

## Neologisms Revisited

Guido Calabresi

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Torts Commons](#)

---

### Recommended Citation

Guido Calabresi, *Neologisms Revisited*, 64 Md. L. Rev. 736 (2005)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol64/iss1/24>

This Conference is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

## NEOLOGISMS REVISITED

### REMARKS OF GUIDO CALABRESI\*

Oscar Gray, you are a great student of Jimmy's [Fleming James] and since you and I are not the last, but among the last, of his students, it pleased me particularly that you remembered him. Thank you. I also want to thank all my other friends who took the time to come here today, and most especially this University, which has been so kind to me in the past but which outdid itself in setting up this Symposium. When Fowler Harper died, he left me his copy of Harper & James, *The Law of Torts*,<sup>1</sup> which you, Oscar, have kept going so well.<sup>2</sup> Since Fowler was dead, I could not have him sign it; I brought it to Jimmy, who signed it in a way that moved me enormously then, and has ever since. He wrote, "To Guido, with that special affection that a teacher has for a student who has pushed the quest forward." To me, what is so joyous about this event is that I see an awful lot of students—some whom I never had in class—who have pushed the quest forward. So I speak today, with that special affection and delight that a teacher has in seeing the quest pushed forward, feelings that I know Jimmy would share.

#### I.

Frank Michelman, in his wonderful talk,<sup>3</sup> spoke about what happened after *The Costs of Accidents*.<sup>4</sup> He stopped, though, at *Spur*,<sup>5</sup> and I'd like to start by saying something about the relationship of judges and scholars as demonstrated in *Spur*. When *Spur* came out, shortly after the *Cathedral* article,<sup>6</sup> I wrote *Spur*'s author, Vice Chief Justice James Cameron, and said, "Darn it, I wish that your opinion had come

---

\* Judge, United States Court of Appeals for the Second Circuit; Sterling Professor Emeritus and Professorial Lecturer, Yale Law School. This Essay is adapted from a transcription of remarks made at the Symposium, *Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship*, held at the University of Maryland School of Law on April 23 and 24, 2004.

1. FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* (1st ed. 1956).

2. FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* (2d ed. 1986 & Cum. Supp. 2005).

3. See Frank I. Michelman, "There Have To Be Four," 64 MD. L. REV. 136 (2005).

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

5. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (ARIZ. 1972).

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

out a little bit sooner so that I could have cited it.” He wrote back, “Nonsense, I wish your article had come out a little bit sooner, so I would have had something to rely on.” And now that I am also a judge, I know how much greater was the achievement of a judge, like Cameron, who had nothing to rely on and who still came out the right way, than that of a scholar who can write what he or she believes to be true without worrying about precedents or authority. Justice Cameron became, by the way, a devotee of law and economics and attended many law and economics conferences thereafter. I think he did this in the hope of learning something that would give him the basis for another really novel opinion. He never found it. I don’t know if he is still alive; I lost track of him, but I remain a great admirer.

## II.

If Frank went forward, I want to go backward and say something about the background of this book. *The Costs of Accidents* was written mainly in 1965-1966, during a sabbatical year in Rome. It derived in part from the articles I had written earlier, especially *Some Thoughts on Risk Distribution and the Law of Torts*,<sup>7</sup> which I originally submitted in February of 1957 to the *Yale Law Journal* as a Comment in the journal’s competition for officerships. I was enormously lucky that, though they made me an officer, the distinguished law journal editors (Arthur Liman was one of them) did not like the article. They did not understand it and thought it was very peculiar. The tradition of the time was that one published one’s Comment after becoming an officer. I saw their reaction, and said to them, “Would you mind if I don’t publish it?” They said, “No, no, by all means don’t do it.” This was very important because I think that the article, had it been published as a student Comment in 1957-1958, would never have been noticed.

As it was, it got published with very few changes in January of 1961, after I had gone on the Yale faculty. This was the same time that Ronald Coase was writing his much more monumental piece,<sup>8</sup> which had a great effect. The result was that my piece also received a lot of

---

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

8. R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960). Because of a delay in the publication of the *Journal of Law & Economics*, Coase’s article, despite its earlier date, came out some months after my *Yale Law Journal* article. (This is, of course, the reason I did not cite Coase’s great piece.) Both articles were, in any event, written entirely independently of each other.

attention, which it surely would not have gotten had it been published in 1957 as a student Comment.

