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JUSTICE AND THE OPTIMAL DETERRENCE OF ACCIDENTS

Stephen A. Kiholm*

I. INTRODUCTION

The attempt to maximize social wealth in the field of accident law did not originate with Richard Posner and his application of economics to law. Since 1961, Guido Calabresi has analyzed the problem of accidents with a view to reducing their costs, and like Posner he relies on economics for that analysis.¹ But unlike Posner, who has

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1. His principal works are Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965) [hereinafter *Decision for Accidents*]; Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. LAW & ECON. 67 (1968) [hereinafter *Transaction Costs*]; Calabresi, *Does the Fault System Optimally Control Primary Accident Costs?*, 33 J. LAW & CONTEMP. PROBS. 429 (1968); G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter *Costs*]; Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter *Calabresi & Melamed*]; Calabresi & Hirschhoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) [hereinafter *Calabresi & Hirschhoff*]; Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975) [hereinafter *Optimal Deterrence*]; Calabresi, *Concerning Cause and the Law of Torts*, 43 U. CHI. L. REV. 69 (1975) [hereinafter *Concerning Cause*].

made some attempt at empirical verification,² the economics Calabresi offers nowhere contains a quantitative study relating a particular system of accident control with its success at cost reduction. Rather Calabresi's intention is to lay a "theoretical foundation of accident law," where the principal task is in describing not solving the relevant issues.³

The approach provides the basis for an applied economics or cost-benefit analysis. In his book *The Costs of Accidents*, Calabresi sets forth the goals tort law should seek to accomplish, suggests alternative methods of achieving those goals, and then evaluates each alternative as it relates to each goal and collection of goals. The system which optimizes accidents, or achieves the best mix of desired goals and subgoals, is the one then selected. Although Calabresi never evaluates alternative methods in a quantitative sense, he compares each method in terms of its apparent economic costs and therefore suppresses concerns like "justice" that are incapable of an objective analysis. The result is twofold: A set of theoretical conclusions largely unsupported by fact, and a misstatement, because of his relative neglect of justice, of the goals of tort law.

Economists observe that productive activities commonly impose externalities upon society—benefits or costs which are not reflected in the market price of the product of service. Accidents, being the negative externalities of productive activity, therefore impose costs upon society. In Calabresi's terminology there are three main types of accident costs: primary (involving personal injuries and property damage), secondary (consisting in the failure to compensate, or to compensate adequately, the victim of an accident), and tertiary (the costs of administering any system for reducing primary and secondary costs).⁴ Calabresi states that the foremost goal of accident law should be "the maximum reduction of the sum of accident costs and the costs of avoiding accidents that can be accomplished in a just way."⁵ Justice, then, serves as a "constraint that can impose a veto" on any cost-maximizing system of accident law.⁶ In reality, however, this constraint proves quite unimportant, for according to Calabresi

2. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987), and references cited therein.

3. *COSTS*, *supra* note 1, at 3-33.

4. *Id.* at 26-28.

5. *Id.* at 31.

6. *Id.* at 25.

the very idea of what is just or unjust in the field of accident law is greatly influenced by a system's success at cost reduction.⁷ In Parts II and III of this article I describe the implausible role that justice plays in Calabresi's "decision for accidents."

It is significant that for Calabresi the task of accident law is not the elimination of accidents altogether; that could be achieved simply by prohibiting the activities that give rise to them. Instead the object is to "optimize" accidents, whereby society induces accident-prone but socially beneficial activities to reflect in their market prices the costs of their accidents—to pay their way. It is with activities Calabresi labels "useful," those that society chooses not to prohibit (though as an inducement for an efficient level of care it will impose liability if an accident occurs), that strict or enterprise liability is to be preferred over the traditional fault system.⁸ To be sure, Calabresi does not abandon the fault principle as a criterion of responsibility, when sanctioned by civil or criminal fines, for he argues that the principle is appropriate for "useless" activities, or those, like speeding, that society deems wrongful and so forbids.⁹ But as a basic proposition strict liability should be the dominant system of accident law since useful activities comprise the majority of accidents.¹⁰ The distinguishing of activities according to their usefulness, a distinction I take issue with in Part II, forms the rationale for Calabresi's notions of "general" deterrence, where the decision regarding the level of accidents is left to market forces, and "specific" deterrence, where government enforces the collective judgment of society and forbids specific instances of faulty conduct.

