

# Calabresi's *The Costs of Accidents*: a Generation of Impact on Law and Scholarship

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## Symposium

### CALABRESI'S *THE COSTS OF ACCIDENTS*: A GENERATION OF IMPACT ON LAW AND SCHOLARSHIP

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#### FOREWORD

In 1965, Guido Calabresi, then a young Yale Law School Professor, was on sabbatical in Italy writing a draft of what would become his book, *The Costs of Accidents*.<sup>1</sup> While in Europe, he was invited to the Max-Planck-Institut für Ausländisches und Internationales Privatrecht in Hamburg to talk about his work with law and economics. Professor Calabresi delivered the lecture, and at its conclusion, the Direktor of the Institut, Professor Dr. Konrad Zweigert, said, "Very interesting. Very interesting indeed." He continued, "But you must understand. This is not law. And this is not legal scholarship." Whereupon the young American professor replied, "It may not be now. But it will be soon."<sup>2</sup>

On April 23 and 24, 2004, a distinguished group of judges and professors assembled at the University of Maryland School of Law to assess whether developments in legal scholarship and in the law have confirmed Calabresi's prediction.<sup>3</sup> How has publication of *The Costs*

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

2. The account of the conversation between Professor Guido Calabresi and Professor Dr. Konrad Zweigert is taken from my telephone conversation with Judge Calabresi on April 8, 2004.

3. The Symposium, *Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship*, was jointly sponsored by the University of Maryland School of Law and the *Maryland Law Review*. We express our thanks to Judge Guido Calabresi, not only for his

of *Accidents* contributed to the emergence and maturing of the discipline known as law and economics? How have the perspectives of scholars and judges in viewing tort law been affected by the famous “Calabresian lens”?

This issue of the *Maryland Law Review* publishes the papers presented at the Symposium, *Calabresi’s The Costs of Accidents: A Generation of Impact on Law and Scholarship*. The papers, presented as portions of loosely related panels, were disparate ones. As Professor Anita Bernstein remarked at the Symposium, “This book is a great signifier. It’s a book that you can hand to two dozen people and say, ‘Tell me what it says or what you think about it,’ and get a huge variety of answers or insights.” Yet major themes emerged during the Symposium that cut across the various panels. In this Foreword, I consider some of these major themes.

The first theme is that law and economics is a broadly defined field of scholarly inquiry that encompasses many different perspectives; the differences among scholars in the field may be at least as important as any shared common tenets. Professor Keith N. Hylton, in his intellectual history of the development of law and economics, divides the field using three sets of contrasting criteria: positive versus normative, positivist versus anti-positivist, and belief in the strong form of rationality contrasted with the weak form of rationality.<sup>4</sup> He finds Calabresi’s contributions in *The Costs of Accidents* to be “clearly” normative,<sup>5</sup> as contrasted with Posner’s scholarship that “rejected the reform efforts of Calabresi . . . [and] defended the law as it is.”<sup>6</sup> Hylton laments, however, the predominance of normative analysis in contemporary law and economics scholarship without greater efforts to apply law and economics to understand the existing common law. He also contrasts Calabresi’s approach of weak rationality, in which actors

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vigorous participation in the two-day Symposium, but also for his assistance in planning it. We also want to express our appreciation to Dean Karen H. Rothenberg for her sponsorship and support of the Symposium; to Associate Dean Richard Boldt for the key role he played in conceiving of the Symposium and making it a reality; and to Professor Emeritus Oscar S. Gray for all his contributions. Richard Boldt, along with University of Maryland School of Law Professors Richard A. Booth, David Hyman (now at the University of Illinois), Jana B. Singer, and Marley Weiss superbly moderated the panels at the Symposium. LuAnn Marshall, Nancy Zibron, Mary Jo Rodney, John Style, and Dave Fagan provided the administrative support that made the Symposium run smoothly. Finally, the Symposium was made possible by generous financial support from Morton P. Fisher, Jr.; Foundation Press; The Pearl, Lawrence I., and Lloyd M. Gerber Memorial Lecture Fund; and Richard J. Himelfarb.

4. Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 MD. L. REV. 85 (2005).

