so clogging and overwhelming the court system with insoluble accident litigation that it becomes increasingly difficult for the American citizen to obtain justice from the courts in matters of true substance. Suppose, to use an obvious example, an electronic control system were devised and installed that would make it impossible for automobiles to go through a red light or to collide at blind intersections. Would not one of the effects be to free, each year, untold numbers of Americans from the humiliation and guilt of a traffic-court conviction[?]¹⁵

In sum, the dominant critical aspects of the Great Society outlook on accidents entailed disparagement of the localized and individualized inquiry into responsibility associated with criminal and tort law as judgmental, emotive, irrational, and unscientific. Correspondingly, in its dominant constructive aspects, it regarded accidents as a public health problem, like the problem of contagious diseases, that had to be addressed through scientific study (data collection and analysis), technological development (safer vehicles), and better planning (safer roads).

B. Identifying the Goal of Accident Law as Cost Reduction

The Costs of Accidents shares most of the impulses we have just described. Like the Motor Vehicle Safety Act, the book is built on frustration with previous, unsystematic efforts to deal with the problem of accident law. Academic critiques of the operation of the tort system—particularly negligence law—had been sounded regularly since the late 1800s, and had swelled into a condemnatory chorus in the 1940s and 50s over burgeoning automobile accident litigation. Yet, accord-

14. *Id.* (quoting Moynihan statement, *supra* note 13).

15. *Id.* at 52 (quoting *Examination of Public and Private Agencies' Activities and Role of the Federal Government: Hearings Before the Subcomm. on Traffic Safety of the Senate Comm. on Gov't Operations*, 89th Cong. (1966) (statement of Daniel Patrick Moynihan, Assistant Sec'y, U.S. Dep't of Labor)).

ing to Calabresi, the critiques and corresponding reform proposals had been haphazard—knee-jerk reactions to the failings of the fault system, rather than exercises in comprehensive policy analysis.¹⁶ They also tended to incorporate and perpetuate—rather than explode—various misconceptions. For example, they tended to suppose that the question posed by accidents is properly framed as a question of who, as between injurer and victim, ought to be made to bear the costs, and thus to limit reform proposals correspondingly. To pose the question this way was already to misconceive the real issue: On whom, among all persons, should the law place the costs of accidents, so that the law will best achieve its desired goals? For these and other reasons, “the time ha[d] come for a full reexamination of what we want a system of accident law to accomplish and for an analysis of how different approaches to accidents would accomplish those goals.”¹⁷

To undertake that analysis required a return to first principles—the identification of the goals that a law of accidents should serve. Of these, *The Costs of Accidents* entertains two possibilities. One is justice.¹⁸ The other is a reduction in the costs of accidents.¹⁹ Justice is quickly sidestepped on the ground that it is most plausibly viewed not as a goal unto itself, but as a side-constraint on the pursuit of other goals.²⁰ For example, justice would presumably bar the imposition of the death penalty on a CEO simply for being in charge of a company that happened to produce an unreasonably dangerous product, even if it could be shown that the threat created by such a penalty would best achieve the goals of accident law.²¹ In sum, Calabresi at least initially posits that the concept of justice is exhausted by a notion of rights acting as constraints on what government may do to individuals in pursuit of collective goods such as efficiency.²²

With justice set aside, the goal that anchors the book’s analysis is established: to minimize the costs of accidents. That goal, Calabresi famously asserts, can in turn be broken down into three subgoals: pri-

16. THE COSTS OF ACCIDENTS, *supra* note 1, at 5-14.

17. *Id.* at 14.

18. *Id.* at 24.

19. *Id.*

20. *Id.* at 25.

21. *See id.* at 293 (offering a similar example).

22. In support of this description, we note that, in his conference remarks, Judge Calabresi recalled that his treatment of justice was influenced by his then-colleague Ronald Dworkin. Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 746 (2005). In Part V of *The Costs of Accidents*, Calabresi seems to entertain the notion that tort law might be a means of *doing* justice. He concludes, however, that any such notion of justice is not a value that a modern legal system ought to recognize or advance. THE COSTS OF ACCIDENTS, *supra* note 1, at 289-308; *see infra* Part III.

mary cost avoidance (i.e., reduction in the number and severity of accidents resulting in injuries); secondary cost avoidance (i.e., reduction in the economic and social dislocation experienced by accident victims and their families); and tertiary cost avoidance (i.e., reduction in the costs of administering a regulatory system for achieving primary and secondary cost avoidance).²³

In the space of a few introductory pages, Calabresi establishes these axioms as the platform on which his analysis will be built. The trick will be to determine what sort of regulatory regime is most likely to produce the largest net reduction in primary, secondary, and tertiary accident costs. Once we know that, we will know what sort of system, and what sort of rules, we will want to adopt. In Part III of this Article, we revisit and question the soundness of these axioms. For now, however, we will take them as given.

C. Primary Cost Avoidance: The Economist and the Great Society

There is one important respect in which Calabresi's intellectual disposition arguably departs from the dominant attitude among Great Society reformers. As noted above, when policymakers such as Daniel Patrick Moynihan expressed the view that accidents are the product of inevitable human error, they did not do so to cast blame. Quite the opposite, they aimed to destigmatize errors as "only human." Humans, it was supposed, are incorrigibly mistake-prone. Efforts at education and incentivizing individual actors through penalties were thus destined to be ad hoc, short-lived, and spotty in their efficacy. Indeed, if the law were really serious about tackling the problem of car accidents by controlling their human element, it would have to aspire to nothing less radical than a program of eugenics—the task of building a better, less error-prone, human.²⁴

By contrast, the environment in which individuals operate vehicles—vehicles and roads—was more readily controlled through technological and engineering improvements. Passenger restraint systems, improved brakes, and better-designed roads would solve the problem at a retail level. That sort of change, explained Moynihan, did not require controlling the behavior of millions of drivers. Instead, it could be "put into effect by changing the behavior of a tiny population—the forty or fifty executives who run the automobile industry."²⁵ Implicit in this claim was the idea that the law had hopes of

23. THE COSTS OF ACCIDENTS, *supra* note 1, at 26-29.

24. MASHAW & HARFST, *supra* note 6, at 63.

25. *Id.* at 65 (quoting Moynihan statement, *supra* note 13).

changing the behavior of the members of this group because it was realistic to suppose that government regulations prescribing safety standards could be enforced against them, whereas enforcement of laws against unreasonably unsafe driving will necessarily always be spotty.

Relative to someone like Moynihan, Calabresi is perhaps more optimistic about the ability of the law to change individual behavior. In particular, the economist in him supposes that individuals tend to be rational actors who respond to price changes.²⁶ If the price of driving goes up enough, people will drive less or choose other forms of transportation. Thus, while Calabresi might well have agreed with Moynihan's supposition that the law has little hope of reducing the incidence of human error in the operation of vehicles, he would argue that it nonetheless does have a realistic hope of encouraging individuals to drive less, or to buy a different kind of car. This it can do by affecting the prices of those activities.

Calabresi's faith in pricing mechanisms plays a pivotal role in the central policy prescriptions of the book, which are twofold. The first is that accident law will generally do better to focus on primary accident cost avoidance—i.e., deterrence of accidents—rather than secondary cost avoidance.²⁷ The second is that primary cost avoidance ought to tend to take the form of “general” or “market” deterrence, as opposed to “specific” or “collective” deterrence.

Collective deterrence involves decisions by officials—typically legislators and/or bureaucrats—to identify and prohibit activities they deem to be socially undesirable by, for example, imposing fines on, or ordering imprisonment of, those who undertake such activities.²⁸ Criminal law exemplifies specific deterrence. It sets out to prohibit various forms of conduct deemed unacceptable by threatening those who engage in such activities with fines or prison terms. Although Calabresi acknowledges the importance of specific deterrence, he nonetheless presumes that, in a society such as ours, its use requires special justification. One such justification is paternalism. Govern-

26. THE COSTS OF ACCIDENTS, *supra* note 1, at 70.

27. We will not explore this move in his argument here. Calabresi seems to claim that it is facially implausible to suppose that after-the-fact loss spreading can be the main goal of any system of accident law because the problem of concentrated losses is not a problem limited to accidents. *Id.* at 43-44. For example, it also occurs when people contract diseases, and when they face ruination as a result of natural disasters or political upheavals. Anyone who really supposes that the central aspiration of accident law should be the reduction of the secondary costs of accidents, such as lost income and status, would, in the end, be committed to arguing instead for widespread social safety-net legislation. *Id.*

28. *Id.* at 95-96.

ment should prohibit activities directly rather than deter with pricing mechanisms when individuals can be expected to respond to pricing irrationally (e.g., by declining to buy a slightly more expensive car that more than pays for itself in terms of the added safety it provides).²⁹ While appropriate to particular pockets of individual decisionmaking, this sort of reasoning cannot be endorsed as a general justification for preferring specific to general deterrence without flouting basic tenets of liberal-capitalism. Another possible justification for relying on specific deterrence is that it is needed to respond to conduct that is not merely undesirable (and therefore to be discouraged), but immoral (and therefore to be prohibited).³⁰ This sort of justification, however, seems generally less apt when it comes to the sort of conduct that typically generates accidents.