Inasmuch as deterring cost inefficiency is for Calabresi the primary task of accident law, it is not surprising that he directs most of his criticism at the fault system and its reliance on the principle of "corrective justice."¹¹ By favoring economic analysis over the approach commonly used in tort litigation—the close reading of cases

7. *Id.* at 296-97. See also Calabresi & Hirschhoff, *supra* note 1, at 1078.

8. *Decision for Accidents*, *supra* note 1, at 719-20.

9. *Id.* at 718-19.

10. *Id.*

11. The principle of corrective justice derives from Aristotle in Book V, Chapter 4, of his *Nicomachean Ethics* (M. Ostwald trans. 1979). It states very briefly that regardless of the wealth or virtue of either party, where one person wrongfully injures another, he must make compensation in order to restore their relationship to a prior condition of equality. See Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37 (1983) (for its application to contemporary tort law). But cf. Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. LEGAL STUD.* 421 (1982); Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 *J. LEGAL STUD.* 187 (1981).

and statutes for the rule of law thought applicable to a given fact situation—Calabresi rejects a particularized determination of liability. As a matter of general deterrence, he views the issue of accident cost reduction from the perspective of “activities,” not individual actors. The object, then, is to impose nonfault liability on those “categories” of accident-prone activities, such as automobile manufacturers, which are the “*cheapest cost avoiders*”—those parties best situated to make a cost-benefit analysis as to whether accident costs are worth avoiding and to act on that decision.¹² Calabresi admits that the search for the cheapest cost avoider will sometimes rest with the victim rather than the injurer class and that the imposition of strict liability is not without exceptions.¹³ He argues, however, that since the goal is efficiency, the focus should be on those accidents that are recurring not on the isolated case, and so not on individualized relationships between injurer and victim.¹⁴

Therefore the question of “fairness between the parties,” which is the exclusive concern of corrective justice and of the fault system, is not on this reading the proper inquiry for accident law. Indeed the justice Calabresi speaks of is not justice as between discrete litigants but rather the “community’s sense of justice,” which he regards as broadly utilitarian, consisting in wealth efficiency and its equitable distribution.¹⁵ This article, to the contrary, defends the fault system and the principle of corrective justice rooted in case-by-case adjudication. I argue below that fault liability, when coupled with a social insurance scheme for uncompensated victims, provides for adequate deterrence, fairer compensation, and imposes no greater administrative costs than would a system of nonfault liability. More importantly, unlike nonfault, the system I propose vindicates the sense of fairness implicit in requiring that injurers, to the degree possible, compensate their victims in proportion to their wrongdoing. The article describes and offers one solution to the problem of synthesizing corrective with distributive justice in the field of accident law, and it outlines the limited role wealth and utility may play in tort litigation. I argue, in conclusion, that efficiency is subordinate to enforcing the legal rights and expectations of isolated parties and is consequently of

12. Calabresi & Hirschhoff, *supra* note 1, at 1060; Costs, *supra* note 1, at 135.

13. Costs, *supra* note 1, at 135; Calabresi & Hirschhoff, *supra* note 1, at 1060-74; *Optimal Deterrence*, *supra* note 1, at 666-71.

14. Costs, *supra* note 1, at 135.

15. *Id.* at 291-92. See also Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 553-62 (1980) [hereinafter *About Law and Economics*].

secondary importance to the rule of law—treating alike those parties who are similarly situated.

II. ACCIDENT COST REDUCTION

A. *General and Specific Deterrence*

Although less committed than Posner to a free market economy for achieving efficient accident control, Calabresi nevertheless depends heavily, but at times inconsistently, on the central idea of general or market deterrence. Indeed were it not for the ability of the market to direct consumer behavior to an optimal level of accidents, Calabresi argues that the best solution to the accident problem would consist in a social insurance system supplemented by criminal sanctions.¹⁶ In that scheme, social insurance would reduce the secondary costs of victim compensation, while criminal sanctions would reduce the primary costs associated with the number and severity of accidents.