5. *Id.* at 91.

6. *Id.* at 90.

generally act in rational ways, but with consistent deviations, with the strong rationality version of Judge Richard A. Posner and others identified with the Chicago School.

The differences between the law and economics of Posner and of Calabresi are evident in each of their own articles. Shortly after the publication of *The Costs of Accidents*, the book was reviewed critically by Posner, another of the founders of the law and economics movement.<sup>7</sup> As the opening speaker for the Symposium, Posner acknowledged that by creating “an analytical framework that others could use to formulate and advocate practical legal improvements,” *The Costs of Accidents* made “a classic contribution to legal thought,”<sup>8</sup> but he indicated that he was “inclined to stand by [his earlier] criticisms.”<sup>9</sup> Posner defends the fault system and claims that the limited research available supports his view that the existing system yields a variety of benefits, including deterring harmful conduct, decentralizing the goal of preventing accidents, and minimizing the bureaucratic administration of accident prevention. In response, Calabresi concludes that although using economic analysis to criticize, explain, and justify existing legal rules is appropriate, the discipline of law and the discipline of economics, as they interact with each other, are also capable of creating a synergistic cycle of refinement and reform.<sup>10</sup>

Adam Benforado and Professor Jon Hanson analyze Calabresi’s and Posner’s very different views of law and economics using concepts borrowed from social psychology.<sup>11</sup> They view Posner as representative of the “relative” dispositionist whose analysis proceeds from the belief that “[t]he individual is presumed to be an independent, choice-making agent whose acts both satisfy and reveal a set of underlying preferences.”<sup>12</sup> In contrast, according to Benforado and Hanson, “Calabresi stands as a relative situationist in a particularly dispositionist school of thought”;<sup>13</sup> he “has the instincts of a social psychologist,”<sup>14</sup> and differs from those who would “ignore the more significant role played by situational forces—unseen or underappreciated features in our environment and in our interiors.”<sup>15</sup>

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7. Richard A. Posner, Book Review, 37 U. CHI. L. REV. 636 (1970).

8. Richard A. Posner, *Guido Calabresi’s The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 23 (2005).

9. *Id.* at 12.

10. Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736 (2005).

11. Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics*, 64 MD. L. REV. 24 (2005).

12. *Id.* at 34.

13. *Id.* at 30.

14. *Id.* at 59.

15. *Id.* at 29.

Benforado and Hanson suggest that both Calabresi's and Posner's intellectual development were influenced greatly by their differing reactions to changing intellectual trends emerging during the 1960s: Calabresi seems to have embraced "the general push toward situationism," while Posner was one of a number of scholars that "lashed back in an attempt to legitimate the systems that were being upended by situationist thinking."<sup>16</sup>

In her paper considering the disparate strands of law and economics theory, Professor Bernstein goes so far as to suggest that "law and economics [has] lost its distinctive characteristics" that have served as a "basis for dividing the legal academy into members and nonmembers."<sup>17</sup> According to Bernstein, many of the tenets once held by law and economics, including "rational choice, utilitarianism, efficiency, wealth maximization, markets, predictive power, and coherence have been questioned, abandoned, or smudged beyond recognition."<sup>18</sup> The widespread acceptance of other notions often previously identified with law and economics, such as "an explicit desire to make policy, an apparent taste for better-offness in a Kaldor-Hicks sense, and an affinity for ex ante perspectives on the law" have "triumphed" and have been so pervasively absorbed into legal thought that they are no longer defining characteristics.<sup>19</sup> Nothing may be left of law and economics as a separate discipline, charges Bernstein, other than "a faculty club."<sup>20</sup>

The second theme that emerged throughout the Symposium was the need for a greater commitment to empirical research to determine how legal rules and legal institutions affect the behavior of parties in the real world. Despite their considerable differences, both Judge Posner and Judge Calabresi call for such research. Posner takes issue with Calabresi's critical analysis of the traditional tort system because it was based on a priori reasoning, and "involved no inquiry into the actual operation of the fault system."<sup>21</sup> Calabresi, while standing by his critique of the fault system, acknowledges that in *The Costs of Accidents* he dismissed the fault system "immediately, and almost intuitively,"<sup>22</sup> and that the issue of which accident compensation system

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16. *Id.* at 65.

17. Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 332 (2005).

18. *Id.* at 324.

19. *Id.* at 328.

20. *Id.* at 308.

21. Posner, *supra* note 8, at 18.

22. Calabresi, *supra* note 10, at 748.

can best reduce the sum of the costs of accidents and accident prevention is an empirical question.<sup>23</sup>

While Calabresi and Posner both address the benefits of empirical research, Professor Robert L. Rabin laments what he calls the “critical intellectual vacuum . . . in the empirical realm” that remains a generation after the publication of *The Costs of Accidents*.<sup>24</sup> Rabin surveys the failure of both legislatures and courts to advance significantly “the renaissance” of experimentation with accident plans that Calabresi anticipated at the time of the book’s publication. This failure to adopt innovative alternative plans, according to Rabin, has resulted from concerns about horizontal equity that are inherent in legislatively carving out a narrow subcategory of injuries for specialized treatment within a no-fault system, from the pragmatic realities of legislative politics, and from the unwillingness of courts to venture into areas where they perceive that they lack institutional competence compared with the legislative branch.

While acknowledging the need for greater empirical study, Judge Calabresi also defends the continued use of theoretical model-building in his concluding article.<sup>25</sup> He suggests that model-making identifies what “boxes” might exist, and then the question becomes whether these theoretically derived boxes are “full” or “empty” in the real world. The advantage of model-making, according to Calabresi, is that the model may cause the scholar to look for something that his canonical viewpoint would otherwise cause him to miss. In one of the highlights of this Symposium issue, Professor Frank I. Michelman reopens a debate—dormant for more than thirty years—between Calabresi and himself on the topic of liability and property rules and, in doing so, illustrates the benefits of model-building in legal analysis.<sup>26</sup> In his original review of *The Costs of Accidents*, Michelman, as a scholar of property law, applied concepts from the book to create a right/remedy typology for private nuisance.<sup>27</sup> By separating “liability” entitlements from “property” entitlements, he identified three possible outcomes of a plaintiff’s action seeking relief from a private nuisance caused by a polluter: dismissal of the plaintiff’s action, an injunction, and damages without injunctive relief (which Michelman, in the instant article, clarifies to be “pay-as-you-go”—or temporary—dam-

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23. *Id.* at 749.

24. Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 733 (2005).

25. Calabresi, *supra* note 10, at 752-53.

26. Frank I. Michelman, “*There Have to Be Four*”, 64 MD. L. REV. 136 (2005).

27. Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs*, 80 YALE L.J. 647 (1971) (book review).

ages<sup>28</sup>). Subsequent to Michelman's original review, in the famous *Cathedral* article, Calabresi and Douglas Melamed identified a fourth possibility: the possibility of a purchased injunction<sup>29</sup> (which Michelman here re-categorizes as a "compensated restrictive real covenant"<sup>30</sup>). In his article in this issue, Michelman identifies two additional remedial outcomes. First, the compensated restrictive real covenant—previously recognized only as a single possibility—can be subdivided into either compensated restrictive real covenants *specifically enforceable* or compensated restrictive real covenants *enforceable only by damages for breach*.<sup>31</sup> Second, the plaintiff's remedy for damages, again recognized in the past as a single option, in fact consists of two separate remedial outcomes: (1) "pay-as-you-go" (temporary damages), and (2) permanent damages (Michelman describes the latter as a "lump-sum" compensated easement).<sup>32</sup> Michelman now claims that, just as Calabresi and Melamed had raised the bid to four in their 1972 article, he has now upped the bid to six remedial entitlements. The significance of this is that Michelman recognizes the limitations of the Hohfeldian "duple analysis"<sup>33</sup> that had structured the dialogue in the past between Calabresi and Melamed, on one hand, and Michelman himself, on the other hand. The criterion of remedial outcome joins the criteria of the liability decision (which looks backward) and the entitlement decision (which looks forward) to generate the additional possible outcomes. Michelman's analysis thus exposes the profound difference between Hohfeldian analysis and the analysis of Calabresi and Melamed: "From *The Cathedral* we view law, not in its aspect of a field of struggle for life, but rather in its aspect of a forum of public-minded, policy-analytic intelligence."<sup>34</sup> In this statement, Michelman captures the essential difference between the tort law of generations prior to *The Costs of Accidents* and tort law as conceptualized by Calabresi and many others in our own time.