In addition, specific deterrence might be warranted to fill gaps in schemes of general deterrence. General deterrence systems are geared to broad activity types—they encourage individuals through pricing to avoid a given course of conduct, or to go about it in a way that promises to make it less expensive.³¹ Thus, by attaching liability for injuries resulting from car accidents to car drivers, a scheme of general deterrence might discourage driving, or encourage enrollment in drivers' education courses. Yet, it may still make sense to employ specific deterrence to deal with situations in which individuals faced with decisions on how to proceed with a given activity might rationally decide to pursue that activity even though doing so is likely to generate costs to society greater than the resulting benefits.³² For example, an insured driver might conclude that, in a given instance, speeding through a yellow light or ignoring a particular stop sign is a rational way to drive.³³ On balance, however, it may cost society more than it benefits to permit such activity. And so specific deterrence (traffic tickets; threats of jail time) can be used to prevent inefficiencies that are hard to prevent through schemes of general deterrence.

Absent these sorts of special justifications, accident law ought to work by means of general deterrence. As noted above, the policy goal here is to make activities that risk harms to others more costly, on the theory that actors will either: (a) engage in such activities less often, or (b) devise ways to undertake the activity that involve less risk of injury to others, or (c) engage in the activity, but do so with a more accurate

29. *Id.* at 96-97.

30. *Id.* at 100.

31. *Id.* at 103-04.

32. *Id.* at 105.

33. *See id.* (using a similar example).

understanding of its social costs. To offer a variation on one of the book's examples, suppose that during the course of a year a car owner/driver is likely to get into accidents resulting in \$200 worth of costs to others—e.g., cyclists who suffer bodily injury when these accidents occur.³⁴ Now suppose that the driver can install a new kind of brakes with a total cost that works out to \$100 per year over the life of the car, and that will reduce the amount of damage to cyclists caused by driving to \$50 per year. If the law imposes the \$200 cost incurred by cyclists on the driver, he will, if he is acting rationally, pay to install the brakes. In doing so, he reduces the cost to society of accidents associated with the operation of his car from \$200 per year to \$150 per year. By charging the \$200 cost of accidents to the driver, the law thereby creates a monetary incentive in the driver to change his behavior so as to save society money.

Although Calabresi sometimes seems to suggest otherwise, it is important to grasp that the difference between general and specific deterrence is *not* that the former excuses policymakers from making some form of normative decision about the “worth” of different activities. Quite the opposite, in order to harness general deterrence to serve the goal of primary cost avoidance, the legislator must make a deliberate decision to assign the costs of accidents to different activities in accordance with a particular normative criterion.³⁵ To appreciate this point, let us return to the preceding car-bicycle example. There we simply presumed that the driver should be made to internalize the losses suffered by bicycle owners. But why the driver? Again, the issue is not who is to blame for the accident, or who is likely to have greater means to pay for the losses. The issue is instead whom ought the law incentivize to change his conduct in order to promote primary accident cost avoidance more effectively. Calabresi's answer, famously, is that the law ought to search for the “cheapest cost avoider” and place the losses associated with a given class of accidents on that sort of actor.³⁶ This conclusion follows rather directly from the preceding steps. If the goal is to minimize the costs of accidents by avoiding accidents, the most economical thing to do is to arrange

34. *See id.* at 73-74.

35. Of course, with market deterrence, the decision to assign a cost to a given set of actors is made on criteria of efficiency, but that does not render it somehow value-neutral or noncollective. Instead, it is a collective decision to price conduct to achieve the goal of getting the biggest aggregate bang for each dollar spent on safety (as opposed to, say, pricing conduct to maximize consumer safety, or to redistribute income). While this decision may be a plausible one, it nonetheless constitutes a normative judgment made by regulators about the desirability or undesirability of certain conduct.

36. *See* THE COSTS OF ACCIDENTS, *supra* note 1, at 135-40.

for those who can accomplish the most accident avoidance for the least amount of money to take on the burden of avoidance. If it turns out that drivers are in the best position to take cost-efficient precautions against losses suffered by cyclists in collisions with cars, then the law ought to be arranged so that liability for those losses is placed on drivers.

Crucially, Calabresi sees no reason to suppose that moral notions such as fault, blameworthiness, culpability, or responsibility correspond in any tight way to being in the best position to avoid a certain kind of recurring loss. Thus, even if it is the case that most accidents involving cars and bicycles can be attributed to the "fault" of car drivers, it does not follow that the law should make drivers pay for those losses. If the goal is to induce changes in behavior in the persons in the best position to avoid this sort of loss in the future, and if it turns out that, because of the way car-bicycle accidents tend to happen, cyclists can more cheaply prevent them, then cyclists should be assigned this liability. Likewise, the normative criterion of cheapest cost avoider has no necessary connection to notions of causation. If persons or entities not typically involved in the relevant type of accident happen for some reason to be in the best position to prevent accidents from occurring, then liability should be placed on them, regardless of whether they had anything to do with generating the accidents in the first place. Thus, if it turns out that airline companies are in the best position to prevent car-bicycle accidents, then policymakers should assign the cost of those accidents to airlines even if the conduct of the airlines played no causal role in bringing them about.

Calabresi concedes that the identification of the cheapest cost avoider is an ideal objective: policymakers will not always have the sort of information that they need to identify with confidence the person or group of persons who is or are the cheapest cost avoider of a given type of recurring loss.³⁷ Still, they will likely be able to narrow the range of candidates by means of a "rough guess."³⁸ For example, it is in fact quite unlikely that airlines will be in the best position to reduce the cost of car-bicycle collisions given their relative lack of involvement in them. As between plausible candidates—say, road engineers, car manufacturers, drivers, bicycle manufacturers, and cyclists—the question is much closer. Thus, a good portion of *The Costs of Accidents* is devoted to the task of providing guidelines that, if followed by policymakers, will lead them to cheapest cost avoider(s).

37. *Id.* at 139-40.

38. *Id.* at 140.

Two of these guidelines are particularly worthy of note because they figure prominently in Calabresi's critique of negligence law: (1) externalization avoidance,³⁹ and (2) identification of the "best briber."⁴⁰

Calabresi's scheme at its core puts the onus on regulators to place monetary incentives on a particular set of persons to change their conduct so as to reduce the number (or severity) of a certain class of injury-producing accidents. The group in question consists of those persons who are in the best position to modify their conduct so as to prevent these injuries from occurring in the future. But the regulator's task is complicated by the fact that the force of these incentives can be dulled in various ways. The externalization avoidance guideline is essentially a call to policymakers to attend to the issue of who in fact will be paying the bill for the losses associated with a given recurring type of accident.

For example, if the policymaker defines membership in the group identified as the cheapest cost avoider too broadly, waste will occur because some persons will be incentivized to change their conduct even though they are not the ones whom society wants to be taking precautions. If it turns out that car-bicycle accidents overwhelmingly involve car drivers between the ages of eighteen and twenty-five, then the imposition of liability on all car drivers, including drivers not in this age group, who happen to collide with and damage bicycles, might result in suboptimal spending of accident prevention dollars. This is the problem of "insufficient subcategorization."⁴¹

Moreover, it may be that members of a group who are in the best position to avoid a certain set of losses are sometimes relieved by other laws of some or all of the costs of being held liable for those losses. For example, suppose it is the case that cyclists tend to be the beneficiaries of publicly funded health insurance programs that pay the full cost of their medical bills. Unless the government consistently seeks reimbursement from drivers for the cost of medical care to cyclists resulting from bicycle accidents, the cost of these accidents will be borne neither by drivers nor cyclists, but by the general public, thus preventing the law from incentivizing one or the other class of actors to alter its behavior so as to reduce those costs. This is the problem of "externalization due to transfer."⁴²

In addition to being mindful of who actually will be made to pay for a given set of losses, regulators uncertain as to who will be the

39. *Id.* at 144-50.

40. *Id.* at 150-52.

41. *Id.* at 145.

42. *Id.* at 147-48.

cheapest cost avoider of a given type of loss ought to consider the relative ability of potentially liable groups to correct the situation if the regulators pick the wrong group.⁴³ Suppose, for example, regulators are unsure whether the managers of companies in a given industry or workers in that industry are the cheapest cost avoiders of injuries resulting from workplace accidents. As a rule they should be disinclined to place liability on workers for the following reasons. Suppose management can most cheaply reduce the number of workplace accidents by, say, posting warnings and undertaking workspace redesign. If the cost of workplace accidents is assigned to management, all is well. However, if it is assigned to workers there is a problem. Society still wants management to make the same safety improvements; again, we are positing that this is the best solution to the problem of workplace accidents. Yet, as a diffuse, disorganized group, with perhaps little leverage against management, workers will have a hard time organizing themselves to "pay" management to make the changes that society wants made.

Now suppose workers turn out to be the cheapest cost avoiders because there are relatively cheap precautions individual workers can take to avoid injury. Again, if workers are assigned the cost of workplace accidents, then all is well. Yet, even if the policymaker mistakenly assigns the cost to management, management, in contrast to workers, will likely be in a relatively good position to induce employees to change their behavior. In short, management is in a better position to "bribe" employees to take socially desirable safety precautions than are employees in relation to management, which gives legislatures a reason, in a close case, to put the loss associated with workplace injuries on management, either because management will turn out to be the cheapest cost avoider, or because, if not, management can more cheaply correct for the legislature's mistake.