However, assuming the feasibility of general deterrence, Calabresi insists that it would be preferable to rely on that method of control for most types of accidents. This is so because he views accident law from the perspective of multiple goals, each of which impinges upon the others. Given the complexity of goals, where the object is to achieve the best combination of each, a social insurance system is inadequate since it fails to deter accidents; it achieves the goal of secondary cost reduction only at the expense of reducing primary costs, a separate goal. For example, product manufacturers who know that users who are injured will be compensated from a social insurance pool regardless of the manufacturer's fault or insurance contribution, will have little incentive to invest in cost-justified safety precautions. Similarly, criminal sanctions (the collective determination of liability) will be useful in deterring accident costs only in those cases where it is certain that the injurer class is the cheapest cost avoider. Calabresi often points out that accident victims will sometimes be in a better position than injurers to decide whether the costs of the accident should have been avoided, and that in other cases neither the injurer nor victim but some third party will be in the best position.¹⁷

16. Costs, *supra* note 1, at 6-7, 66-67, 312-13.

17. See, e.g., Calabresi & Hirschhoff, *supra* note 1, at 1067.

As an illustration, in a collision between two automobiles it may be that neither driver but instead the automobile manufacturer was best situated to decide the issue of accident cost avoidance. However, were courts to impose liability on automobile manufacturers without exception, that practice too would be inefficient. For Calabresi reasons that in other accidents involving automobile driving, say a car-pedestrian collision, it may be more efficient to build a pedestrian overpass, or to rely on some other solution, than to impose liability on the automobile manufacturer. He writes that the fault system and case-by-case adjudication, "because it centers on the possible *particular* cost avoider, is very likely to ignore the recurring cost avoider and hence fail altogether to consider some potential cheapest cost avoiders such as highway builders or tire-makers."¹⁸

Therefore, according to Calabresi, the decision whether to rely on general or specific deterrence will depend, first, on the type of accident or accident-prone activity (both reduce to the issue whether the accident-causing activity was useful or useless), and second, on the degree to which it is certain or judged to be certain that one party is in fact the cheapest cost avoider with respect to that accident or activity. The method of general deterrence relies on voluntary market transactions, induced by the threat of civil liability, whereas specific deterrence opts for government regulation of acts or activities, such as traffic rules or safety laws. Calabresi concludes that a mixed system of general and specific deterrence is desirable, with the proportion of each being a mixed factual and political question.¹⁹

Unfortunately, as critics of Calabresi have observed,²⁰ the distinction between general and specific deterrence is at best problematic and indicates, in part, his wavering endorsement of the market. Calabresi assumes that because individuals undervalue the risk of accidents they will fail to adequately insure against an accident's occurrence.²¹ Therefore he assumes that insofar as a free market will fail to promote safety, public regulations serve as a necessary deterrent. However, it might be argued that traffic ordinances do not, as

18. COSTS, *supra* note 1, at 256 (emphasis in original). See also *Decision for Accidents*, *supra* note 1, at 719-20.

19. COSTS, *supra* note 1, at 178, 180, 312.

20. See, e.g., England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 38-47 (1980) [hereinafter England]; Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647 (1971) [hereinafter Michelman]; Posner, *Book Review*, 37 U. CHI. L. REV. 636 (1970) [hereinafter Posner].

21. COSTS, *supra* note 1, at 55-64, 206, 220.

he says, reflect a dissatisfaction with the level of accidents determined by the market, but instead have arisen only because the state is the exclusive owner of traffic highways. Assume, as Professor Posner has hypothesized, a situation where all roads are privately owned. He writes, "One would expect the highway owners to establish rules of the road, speed limits, and the like for the same reason that auto manufacturers installed some safety devices even before they were required by law to do so: in order to promote use of their product by meeting the user's demand for safety."²² Posner asserts, and I concur, that in an unregulated economy with respect to a given act or activity the level of safety can be negotiated on the basis of voluntary private contracts. The point is not to argue for the feasibility of private contracts in all cases,²³ but only to show that safety regulations, and so specific deterrence of faulty conduct, can in principle be determined by market rather than by collective means.

Calabresi is also mistaken, it seems fair to conclude, in his suggestion that market deterrence will fail to insure safety because individuals are "risk preferers," and because they often lack adequate information to make a rational decision for or against accidents.²⁴ With respect to a psychology of high risk preference, Calabresi assumes without question that it correctly describes rational behavior in the marketplace. Economic theory, however, does not posit any preference for risk that holds uniformly for all individuals and types of activity. And social theorists who have attended to the degree of risk taking in the rational selection of political institutions differ widely in their conclusions. While a rule of "expected-utility maximization" permits high risk taking where the probability of an undesirable outcome is low, John Rawls' "maximin rule" of rational choice requires that in all cases we select the best alternative among worst-case scenarios. In comparison with Calabresi's psychological assumptions, a rational person is for Rawls highly risk averse.²⁵

Moreover, it is equally doubtful whether collective interference is necessary in a competitive economy to rectify consumer ignorance of safety hazards. Again, following Posner, if we assume that buyers