Though I made very few changes, I did make one unfortunate alteration. The original version included a discussion of the reciprocity of cause, which paralleled the discussion in Coase's pathbreaking article. My article still would not have approached the scope of Coase's because Coase also dealt with the matter of transaction costs and their effect on the internalization of externalities. The reciprocity of causation got taken out of my piece because a professor (an economist on the Law School faculty) told me it was wrong. I said, "I don't see why." He said, "Pigou." I said, "I've read Pigou." And he said, once again, "Pigou." He then said, "Take the point out. I think it's wrong and you don't need it in the article." I was young, and took the point out. I still thought the professor wrong and, as a result, put in a footnote, which questioned why, when there is a car-pedestrian accident, it is automatically viewed as a cost of driving rather than a cost of walking.<sup>9</sup>

My footnote left a lot out; it was not a complete discussion. And this was too bad because it would have been useful if the presentation of at least part of Coase's theorem had been made by somebody, like me, who at the time would probably have been described as a "lefty" (though maybe less so now), as well as somebody, like Coase, who was being described as a "righty." Then people would have understood that Coase's insight was not an ideological insight, but rather a purely scholarly one. It was the last time I ever took anything out of anything as a result of anybody telling me anything. It is, however, also the reason why this business of cost of driving, cost of walking, which Dick Posner mentioned yesterday,<sup>10</sup> is still only *sort of there* in *The Costs of Accidents*.

On rereading *Some Thoughts on Risk Distribution*, I still think it was pretty good article for a twenty-four-year-old student or a twenty-eight-year-old professor to have written. And *The Costs of Accidents* is a pretty good book for a thirty-three-year-old—when it was written in 1965-1966—or, for a thirty-seven-year-old—when it came out in 1970. But it was, in many ways, a young book. It was a book written by somebody who was very young. And like most such things, it had many gaps in it and many parts that relied on the work or the ideas of others. Today, we tend to act as if the gaps were not there. We tend to read *The Costs*

---

9. See Calabresi, *supra* note 7, at 506 n.24.

10. See Richard A. Posner, *Guido Calabresi's The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 17 (2005).

of *Accidents* and *Some Thoughts on Risk Distribution* and say, as several of you earlier today said, “Guido was already seeing these things,” or, “This idea was already there.” That is a mistake. Of course, we are always the same person and so thirty-five years later you can trace me and my writings back to what I wrote then. But when I reread those early pieces I say to myself, “How much didn’t I understand. How much my later writings filled this out.” And so when I hear people say, “Oh, that point was something that he already had in mind when he wrote *The Costs of Accidents* or *Some Thoughts on Risk Distribution*,” I think how very devastating this must be to young writers. How hard it is for young scholars who read early articles by their very senior colleagues and assume the older scholars already knew what they were going to say much later, when instead there was nothing of it, when the early pieces were in fact only that, just the first steps.

Okay. What was the background? Well, it was in my torts class with Jimmy James, who used the Shulman & James torts materials,<sup>11</sup> that I first began to develop the ideas that would figure prominently in my early writings. But how come? Fleming James was not an economist. He was a railroad lawyer who looked at torts from a broad point of view. He was a legal realist, who, having destroyed traditional tort doctrine—in typical legal realist fashion—because it ignored the existence of insurance, went on to do something that very few legal realists did. He tried to rebuild, to recreate tort law, in light of the presence of insurance. He said, “Tort law, as it is, makes no sense because it talks in ways that have nothing to do with the reality of insurance. But there is insurance, so let’s look at tort law from the standpoint of insurance.” As a result, the main issues he was interested in were all those things that I lumped together under secondary cost avoidance in *The Costs of Accidents*. Which is why, by the way, secondary cost avoidance is such a confusing term; it is simply all the things that Jimmy James was concerned with. He was not concerned with deterrence. Like most of the other scholars of that time, as Ken Abraham has so ably said,<sup>12</sup> he thought that there was no place for it in torts, given insurance.

Why, then, was the Shulman & James casebook one that would make someone like me think about category deterrence, law and economics, and all those things? It wasn’t Harry Shulman—a brilliant professor, of course, but also not an economist. The reason was rarely

---

11. HARRY SHULMAN & FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS* (2d ed. 1952).

12. Kenneth S. Abraham, *Liability Insurance and Accident Prevention: The Evolution of an Idea*, 64 MD. L. REV. 573, 599-602 (2005).

recognized in years past, but it is now duly noted—in the latest edition of Shulman & James.<sup>13</sup> The origin of the casebook lay in some materials on torts that were put together by Walton Hamilton and Harry Shulman. Walton Hamilton was the senior guy, and he was an institutional economist. Significantly, he was putting together these materials at approximately the same time—the 1930s—that Ronald Coase was writing about the firm.<sup>14</sup> Walton Hamilton was an institutionalist in the same way Ronald Coase was. They were looking at things in the real world and saying, “What is it that can be said about these?” Coase said, “If economic theory were correct and markets were costless, there would be no firms. There are firms. Is it in any way necessary to economic theory to say that markets are costless, or can we modify that assumption?” Coase modified it, and a tremendous amount of wonderful work came from that. Walton Hamilton had started down a similar path, but he moved on to other things, primarily antitrust law. He was not that interested in torts, but he did put together materials that asked a series of questions that a kid who knew economics would react to many years later. So that when James, teaching that kid, said, “We don’t know why this is so, we don’t know why that is so,” the kid, me, answered, “Hey, but it is perfectly obvious.” The materials were set up to lead one to give an economic answer. I did, and that is how I—and a lot of other things—got started.