D. The Critique of Negligence Law as a System of Deterrence

To set the stage for Calabresi's critique of negligence law, it will be helpful to review the bidding thus far. According to the argument of *The Costs of Accidents*:

(1) Accident law can only be rationalized by (a) establishing the goals accident law aims to serve, and (b) identifying the institutions and rules that are most likely to achieve those goals;

(2) The proper goal of accident law, subject to the constraint(s) of justice, is to reduce the costs of accidents;

43. See *id.* at 150.

(3) The costs of accidents are a function of three variables—(a) the number and severity of accidents, (b) the economic, social, and emotional displacement associated with accidents, and (c) the costs of administering the system for reducing the number of accidents and the severity of their displacing effects;

(4) The best way to achieve the goal of reducing the costs of accidents is to focus primarily, albeit not exclusively, on the first variable, by pursuing the subgoal of accident prevention (primary accident cost avoidance);

(5) The best way of achieving the subgoal of accident prevention is through a system of general (market) deterrence, supplemented with specific (collective) deterrence where there is reason to suppose that pricing won't induce efficient behavior, won't change behavior, or would be inappropriate given the immorality of the activity;

(6) The system of market deterrence ought to assign the costs of accidents (i.e., personal injury, property damage, lost income, pain and suffering, etc.⁴⁴) to the person who can most readily avoid or prevent that sort of accident from occurring in the future; and

(7) To determine which among several groups of actors who might plausibly be the cheapest cost avoider of a given type of accident is in fact the cheapest cost avoider, regulators ought to follow certain guidelines including the externalization avoidance guideline, and the best briber guideline.

Armed with this analytic framework, *The Costs of Accidents* finally turns its attention to consideration of negligence law, which the book refers to as "the fault system." The question is whether the fault system can be defended as likely to meet the foregoing desiderata—particularly whether it is likely to operate as an effective scheme of general deterrence. Calabresi's conclusion, of course, is that negligence law does not deliver and cannot be made to deliver general deterrence. As we discuss in Part III, below, he thinks that it also fails to deliver justice.

The problems with the fault system as a scheme of deterrence are, in his view, legion. For one thing, there is the identity of one of the system's two central policymakers—i.e., the jury. Negligence law usually asks the jury to make the call as to whether a given actor's conduct was unreasonable. Given that the concept of reasonableness is vague, that the information presented to jurors on the issue of rea-

44. This claim is subject to certain qualifications, including the qualification that the victim will presumptively be the cheapest cost avoider of certain idiosyncratic losses associated with accidents, such as unusually severe emotional distress. *See id.* at 222-23.

sonableness is biased by the adversarial nature of the proceedings, and that jurors usually have no specialized training, one can at best maintain modest expectations about their capacity for sound policymaking.⁴⁵

More fundamentally, negligence law's failings as a scheme of general deterrence stem from the fact that it calls on judges and jurors to pursue deterrence within the artificially limited bilateral universe of a *P v. D* lawsuit.⁴⁶ This focus has several undesirable effects. First, the policymaker is often likely to miss the forest for the trees. A negligence trial is likely to focus on the various particular circumstances of a car accident, rather than the systemic features that would permit avoidance of such accidents in the future.⁴⁷ For example, there may be a great deal of evidence on what exactly a given driver did badly in running over a pedestrian, while at the same time no attention is given to whether the car, its tires, or the road could have been designed so as to prevent this and other accidents in the future, notwithstanding driver error.⁴⁸

Second, the policymaker is, at the end of the day, asking the wrong question. By casting the parties to an accident in the role of alleged wrongdoer and victim, negligence law runs together specific deterrence and general deterrence by placing a moralistic cast on what should be nonmoralistic policy analysis. If the question is framed in terms of who is morally responsible for harm to cyclists resulting from car-cyclist collisions, the average citizen or policymaker might instinctively be inclined to point to the car driver as the injurer whose conduct has injured the cyclist. Yet framing the question in this way prejudges on inappropriate criteria the real question at hand: Who should be made to pay, given the goal of accident reduction? The answer to this question might well be cyclists.

For example, suppose cyclists can install bright orange flags on their bikes at a cost of \$1 per year to achieve the same loss reduction as could be achieved by a \$100 per year expenditure on automobile brakes. On this supposition, the damage associated with car-bicycle accidents almost certainly will be more cheaply avoided by cyclists.

45. *Cf. id.* at 241-42.

46. *Id.* at 240.

47. *Id.* at 256.

48. This critique of negligence law, along with certain others leveled by Calabresi (e.g., its being an all-or-nothing scheme), has been dulled somewhat by doctrinal developments that have occurred largely since the publication of the book. These include expansions of duty and proximate cause, contraction of superseding cause, and the adoption of comparative fault. As a result, a negligence suit today brought by a pedestrian run over by a car often will include claims against the car manufacturer and the road's designer.

Thus, it is the cyclists, rather than drivers, whom the law should incentivize, by having them internalize the cost of losses associated with car-bicycle collisions.⁴⁹ The fact that cyclists are “innocent,” or have suffered losses at the hands of others who have not suffered any loss (absent the imposition of liability), is irrelevant. What the policy analyst wants to know is how he can most effectively harness individual behavior to achieve the social good of accident cost reduction.

Third, a judge and jury in a negligence case do not ask who really pays the liability bill. Thus, the fault system does not account for the fact that it often will impose liability in a way that is not likely to change behavior (or the right person’s behavior) because the cost is not paid by the person to whom it is nominally assigned at the conclusion of the negligence suit.⁵⁰ For example, suppose a jury finds against an injured cyclist who sues the driver that ran her down, on the ground that the driver was driving reasonably at the time (no fault, therefore no liability). The jury has thus nominally assigned the cost of this accident to the cyclist. But if the taxpayers will end up paying the cyclist’s medical bills through a government benefits program, and if drivers, relative to taxpayers, are in a better position to avoid such collisions, the loss will not have been placed on the cheapest cost avoider.

Likewise, the fault system fails to consider what groups of persons are in the best position to be incentivized by liability rules.⁵¹ For example, pedestrians are a scattered and diverse group, facing diverse risks. A jury’s determination denying recovery to a given pedestrian injured in a car-pedestrian accident is not likely to incentivize the class of pedestrians to take greater care to avoid being run down. Certainly, as compared to this weak signal, it might well be better to place liability even on not-at-fault drivers, because, as a class, they can realistically be induced to take more care. This is particularly likely to be a more promising strategy if it is the case that automobile insurers are monitoring drivers’ behavior and charging premiums based on the relative risks posed by different classes of drivers.

Finally, Calabresi briefly considers and rejects the idea that the fault system can be conceptualized and defended as a scheme of collective rather than general deterrence, or as a mixed scheme of general and collective deterrence.⁵² Here, the issue is whether a defender

49. Likely, that is, because of the presence of transaction costs that would make it more expensive for drivers to bribe cyclists to use flags.

50. THE COSTS OF ACCIDENTS, *supra* note 1, at 246.

51. *See id.* at 246-50.

52. *Id.* at 266-77.

of negligence law can convincingly justify the scheme of damage awards in negligence cases as a desirable means of penalizing a special class of prohibited conduct (namely, unreasonable conduct), or whether she might claim that negligence successfully achieves an artful balance of market and collective deterrence. Some proponents of negligence, Calabresi observes, might defend it as a system that enforces a collective moral sense that careless behavior is immoral, and therefore should be prohibited and punished.⁵³ Yet, he argues, for conduct that can be identified with a reasonable degree of specificity in advance as clearly immoral—for example, drunk driving—a system of fines and penalties will better achieve prohibition than a system that only imposes liability if the drunk driver happens to hit someone, happens to be sued, happens to be found liable, etc.⁵⁴ For conduct that cannot be identified in advance with reasonable specificity—e.g., driving that is careless given the particular circumstances in which it took place—there is no moral basis for employing collective deterrence, because conduct that can be adjudged wrongful only after the fact cannot be condemned as immoral.⁵⁵

For these and other reasons, Calabresi concludes that the fault system holds little promise as a scheme of general or specific deterrence, or some combination thereof. Designed more than a century earlier, and with very different purposes in mind, the law of negligence is the civil counterpart to the cowboy-hatted, six-gun toting state troopers lampooned by Moynihan. It is an outmoded and irrational system that has little hope of incentivizing the right actors—i.e., those well-positioned to prevent accidents—to undertake accident prevention.

II. LAW AND BEHAVIOR: OBLIGATIONS AND “INTERNAL” DETERRENCE

We now shift from exposition to critique. In this Part, we argue that Calabresi fails to make the case that negligence law has little or nothing to offer by way of deterring accidents. In Part III, we suggest that he in any event fails to deliver the promised knockout punch against negligence because he does not even consider various goods and values that negligence law can serve. Both criticisms turn on the same general idea—that Calabresi’s condemnation of negligence fails because it ignores entire dimensions of law and human behavior. Given the tenor of these criticisms, our remarks will be more sugges-

53. *Id.* at 266.

54. *Id.* at 268-69.

55. *Id.* at 269.

tive than definitive. We aim to point out ideas that have gone unconsidered and argumentative paths not taken. We will demonstrate that attention to those ideas and arguments at a minimum reveals that there is more to be said for negligence than Calabresi supposes. To what conclusions about negligence and its alternatives these observations ultimately lead is a question we reserve for another occasion.

The Costs of Accidents, we suggested at the outset, bears many of the hallmarks of Great Society thinking. It is bold and ambitious, committed to reinventing an area of law from the ground up. Despite its evident faith in pricing as a device for behavior modification, it is also technocratic in adopting an "engineering" model of how law influences individual behavior. Taking the goal of accident cost reduction as given, Calabresi ponders how to design a set of laws and institutions that will induce citizens to change their behavior to promote efficient precaution-taking.

Strikingly, the tools he posits as available to would-be lawmakers are few in number and, for all the sophistication of his analysis, quite crude. The implicit claim that underwrites Calabresi's critique of negligence is that market deterrence and collective deterrence (as well as mixes of the two), exhaust the possible ways that an accident law system might serve to reduce primary costs. The question thus naturally arises: Has he adequately canvassed the possible ways in which negligence law might promote primary accident cost reduction? For if there are other possible mechanisms of deterrence than the two he considers, the critique of the fault system as ill-suited to the task of primary accident cost reduction is incomplete.