22. Posner, *supra* note 20, at 641.

23. Later in this article I propose a social security compensation scheme for victims of nonnegligent injurers.

24. See Costs, *supra* note 1, at 55-64, 206, 220.

25. See generally Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory*, 69 AM. POL. SCI. REV. 594 (1975) (defends a decision rule of maximizing expected utility); J. RAWLS, A THEORY OF JUSTICE (1971) (for the maximin rule that seeks to improve the position of the least favored social strata).

and sellers can privately contract for safety, it seems likely that a seller's competitor will inform prospective buyers of the dangers associated with the first seller's product. By a competitive exchange of information, consumers will often have sufficient information with which to make a rational decision, and so the argument that safety regulation cannot be achieved except through specific deterrence is simply untrue.

The criteria for selecting one form of deterrence over the other is far from obvious in Calabresi's writings. Often his arguments are confusing and seem contradictory.²⁶ For example, he writes that juries and case-by-case determinations of liability are not essential to an adequate system of either general or specific deterrence and that neither are they essential in a system, as he favors, that mixes the two approaches.²⁷ But since his own system will at times rely on tort fines as a means of deterrence, he has to later acknowledge that "tort fines would be accompanied by the expense of case-by-case determinations."²⁸ Thus, his earlier statements to the contrary notwithstanding, case-by-case determinations are essential in the nonfault system he proposes. In another context, Calabresi argues for imposing nonfault liability on the product manufacturer "because he is the party who can, by actions reasonably to be expected, reduce the risk."²⁹ But in the next footnote he states, "[i]t may be that the producer is not the cheapest cost avoider in the long run, and this needs to be kept in mind in deciding whether to impose liability."³⁰

The confusion surrounding general and specific deterrence has led one commentator to remark that their intended use is as "a mere convenience in organizing discourse—as a compendious descriptive terminology through which we can refer to fluid and overlapping combinations of regulatory techniques."³¹ But the distinction between forms of deterrence is not, in my view, simply one of "decentralizing" and "centralizing" regulatory functions. To the contrary, their use reflects a significant normative decision implicit in a theory which purports to be comprehensive and value-free. The point to be made in this context is that the single-minded striving for an efficient "market" deterrence of accidents undermines any attempt to do

26. See England, *supra* note 20, at 44-45.

27. Coors, *supra* note 1, at 286-87.

28. *Id.* at 287 n.2.

29. Calabresi & Hirschhoff, *supra* note 1, at 1071 n.57.

30. *Id.* n.58.

31. Michelman, *supra* note 20, at 661.

corrective justice in isolated cases. Admittedly, the specific deterrence of accidents makes some attempt at justice—at linking injurer with victim on a moral plane—but as we see below, it is not synonymous with the fault system and is based, as it implies, on deterrence not rectification for harm caused. Further clarification of the distinction between the forms of deterrence, best characterized by “useful” and “useless” activities, lends support to the position that market efficiency is a value often antithetical to corrective justice.

With general deterrence, the object is to impose prospective liability on broadly defined classes of activity rather than on a particular individual who, judged retrospectively from the accident’s occurrence, was negligent in his conduct.³² Courts (or legislatures) will in this view devise categorical rules of nonfault liability based on statistics correlating an activity, say automobile driving or product manufacturing, with types of accidents. For instance, a rule might state that automobile drivers are presumptively liable for the costs of collisions between cars and bicycles, and similarly for lawnmower manufacturers in relation to lawnmowing injuries. Classes of activity may themselves be divided into subcategories of activity if subcategorization results in greater accident deterrence. Thus automobile driving may be isolated to impose accident liability only on driving which occurs at night, or we might distinguish between steel and aluminum-made lawnmowers, so that a manufacturer’s liability will depend on its choice of construction and the relative accident-proneness of those materials.

By imposing nonfault liability on an activity or subcategory of activity, those responsible for accidents will be prompted to alter their behavior—e.g., by reducing night driving, or by substituting steel for aluminum-made lawnmowers. Activities and subcategories which carry a high accident risk will become progressively more expensive, perhaps even pricing themselves out of the market; and producers (or consumers), acting in response to a change in price, will opt for safer, less expensive substitutes. The underlying principle is that by focusing on statistical accident “involvement” instead of isolated faulty conduct, activities and their subcategories will be made to reflect their true social costs. Calabresi summarizes his market approach to “useful” activities as follows:

The best way we can establish the extent to which we want to allow such activities is by a market decision based on the relative price

