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## GUIDO CALABRESI'S *THE COSTS OF ACCIDENTS*: A REASSESSMENT

RICHARD A. POSNER\*

It is a strange sensation to reread a paper that one wrote more than thirty years ago and has not looked at since. In 1970 I wrote a review of Guido Calabresi's new book, published that year, *The Costs of Accidents: A Legal and Economic Analysis*,<sup>1</sup> that began: "Torts is not my field. But in one sense neither is it Guido Calabresi's . . . ."<sup>2</sup> The review was critical—a harbinger of deep differences between us (though not of any personal antipathy or lack of mutual respect) concerning the proper way to apply economics to torts, and indeed to law in general<sup>3</sup>—and rereading it after all these years I am inclined to stand by my criticisms. But despite the critical cast of the review, I didn't fail to remark the significance of Calabresi's contribution to legal theory. I said that the book was

an ambitious effort to employ a social science perspective (. . . that of economics) in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists, on which to rely. In its bold break with conventional legal analysis of tort questions, Calabresi's work may be a portent of the future direction of legal scholarship in fields that, unlike antitrust, remain bastions of the traditional [i.e., doctrinal] approach.<sup>4</sup>

Only now we know that instead of saying "may be a portent" I should have said "is a portent."

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

2. Richard A. Posner, Book Review, 37 U. CHI. L. REV. 636, 636 (1970) [hereinafter *Book Review*].

3. See James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275, 316–21 (1997). On the current state of academic thinking about negligence law, see the articles in Symposium, *The New Negligence*, 91 GEO. L.J. 511 (2003).

4. Posner, *Book Review*, *supra* note 2, at 638.

The series of articles that Calabresi had published in the 1960s, beginning with *Some Thoughts on Risk Distribution and the Law of Torts*,<sup>5</sup> which was published the same year as Ronald Coase's article on social cost,<sup>6</sup> were landmarks in the emergence of a distinct interdisciplinary field of economic analysis of law, or, as it is more commonly known, "law and economics." Before Calabresi's articles (and Coase's article) appeared, the only relevant *economic* question about accidents and dangerous behavior was thought to be, "What is the best legal regime for compensating accident victims?" Coase and Calabresi pointed out that the law could affect the behavior of potential tortfeasors and tort victims—could have, in short, an allocative rather than merely a distributive effect.<sup>7</sup>

It is remarkable how late in the history of legal thought this insight emerged. Bentham and Holmes, who had so clear a grasp of the deterrent, that is, the allocative effect of criminal punishment, failed to see, or at least to remark, that civil sanctions might also have a deterrent effect. Holmes did say in *The Common Law*,<sup>8</sup> discussing the reasonable-man rule, that the "neighbors" (that is, the community) of the man who "is born hasty and awkward, [who] is always having accidents and hurting himself or his neighbors, . . . require him, at his proper peril, to come up to their standard."<sup>9</sup> But "require" is used here in a special sense, since what Holmes is really pointing to is a pocket of strict liability in negligence: The person who because of below-average capacity to take care is not deterrable by threat of liability is nevertheless deemed "negligent," and held liable, if one of those accidents that he can't avoid occurs.

Calabresi's early articles alone would be enough to confirm his position as one of the principal founders of economic analysis of law,

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5. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter *Risk Distribution*].

6. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Despite the date printed on the issue in which Coase's article appeared, the issue was not in fact published until 1961, and Calabresi was unaware of Coase's article when he wrote *Some Thoughts on Risk Distribution and the Law of Torts*.

7. Coase, *supra* note 6, at 30-34 (discussing ways in which laws imposing strict liability on railroads for fire damage done to adjacent farmland affect both the railroad's and the farmer's output decisions); Calabresi, *Risk Distribution*, *supra* note 5, at 506 (contrasting the effect of allocating the cost of car-pedestrian accidents to car buyers with the effect of allocating the cost to pedestrians).