We think Calabresi has not adequately canvassed the possible means by which accident law might reduce primary accident costs. Indeed, we think he ignored a basic and vital means by which law can achieve primary cost reduction, one that will become obvious if we step outside the legislative arena for a moment and turn to "ordinary" social life. What is it that makes day-to-day life for most citizens relatively safe from serious accidents? Part of the answer must be the law and the threat of liability or punishment. But the safety of conduct is at least as much a function of education, habit, and socialization: "social norms." For example, the dangers associated with driving cars are influenced by criminal laws and the threat of tort liability (or increased insurance premiums). But they are also influenced by how new drivers are instructed to drive, how parents model the activity of driving for children ("A car is not a toy; it is an adult responsibility!"), how we tend to attach praise and blame to different instances of driving, how individuals actually drive in the presence of others, etc.

Safe driving norms are not of themselves law. Still, once we acknowledge their existence, we can appreciate the existence of an opportunity for law generally, and tort law in particular. Indeed, the natural supposition would be that law, including negligence law, effects a reduction in car accidents (and hence car accident costs) not only by pricing and prohibiting conduct, but by helping to foster, sustain, and articulate norms of safe driving. Wedding contemporary social norms theory with Calabresi's own terminological predilections, one can identify a third means of deterrence that he never seems to have considered: "internal deterrence." Insofar as negligence law can achieve safety through internal deterrence, Calabresi's critique of negligence is incomplete.

We think that the phenomenon of internal deterrence is real, and that negligence law is, and has always been, bound up with it. Before we explore those points, however, it will be worthwhile to take a brief argumentative detour to help explain the absence of internal deterrence from *The Costs of Accidents*. Explaining this lacuna will in turn help provide the basis for a positive (though highly preliminary) account of the role that negligence law might play in fostering internal deterrence.

A. *Conceiving of Persons as Rational Actors, as Citizens Subject to Regulation, and as Bearers and Beneficiaries of Obligations*

Broadly speaking, Calabresi appears to have been in the grips of a stripped-down version of Benthamite political theory and an equally spare Austinian jurisprudence. By this we mean that he seems to have envisioned government, through law, interacting with the individual citizen only directly, by means of rules that alter the consequences of engaging in certain behavior for that individual. Further, he seems to have contemplated that law will interact with citizens exclusively in the form of setting some sort of obstacle to the fulfillment of pre-existing preferences.⁵⁶ Law is, on this view, a policy lever that achieves collec-

56. In questioning the Calabresian picture of how law operates, we draw on the work of those like Hart, who famously stressed that citizens frequently regard legal duties as having a sort of normative content not identical to moral duties, but nevertheless similar in the injunctive force that they carry with them. See generally H.L.A. HART, *THE CONCEPT OF LAW* 79-91 (1961) (explaining the notion of obligation in terms of the "internal aspect" of rules, and criticizing forms of positivism that do not account for this aspect). For our part, we have argued in several places that duties in tort law should be understood, at least in part, as having such force. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) [hereinafter *Moral*] (arguing that duty in negligence law must be understood in terms of genuine concepts of obligatory conduct, not just in terms of liability); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of*

tive goods exclusively by adjusting the payouts of different actions for self-interested individuals. By now, it has become familiar to see philosophically oriented tort scholars like ourselves criticize economically oriented scholars as erring because they adhere to a confident cynicism about human nature that treats law purely as an instrument for motivating the self-interested rational agent. Our present point, however, has nothing to do with the cynical or non-edifying aspects of Calabresi's view of the capacity of law to affect conduct. Rather, we are observing—within the spirit of *The Costs of Accidents* itself—that his evaluation of the fault system's capacity to reduce accident costs seems to rely on a particular, and particularly limited, account of how law can affect conduct.

Appreciating the role played by these background assumptions is critical to understanding, and responding to, Calabresi's critique of negligence as an inept system of deterrence. Put simply, it is no surprise that negligence law does not fare well in his eyes, because negligence was built on a richer (and we believe quite plausible) picture of how law and society are intermeshed. In short, there is much more to be said for tort law on a view that, in opposition to Benthamite and Austinian top-down reductionism, is bottom-up, organic, and incremental.⁵⁷ To make the same point by reference to a famous American pairing, the value of tort law, even along the dimension of deterrence, can be much better appreciated by abandoning Holmes's reductionist understanding of law in favor of the anti-reductionism of Cardozo.⁵⁸

Torts, 51 VAND. L. REV. 1, 55-70 (1998) (setting forth a relational theory of tort under which tort law is understood as enjoining tortious conduct). Also quite to the present point is Dale Nance's important critique of Calabresi and Melamed's famous *Cathedral* article, which argues that Calabresi's thought rests on a "flat" conception of how citizens interact with law (namely, as Holmesian "bad men"), and that a richer picture (e.g., one that recognizes the disposition among many citizens to feel obligated to follow the law) would entail that law might shape individual behavior in ways that Calabresi's analysis does not seem to acknowledge. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 930 (1997). Our argument runs parallel to Nance's, focusing not so much on citizens' attitudes toward law, but their self-conception as persons who feel the pull of responsibilities that inhere in various relationships and attend various activities.

57. See Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85, 86-87 (2005) (contrasting the theoretical commitments of Bentham and Blackstone); Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569 (1976) (same).

58. See Goldberg & Zipursky, *Moral*, *supra* note 56, at 1777-90. Calabresi and Holmes make an interesting pair. Their works seem to share a commitment to a stripped-down jurisprudence that defines law in terms of threats, prices, and sanctions rather than genuine obligations. They also rely on a reductive form of instrumentalism, one which supposes that a successful explanation or justification of an institution like tort law must explain or justify it in terms of its ability to produce a desirable end-state such as greater deterrence or compensation. These commonalities notwithstanding, their works obviously part company at the level of substantive tort theory. Holmes was by and large content with

Holmes (at least at times) seemed to suppose that the job of the jurist was to get past the thick context of actual social life to what was really going on underneath it. Embracing reality, on this view, consisted of capturing human conduct and legal regulation of that conduct along two and only two normative dimensions: (1) individuals conceived as autonomous agents pursuing their own interests; and (2) individuals in their capacity as political subjects and hence objects of government regulation. Every other dimension of human social interaction is to be discarded by the analyst as mere appearances—window-dressing. So, said Holmes, if one wants to get at the real structure of negligence law, one must describe and analyze it exclusively in terms of the state's interaction with individual citizens, rather than in terms of how citizens interact with one another.⁵⁹ A casual observer familiar with the law might assert that doctors owe patients a duty to provide competent care. A rigorous Holmesian analyst, by contrast, would consider this assertion to be just a sloppy way of saying that government has issued a rule, backed by sanction, that doctors, like all other actors, must be careful not to injure others, including patients.⁶⁰

In contrast, anti-reductionists like Cardozo (and Blackstone before him) suppose that social interaction occurs across many normative dimensions and that none of these have the quality of being especially authentic. To be sure, each person who is a citizen of a constitutional democracy such as our own incurs various political obligations by virtue of his citizenship (e.g., duties of loyalty, perhaps a *prima facie* obligation to obey duly enacted laws, etc.), as well as various rights, such as rights against state interference with certain liberties and rights to equal treatment and to participation in democratic government. Each person is also in many respects devoted to pursuing his own happiness or material interests, either by competing, cooperating, or exchanging with others. In a wide range of situations, however, a person interacts with others in different ways and by reference to different norms. The norms governing state-citizen interac-

negligence law, primarily because he viewed it as an appropriate instrument of compensation within a legal system generally committed to the recognition of a wide sphere of individual liberty. (In other words, he saw it as a means by which government, through judges, shifted undeserved losses from innocent victims to actors who had rendered themselves eligible to bear those losses by having caused them through their "unreasonable" actions—i.e., actions exceeding the bounds of the sphere of liberty granted to them by law.) Calabresi, by contrast, sees negligence law as an inefficient and ad hoc device for delivering compensation, as well as an ineffective and wasteful system for deterring undesirable conduct.

59. *See id.* at 1755.

60. *See id.* at 1756.

tions, and the norms governing the marketplace are not, by and large, the norms of the family. Nor are those norms the ones associated with interactions among members of an association, or a neighborhood, or a religious or ethnic group. Nor are they the norms that govern the vast array of standard social interactions in which an individual might participate, whether as an employee, consumer, volunteer, driver, pedestrian, passenger, patient, client, student, entrepreneur, and so forth.

In short, individuals act within a complex skein of habits, conventions, and rules, all of which establish context-specific norms, including norms of behaving appropriately and responsibly, and norms of entitlement as to how others are supposed to behave. Being a parent, for example, comes with a relatively demanding set of duties to nurture and support one's young children; a duty that corresponds to a broad set of powers over those children as well as a set of expectations that children are entitled to have of their parents.⁶¹ Likewise, even though employers and employees are, in some senses, out for themselves, employers have various expectations of their employees (honesty, productivity, a certain degree of loyalty, etc.), and vice versa (a fair wage as determined by agreement and/or background legal rules, a reasonably safe workplace, etc.), although there are clear limits on both sets of obligations (e.g., the employer often may choose to terminate the employee without cause; the employee is often free to join a competitor of the employer). The same holds true, in different ways, for other standard civic relationships: manufacturer-consumer, business-business, business-customer, doctor-patient, lawyer-client, accountant-client, neighbor-neighbor, landlord-tenant, host-guest, school-student, common carrier-passenger, utility-customer, and so on. Obligations and expectations also attend interactions between strangers. For example, users of public ways owe duties to all others with whom they share those ways and their immediate environs. Thus, automobile drivers owe vigilance to avoid driving in a manner that causes injury to other drivers, cyclists, pedestrians, utility workers, persons in storefronts, et al.