32. See, e.g., *Costs*, *supra* note 1, at 68-94, 135-73.

of each of these activities and of their substitutes when each bears the costs of the accidents it causes. This can be done by a system of nonfault enterprise liability, a system that assesses the costs of accidents to activities according to their involvement in accidents. By contrast, our fault system, with insurance, assesses the cost of an activity not according to the number of accidents it causes but according to the number of accidents it causes in which certain predetermined indicia of fault can be attributed to it. This results in a deterrence of only faultily caused accidents in an area where by hypothesis we are interested in deterring activities not because of some moral implications but because of the accidents they cause.³³

With specific deterrence, it has been noted, Calabresi states that the object is to reduce "useless" acts or activities, those where injurer fault of carelessness is involved.³⁴ Here courts (or legislatures) vindicate the collective judgment of society by forbidding what is deemed too likely to cause an accident or is not otherwise socially desired. Typically, a specific deterrent will take the form of a penal law which forbids specific conduct; they are cases, like drunken driving, where the doer of the act has sufficient control over his conduct that it can be avoided in the future. A political judgment is made that the behavior will not be permitted even if the doer is willing to pay for ensuing accident costs. In these cases, real or potential victims are protected by what Calabresi calls a rule of "inalienability": injurers may not cause accidents upon the condition that they compensate for them.³⁵ Thus drunken driving or driving without an operator's license or vehicle safety inspection are forbidden because of the perceived correlation between those activities and subsequent accidents. In other, less frequent examples of specific deterrence, those where the doer has insufficient control over his conduct to warrant a criminal penalty, the imposition of civil liability—the payment of money damages—will be appropriate. Here victims are protected by a "liability" rule, or one where injurers are permitted to cause accidents provided they make restitution.³⁶

Hence, for Calabresi, not all specific deterrents will consist, like drunken driving, in forbidding the activity. Some activities may merely be taxed, to reduce their frequency, while others—those thought to promote safety—may even be subsidized. Society may,

33. *Decision for Accidents*, *supra* note 1, at 719-20.

34. *See id.* *See also Costs*, *supra* note 1, at 95-129, 174-97.

35. Calabresi & Melamed, *supra* note 1, at 1092-93.

36. *Id.* at 1092.

for example, pay young or old-age automobile drivers not to drive, or to drive less often, if it finds that those age groups contribute disproportionately to accidents. Specific no less than general deterrents may divide accident-prone activities into subcategories, like age groups, to achieve maximal effect. Specific deterrents are distinguishable in that they coerce accident prevention rather than leave it, as with general deterrents, to individualized market judgments. They may reflect unusual certainty by society that injurers (or subcategories of injurer activity) are, for a given accident or accident type, the cheapest cost avoider, or they may reflect a moral or aesthetic, i.e. "nonmonetizable," judgment that some act or activity should not be allowed.

But the separating of activities according to their usefulness is implausible, as critics have argued, since the category of useful activities comprises only those accidents that, under the fault system, are deemed "unavoidable."³⁷ Unavoidable accidents, of course, are those that are unintended and could not have been prevented by the exercise of reasonable care.³⁸ Historically they account for a very small fraction of all accidents, for in most cases some human carelessness or negligence is involved. Yet in applying Calabresi's analysis, where careless conduct can be singled out as an accident's cause, we are left with a useless act requiring specific not general deterrence as the appropriate means of prevention. Moreover, for Calabresi the presence of any carelessness in an otherwise useful activity will necessarily convert the latter into a useless one, again requiring specific deterrence. Thus his warranted reliance on the general deterrence of accidents—the showpiece of his theory—is considerably lessened.

The conclusion that useful activities are limited to unavoidable accidents is based on Calabresi's assumption that there are a great many activities "whose undesirability consists only in the fact that they result in accidents and then only to the extent that people would, if they knew the costs of these accidents, prefer to abstain from the activity rather than pay those costs."³⁹ They are activities which "comprise the bulk of the decisions as to accidents" and so account

37. See, e.g., England, *supra* note 20, at 41.

38. See W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 162-64 (W. Keeton, D. Dobbs, R. Keeton & D. Owen 5th ed. 1984) [hereinafter PROSSER & KEETON]; CASES AND MATERIALS ON TORTS 55-85 (Epstein, Gregory & Kalven 4th ed. 1984) [hereinafter EPSTEIN].