8. O.W. HOLMES, JR., *THE COMMON LAW* (1881).

9. *Id.* at 108.

although that position was further and greatly enhanced by his 1972 article with Douglas Melamed on property rights and liability rules.<sup>10</sup>

Although I shall be repeating and even amplifying my criticisms of *The Costs of Accidents* in this talk, I do not deny its landmark status, or its influence, which has been great, as is proxied by the very large number of scholarly citations that it has garnered over the years—951 to be precise, according to the *ISI Web of Science*—and there has been a large number of judicial citations as well (60). (The article with Melamed on property rights and liability rules has received 1,231 scholarly citations.) The book is still in print after all these years. The papers given at this conference signal its continuing influence. It is a classic.

*The Costs of Accidents* was the first book-length work of what I have elsewhere termed the “new” economic analysis of law.<sup>11</sup> The “old” economic analysis of law was limited to fields of law such as antitrust, regulated industries, corporations, and taxation, in which economics is on the very surface of the law because they are fields in which the law is engaged in the explicit, self-conscious regulation of commercial activities that have long been studied by economists. The new law and economics, to which Calabresi made so signal a contribution, takes the whole of the law for its subject. This requires that nonmarket behavior, such as crime, prosecution, divorce, pollution, racial and other forms of discrimination, judicial behavior, and accidents be placed under the lens of economics.

Lying between the fields of law that are explicitly economic and the fields of law that regulate nonmarket behavior are those fields of the common law, such as property law and contract law (along with remedies), that although they deal with market behavior had received little attention from economists before these fields drew the attention of the “new” law and economics. They had received little attention in part because common law is more difficult for nonlawyers to understand than legislation is (Coase being an early and remarkable exception) but more because legislation is assumed to be the form that economic regulation would take. This was also assumed by lawyers. Common law was made by judges; judges were not legislators (though Holmes knew better), let alone legislators legislating intuitive economics. The idea that the logic of the common law might be microeconomics was a shocking one that is still resisted. In fact it is

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

11. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 23–24 (6th ed. 2003) [hereinafter *ECONOMIC ANALYSIS*].

still resisted by Calabresi who, as I shall argue, failed in *The Costs of Accidents* to grasp the economizing features of the common law, though he did better in the article with Melamed. But by bringing tort law under the lens of economics, Calabresi helped others, such as myself, to see his blind spot.

*The Costs of Accidents* sets forth a simple and useful, though as I'll argue not entirely satisfactory, framework for applying economics to a variety of law-regulated activities, whether accidents, which were Calabresi's focus, or pollution, land use, contracts, or virtually any other social activity with which the law is concerned.

The framework proposed by *The Costs of Accidents* directs the analyst's attention to three dimensions of social welfare—the allocative, the distributive, and the administrative.<sup>12</sup> The allocative benefits of alternative regimes for the control of accidents are to be traded off against administrative costs and distributive consequences—the latter, however, confusingly termed by Calabresi “secondary” costs.<sup>13</sup> The confusion lies in the fact that these so-called costs include both real costs, as an economist would use the term, namely costs of medical treatment, and replacement of income, which is a transfer payment rather than a cost. A further complication in Calabresi's analytic framework, though it proves harmless in practice, is that the analysis is subject to a constraint, never clearly specified and rarely applied by him, of “justice.”<sup>14</sup> He could have made his discussion of justice meatier by asking whether the fault system is required by the influential Aristotelian notion of corrective justice; but this is a detail.

The simplicity of Calabresi's framework—a framework that, as I had suggested in my review, approximated cost-benefit analysis, though imperfectly—enabled law professors who had no training in or previous knowledge of economics to get their feet wet in the new field of law and economics. This was of enormous value. (The exposition of the basic economics of accident control, notably in Chapter 5 of *The Costs of Accidents*, is exemplary.) It was not something that I noticed in reviewing the book so soon after it was published; I failed to foresee that Calabresi's book would provide an analytical template for the new field of interdisciplinary legal studies that was aborning.

Now in fact cost-benefit analysis has many subtleties. But even in its simplest form, as when at one place in the book Calabresi treats as “axiomatic that the principal function of accident law is to reduce the

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12. THE COSTS OF ACCIDENTS, *supra* note 1, at 26-28.

13. *Id.* at 27.

14. *Id.* at 24 & n.1.

sum of the costs of accidents and the costs of avoiding accidents,"<sup>15</sup> and when, more generally (and this has proved to be a justifiably influential simplification), the goal is defined as finding the "cheapest cost avoider" and putting the legal responsibility on him,<sup>16</sup> it provides a useful way of beginning to think about legal doctrines, procedures, and institutions as policy instruments analyzable in terms of the balance between the benefits and the costs that they produce.