In sum, on the commonsensical view articulated here, different standard activities and interactions are governed by different norms, and there is no reason to suppose that these diverse norms are really just expressions of a deeper reality that is captured by viewing individuals only in their capacities as autonomous, self-interested agents or

61. Of course there will be significant variation within different cultural and economic subgroups as to the content of these duties. Still, few if any would regard the parent-minor child relationship as arm's length.

citizens of a polity subject to regulation.⁶² This depiction of social interaction is pragmatist rather than Platonic: it does not posit a fixed or universal list of forms of social interaction. Nor does it operate on the notion that modes of interaction are “natural” in the sense of pre-political. In modern society, most of these modes will be defined in part by law, although they also function independently of law. To some degree, the norms governing conduct within these different spheres of activity will form a hierarchy. Thus, political norms of liberty, equality, and democracy will often trump conflicting illiberal, inequalitarian, or undemocratic social norms. This is partly what it means for a society to be organized as a liberal constitutional polity. In other respects, norms are not hierarchically arranged, but instead coexist alongside one another. Thus, whereas narrowly self-interested behavior might be approved and indeed expected in ordinary consumer or business transactions, or among the participants in certain kinds of contests (think of the television show “Survivor”), such behavior would generally be regarded as intolerable and worthy of condemnation in other settings, such as interactions among family members or friends. There is no reason to suppose that modes of social interaction, and the norms governing them, are self-contained, or exist in a state of undisturbed harmony. Boundaries will often be fuzzy and contested (e.g., at what point does a “family” matter become a “legal” or “political” matter), and a person occupying multiple loci may find herself facing conflicting responsibilities. Persons and groups may clash over the norms that ought to govern a certain sort of activity or interaction, or whether the activity or interaction ought even to take place. Finally, although many are stable over time, none of the norms governing standard forms of interaction are static. With the passage of time and changes in circumstance, some obligations are rendered more or less demanding. New obligations are recognized and existing ones ignored or disavowed. Often, change occurs precisely because of efforts to interpolate norms from one sphere of life into another—e.g., the introduction of democratic political norms into the workplace or the family.

B. Reconsidering Negligence Law (and Tort Law) as a Law of Obligations

This Article is hardly the place to reconstruct a complex political, social, and legal theory. We hope instead that the foregoing detour

62. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981) (on practices); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983) (on the idea that different “spheres” of social life are governed by different principles of justice).

has offered enough to cause the reader to worry that Calabresi's analysis has failed to capture important dimensions of social life, and in doing so, has failed to come to grips with how law might interact with and influence its contours. Here, we join forces with a chorus of critics who, from within an instrumentalist conception of law as a tool for guiding individual behavior, have pointed out, under the rubric of social norms theory, various inadequacies in a narrow "engineering" conception of how law guides behavior.⁶³ Although our approach differs from theirs in many ways, we share with them the view that an adequate account of regulatory law must appreciate the different ways in which law interacts with social life if it is to identify both opportunities and pitfalls that might exist in connection with a given sort of regulation. The argument of this Part of the Article is that a similar sort of criticism can be leveled against the thin conception of accident law articulated in *The Costs of Accidents*.

For example, within a conception of social interaction of the sort just sketched, torts can be understood in a new light—namely, as an effort to recognize, refine, reinforce, and revise obligations that are instinct in various standard social interactions. Nuisance, for example, defines and enforces the "live and let live" obligations that neighbors owe to one another. Trespass vindicates the rights of property owners to exclude others from their land. Battery describes the obligation owed by all citizens to each other citizen not to beat, wound, or inappropriately touch another intentionally and unjustifiably. Meanwhile, the innominate tort of negligence articulates, across a range of situations, obligations to take care with respect to certain interests of others (usually the interest in bodily integrity). In its guise as malpractice, negligence thus enforces the obligations owed by professionals to their clients and certain third parties. With respect to premises liability claims, it sets out the extent to which a property owner must maintain premises reasonably safe for use by others. Applied to car accidents, it enforces obligations of care owed by users of the roads to avoid injuring others.

On this rendering of tort, judges, in the course of deciding cases, shape and reshape some of the basic obligations that persons owe to

63. E.g., STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* (2004); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); LAWRENCE LESSIG, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). See especially ROBERT D. COOTER, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996), which notes the importance of social norms theory for legal analysis. Cooter explores the implications of social norms theory for debates about the relative advantages of negligence over strict liability and recognizes that it provides a possible basis for re-awakening the common-law idea that courts "discover" law. *Id.* at 1680-81; 1695-96.

various others as they go about their lives. Law is as much education, explication, articulation, and reinforcement as it is command or threat. The point is not that law in this sense is expressive as opposed to functional. Rather, it functions in ways other than by simply changing the payouts of particular activities. Tort law, on this view, is not limited to functioning as a carrot or stick, although it can so function. It does not address the citizen exclusively in his or her capacity as rational maximizer or Holmesian "bad man," although it can do that. In addition, it speaks the language of obligation, helping to settle, as much as possible, what is expected of a person in a range of situations.

In different settings and situations, with respect to different sorts of interactions, individuals conceive of themselves as occupying different sorts of normative space governed by different norms of responsibility that impose different sorts of demands or expectations on them. So long as this is the case—and we think it painfully obvious that it is the case—there will be plenty of room for law that seeks to regulate conduct by articulating obligations; certainly far more room than Calabresi has let on. Once law is viewed as connected in this organic way to obligations already recognized in familiar forms of social interaction, it is far more plausible to suppose that law might accomplish something than if it is set the task of acontextually incentivizing rational actors. Law that carves with the grain, or at the joint, will meet with less resistance, and enjoy greater efficacy. Thus, a legal system that includes a branch of law that seeks to articulate duties of care that persons owe to others, and that already tend to be well-recognized, is likely to promote safe conduct simply by reinforcing norms of safe conduct. For example, by developing a law of medical malpractice that fleshes out in various concrete settings what it is that doctors owe their patients (and certain third parties), tort law likely promotes care in the provision of medicine.

Negligence law, in this conception, might also function to extend or "activate" previously dormant safety norms by identifying forms of conduct to which a norm of care ought to apply but, for one reason or another, has not.⁶⁴ So, for example, the imposition of tort liability on car manufacturers in the late 1960s for failing to include certain basic

64. As Michael Vandenberg notes:

[Norm activation] theory suggests that a norm's influence on behavior is affected by the intensity of the obligation felt by the individual. Two factors are necessary to "activate" the existing norms of individuals: (1) an awareness of the consequences of the individual's act regarding the welfare of others (awareness of consequences is commonly referred to in the literature as "AC"); and (2) an ascription of personal responsibility for causing or preventing those consequences (ascription of responsibility is commonly referred to as "AR"). These two

safety features such as seatbelts and padded dashboards might appeal to a norm of taking precautions on behalf of product users that, for one reason or another, had not yet been applied to passenger cars. The articulation of new duties of care might likewise encourage new forms of safer conduct. Thus, suits today against gun manufacturers are attempting to establish that the manufacturers should be more careful about how their products are distributed downstream in the chain of marketing. If successful, that sort of argument forces the manufacturers to reconceptualize to whom they are responsible, and to take account of a class of persons adversely affected by the business that had not previously been taken into account. (Here we are not taking a position on this litigation, but merely noting the type of argument and why, if a court were to accept such an argument, it might have a deterrent effect on conduct generative of harm.⁶⁵)

Often, the articulation of obligations and threat of sanction can and will be combined to produce the desired regulatory effect. Indeed, that is one of the reasons courts are motivated to link redress with wrongs. As *The Costs of Accidents* suggests, however, there may be common situations in which these two modes of regulation might work at cross-purposes. When that is the case, lawmakers ought to be very attentive—certainly more attentive than was Calabresi in 1970—to the possibility that the pursuit of deterrence by means of sanction-based schemes may actually generate a net loss in deterrence because doing so effectively unravels either a particular locus of responsibility, or erodes more generally norms of responsibility.

One of the core insights of Calabresian analysis is that lawmakers must look beyond the bilateral universe of injurer and victim if they are going to locate the cheapest cost avoider.⁶⁶ Thus, to refer to an earlier example of ours, if it happens to be the case that airline companies are in the best position to prevent car-bicycle collisions, the liability ought to be placed on them. More plausibly, it might be supposed that some other third party, such as traffic engineers, occupy that position. To treat car-bicycle accidents as a cost of air transporta-

factors lead to the activation of a norm, generating a feeling of obligation to comply with the norm and guilt if the norm is violated.

Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 72-73 (2003).

65. We do not mean to suggest that negligence law's obligation of reasonable care—assuming it admits of a singular generic description, which we doubt—is the optimal or exclusive safety norm for governing all instances of accidentally produced harm. No-fault liability, at least in some iterations, might itself be understood as expressing a norm of responsibility.