39. *Decision for Accidents*, *supra* note 1, at 718.

for the importance of general deterrence.⁴⁰ But with rare exception are not almost all accidents the result of human failures which can be isolated and described—speeding, inattention, or improper equipment?⁴¹ The undesirability of these damage-causing activities involves not merely their outcome but their root cause in avoidable human neglect. And even in cases where we are uncertain as to an accident's cause or decide that it is too costly to inquire, if there exists even some small element of fault in a basically useful activity the appropriateness of general deterrence breaks down.

In describing how accident costs are affected by general deterrence, Calabresi suggests the case where a hypothetical driver could reduce his accident rate by using a different kind of brake in his automobile.⁴² He argues that the threat of civil liability creates an incentive for the driver to make his activity of driving safer, and that that form of accident prevention is less costly than specifically deterring faulty driving. Nevertheless, it seems that if the driver were to cause an accident despite the installation of new brakes, the cause most likely would rest with a specific faulty act, either by the driver or by the person he injures in acting carelessly. In that event, although general deterrence (the installation of new brakes) was more appropriate for the activity of driving, the presence of fault would convert the activity into a useless one and thus invoke, according to Calabresi, specific deterrence. Calabresi entirely overlooks that the incentive to act more safely assumes that individuals can predict in advance the cause of an accident and therefore prevent its occurrence. Surely that measure of controllability is lacking in most accidents, which are more likely the result of unpredictable human error.

In general, we may question whether dissimilar accidents are equally amenable to an efficiency analysis in terms of cost-avoidance categories. Although product manufacturers may be induced to make their products safer if they were routinely held liable for the injuries their products caused, the same incentive is unlikely to be found, e.g., with automobile drivers.⁴³ For the latter, accidents happen seldom if at all; they can hardly be deemed a common cost of doing business with a large consuming public. Safe automobile driving

40. *Id.* at 718-19.

41. See, e.g., Englard, *supra* note 20, at 43; Posner, *supra* note 20, at 645; G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 221-23 (1980) [hereinafter WHITE].

42. COSTS, *supra* note 1, at 73-74.

43. See, e.g., WHITE, *supra* note 41, at 223; Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 250 (1967).

involves careful attention and some physical ability, neither of which are reducible to any kind of cost-benefit calculus. Indeed, an automobile owner might invest heavily in safety precautions and still be physically incapable of driving safely, avoiding those accidents he had a cost-incentive to avoid.

Finally, there appear to be some damage-causing activities, like industrial polluting, that are intentionally engaged in, yet, when optimally produced, are socially desired and beneficial.⁴⁴ The problem for Calabresi is that under his theory if society wished to reduce the level of pollution it would either have to specifically deter a useful activity, manufacturing, or else generally deter an activity whose undesirability, excessive pollution, is "nonaccidental." The polluting manufacturer, to be sure, is fully aware of the consequences of its behavior, and there is no fortuity, as with accidents, in the nature and extent of any damage. Again, contrary to Calabresi, there are very few activities whose undesirability consists only in their causing accidents (the intentional production of unwanted pollution suggests as much), and so added doubt is cast upon the plausibility of his distinction between general and specific deterrence.

B. The Critique of the Fault System

The reliance on general deterrence of accidents represents Calabresi's unique contribution to the field of tort law. The fault system, insofar as it focuses on the issue of fairness between parties and case-by-case determinations of liability, is based for the most part on the specific deterrence of accidents, though if Calabresi is correct it does a poor job even at that. For it does not deter wrongful acts regardless of accidents, he points out, but only accidents where some wrongful act, judged after the fact, was the cause—a much narrower category.⁴⁵ In addition, whatever general deterrence results from fault-based liability is for Calabresi unintended, and in any event depends on marginally efficient private insurance contracts.⁴⁶ His argument is that if we wish to reduce the costs of accidents then we are better off in the majority of cases in not specifically deterring faulty acts but in generally deterring, through nonfault enterprise liability, classes of accident-prone activities. Consequently, the importance of injurer

44. See, e.g., England, *supra* note 20, at 42 n.60; Michelman, *supra* note 20, at 666-67, 669.

45. Costs, *supra* note 1, at 266-77.

46. *Id.* at 244-65.

responsibility toward discrete accident victims—the position favored in this article—is expressly rejected. Calabresi's assumption of market efficiency rather than corrective justice as the appropriate judicial norm is the value judgment referred to earlier as implicit in his distinguishing the forms of accident prevention.