Some of the criticisms that I made of the book, though they still seem to me to be correct, are no longer significant because the points at which they are aimed are no longer being made and so do no mischief. One example is Calabresi's claim that approaches to damages that require dividing them between injurer and victim, such as comparative negligence, have different allocative effects from all-or-nothing approaches;<sup>17</sup> that is incorrect.<sup>18</sup> Another example is his claim that economists no longer accept the diminishing marginal utility of income.<sup>19</sup> That is not true; what economists question is whether transferring money from a rich person to a poor person increases aggregate utility (the expense of making the transfer to one side), because, while both experience diminishing marginal utility of income, their marginal utility need not be the same. The rich person's may be greater than the poor person's, in which event a transfer from the rich to the poor person may reduce aggregate utility. Calabresi had confused diminishing marginal utility with the difficulty of making interpersonal comparisons of utility.

In addition, as I have already noted, the suggestion, embedded in his use of the term "secondary costs," that a failure to compensate an accident victim, as when under the negligence regime a victim fails to obtain relief because the defendant could not have avoided the accident at reasonable cost,<sup>20</sup> is itself a cost is incorrect. The only cost is the loading cost of the premium required to buy insurance against being injured in an accident for which no one is legally liable. That cost is a real cost; the transfer of money from the insurance pool to the insured is merely a transfer payment.

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15. *Id.* at 26. To these costs should be added, as Calabresi emphasizes throughout the book, information and other costs incurred in administering a system of accident control. *E.g.*, *id.* at 28, 146, 225-26.

16. *Id.* at 135 n.1.

17. *Id.* at 278-85.

18. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 73-82 (1987).

19. *THE COSTS OF ACCIDENTS*, *supra* note 1, at 39.

20. *Id.* at 42-43.

Another confusing, but I think by now harmless, feature of Calabresi's analysis is the idea of having to decide whether automobile accidents, for example, "are a cost of driving" rather than a cost of something else.<sup>21</sup> The (in his phrase) "what-is-the-cost-of-what" question<sup>22</sup> is not worth asking. What is worth asking is whether, for example, the cost of an accident in which the injurer was negligent and the victim was not should be left with the victim (and his insurer) or shifted to the injurer by the legal system. Once that judgment is made, presumably in favor of shifting the cost to the injurer, saying that the accident was a "cost of driving negligently" adds nothing.

Calabresi was also too pessimistic about the possibility of inferring value of life from people's behavior toward small risks.<sup>23</sup> Valuing human lives sounds like an ethical or even a metaphysical undertaking, but all that's actually involved is determining the value that people place on avoiding small risks of death. From data on wage premia in dangerous occupations, the response of housing prices to proximity to hazardous sites, seatbelt use, cigarette smoking, and other behavior toward risk of death, actual or perceived, economists can calculate how much money the average person would demand to incur a given such risk. Division of the "price" charged to bear a given risk by the risk yields the value-of-life estimate. So if the risk of death is one in ten thousand and the price demanded to bear the risk is \$500, the value of life would be \$5 million ( $\$500 \div .0001$ ). There have been many studies of risk-taking and risk-avoiding behavior; they yield a range of estimates of the value of (U.S.) life from around \$4 million to \$9 million, with a median of \$7 million.<sup>24</sup>

Last in this catalog of marginal criticisms, Calabresi drew too sharp a distinction between market deterrence, as by making certain injurers pay for the injuries they cause, and collective deterrence, illustrated by punishment of speeders.<sup>25</sup> It is only because most roads are owned by governments that rules of the road are "collective." Owners of private roads would fix speed limits, require everyone to drive on the right, etc. in just the same way that private golf clubs prescribe rules for their members, including safety rules.

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21. *Id.* at 105.

22. *Id.* at 133.

23. *See id.* at 91 (arguing that individuals' willingness to take risks varies considerably, thereby making "any purely market determination of the costs of accidents entirely inadequate").