66. THE COSTS OF ACCIDENTS, *supra* note 1, at 240, 297-99.

tion, or even traffic engineering, is to diminish the sense that driving is a locus of responsibility—an activity that requires vigilance on the part of the driver for the well-being of others around him (the same goes for cycling). More generally, and perhaps more insidiously, to suggest that liability should not to some degree track ordinary notions of responsibility, but should instead exist in a pattern that happens to serve the public interest, might change the meaning of what it means to be held responsible. Actors, one might suppose, will increasingly cease to view themselves as responsible to others because they will cease to conceive of liability to one of those others as a tangible manifestation of the paradigm of being held responsible. Instead, they will think of themselves as responsible in an impoverished sense—"I am responsible when government concludes that it is in the public interest that I be held responsible."

In fairness to Calabresi, it may be that his obliviousness to the efficacy of norms of responsible behavior as a means of deterring accidents was driven in large part by a tacit supposition about what sort of actor was likely to play the role of cheapest cost avoider in any given setting. Rereading the book, one is left with the distinct impression that he supposed that, more often than not, cheapest cost avoider analysis would result in the imposition of liability on entities such as governments and business firms rather than individuals. This attitude is entirely in keeping with Moynihan's observation, noted above, that a rational scheme of accident regulation would seek to change the behavior of a handful of automobile industry executives, rather than millions of drivers. The best solutions to the problems of car accidents were going to be engineering solutions: better-designed cars and roads. And the actors in the best position to identify and implement those solutions were going to be manufacturing companies and government engineers. It makes a bit more sense, on this view, to focus exclusively on sanction-based forms of deterrence. Entities—particularly business firms—unlike individuals, do not inculcate norms of safe conduct in exactly the way that individuals do. As to these entities, at least, the scheme of general deterrence might be supposed superior to a norms-based approach.⁶⁷

Observing this implicit aspect of Calabresi's analysis probably helps make sense of why he was quite comfortable approaching the

67. Cf. Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515 (2004) (discussing the substantial contribution of individual behavior to various forms of pollution, and the need for norms-based regulation, rather than command-and-control regulation, to reduce that contribution).

deterrence question from the narrow perspective that he did. But it does not justify that approach. For one thing, it assumes away the very question it is meant to answer: Who really is the cheapest cost avoider of a given type of accident? If individual actors are prone to heed safety norms, then it might well be that a scheme of liability that reinforces those norms, rather than a scheme of liability that gambles on technology-forcing, will be the more efficient scheme.⁶⁸ It is also not obviously the case that the behavior of individuals, in their capacity as agents for entities, is governed solely by the norm of maximizing the institution's self-interest, such that entities should be assumed to be immune to norm-based regulation. A corporate culture of safety may itself be a desirable byproduct of the operation of negligence law, as it creates additional norms for those in control of corporations to obey.

C. *Concluding Thoughts on Internal Deterrence*

The foregoing account of tort law and internal deterrence is meant to be suggestive rather than systematic. Our goal has been to convince the reader that *The Costs of Accidents* cannot be taken as the final word on the failings of negligence as a scheme of accident deterrence because it never bothers to consider basic and important dimensions of law's interaction with individuals' behavior. How one ought to think about negligence once these dimensions are taken into account is a subject that is beyond the scope of this Article. Instead, we will conclude this portion of our analysis by listing some of the most obvious implications of the foregoing discussion.

First, any adequate analysis of negligence law, or tort law generally, must take into account the fact that, although law does directly affect the types of activities that actors choose to engage in and the manner in which they engage in those activities, activity types and activity performance are influenced by a variety of norms, practices, institutions, and habits that are not themselves law. Indeed, as compared to the role played by formal and informal instruction, habit, convention, and social mores, law itself is probably not the main direct influence on behavior.

Second, the analyst must appreciate that tort law does not write on a blank slate. A fault standard incorporates norms of care that exist outside of law into the law. The more closely linked the defendant's conduct is to an accepted standard of conduct, the more reason the defendant has to believe that she will not be held liable. In

68. *But see generally* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999) (describing the role of social norms in corporate governance).

this way, whatever salience accepted care levels have in terms of social norms is amplified by tort law within a fault system. Thus, if citizens are accustomed to find within the normative acceptability of a certain standard of care a reason and a motivation for heeding it, the effect of tort law that incorporates that standard is to add to this incentive for heeding it, and the disincentive for flouting it. It is also to create a public articulation of this care level as a basis for legitimate expectation for others. At least in some localities, one expects that if one has signaled to turn left at an intersection, and the light is about to turn red, the oncoming traffic is likely to slow down so that one can make the left turn. The thought that it is good, safe driving for the oncoming car to do so plays a role in the expectation or prediction that it is not very likely that the oncoming car will act erratically. Moreover, that expectation is built not so much on confidence that criminal or tort law will make the oncoming driver pay if he flouts that norm, but that the driver understands that to flout the norm would be to engage in unsafe driving, and hence to violate the general social norm that, ordinarily, one is supposed to drive safely.

Third, Calabresi's admiration for the ability of general deterrence to reduce our reliance upon direct regulation should carry over to a comparable appreciation of the fact that law can harness social norms, practices and habits to similar effect. The degree to which informal practices and practices without regulatory bite can obviate the need for regulation will depend, moreover, on how well tort law can amplify these internalized norms.

Fourth, as we have indicated above, respect for law as authoritative can affect citizen conduct, and thus law can directly affect conduct even without threatening or raising the price of activities. Law, in Dale Nance's term, can play a guidance function,⁶⁹ which is not captured by the Austinian idea of a threat⁷⁰ or the Calabresian idea of a liability rule.⁷¹

Fifth, the connection between law and social practices runs in both directions. Of course law, in the ways Calabresi has enumerated and we have supplemented, can directly deter unsafe conduct. But this is only part of the larger give-and-take between norms and law. Law thus not only stands to affect individual choices, but also to influence forms of education, socially constructed informal criteria for ac-

69. See Nance, *supra* note 56, at 909-17.

70. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 602-03 (1957).

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

ceptable behavior, habits, and institutional structures. Ironically, one of Calabresi's great contributions is to point out that a large component of the manner in which tort law tends to influence conduct is dependent on its being funneled through our insurance system.⁷² But the fact that insurance is easier to get our teeth into numerically, and more clearly plays into a sort of business model of conduct selection, should not lead us to overlook the fact that tort law is likewise funneled through a variety of other institutions. Thus, for example, while drunk driving liability affects insurance rates, which in turn affect individuals' choices at many levels, it also affects schools, parents, churches, and driving instructors. That we identify as careless drunk driving, permitting drunk driving, or risking that another over whom one has control will drive drunk also affects our norms of conduct and our attitudes about who can be held responsible for drunk driving, and who should take steps to control for it.

Finally, to return to the immediate subject of this Article, the picture of tort law offered here embraces the idea that the existence and content of tort law make a difference in how people conduct their activities, and which activities they choose to conduct, and therefore make a difference to primary accident cost levels. Yet this picture does not fit comfortably with the metaphor of tort law as an instrument for reducing primary costs. And it does not fit particularly well with the methodological instincts that Calabresi brings to bear in *The Costs of Accidents*. For he is looking instead at the way allocations of costs, and explicit legal rules declaring how costs shall be allocated, affect individual decisionmakers (and aggregates of such decisionmakers) once market effects are properly anticipated. He simply does not inquire into how the law will mesh with aspects of life other than behavior on the model of the rational self-interested agent. Given the sophistication and complexity he sees at that level, and the insights he was able to generate by taking that methodological tack, there is nothing inherently wrong with his having abstracted in this way. On the other hand, evaluative conclusions about the fault system do not follow from the actual analysis he has offered, given that it abstracts away from its setting within a society in which activity levels and choices are a product of many other forces. More particularly, given that there is reason to believe that a large part of the efficacy of many of those other norms depends on their connection with certain kinds of law, and conversely, a large part of the efficacy of the law

72. See Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573 (2005).

depends on its connection with certain kinds of norms and practices, it is premature to evaluate the fault system without moving back from these abstractions. To put it more cleanly, the larger policy question concerning primary cost reduction and the fault system must be how well the package of norms, institutions, and law, of which accident-law-with-a-fault-standard forms one part, serves the goal of primary accident cost reduction. Because he simply omits important possibilities of internal deterrence within his analytic framework, Calabresi's argument that the fault system does poorly on this score, relative to other possibilities, is insufficiently justified. In offering this criticism, we do not further claim, as some have, that the fault system is particularly adept at placing liability on cheapest cost avoiders, or that the system tends to ensure that only efficient primary cost reduction measures are undertaken. We maintain only that Calabresi's conclusion that the fault system is inept at primary cost reduction is unwarranted, because the analysis supporting it is very seriously incomplete.

As we have already noted, these remarks can only suffice to suggest further lines of inquiry and research. They do not come close to offering a fully developed account of what our accident law should look like if it is to best serve the goal of primary accident cost avoidance. Still, as Calabresi would be the first to admit, the same can be said of *The Costs of Accidents*.⁷³ For present purposes, it is enough to note that there is a whole host of issues yet to be examined concerning the potential for desirable and undesirable forms of interaction between law, on the one hand, and social practices and norms of responsibility, on the other.