A story concerning *The Costs of Accidents*’ publication: The Yale Press was troubled about publishing it because they didn’t think it would sell. (In retrospect, it has been one of their best sellers, and it continues to be.) The guy who reviewed the manuscript for them was Louis Jaffe, a great torts professor at Harvard. He was mad as a hatter and a wonderful, wonderful man (I once went sailing with him, and it was the closest scrape I have ever had anywhere, for he was truly mad as a hatter). In his review, which he kindly gave me as well as the Press, he wrote that it was a marvelous book and enormously significant, that it would do all sorts of important academic things, but that it wouldn’t sell. No one would buy it. He then added, “There might be some people who will buy it. The book will be so important, that *trial lawyers* may feel they have to have it on their shelves, just for show.”

The result of this review was that the Yale Press thought that they might sell a few copies to trial lawyers. (I don’t think a trial lawyer has ever bought a copy of the book.) This meant that the Yale Press did

---

13. See HARRY SHULMAN, FLEMING JAMES, JR., OSCAR S. GRAY & DONALD G. GIFFORD, *CASES AND MATERIALS ON THE LAW OF TORTS* (4th ed. 2003).

14. See, e.g., Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

not want to come out with a contemporary paperback edition for fear that the trial lawyers might buy the paperback and not the hardcover edition, which was going to pay for the cost of publication. I wanted the book to come out in paperback at the same time, and so I came up—I was a lawyer after all, and lawyers try to find solutions—with a way out. This was to call the paperback the Student Edition. That is why, to this day, that copy over there says, “Student Edition.” It is identical, of course, to the hardcover, but the Yale Press thought that no self-respecting trial lawyer would want the Student Edition rather than the *real* edition. In the end, it didn’t matter because trial lawyers didn’t buy either one. But the Student Edition did okay.

A comment about the book’s style: While Frank described the “mind-cracking neologisms” in his early review<sup>15</sup> (and I agree with him completely), Dick described the style as “sinuous.” Calabresi’s “sinuous and elusive style,” I believe he said in his review.<sup>16</sup> We’ve been told what neologism means and what I hope it doesn’t mean, by Cathy Sharkey,<sup>17</sup> but I’m not quite sure what “sinuous style” means. In any event, the style *is* odd in places, and part of this has to do with where the book was written. It was written, as I mentioned, primarily when I was in Italy on sabbatical.

Later, when the book was translated into Italian, I had an odd experience. In order to help the translators, who were young assistants to a distinguished senior professor, Mauro Cappelletti—now they’re senior professors or former deans of law schools, like Florence—I took a microphone and dictated the book into Italian without trying to make it grammatical or literary. My aim was just to get the meaning across in Italian. But, as often is the case when one tries to translate, much of even that simple translation was extraordinarily difficult. It took many, many more words to say badly, in Italian, what I think the book said well in English. There were, however, occasional passages, not just a paragraph or two, but pages and pages, which instead were extremely awkward in English, but which flowed smoothly in Italian. What must have happened was that, because I wrote the book in Rome, I originally thought out these sections in Italian, and

---

15. Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 648 (1971) (book review).

16. Richard A. Posner, Book Review, 37 U. CHI. L. REV. 636, 642 (1970) [hereinafter Book Review].

17. Professor Sharkey notes that she has “it on good authority that Professor Michelman used ‘neologism’ in its primary meaning of ‘a new word, usage, or expression,’ as opposed to its secondary meaning as ‘a meaningless word coined by a psychotic.’” Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 411 n.3 (2005) (quoting MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 778 (10th ed. 1996)).

had, without realizing it, translated them into English. Now in translating them into Italian, I was actually restoring these passages to the original! No wonder, then, that segments of the book are stylistically difficult. You should think of the book, in some measure, as the translation of something from Italian. Go read the Italian, Dick, and perhaps you'll conclude that it's less sinuous.

About the neologisms, one anecdote. Parts of the book were translated into Japanese. (It's about to be translated into Chinese, and I wonder whether what I am about to say will happen again.) I could not help the translation into Japanese, as I could the Italian, so I just let it happen. The able translator was very nice and careful and, of course, could not adequately translate the neologisms. He tried by using circumlocutions, but being extremely scrupulous, he also put in the original neologisms in brackets in English. So, when you look at the Japanese edition you see—at least if you are someone who does not know Japanese—squiggle, squiggle, squiggle, “what-is-the-cost-of-what,” squiggle, squiggle, squiggle, “best briber.” All the things that are “mind-cracking neologisms” stand out and flash at you in ways that are perfectly horrible. This reminded me, a little, of Thomas Bowdler, who took out the dirty parts of Shakespeare because he thought they were improper.<sup>18</sup> But being scrupulous, he put them all in, at the end, in an appendix. This made school much easier for Lord Byron's young Don Juan, because all he needed to do was read the appendix.<sup>19</sup>

### III.

Let me say a couple of things by way of patting myself on the back. I think the book was the first systematic attempt since Oliver

---

18. WILLIAM SHAKESPEARE, *THE FAMILY SHAKESPEARE, IN ONE VOLUME: IN WHICH NOTHING IS ADDED TO THE ORIGINAL TEXT, BUT THOSE WORDS AND EXPRESSIONS ARE OMITTED WHICH CANNOT WITH PROPRIETY BE READ IN A FAMILY* (Thomas Bowdler ed., Longman, Green, Longman, Roberts & Green 1863) (1807).