The efficiency judgment is implicit because Calabresi fails to defend adequately the value of efficiency. Most of his arguments against the fault system are based on the view that fault serves as a poor method of optimizing accident costs. But he also argues that it is not required by justice.⁴⁷ The justice he has in mind is not corrective justice between isolated parties, as I propose. Rather it is a kind of distributional fairness—the principle of not singling out individuals with accident costs unreflective of their responsibility for them. Having outlined the goals and methods of accident control, in which justice, as he defines it, serves as a constraint, Calabresi appraises the fault system with each of these goals and methods in view. He concludes that the fault system is outmoded, “absurd,” and so “ineffective” that any one of several substitutes would be preferable.⁴⁸

For example, he argues with respect to reducing secondary (victim compensation) costs that the fault system unfairly places all of the costs of an accident on either of two parties: the injurer, if he was negligent, or the victim, if there was no injurer negligence or if the victim was contributorily negligent. This, he says, may result in serious economic hardship if the party left with the costs is not privately insured.⁴⁹ A more equitable system would spread the costs of accidents throughout society generally to reflect the full measure of its responsibility for those costs. What is more, the argument continues, private insurance begets problems of its own. Calabresi maintains that it often is inadequate for compensating victims because, as we saw, individuals tend to underinsure; that it may result in “externalizing” accident costs from the cheapest cost avoider, since, if parties are insured, they have little incentive to take cost-justified precautions; and that it requires costly and time-consuming court litigation, thereby increasing the administrative (tertiary) costs of the system and needlessly delaying victim compensation. Presumably, a system of nonfault enterprise liability would compensate victims immediately and so reduce the administrative costs associated with case-by-case determinations of fault.

47. *Id.* at 291-308.

48. *Id.* at 276, 316.

49. *Id.* at 278-79. *See also id.* at 39-67, 278-87.

The fault system fares no better, according to Calabresi, in optimizing primary accident costs.⁵⁰ He states that its success in that area depends on the commercial feasibility (usually lacking) of private insurance carriers in establishing, for purposes of client rate-schedules, subcategorization of risk groups; that it fails, as we saw, to impose liability when it is warranted on entire classes of injurers or on blameworthy third parties not brought into litigation; and that the concept of "fault" itself is loaded with an antiquated moral connotation (a view of "inward" injurer culpability requiring retribution) that prevents our developing efficient accident solutions.

Accordingly, he rejects the fault system's "simplistic bilateral view" of the accident problem, in which accidents are "incidental events linking one victim with one injurer," and argues instead that accidents are part of a more general social problem of reducing the costs associated with them consistent with our sense of justice.⁵¹ So if justice requires (as it appears to) that innocent victims be compensated and that injurers be penalized in proportion to their wrongdoing, it does not for Calabresi necessitate the fault system. Rather, both justice and efficiency suggest the appropriateness of a social insurance pool for victim compensation to be supported by requiring that "all parties involved in similar accidents divide all the injury costs according to a scale of relative guilt."⁵² This means, in summary, that where society is certain that an activity is undesirable it will impose noninsurable civil or criminal penalties regardless of accidents, and, where it is uncertain, it will devise actuarial categories for charging "different groups different amounts in relation to the relative desirability or blameworthiness of the activities in which they are engaged."⁵³

I propose in the remainder of this section to defend the fault system against the charges that it is inefficient and unfair. Consider, first, the fault system's method of compensating accident victims, namely, private liability insurance. Calabresi is correct, in part, in criticizing the insurance industry because of its processing of automobile accidents. As Professors Keeton and O'Connell have shown,⁵⁴ the modern practice of insurance has been to shift accident costs from the most accident-prone drivers to the least. They point out

50. *Id.* at 244-65.

51. *Id.* at 301-08.

52. *Id.* at 306.

53. *Id.* at 303.

54. R. KEETON AND J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 76-102 (1965).

that in most schemes of traditional "third party" insurance (where a driver is responsible for the damage he may cause others), private carriers are compelled by law to insure, at near average rates, high-risk drivers that would not otherwise be covered; and that it is only the premiums paid by the carriers' safer policy holders, by far the larger number, that allow the insurance industry to operate at a profit. Consequently, in that setting the fault system with insurance probably does encourage greater accident costs.