III. BEYOND JUSTICE AND COST REDUCTION

A. *Fashioning a Framework for Evaluation of Accident Law*

Viewed in the light of accident law scholarship of the 1960s, it is clear that a large part of Calabresi's aim in *The Costs of Accidents* was to show the significance of his theoretical apparatus for the overall evaluation of the fault system within tort law. Early Calabresi articles had ventured into market deterrence;⁷⁴ the question was really whether the inferiority of the fault system from the vantage point of market deterrence was a good argument against the fault system more gener-

73. THE COSTS OF ACCIDENTS, *supra* note 1, at 14-15.

74. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Guido Calabresi, *Views and Overviews*, 1967 U. ILL. L. FORUM 600.

ally. One can see—focusing on the part of the book that remains after his seminal discussion of market deterrence and the fault system—that Calabresi acknowledges that there are several tasks ahead of him before his critique of the fault system is complete. The first is to explore alternative ways that tort law could reduce primary accident costs: Calabresi looks at specific deterrence and mixed systems. We have already argued that this examination was damagingly underinclusive. He next moves to secondary and tertiary costs, and again argues against the fault system. We will leave that point alone (actually, we are quite sympathetic to these arguments). Finally, he arrives at justice, having established roughly the following framework: Unless the fault system serves some goal of comparable importance to cost reduction, then it is unjustifiable. Satisfying justice or fairness, he supposes, is the only goal of comparable importance to cost reduction, for purposes of evaluating accident law. Yet the fault system's claim to be just or fair is extremely weak, he concludes, and hence there is no reason to think that it justifies the fault system. This completes the argument.

Today, years after the publication of *The Costs of Accidents*, Calabresi's dismissal of the justice-based arguments for the fault system continues to be controversial. Calabresi's colleagues and students, like Jules Coleman,⁷⁵ Ernest Weinrib,⁷⁶ Arthur Ripstein,⁷⁷ and Stephen Perry,⁷⁸ have, in a sense, responded to the challenge offered in *The Costs of Accidents*—they have offered sophisticated justifications of tort law as a system of corrective justice. In particular, they have argued, Calabresi's critique of bipolarity from the point of view of justice displays a failure to appreciate the form of justice that is distinctive to tort law; he therefore gives justice short shrift. Their theories are sufficiently well developed and sufficiently tied to the fault system that they raise the question anew of whether Calabresi's criticisms of tort from the point of view of justice are ones that he could sustain today. That is not, however, our question in this Article. Although our own perspective on tort law shares a substantial amount with the corrective justice theorists', we think it valuable to challenge a more basic piece of the critique of the fault system in *The Costs of*

75. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

76. See, e.g., WEINRIB, *supra* note 2.

77. See, e.g., ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999).

78. See, e.g., Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

Accidents: the idea that if not cost reduction, the only value that could justify the fault system would be justice itself.⁷⁹

The first problem with framing the question this way is its assumption that a system's capacity to achieve certain goals is the only basis for evaluating it. Indeed, Calabresi himself equivocates between the suggestion that justice is a goal that we are trying to reach, and the rather different point that justice is, or supplies, constraints that we must stay within.⁸⁰ To illustrate the difference, note that a Marxist egalitarian conception of justice is likelier to make sense as a goal than is a Nozickean rights-based view, which appears much more like a constraint.⁸¹ We are not suggesting that Calabresi needs to work through these problems or distinctions. We are simply suggesting that the process of evaluating a system of law by enumerating relevant evaluative dimensions, and then limiting evaluative dimensions to goals and subgoals, is inadequate, for, as Calabresi recognizes, the choice to depict all the relevant evaluative dimensions as goals that a system does or does not achieve itself carries considerable baggage. Moreover, "constraint" is not the only alternative; "desideratum," "potential advantage," and "potential disadvantage" are also possible categories of evaluative dimension. More importantly, it is not clear that it is necessary or helpful to cram all evaluative considerations into categories or types. Thus, for example, "capacity to be transparent" and "sustainability" might be evaluative considerations, as might "openness to corruption."

Second, the choice to assess the fault system in terms of its capacity to serve certain goals in the area of accidents is also problematic. This is for both a relatively narrow and a relatively broad reason. The narrower reason is that "the fault system" seems to be at once too small and too large; too small because tort law generally would seem to be the more natural body of law to be evaluated, which would require assessments of medical malpractice, fraud, libel, trespass, and nuisance. "Accident law" seems artificial. Moreover, as Calabresi himself notes, accident law is not the same as applied to product-caused accidents, car accidents, and industrial accidents. But the broader reason is a subtler one; it is that certain immensely important values within the legal system—such as the rule-like orientation of the law, and its systematicity—arguably are not goals or desiderata that it would make sense to assign to any single branch of the law. Similarly, one might not expect property law to be expressive of society's most

79. See *THE COSTS OF ACCIDENTS*, *supra* note 1, at 291.

80. *Id.* at 25.

81. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974).

fundamental convictions about the value of human relationships. Certainly that would not be included among the "goals" of property law. But that is not to deny that if property law were reconfigured such that it meshed poorly with other aspects of our law—say, marital law—this might turn out to be a very serious problem. The same is true of accident law. It may well turn out that the most important fact about the structure of accident law is something that relates more broadly to our legal system as a whole, not to accident law taken by itself.

Third, Calabresi similarly oversimplified in referring to negligence law and individual litigation as the "fault system." It is as if the common-law system had a rule that defendants are held liable for injuries they cause only if they are at fault. Of course our system is quite different from this; even within negligence law, "fault" does not very accurately capture what the system looks to, and tort law (including accident law) goes many different places besides negligence.

By calling attention to these unstated questions, we are not trying to argue against the wisdom of Calabresi's undoubtedly self-conscious decision to strike out as he did, by simply and cleanly evaluating the law by goals; selecting cost minimization and justice; defining justice in terms of desert; and evaluating accident law in terms of the fault system compared to various others. Perhaps this was wise. Even if schematic oversimplification carries risks of misleading, obsessive subdivision carries such risks too. But the book is too important to leave in its oversimplified form. We are now in a better position to consider whether Calabresi led himself astray by oversimplifying, and whether he missed or distorted significant dimensions of value by structuring his analysis so that the goal of delivering justice was the only evaluative dimension against which to assess the fault system beyond the goal of accident cost reduction. We ask these questions, and we answer that he was led astray; serious omissions and distortions come from Calabresi's particular way of framing the issues.

The account we will present comes rather naturally in different terms than Calabresi's. In that sense, the criticism of Calabresi's unexamined selections as to framework is important as a way of making room for our more constructive account. The evaluative dimensions we look at involve the capacity of the law to create and reinforce certain kinds of relationships, bonds, and institutional and professional settings. Law supports, and in some cases constitutes, things of value in these domains. A related but quite different dimension of value involves the empowerment of private parties within a state as agents and rightholders with certain standing vis-à-vis the state and vis-à-vis

other agents. These values, on the one hand, are connected to the possibility, enforceability, and flexibility of obligations and rights among parties; on the other, they relate to social virtues of equality and individual accountability and responsiveness. We do not claim these values for accident law as such; we claim them for a system of tort law, of which accident law is a part. And it is not precisely a fault system in tort law that does this, but it is a system based in a particular way on relational wrongs among private parties. Finally, our point is not that this system needs no revision or even that it is basically the right system. Our point is that, although Calabresi's critique is both sharp and brilliant, it ultimately ignores the most subtle, and probably the most important, dimensions of value that any thorough critique of our system of tort law must face. The foregoing dissection of evaluative dimensions is thus meant defensively. We have said enough to dispel the idea that it is our job to fit these evaluative dimensions into his framework.

B. Responsibility and Redress

Tort law in Anglo-American systems is really a marriage of two ideas. One is the idea that the law recognizes duties of individuals to treat each other in various ways, and to refrain from treating others in various ways: One must treat others with reasonable care; one must refrain from injuring others through the failure to use due care; one must not defame others, defraud them, batter them, assault them, or intentionally inflict upon them emotional distress. And so on, for many torts. The common law, and to some extent today, statutes, enjoin citizens to act (or not act in certain ways) toward all persons or toward some subset of persons. In that sense, tort law essentially involves reidentification and reinforcement of norms of conduct applicable to various persons in relation to various other persons.

A second idea central to tort law is that one who has been the victim of a tort is entitled to sue the tortfeasor. Broadly speaking, torts is about victims suing people who have wrongfully injured them. It is not a coincidence that the victim is the one who receives the compensation, nor is it a coincidence that the victim is the one who brings the lawsuit. The empowerment of the victim to take from the tortfeasor is a central feature of tort law. In empowering the victim to act against the tortfeasor, the state is both constituting a power of individuals to act in certain ways and recognizing a right in the victim to act in such ways.

We have elsewhere described this idea as a "principle of civil recourse": the principle that an individual who has been wronged is

entitled to an avenue of recourse against the wrongdoer.⁸² Our point here is not that such a principle is demanded by principles of justice, or even morally sound, but that it is the animating idea behind our system of tort law. Similarly, with regard to the first idea, our point is not that individuals do have a variety of moral obligations to treat others in various ways, but that the law entrenches the notion of obligations to treat others in various ways.

Our account of internal deterrence fits nicely within this framework (although it does not require adoption of this framework). The first point of recognizing relational legal obligations is that the obligees more often than not live up to these obligations, and therefore the individual and social benefits of having the pertinent course of conduct followed are in part owed to the existence of the legal obligations. For example, people drive carefully in part because they are legally obligated to take care not to injure others; physicians live up to demanding standards of care to their patients, in part because they are obligated to do so; businesses refrain from defrauding customers; enemies refrain from punching each other in the nose; newspapers refrain from publishing false gossip, and so on, because there are legal obligations at stake in these situations. This is in part a deterrence claim, of course, but, as Calabresi notes, "deterrence" does not necessarily have a univocal meaning. One may be deterred because one recognizes that a price may have to be paid for one's course of conduct, or one may be deterred because the state commands, with the voice of a sovereign who intends to punish lawbreakers, that the conduct not be engaged in. To repeat our first point, these are not the only possibilities, from a psychological point of view. One may live up to these obligations because one feels obligated to do so, because one has been trained or been socialized to do so, or has become habituated to doing so, because one wishes to please others (e.g., friends, mentors, employers), because one wishes to have a certain reputation, or because one finds it personally gratifying to do so. The form in which these obligations are entrenched as law probably bears on what sorts of motivation to follow the course of conduct citizens have.