19. See LORD BYRON (George Gordon), *Don Juan*, canto I, stanza 44, ll.342-52 (Leslie A. Marchand ed., Houghton Mifflin 1958) (1821). Byron writes:

Juan was taught from out the best edition,  
Expurgated by learned men, who place  
Judiciously, from out the schoolboy's vision,  
The grosser parts; but, fearful to deface  
Too much their modest bard by this omission,  
And pitying sore his mutilated case,  
They only add them all in an appendix,  
Which saves, in fact, the trouble of an index[.]

*Id.* Byron, moreover, adds a footnote to this passage: “Fact! There is, or was, such an edition, with all the obnoxious epigrams of Martial placed by themselves at the end.” *Id.*



Wendell Holmes to consider four possible functions of tort law. (I know that Dick Posner doesn't think Holmes treated civil law, but I am willing to say he did, and in a fairly systematic way, in *The Common Law*.<sup>20</sup>) The four functions I presented were:

- (1) the reduction of the sum of accident costs and of safety costs;
- (2) distributional equity;
- (3) achieving most effectively the desired degree of interpersonal and intertemporal spreading; and,
- (4) the minimization of the administrative costs of achieving (1), (2), and (3).

Functions (2) and (3) were lumped together awkwardly under secondary cost avoidance, but then divided afterwards. I grouped them that way, and only dealt with them separately later, because the book was, in part, an answer to my teacher, Fleming James, who treated them together.

What I thought was an achievement then, and still do, was that these things were discussed in relationship to each other, which Holmes did not do. That is, I asked what structure is most desirable if one cares about *all* of the goals, at least to some extent? Holmes had written, "[t]he general principle of our law is that loss from accident must lie where it falls," unless of course there is a good reason to move it.<sup>21</sup> As a statement of a single goal, this is perfectly sensible. If one is concerned with administrative costs, why the heck would one move costs from where they fall to any place else, unless there is a good reason for doing so? That would entail undertaking unnecessary costs. Unnecessary, it should be noted, *by hypothesis*, for Holmes had said, "Leave losses where they lie, *unless there is a reason for shifting them*." It follows that, standing alone, his fundamental principle is tautologically true.

Holmes also suggested valid reasons for shifting losses. Deterrence was one of them. (Incidentally, deterrence to him was not always fault. Fault was very powerfully linked to deterrence, but Holmes also believed in ultrahazardous activity liability. And he explained such liability in terms of deterrence; not well, perhaps, but adequately, and better than Douglas did in his vicarious liability article many years later.<sup>22</sup>) Holmes, however, did not go back and reexamine his fundamental principle of letting losses lie where they fall, in the light of

---

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

21. *Id.* at 94.

22. William O. Douglas, *Vicarious Liability and Administration of Risk I*, 38 *YALE L.J.* 584 (1929).

situations in which, in his own terms, one should move the loss from the victim to the injurer.

But, once one moves *some* losses, it is no longer necessarily true that a general starting point of leaving losses on the victim is administratively the cheapest. Consider a hypothetical situation in which most of the time there is injurer fault, but such fault is expensive to prove. In such circumstances, it might well be better, from an administrative cost point of view, and, despite the cost of shifting, always to put losses on the injurer, and only to move them back sometimes. It might be less expensive to do this than to start out leaving them on the victim. What was tautological to Holmes because he focused on only one goal—administrative cost savings—becomes an interesting empirical question once two goals—deterrence and administrative cost reduction—are considered together.

The same is also true with respect to spreading. How does spreading affect deterrence? Holmes talked about some of these things. I think he even talked about distribution. (Of course, his view of a just distribution and of distributional equity was a totally different one from what is common today. Holmes believed that one should put losses on the drones, on the passive parties, on the victims—probably because he thought them to be less deserving. His distributional point of view is a very different one from many twentieth-century distributional points of view, but it is a distributional position, nonetheless.) Once again, however, he looked at these goals—spreading, distribution, and deterrence—separately from each other. What I tried to do was look at them together: What do different ways of achieving spreading or distributional goals do to deterrence; what do different ways of furthering deterrence do to spreading goals? And I still think that is a useful thing to do.