A third major theme of the Symposium, illustrated by a number of panelists, was that something is lost if tort law, and the law more generally, are viewed solely—or even predominantly—through an instrumental lens. Professor Jules Coleman's article clearly articulates

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28. Michelman, *supra* note 26, at 155 tbl.F.

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

30. Michelman, *supra* note 26, at 147 tbl.C.

31. *Id.*

32. *Id.* at 155 tbl.F.

33. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

34. Michelman, *supra* note 26, at 157 (footnote omitted).

the differences between a predominantly instrumental approach to tort law, such as Calabresi's, and a corrective justice perspective.<sup>35</sup> Coleman sees the conceptual argument of *The Costs of Accidents* as moving tort law analysis away from addressing an "accident"—an unfortunate event between two parties—and transforming it instead into an analysis of "accidents"—a social and economic problem. What is lost when tort law becomes a technology to solve a social problem, according to Coleman, is "the rich moral character of tort law," which "is a way of expressing the nature of responsible agency to one another in our legal practices."<sup>36</sup> In a similar vein, the article of Professors John C.P. Goldberg and Benjamin C. Zipursky defends the common-law tort system and its focus on obligation and redress against the instrumental critiques of Calabresi and others.<sup>37</sup> Goldberg and Zipursky argue that the common law fulfills a number of goals other than the reduction of the costs of accidents, including elaborating and enforcing norms of conduct and dispersing power within the political system to enable individuals to demand accountability. The set of articles from the panel on *The Costs of Accidents and Reform* concludes with the article of Justice Izhak Englard,<sup>38</sup> who, in a 1980 article, criticized the publication of *The Costs of Accidents* for ignoring what he called the complex psychological factors supporting corrective justice goals of the tort system, including retribution and retaliation.<sup>39</sup> In his article in this Symposium issue, Englard argues that the "legal Cathedral" remains an inherently pluralistic one, in which judges in a single mental process simultaneously consider goals of compensation and retribution, as well as distribution and allocation.<sup>40</sup> This pluralism of aims and methods in the judicial process, concludes Englard, is a "reality, like human life."<sup>41</sup>

Similarly, the three articles presented as a part of the panel on *Justice and the Role of Economic Theory* consider how economic-based standards may inadequately serve the interests of justice. Professor Gregory C. Keating considers the "tragic conflict" between the pricelessness of human life and the necessity of acknowledging that some

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35. Jules Coleman, *The Costs of The Costs of Accidents*, 64 MD. L. REV. 337 (2005).

36. *Id.* at 353.

37. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005).

38. Izhak Englard, *The Costs of Accidents: A Retrospect View from the Cathedral*, 64 MD. L. REV. 355 (2005).

39. Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 33-36 (1980).

40. Englard, *supra* note 38, at 361.

41. *Id.*

accidents are not worth preventing.<sup>42</sup> He concludes that although such trade-offs are inevitable, they need not be made on the basis of market-based or cost-benefit criteria, but can be based on other standards. As he notes, regulatory approaches often use an alternative criterion such as reducing risks to the extent feasible or to the point where the activity is deemed “safe.” Ultimately, Keating concludes that we may be expecting too much of “fair norms of accident law.”<sup>43</sup> Regardless of the standard that society chooses to determine the tradeoffs between the costs of accidents and the costs of accident prevention, the accident compensation system still must operate against society’s “allocation of basic rights and [a] distribution of wealth, income, and property”<sup>44</sup> that constitutes “background justice.”<sup>45</sup> Professor Ugo Mattei argues that the early Calabresian version of law and economics, aided by the political agenda of Reagan-Thatcher economics and globalization, established “hegemony” of American legal scholarship worldwide.<sup>46</sup> The later adoption by the law and economics movement of an extreme ideology of individualization and property rights, argues Mattei, has led to a decline of the worldwide impact of law and economics scholarship specifically and American legal scholarship more generally. Mattei asserts, “When an approach to the law loses its critical strengths and merely legitimizes a status quo, it betrays the function that in Western law has always granted prestige to academic thinking: a strong independent check on the political process.”<sup>47</sup> Hanoch Sheinman explores Calabresi’s two goals of accident law, justice and cost reduction.<sup>48</sup> He argues that both justice and welfare are independently valuable goals of accident law and challenges the claim, attributed to Ronald Dworkin, that “welfare is not a distinct, intrinsically normative value, and in any event . . . its value depends on justice in a way that renders conflicts [between the two goals] impossible.”<sup>49</sup>