But the network of legal obligations that comes with tort law plays a substantial role beyond its place in the incentive structure attached to social norms of care. As indicated above, legal obligations play a role in creating and sustaining loci of responsibility. Again, the point is not that the law alone does all the work; certainly, institutions, tradi-

82. E.g., Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735 (2003).

tions, and a variety of social practices distinct from law are essential to our society's ways of thinking about the obligations of schools to students, of employers to workers, of doctors to patients, or of business associations to customers, to strangers, and to potential investors. It would be unrealistic, however, to ignore that law itself, including tort law, plays a role in sustaining and defining these relationships. Schools, for example, take their role to be quasi-parental in a variety of settings, and the law's imposition of obligations upon them to take care for certain aspects of their students' well-being under certain circumstances is part of the reason they take themselves to be responsible for the students. Similarly for product manufacturers and their consumers, or for doctors and their patients, or for attorneys and underwriters and investors. A range of moral obligations may exist, in some quasi-articulate form, prior to the legal recognition of an obligation, and may be part of the reason for the recognition of such an obligation—or, as in the case of *Tarasoff*⁸³ and its progeny, tort law may lead the way. But whatever the order, the two levels (and, perhaps, a moral/social/legal spectrum in between) are mutually supportive. Through the law, and in the law, a locus of responsibility is crystallized into a public reality. This public reality becomes a basis for reliance on others, for trust, and for education of those who step into the scenario.

More generally, the common law of torts, as Holmes, Cardozo, and Posner have each maintained in different ways, supplies a web of obligations among private parties that complements an individualistic society in a remarkably flexible way. The values of civil bonds, respect, reliance, predictability, and liberty are fostered by a pattern of norms that generate obligations among private parties, including obligation-generating norms that flow from tort law.

Are these large claims about the contribution of tort law to our network of relationships, institutions, and structures of obligation in society plausible? Wouldn't drivers continue to teach careful driving to future drivers, continue to drive carefully, and continue to criticize careless drivers, even without tort liability? Similarly, wouldn't doctors teach standards of care to one another without medical malpractice liability, or without the tort-mediated conception of the physician's responsibilities to her patients? Don't other societies with no (or virtually no) private tort liability system demonstrate that the fault system does not play such a substantial role after all? Would these networks

83. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (imposing a duty of reasonable care upon psychotherapists to warn third parties threatened by their patients).

of obligation and loci of responsibility really disintegrate with the rejection of the fault system in torts?

These challenges point to the difficulty of identifying the contribution made by the structure of tort law to our overall system of obligations, responsibility, and social networks. That is far from undermining the claim that tort law does play a substantial role. It is true that significant changes in tort liability—for example, the move to workers' compensation and its nearly strict liability system—have occurred and have not undermined our notions of responsibility. But we would argue that such changes, including workers' compensation, constitute innovation within the fabric of our notions of obligation and responsibility, and are not alien to it. A remarkable feature of tort law, one certainly appreciated by Calabresi and other leading common-law judges, is that it can easily absorb substantial change within its structure. That is quite different from an abandonment of the structure altogether.

As for the claim that some societies are able to sustain networks of obligation without any private tort liability system at all: it is true but again potentially misleading, for three reasons. First, and most obviously, modern industrialized societies such as our own overwhelmingly have such a system, or similar systems; those that lack such a system are quite different from ours in numerous *prima facie*, relevant ways.⁸⁴ Second, the archetypes that common-law jurisdictions and the Western European law of private liability have created in corporate, professional, and governmental domains have an enormous shadow, thus throwing into question to what extent similar social frameworks can exist without fault liability systems (i.e., are they free riders?). Third, and most importantly, other sorts of institutions, such as religion, extensive political bureaucracy, and aristocracy may absorb a larger role in defining obligations and loci of responsibility. It is naïve to suppose that the sustaining and coordinating role of the law simply disappears when tort law is not there; our question would be the possibility of these alternate institutional structures for a society like our own, and the comparative advantages and disadvantages of, for example, a larger role for religious institutions and political bureaucracy.

What we have argued above is that reduction in accident costs and justice are not the only two evaluative dimensions along which to measure the value of the fault system. Tort law as we know it, including the fault system, plays a large role in constructing and sustaining obligations and responsibilities owed among persons and other enti-

84. See UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 223-56 (1997).

ties in our social world. While it is not precise to describe the construction and sustaining of such notions as a goal of tort law or even as a constraint on it, this imprecision points more to the poverty of Calabresi's vocabulary for categorizing dimensions of value than it does to the significance of this value. In answer to the broader, and still important question about the fault system, "What good is it?", "It plays a major role in sustaining forms of responsibility and obligation," is a responsive reply.

A similarly broad analysis applies to the idea of civil recourse. Is this just a fancy way of referring to compensation, to a day-in-court ideal, or to vengeance? We think not. A notion of recourse or redress is complementary to the notion of responsibility in several important respects. First, if obligations and responsibilities provide a sort of social "glue," bonding citizens to one another and permitting mutual reliance, the idea of civil redress does the opposite. It permits individuals to be independent in two critical ways. It permits private individuals to be independent of other private individuals' assertions of power and will over them, because it empowers them to respond when they have been wronged, injured, or unjustifiably disappointed. It also permits individuals to be, to some extent, independent of the government. Although the existence of a private right of action relies upon the state's willingness to play its role, the state is not in the driver's seat. The individual need not wait around until the state decides to intervene. A right of action means a right to use the courts to proceed against a private party for a remedy. It is, in significant part, a power to redress a wrong done to one.

By the same token the legal right to redress plays a major role in equalizing power. All have a right to seek redress for a wrong done to them. Similarly, insofar as the right to recourse provides a disincentive for wronging someone, it provides protection to potential victims of wrongs (or, in the case of accident law as opposed to tort more broadly, victims of careless injuries). Moreover, the protection it provides is equal among potential victims.

Third, and related to the comments about independence, a system of private redress for wrongs disperses power to hold individuals accountable, and this dispersion of power has social benefits, as Posner and others have recognized.⁸⁵ For one thing, it reduces the role that government must take. Whether this is a diminution in tertiary costs is debatable; our point is that there may be social and political benefits to reducing the reliance upon government. As political

85. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 529-30 (6th ed. 2003).

thinkers from Blackstone to Nader have recognized, there are also political benefits to the existence of separate repositories of power for holding tortfeasors accountable.

Again, our points about redress, like those about responsibility, are not meant to suggest that Calabresi reaches the wrong answer in his analysis. They are meant to highlight the inadequacy of the framework for analysis: its failure to look at the depth of the fault system, and its failure to consider the evaluative dimensions along which to appraise the fault system.

CONCLUSION

We have called attention to two sorts of considerations simply ignored by Calabresi in *The Costs of Accidents*: the capacity of negligence law to reduce accident costs by reinforcing social norms of safe conduct, and the contribution to society negligence law, and tort law more generally, makes by helping to constrict and maintain domains of responsibility among individuals, entities, and institutions, which in turn supply important values on several dimensions. In short, Calabresi's treatment of "accident law" is woefully incomplete because it entirely overlooks customs of care, obligations, and responsibility. Yet, how could this be, when duties of ordinary care and responsibility are right there, on the face of negligence law? Put this way, the oversight of the leading critique of the fault system by an unparalleled legal thinker is quite startling.

With the benefit of hindsight, this otherwise astonishing failure is not hard to explain. Tort law sets out legal duties of care owed to others that, although not captive to conventional mores, tend to track them. It is also a law of redress, granting private citizens a limited power to set things right between themselves and others who have acted badly toward them. To a generation of reformers who were justifiably focused on the downsides of established ways of doing things—stultification, complacency, intolerance, conformism, exclusion, and discrimination—and who were correspondingly keen to imagine and implement new ideals, tort law was destined to be an object of suspicion and derision, and hence an obvious candidate for reform or elimination. For many, the 1960s were a time for personal experimentation and the pursuit of strongly egalitarian notions of social and political justice. In such a climate, there was little reason to find value in a part of the law so intently focused on what must have seemed to be hidebound notions of obligation and duty. Since that time, social and political conservatives have seized on the inattentiveness of liberal egalitarians to notions of responsibility and private right as a ground

for rejecting liberal politics altogether. We accept the premise of the conservatives' critique, but not its conclusion. The dissociation in the 1960s and 70s of egalitarian liberalism from notions of responsibility and redress, though understandable, was hardly inevitable. Nor is it a necessary feature of egalitarian liberal thought. Rather, it was a historical contingency; an avoidable and, in retrospect, costly accident of the Great Society. Liberal egalitarians can embrace a law of responsibilities and redress without sacrificing their commitment to reform and social and political justice. That, at least, is our supposition. Certainly nothing in *The Costs of Accidents* gives us reason to suppose otherwise.

If the Great Society thinkers' impatience with the status quo may have preempted a full and fair evaluation of negligence law, it nonetheless generated a monumental drive for the improvement of our society through intelligent creativity. *The Costs of Accidents* remains an unparalleled achievement of that intelligence. As Calabresi has repeatedly demonstrated over the past thirty-five years through his judging, his teaching, and his writing, this extraordinary passion for thoughtful reform is as unusual, as welcome, and as necessary to the growth and improvement of law as is a full appreciation of what the law we have actually does, and how it does it.