One other important thing, which I think the book did do, was emphasized in this morning's panel.<sup>23</sup> That was to bring back the notion of deterrence as a significant goal of tort law. It did this by looking at deterrence from a structural point of view rather than from an individual point of view. Insurance might make *individual* deterrence relatively insignificant in torts, but *category* deterrence remained crucial. It remained crucial, at least sometimes, although, as Don Gifford pointed out,<sup>24</sup> not always. On *that* basis, torts began to ask whether losses should lie on a victim, on an injurer, or even, as in some prod-

---

23. This was the panel on mass torts, which included presentations by Ken Abraham, Don Gifford, and Robert Rabin.

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

ucts liability situations, on a third party. Category deterrence is one of those things that today is taken for granted, and as I said, is almost not even cited. Yet it is, I think, one of the things that the book really did establish.

#### IV.

What were the gaps, and what were the problems in the book? Many of them have been pointed to today. I think my treatment of justice was quite inadequate. Most treatments of justice are quite inadequate. But my treatment was particularly inadequate even in its own time. The book begins in a dramatic way; it says that the goal of accident law is justice and the reduction of accident costs. And then it doesn't talk about justice and its relation to accident cost reduction at all, except for "other justice."<sup>25</sup>

Let's examine, for a moment, "other justice." "Other justice" represents society's veto points. But it is also a catchall for any other goals that the book does not analyze. All these are lumped together in this "other" category. For me, "other justice" was a way of saying, "There are a series of goals, that the book focuses on, but these don't cover the universe of goals." There are other goals in this area of law that we may not understand yet, but whose possible existence I do not wish to deny. And so I "include" them, unanalyzed, in this category. I put them there regardless of whether they are silly goals, like the ones that Jules Coleman<sup>26</sup> and John Goldberg and Benjamin Zipursky<sup>27</sup> have been pushing—I'm joking here obviously—or not silly goals. And, regardless of whether they are goals that I simply didn't bother with or goals that I might have deemed important had I thought about them, I don't deny that they exist. Such unanalyzed goals act as constraints on what we can do to further those goals that I do analyze. I called the combination of these unanalyzed goals "other justice" because that phrase reflects the existence of constraints, imposed by attitudes of people who feel that the book leaves some things worth dealing with unaccounted for.

In dealing with these other goals, in this way, I was thinking of John Stuart Mill and Jeremy Bentham. Mill was asked who were the two seminal minds of the century, meaning the end of the eighteenth and beginning of the nineteenth century. He gave two names: Sa-

---

25. See *THE COSTS OF ACCIDENTS*, *supra* note 4, at 31-33.

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

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

muel Coleridge, the poet, interestingly enough, and Bentham, of course.<sup>28</sup> And, speaking of Bentham, Mill said (and I paraphrase), he approached all ideas as a stranger—it's a nice phrase—and if these ideas did not meet his test, the test of utility, he dismissed them as "vague generalities."<sup>29</sup> Then Mill, utilitarian though he was, said that what Bentham did not realize was that in "these generalities contained the whole unanalyzed experience of the human race."<sup>30</sup> That is, even the great Bentham did not have a model that was complete. He left some things out. But Mill implies as well that the whole "unanalyzed experience of the human race" isn't necessarily worthy. That is, the fact that notions or attitudes or goals are there and that we have not analyzed them doesn't mean that such goals are good. They may in fact represent centuries of exploitation or notions that are simply wrong or no longer matter. As a result, of course, we should try to analyze them, but, also, we should not think that our models cover the whole schmear. All that "other justice" was meant to do in the book was to leave this point open; it was not meant to be justice *tout court*.

And here is a sad story. Ronald Dworkin was my colleague at the time. He had been my friend since we won the same scholarship in the same place at the same time. Two bright, little boys who somehow convinced the people who gave us the scholarships that we were athletes. I asked Ronald if it would be misleading if I called this unanalyzed set of constraints "other justice." I remember walking with him around the Yale campus as I put the question to him. He answered, "No, no." I said, "I don't mean this as justice." He said, "No, no, no. There will be no confusion; it'll be fine." Some years later, when he reread the book he criticized it, properly, for saying that these constraints were justice. He had gotten confused in just the way that he had told me not to worry about. And yet, that confusion is still *my* responsibility, not his. I believe in strict products liability, and I put out a product that has a defect in it, the defect of using the term "other justice" in a misleading way.

This isn't the place to talk about the role of justice at any length. I think that the goals that I talk about in the book, and the goals that I don't talk about, but which are part of that background, are all elements of what is just. Justice is the conclusion and the total. But that doesn't mean that one shouldn't analyze justice. One does not trade off justice. Yet the elements of justice include things like reducing the

---

28. See JOHN STUART MILL, *Essay on Bentham, in THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL, AND RELIGIOUS* 3 (Marshall Cohen ed., 1961).

29. *Id.* at 20.

30. *Id.*

sum of accident and of safety costs, etc., etc., and some of those are things that can be traded off against each other. More than that, I can't say today.