In his paper, Judge Calabresi notes that one of the contributions of *The Costs of Accidents* was to “bring back” deterrence as a goal of tort

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42. Gregory C. Keating, *Pricelessness and Life: An Essay for Guido Calabresi*, 64 MD. L. REV. 159, 159 (2005).

43. *Id.* at 217.

44. *Id.*

45. *Id.* at 216 (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT §§ 14-15, at 50-55 (Erin Kelly ed., 2001)).

46. Ugo Mattei, *The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi*, 64 MD. L. REV. 220 (2005).

47. *Id.* at 248.

48. Hanoch Sheinman, *Are Tradeoffs Between Justice and Welfare Possible? Calabresi and Dworkin on the Normative Foundations of Law and Economics*, 64 MD. L. REV. 250 (2005).

49. *Id.* at 285.

law, but to look at it from a structural point of view rather than from an individual point of view.<sup>50</sup> A number of papers presented in this issue use the analytical framework of *The Costs of Accidents* to analyze the deterrent function of tort law in a variety of contexts. In their article, Professors Francesco Parisi and Vincy Fon consider the alternative of distributing the costs of an accident on the basis of the parties' relative causal contributions, either in the absence of other liability rules or in conjunction with negligence rules.<sup>51</sup> Parisi and Fon conclude that causal contribution rules, in conjunction with negligence rules, may induce both parties to moderate their activities leading to harm, a combination of incentives that they claim is produced by no existing liability regime.

Professor Michael L. Rustad begins the Symposium panel on punitive damages by arguing that a series of Supreme Court decisions since 1991, eagerly pursued by corporate America, "threatens the well-established functions of punitive damages developed over two centuries of Anglo-American jurisprudence."<sup>52</sup> He argues that by focusing solely on the "microanalysis of individual retributive justice," the Supreme Court misses the opportunity to examine "the macrosociological functions of punitive damages" such as those suggested by Calabresi's argument that deterrence should be viewed from a structural—rather than from an individual—perspective.<sup>53</sup> Professor Anthony J. Sebok argues that even if we accept the characterization of at least some punitive damages by Judge Calabresi in *Ciraolo v. City of New York*<sup>54</sup> as "socially compensatory" damages—reflecting harm to victims other than the plaintiff before the court—or perhaps view them in other cases as a penalty functioning as a part of a system that Calabresi would refer to as specific deterrence, similar to fines, these damages still are subject to the constraints imposed by the Due Process Clause.<sup>55</sup> Judge Calabresi's notion that deterrence should be seen as a structural goal, and not just from the point of view of an individual wrongdoer, is also reflected in Professor Catherine M. Sharkey's paper analyzing the historically frequent blanket prohibi-

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50. Calabresi, *supra* note 10, at 744.

51. Francesco Parisi & Vincy Fon, *Causation and Responsibility: The Compensation Principle from Grotius to Calabresi*, 64 MD. L. REV. 108 (2005).

52. Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 540 (2005).

53. *Id.* at 518.

54. 216 F.3d 236 (2d Cir. 2000).