24. W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5, 18 (2003).

25. THE COSTS OF ACCIDENTS, *supra* note 1, at 103-05.

The preceding criticisms that I have made of Calabresi's book are details mainly of historical interest. But one of Calabresi's central arguments that I criticized continues to be noteworthy, and that is the argument that the fault system, which is to say liability for negligence, is, in his words, "absurd"<sup>26</sup> and "irrational,"<sup>27</sup> and "so ineffective that even if we cannot choose with total certainty among possible substitutes we can certainly do better than we are doing now."<sup>28</sup> Yet he offers no substitute. He discusses many alternatives, but discards them all.

Calabresi's inability to sketch an alternative that would be an improvement over the fault system, and his conclusion that the fault system is terrible, do not trouble me as much as the way in which he arrived at his conclusion. He arrived at it by a route that involved no inquiry into the actual operation of the fault system. The reasoning was a priori, even in places semantic; it seemed almost enough to condemn it in his eyes (though he made other criticisms as well) that the fault system is not based *explicitly* on cost-benefit analysis and that the terms it employs, such as "duty of care," "proximate cause," and the rest, are not economic terms.

I am further troubled by the cast of mind, common as it is even among the best lawyers, that underlies Calabresi's dismissal of the possible economizing features of the fault system. It is a cast of mind that regards normative analysis of the law, unaided by empirical inquiry, to be the best, and maybe the only, way to bring the social sciences to bear on law.

Research by legal and economic scholars conducted after *The Costs of Accidents* showed that a number of the doctrinal, procedural, and institutional features of tort law, including the negligence concept itself, have economizing significance and perhaps aims;<sup>29</sup> and there is a growing though still small body of empirical research on the actual consequences of negligence liability.<sup>30</sup> This research supports the view that the fault system, like the criminal law, has a deterrent

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26. *Id.* at 276.

27. *Id.* at 285.

28. *Id.* at 316.

29. *E.g.*, LANDES & POSNER, *supra* note 18; POSNER, *ECONOMIC ANALYSIS*, *supra* note 11, ch. 6.

30. *E.g.*, Frank A. Sloan et al., *Tort Liability Versus Other Approaches for Detering Careless Driving*, 14 INT'L REV. L. & ECON. 53 (1994). There is also empirical research on financial and other dimensions of negligence alternatives, such as no-fault automobile accident insurance, that is highly relevant to assessing the overall consequences of the fault system. *E.g.*, Stephen J. Carroll & James S. Kakalik, *No-Fault Approaches to Compensating Auto Accident Victims*, 60 J. RISK & INS. 265 (1993).



effect; it reduces accidents (including automobile accidents),<sup>31</sup> in part through its effect on liability-insurance premiums. It doesn't just redistribute the losses caused by accidents. It decentralizes, to a degree privatizes, and minimizes bureaucratic administration of the system of accident control. But careful study of the actually functioning system of tort law in general, or liability for negligence in particular, is emphatically not the project of *The Costs of Accidents*.

So, for example, Calabresi does not hesitate to assert repeatedly, without citing any data or studies, that the movement from the fault system to workmen's compensation reduced the number of workplace accidents. He says it made an "enormous" difference in the rate of such accidents.<sup>32</sup> It is unclear whether it made any systematic difference.<sup>33</sup> It may actually have increased the injury rate by making workers less careful.<sup>34</sup>

And remember my crack about there being a sense in which torts was not really Calabresi's field? It is suggestive in this regard that he should have asserted that tort law assigns responsibility for accidents on the basis of "moral" criteria<sup>35</sup> without pausing to ask whether those criteria mightn't be isomorphic with economic criteria. Holmes warned long ago about the confusion that can result from taking the moral overtones of legal language too seriously;<sup>36</sup> Calabresi ignored the warning. Though intimately familiar with Coase's article on social cost, he seems not to have picked up on one of the notable features of the article—Coase's discussion of the English common law of nuisance, a body of doctrine parallel to negligence, as an economizing regime.<sup>37</sup>

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31. Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 LAW & POL'Y 67 (1984); J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427 (2001); Richard W. Grayston, *Deterrence in Automobile Liability Insurance—The Empirical Evidence*, 40 INS. COUNS. J. 117 (1973); Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982); Sloan et al., *supra* note 30.