Another principal gap in the book is that there is no discussion of shaping tastes or formulating values as goals of law. And this, empirically, is a very peculiar gap. If one looks at most legal decisions, one of the things judges are crucially concerned with is how the decision will affect people's values. This insight was central to the work of many critical legal scholars. It was their great contribution. But then they didn't do anything with it; they didn't do any analysis of it. The reason for my missing this goal was my dependence on economics. Economics doesn't talk about shaping values because it self-consciously defines itself as having nothing to say about values. But the fact that economics had nothing to say about substantive taste preferences did not justify my undertaking a *legal* and economic analysis that failed to say, "This is part of what law is about. This is one of the things that we are doing in accident law." As a result, shaping tastes or values ends up being sort of stuck in that "other justice" catchall at the end. The absence of any discussion of value shaping also explains why in the book there is so little discussion of "what is the cost?" When one talks about that awful neologism, one of the things one is inevitably thinking of is, "What is it that society gives value to? What is it that we want to induce society to give value to?" And in this lacuna the book reflected not only the economists' lack of concern with value shaping, but also the typical law school curriculum, which had by then already frequently abandoned remedies as a subject.

And the gap is a crucial one. One of the great strengths of human beings is how adaptable we are. One of the great weaknesses of human beings is how adaptable we are. If somebody had said to many good Germans in 1933 that those first laws against Jews would lead to the gas chambers, they would have said, "You are out of your mind." And yet that is what happened, *and in just 10 years!* We change. What we value changes enormously. Law reflects changes in values, is affected by them, and causes them. That is one of the things that any system of law must take into account. And the fact that economics says that it can't tell us anything about this doesn't make it any less important.

Whether economics can tell us something about values or not is a question I am currently struggling with.<sup>31</sup> I now happen to believe

---

31. I discussed my struggle in a speech I gave at the 2004 meeting of the European Association of Law and Economics, in Zagreb in September of 2004.

that economics can, in fact, tell us a great deal about shaping tastes. I still don't think that economics can tell us about shaping values in the absence of *any* pre-postulated values. But if we posit even two very simple ones—that we want a larger pie, and that we want a given distribution of that pie—then economics can tell us an awful lot about what subsidiary tastes give us the largest joint maximization, the greatest fulfillment, of the two posited values. (For these purposes I don't care what distribution "we want." So, for the moment, I will assume that we want a larger pie and as equal a distribution of it as possible. But any other distribution will do as well to demonstrate my point.)

The more one fosters tastes for things that are common and available, like cheap wine, pure water, or ordinary sex, the more one can have a relatively equal distribution of any size pie. The more one promotes tastes for things that are unusual and rare, like the kind of sex we show in movies, or truly great wine, or truffles, or high- or low-particle physicists, or great legal-economic scholars, or other "rare" things, then one is only going to get a larger pie by giving incentives, to those who have, or can develop, those "rare" goods or attributes to "produce" more. One can do this by the carrot (positive rewards) or the stick (whipping the owner of scarce goods to induce him or her to make or give more). But, either way, one is only going to get a greater total—a larger pie—through greater inequality, for the incentive itself creates inequality. This, then, is a very quick account of why I think that economic analysis can help us in an area where economics traditionally has refused to enter. It turns this area into a simple joint-maximization problem of the sort economists are good at. In any event, not examining this "goal" was a very big gap in the book.

The final gap that I will discuss today is one to which Dick pointed. In analyzing primary accident cost avoidance and in talking about reduction of the sum of accident costs and of their avoidance, the book dismisses fault immediately, and almost intuitively. In fact, there are at least four approaches to reducing the sum of the costs of accidents and of accident prevention (including fault), and in theory they can each do the job perfectly well:

- (1) Prohibition, enforced by criminal-type penalties, of some behavior. (Of course, we all know that even penalties can be, and are, "traded" off, but still penalties are different from simple prices.)
- (2) Fault (an odd system that seems to say, once we conclude that you should not have acted as you did, we will not *penalize* you, but will, in effect, "let you do it," so long as you pay damages and thereby bear the costs of what you did).

- (3) Put the incentive to avoid accidents on the best decisionmaker: the cheapest cost avoider.
- (4) Put the loss on the person who can best find the best decisionmaker. That is, put the incentive on the best briber, the best transactor.

Each one of these four is capable of achieving a result that optimally reduces the sum of accident costs and of safety costs. And, though I didn't say it in *The Costs of Accidents*, each one in theory can do it just as well as the other. The question of which one can *actually* do it best in any given circumstances is an empirical one. It's a question of which approach can work best, when. And that requires much scrutiny, which the book did not attempt.