55. Anthony J. Sebok, *Deterrence or Disgorgement? Reading Ciraolo After Campbell*, 64 MD. L. REV. 541 (2005).

tion against insurance for punitive damages.<sup>56</sup> Sharkey argues that the expanded role of punitive damages in recent decades, including serving as socially compensatory damages, is another way in which the legal system attempts to compensate harms and penalize injurers on a societal scale. Once these new roles of punitive damages are understood, argues Sharkey, blanket prohibitions against the insurability of punitive damages are no longer justifiable and should be replaced by a test based upon whether the conduct causing the harm was intentional or accidental.

Professor Kenneth S. Abraham's article explores the critical role of liability insurance in achieving deterrence from a structural point of view.<sup>57</sup> He traces the relationship between insurance and accident prevention from the mid-nineteenth century to the current time. Abraham chronicles how liability insurance initially was regarded as legitimate because it provided a source of available funds to compensate the injured victim. By the mid-twentieth century, however, academic commentators and courts alike recognized a second function of liability insurance: loss spreading. According to Abraham, Calabresi was among the first to analyze how the setting of insurance premiums contributed to accident prevention. Abraham argues that in the arena of mass products, liability insurance premiums are likely to be more proportional to the degree of risk than in other, more sporadic, accident contexts, and, therefore, the argument that liability insurance premiums will mitigate accident prevention incentives is weaker in the mass products context. My own paper uses an analysis suggested by *The Costs of Accidents* to question whether liability damage judgments achieve their deterrence goals, either from a structural perspective or from the perspective of an individual defendant, in the specific context of the manufacture and distribution of mass products, such as cigarettes, asbestos products, and lead pigment, that are fungible, or nearly so, and cause latent diseases decades after their production.<sup>58</sup>

Judge Guido Calabresi has the last word in this Symposium issue. In his introduction of Calabresi, Professor Oscar S. Gray remembers their common teacher, Professor Fleming James, Jr., whose teaching focused on how society manages the costs of accidents.<sup>59</sup> Judge Cala-

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56. Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409 (2005).

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

58. Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613 (2005).

59. Oscar S. Gray, *Introduction of Guido Calabresi*, 64 MD. L. REV. 734 (2005).

bresi then reflects back as a mature judge and scholar on *The Costs of Accidents*, which he describes as “a young book.”<sup>60</sup> He acknowledges several weaknesses in the book, including some of the issues raised by other papers in this Symposium issue. For example, he acknowledges that his treatment of the role of justice was inadequate,<sup>61</sup> and that there was no discussion of “shaping tastes” or “formulating values” as a goal of law.<sup>62</sup> Calabresi notes, however, that *The Costs of Accidents* was the first attempt to analyze the multiple functions of tort law—loss minimization, distributional equity, achieving the optimal degree of loss spreading, and minimizing administrative costs—in relation to each other.<sup>63</sup>

Calabresi acknowledges that the fault system as it operates today, with comparative responsibility, is a very different system than the generally all-or-nothing regime that he criticized in *The Costs of Accidents*. He asserts that the continuing vitality within tort law of a link between a particular victim and a particular injurer may have less to do with the values described by Coleman, and Goldberg and Zipursky, than with the political power of trial lawyers who “have been able to maintain [the system] to *their* distributional advantage.”<sup>64</sup>

Calabresi also hints at the future direction of his own thinking about accident law: “the relationship of accident law and fault to our generalized system of free enterprise.”<sup>65</sup> He suggests that entrepreneurs function in a free market system that parallels a strict liability system, not a fault-based environment. When a business fails, Calabresi notes, society does not relieve the entrepreneur of the consequences even if her initial analysis of the costs and benefits of her products or services was reasonable.

Calabresi concludes that *The Costs of Accidents* was a “pretty good book”<sup>66</sup> that attempted to use what we know as lawyers and institutionalists to push forward economic theory and then to apply this more sophisticated economic theory to the law of accidents. It is my hope that this Symposium issue, Calabresi’s *The Costs of Accidents: A Generation of Impact on Law and Scholarship*, in some small way, moves forward the dialectic described by Calabresi about the ideas expounded in his “pretty good book.”

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60. Calabresi, *supra* note 10, at 738.

61. *Id.* at 745.

62. *Id.* at 747.

63. *Id.* at 742-43.

64. *Id.* at 751.

65. *Id.* at 750.

66. *Id.* at 738.