32. THE COSTS OF ACCIDENTS, *supra* note 1, at 245.

33. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 11-12, 77-83 (2000).

34. MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 67 (1990); Ronald G. Ehrenberg, *Workers' Compensation, Wages, and the Risk of Injury*, in NEW PERSPECTIVES IN WORKERS' COMPENSATION 71, 85 (John F. Burton, Jr. ed., 1988).

35. THE COSTS OF ACCIDENTS, *supra* note 1, at 293-300.

36. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-60 (1897).

37. See Coase, *supra* note 6, at 8-15.

Calabresi was aware of the Learned Hand test of negligence,<sup>38</sup> but perhaps only dimly, because he cited for it not *Carroll Towing*,<sup>39</sup> but Hand's earlier opinion in *Conway v. O'Brien*,<sup>40</sup> which contains the elements of the test but not the test itself. What Hand said in *Conway* was that "[t]he degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk."<sup>41</sup> He didn't combine the factors into a test, as he did in *Carroll Towing*, where he said that the duty of care

is a function of three variables: (1) The probability that she [the barge that caused the accident] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .<sup>42</sup>

Calabresi never paused to consider whether the Learned Hand test might not be an accurate summation of judicial practice after all.

A further oddity in Calabresi's treatment of tort law in *The Costs of Accidents* was the assumption that tort litigation is inherently bilateral,<sup>43</sup> as if a plaintiff who was injured in an automobile accident that would have been avoided either if the driver of the other car had been sober or if the tires of that driver's car had not been defective would fail to sue *both* the driver of the car and the manufacturer of the tires.

Calabresi had anticipated the criticism that he was weak on factual analysis of the actual operation and effects of the fault system. He noted that "if we waited for such facts to be adequately proven before we made societal changes, we would rarely if ever depart from the status quo."<sup>44</sup> No doubt. But thirty-four years after his book was published, and thirty-seven years after he predicted that the fault system "is so poor a system of compensation that it bids fair to be replaced by the worst possible general system of market deterrence, namely gener-

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38. THE COSTS OF ACCIDENTS, *supra* note 1, at 263 & n.18.

39. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

40. 111 F.2d 611 (2d Cir. 1940).

41. *Id.* at 612.

42. *Carroll Towing*, 159 F.2d at 173.

43. See THE COSTS OF ACCIDENTS, *supra* note 1, at 239 (noting that the fault system "begins by viewing each accident as being the exclusive concern of the parties immediately involved and tries to allocate costs accordingly").

44. *Id.* at 13.

alized social insurance,"<sup>45</sup> the system remains essentially unchanged. To the extent it has changed, it has not been in the direction of Calabresi's proposals for reform. They were few, but they centered on an unelaborated notion of using statistical aggregates to determine cheapest cost avoiders and on substituting "tort fines" for tort damages.<sup>46</sup> Careless pedestrians who were injured would be compensated but would have to pay the tort fine too.<sup>47</sup> This particular proposal illustrates that while Calabresi's discussion of the best possible system of accident control is vague, when he gets concrete, as in the case of fining the careless pedestrian who's been run down, he tends to be impractical.

Overlooked in these embryonic proposals for an alternative system is the fact that since tort victims would not receive the tort fines, the burden of enforcement would be shifted from the victims and their lawyers to the government. Thus there would no longer be private tort liability for accidents. The abandonment of private tort liability would require an expansion of government. Even in 1970 (before Calabresi's student Bill Clinton announced that the era of big government was over), we knew that the difficulty of managing the government is great, that government cannot be allowed to expand indefinitely, that the concept of "market failure" must be complemented by a concept of "government failure," and that to assume as Calabresi frequently does in his book that government intervention is a costless response to market failure is naïve.

But my main point is simply that as a call to reform, *The Costs of Accidents* was a failure, and it was a failure, in part, because Calabresi made no effort to lay an empirical foundation for his rejection of the fault system.

The cast of mind that forswears empirical study for armchair theorizing, a cast of mind that one might (mistakenly) have thought less prevalent at the Yale Law School than elsewhere, is further illustrated by Calabresi's claim that people left to themselves underinsure against the risk of being injured in an accident.<sup>48</sup> Missing from his defense of the claim is any reference to a descriptive or analytical literature in psychology or economics that might support the claim, let alone to the laws, institutions, and practices—ranging from social security disability insurance to employee welfare plans to the provision of health care by doctors and hospitals to indigent patients on a charity basis—

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45. Guido Calabresi, *Views and Overviews*, 1967 U. ILL. L.F. 600, 609.