Having said that, I don't back away from my intuition, reflected in the book, that fault is rarely the approach that will work best. But I didn't say this in *The Costs of Accidents*, for a variety of reasons. First, it struck me that there is *prima facie* inefficiency in the fault system. That is, if the fault system worked, one would never find fault liability. The fault system says, "We charge you the cost of the harm, the damages, whenever the cost of the damages is greater than the cost of avoiding damages." So if fault worked, if people actually knew and were able to evaluate accident and safety costs at the time they acted, they would avoid accidents in all (and just in those) instances in which—if they failed to avoid those accidents—society would find them to be at fault. Therefore, the very fact that we have many, many findings of fault-based liability, in itself, indicates that fault doesn't work very well. That, of course, doesn't mean that fault doesn't work better than other approaches. But, *prima facie*, the above analysis does suggest that there is a problem with how fault works in practice.

The second reason why I didn't focus on fault, and sort of threw it out, was because at the time there were no relevant empirical studies. There weren't even the bad ones that Dick likes to rely on so much (and again, I'm obviously kidding). In their absence, what I did was to talk to insurance people who told me that they didn't believe that whether somebody had been at fault or not was as a good predictor of future accident involvement by that person. They added that they only used fault in calculating insurance rates when the state required them to do so. And that seemed to me a pretty good indication that fault wasn't likely to work well. But these loose conversations weren't something one could cite, or even firmly rely on, and so I didn't cite them.

Third, I wasn't interested in the possible value-shaping reasons for fault because, as I mentioned earlier, my training in economics led me not to focus on value shaping as a goal.

Fourth, and most important, but not spelled out in the book, is something that I have never written about in detail. I have not analyzed the relationship of accident law and fault to our generalized system of free enterprise. Let me mention it very briefly here. We do not charge somebody (who goes into the shoe business and fails) only if that person knew or ought to have known ahead of time that it wasn't worth going into that business. That is, we don't use "fault" as a system of incentives in our generalized free enterprise system. We sometimes do use regulation. In regulated industries we say, "You have to get a certificate of necessity before you can enter that business." And then we usually protect that activity from bankruptcy. But regulation is neither akin to the fault system, nor is it the general norm. What is the norm in the enterprise system at large is a very complicated system of strict liability designed to create and assign proper incentives. Entrepreneurs win or lose, regardless of whether, when they started their enterprises, they knew or ought to have known the benefits and costs of their innovations. We don't, afterwards, ask, "Ought you to have known that it was not worthwhile going into that business?" That isn't how we assign losses in our economic system as a whole.

In fact, as in strict liability, losses in our enterprise system are not even always placed on the party who makes the decision that, in retrospect, turned out to be "wrong." Losses are often put on the party who is the best whistleblower. Through bankruptcy laws, for example, we say to lenders, "You're going to get stuck unless you blow the whistle early." I could go on and show, in more detail, how allocation of losses to best bribers, best decisionmakers, etc., in torts, parallels what is done in our economic system generally. But this is not the place for such an extended discussion. It is enough to say that it was this background that made me think intuitively that fault was not a very effective system. Still, that's not an excuse for treating fault so cavalierly. In the end, the book should still have listed fault as theoretically "efficient," and added that its actual effectiveness was an empirical matter about which we needed more information.

I have already mentioned the book's unfortunate lumping together of many different things under secondary cost avoidance. I do wish to add that if one separates them out, at least some of them are very easy to deal with. One example is the relative cost of buying insurance as a reason for allocating costs to one party rather than an-



other. In his initial review, Dick didn't see that.<sup>32</sup> But later, in his articles on contracts, he picked up on it and said, "Yes, that is a proper basis for allocating costs." 'Nuff said.

Other goals lumped together under secondary cost avoidance are more complicated even when sorted out. But one thing is worth mentioning about all of them. And that is, if some of these "secondary cost avoidance goals"—whether they be distributional, or interpersonal or intertemporal spreading—can be furthered without undermining primary cost avoidance—if, in other words, these goals can be better achieved at the same level of primary cost avoidance depending on which party bears the costs—then charging the "right" party may well be a cheaper way of serving those "secondary" cost avoidance goals than by trying to further the goals independently or through a generalized redistribution system. To this day, much more needs to be said about this point.

## V.

Well, where do we go from here? Let me make a few comments about torts, and then about law and economics. The first is about the perdurance of fault and the plaintiff-defendant link. I've already said that I am not sure that fault has, in fact, perdured, or at least I am not sure that the fault system that has survived has anything to do with what fault liability was, say, before we added to it comparative responsibility. What about the plaintiff-defendant link? Is its continued presence due to the existence of values of the sort that Goldberg and Zipursky, Coleman and so on have described? Or is it only that the trial lawyers have been able to maintain it to *their* distributional advantage? That is, does fault and the plaintiff-defendant link survive for the reasons scholars, like Goldberg and Zipursky, and Coleman give, or does it remain salient only because it yields a great deal of distributional benefit to a group of people who have enormous political power?

My treatment of the power of trial lawyers in *The Costs of Accidents* was self-indulgent. It seemed to me obvious that it was not distributionally "just" for lawyers to get that money. But who was I, as a scholar, to say that? In what way did my conclusion flow from any scholarly work or training? No way at all. As a result, my discussion of that distributional issue was totally inadequate, almost as inadequate as the discussion of distributional issues by those who say that it is neutral to treat all people as if they are the same distributionally,

---

32. See Posner, Book Review, *supra* note 16.

when in fact our society regularly and manifestly treats people very differently on the basis of distributional considerations. Thus, to say, “I will treat all people as the same and employ a simple Kaldor-Hicks efficiency test,” seems to me woefully inadequate.

Is there something that scholars can say about distribution? I think so. But it is not easy, and it is again something that there isn’t time to go into here. Still, there is data from which one can discern what any given society believes its distributional goals to be. And I think you’ll find that such data suggest goals that cannot be achieved readily through lump-sum transfers, as classically urged by Milton Friedman,<sup>33</sup> and more recently, by Steven Shavell and Louis Kaplow.<sup>34</sup> Of course, if lump-sum transfers could achieve a given society’s distributional ends, that would be very nice. But I don’t think that such transfers, in fact, fit with the distributional goals of most any modern society. All too often “we” want to determine who should be made richer or poorer in much more specific—in much more situation dependent—ways.

Alright. Those are a few thoughts on where we go from here with respect to torts. Where do we go from here with respect to law and economics? A few quick points. One thing I believe that we should have learned by now is that almost everything in the economic analysis of law ends up being empirical. When command works, when paternalism works, when markets work, when all of these things work and when they don’t, is not a matter of theory. One can identify the same theoretical problems with each one of these approaches that one can show with respect to their alternatives. And some day I will demonstrate that. But that doesn’t mean that there aren’t very significant practical reasons for preferring one to another. These reasons frequently have to do with how agnostic we are—with how much knowledge we have. Relative agnosticism is what causes one to choose among different approaches: those that require the (1) most knowledge—like command and prohibition; (2) less knowledge—like fault; (3) still less knowledge—like, “who can decide best?;” and (4) least knowledge of all—like, “I don’t even know who can decide best, but I do know—and can put incentives on—the one who can best find the one who can decide best.”

Second, about law and economics and model-making. Model-making is useful because it spins out boxes. Then the question be-

---

33. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

34. See LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001).

comes, "Are the boxes full, or are the boxes empty?" A model may point to something that is of no use at all. Making a model, the simplest model, like the one I used in the *Cathedral* article, says, "Here is a box. Gee, that is interesting, there is a box there. Is there anything in the real world that fills that box?" If there isn't, one can throw the model out. But the model may well cause one to see something that the canonical way of looking at things has caused one to miss. For instance, it may lead one to notice all the administrative eminent domain decisions that are instances of the fourth rule in the *Cathedral* article, all those decisions that escaped attention because there were darn good legal process reasons why such rulings can almost never be made by courts. Indeed, it took a weird case like *Spur* to justify even one court instance. To the extent that economics is a source of modeling and that modeling can help one to look here or look there, and see things that are otherwise hidden, it is obviously useful.

Finally, and this will be final, there are two things we can do with economics. One is to use economics to criticize, explain, or justify legal rules. We've done a lot of that, and we can use other social sciences, or mixtures of social sciences to that same end. That's fine, but if that is all we do, we are limited greatly by the self-imposed limits of economics and of these other social sciences. Such limits are what kept me from looking at value shaping. Or we can do something more, something that as lawyers who know economics or care about economics we are particularly suited to do. We can do what Coase did. We can be institutionalists. As lawyers, we can say, "There are these things out there that economic theory does not explain adequately." Why doesn't economic theory explain their existence adequately? Often it is because of self-imposed limits or canonical presuppositions: "Markets are costless." "We can't talk about values." (I have a whole other game about altruism.<sup>35</sup>) Our theory, economists say, keeps us from having anything useful to say about these. To which the lawyer-economist or the institutionalist answers, "Can you really not talk about this existing institution or practice? Is it essential to economics that you cannot talk about it?" Or can you develop a more sophisticated, maybe more complicated and more difficult economic theory that allows you to talk about it? What would happen to economics if you let yourself say, "Markets cost something?" What would happen to economics if you permitted yourself to say, "There are some circumstances where we can do joint maximizations, which will tell us something about shaping values?" One can then come up

---

35. See *supra* note 31.

with a much more sophisticated economic theory, and, more important, one that can be very useful. For then, one can play that more sophisticated economic theory back into law and ask, "Now what does this 'new' economic theory tell us about the things that exist in law and that had not previously been explained?"

I think that analysis of law through economics has a tremendous future if we are but willing to play the analysis both ways, to be symmetrical, to use what we know as institutionalists, as lawyers, to push economics (and, by the way, to push anthropology, to push bananas, to push all the other social sciences as well), to make its theory more sophisticated. If we push economic theory and then, having pushed it, come back and use it in law, we will see and examine any number of things that need analysis. That is certainly what Coase did. And, in a funny way, I think that, without knowing what I was doing because I was very young and it was a very young book, this is, in part, what I tried to do in *The Costs of Accidents*.

Thank you.