46. THE COSTS OF ACCIDENTS, *supra* note 1, at 282-83.

47. *Id.* at 255-57, 283.

48. *Id.* at 55-57.

that constitute a social safety net providing compensation for accident victims even in the absence of an award of tort damages. There is also, and relatedly, a tension between his emphasis on the psychology of risk<sup>49</sup> and his suggestion that accident insurance may make pedestrians careless about being hit by cars.<sup>50</sup> The latter suggestion illustrates his emphasis on the effect of compensation in reducing the incentive of potential accident victims to take care to avoid becoming victims, and treats potential accident victims as fully rational. I also miss in his book the simple point that to the extent that accidents are deterred, their "secondary costs" are eliminated together with their "primary costs," except insofar as some methods of deterring accidents may have (as Calabresi does emphasize) distributive effects—an example would be prohibiting elderly people from driving because they are accident-prone.

I have suggested that the abstract cast of Calabresi's analysis reflects the legal culture of his time. But it may also be the case that as is true of much, probably most, academic work outside the natural sciences, he was more interested in criticizing the existing academic literature than in studying the underlying social phenomena that were the subject of that literature. At the time he wrote, the academic literature on tort law was almost all written by law professors and was almost entirely concerned with alternative systems of compensation, systems for dealing with what Calabresi called "secondary costs." These academics' neglect of both primary costs and of the need to make trade-offs between deterring accidents and compensating accident victims presented Calabresi with a conspicuous target. He aimed, fired, hit the bull's eye, and demolished a very inadequate body of scholarship. That was a great service. But in focusing so heavily on the previous scholarship he let his gaze wander from the actual tort system. In this regard his influence has been a baleful one; for if you look, for example, at the articles in the recent symposium on negligence in the *Georgetown Law Journal*,<sup>51</sup> you will see that they are preoccupied with academic theories of negligence law to the exclusion of any serious concern with the actual operation of the negligence system; there is barely any discussion of recent cases, let alone of insurance practices, safety statutes, no-fault laws, and other institutional influences on the system.

Abstract, top-down analysis leads not only to a neglect of the real world but also to a misplaced perfectionism. *The Costs of Accidents* asks

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49. *Id.* at 57.

50. *Id.* at 282-83.

51. Symposium, *The New Negligence*, *supra* note 3.

whether the fault system is optimal from an economic and social standpoint, concludes that it is not, and declares that therefore it must be replaced. But there is no "therefore." For what Calabresi really means when he says that the fault system is not "optimal"<sup>52</sup> is merely that it is imperfect. Imperfect the fault system indeed is; what actually existing legal institution is not? Calabresi's criticisms of the fault system, though exaggerated, all have some merit except his complaint about the failure of tort law to divide damages between injurer and victim.<sup>53</sup> He also fails to consider the degree to which government regulation of liability insurance impedes efforts by insurers to base premiums on risk-related factors. Since perfection is unattainable, the question he should have asked was whether there was any alternative that, in practice, would be any less imperfect. But an even more fruitful approach, it seems to me, would be to ask the following question: Given that the fault system is entrenched, how can it be improved, whether by legislation, regulation, or common-law rulemaking, so as to bring it nearer to the theoretical ideal? Had Calabresi framed the question thus, he would not have been so dismissive of the fault system.

But you can sever Calabresi's rejection of the fault system from his overall theoretical analysis of the social control of accidents. The enduring value of Calabresi's book, as of his contributions to law and economics generally, is then seen to be not specific proposals for reform, despite his normative ambitions, but the creation of an analytical framework that others could use to formulate and advocate practical legal improvements. Once this point is firmly grasped, the criticisms that I have made of *The Costs of Accidents*, though they seem to me well to bear in mind, become a minor negative in an overall highly positive evaluation of a classic contribution to legal thought.

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52. *E.g.*, THE COSTS OF ACCIDENTS, *supra* note 1, at 266.

53. *Id.* at 259-60.