But that form of state-compelled insurance, which encourages accidents, is not the only alternative open to the fault system. For example, society could require that drivers obtain private liability insurance at the competitive rate for their appropriate risk group.⁵⁵ Presumably drivers who are very young or very old would pay higher premiums than those in the middle years, and owners of sports and luxury cars would have higher rates than those with less obtrusive, more moderately priced ones. With effective rate-scheduling in place, society, if it chose, could then deny the privilege of driving altogether to those drivers whose poor risks prevent their paying for the higher premiums that would ensue. In this alternative scheme, each driver would indeed pay for the true accident costs of his driving. And so Calabresi's objection to private insurance—that it insufficiently subcategorizes risk groups—would be remedied by effective public regulation of the insurance industry. It is, as Posner suggests, the inadequate form of state regulation and not the fault system that is the major weakness in the traditional handling of victim compensation.

Inasmuch as Calabresi underscores the inadequacy of private insurance as it now exists, his approach to reducing secondary accident costs appears to be twofold. First, he would impose nonfault enterprise liability if the injurer was the cheapest cost avoider, in which case the victim would (presumably) be compensated. But he would let the costs fall upon the victim if the latter was the cheapest cost avoider. In either case, his approach to victim compensation is as a mere byproduct of the primary cost reduction inherent in general deterrence, and it is therefore dependent upon that deterrent's feasibility. Second, he would compensate victims from a fund supported by penalties for faulty conduct, on the model of specific deterrence.

There are a number of areas, in my judgment, where the fault system, buttressed by a comprehensive social security scheme, would

55. See Posner, *supra* note 20, at 645.

provide for greater victim compensation. One of the principal shortcomings of the various nonfault automobile compensation plans is that accident victims are denied recovery for some types of injury; namely, intangible items like pain and suffering, loss of consortium, and lost earnings.⁵⁶ By dispensing with case-by-case adjudications (in order to avoid lengthy delays in compensation), nonfault plans have the disadvantage of denying victims of their common law right to sue for full rectification of their injuries. Under nonfault plans, damages are computed from a statutory schedule, rather than apportioned to the loss suffered by a particular plaintiff. So, for example, a lost finger is worth a predetermined amount, say \$3500, whether it be the finger of an average person, for whom recompense might be adequate, or a concert violinist, for whom the loss may affect his livelihood and who therefore will receive inadequate compensation. A victim under nonfault, declares one author, receives a "minimum recovery which is often but a small portion of the damage he has suffered and to which he is entitled" under the fault system.⁵⁷ In contrast, the fault system permits victims to sue to recover the entire measure of their damages provided injurers are to blame.

Two other areas where the fault system might enhance victim compensation are in cases where injurers are not negligent or "at fault," and in cases where victims are the cheapest cost avoider. In the first instance, a victim in Calabresi's theory would only be compensated if the injurer, though nonnegligent, was the cheapest cost avoider. In the second instance, the victim would not be compensated.

As an alternative theory, one which compensates victims not provided for by Calabresi, suppose the fault system, with private liability insurance, were supplemented by social security payments. Those payments, funded through general taxes, would be designed to compensate all accident victims regardless of injurer or victim fault or cost avoidance potential. Compensation systems quite similar to that proposal have been established in England and in many other foreign countries.⁵⁸

It is also the theory advocated by Professors Blum and Kalven.⁵⁹ They maintain that the accident problem involves two connected

56. See PROSSER & KEETON, *supra* note 38, at 606-08; EPSTEIN, *supra* note 38, at 949-85 (providing a general discussion and references to the critical literature).

57. DeParcq, *Comment: In Defense of the Fault Principle*, 43 MINN. L. REV. 499, 506 (1959) [hereinafter DeParcq].

58. *Id.* at 508.

59. W. BLUM AND H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM—AUTO COMPENSATION PLANS* (1965).

principles of justice.⁶⁰ On the one hand, since victims of automobile accidents have suffered a personal misfortune, there appears no basis for treating them any different from other accident victims: Both groups, they insist, should be entitled to relief as a matter of general welfare to be paid for out of a fund for social security. On the other hand, justice also implies that losses from automobile accidents should be shifted, if possible, to the class of negligent motorists responsible for them, so that if negligent motorists can be identified, accident losses would not lie with victims or as a charge to society. Therefore they argue, as a matter of justice, that we distinguish between responding immediately to a victim's needs, with social security, and then deciding, at a trial, who under the fault principle should ultimately bear the loss. They summarize their proposal as follows:

The social security approach could be used to underwrite relief for those in need without allowing any recovery over by the welfare fund. Victims of faulty drivers, however, would be left with their common law actions intact, subject only to deduction for welfare payments which they have received from the fund. Under such an arrangement, losses below a certain level would be borne by the public generally and would be allocated wholly without regard to fault, while losses above that level would be allocated according to the fault principle—some remaining on victims and some shifted to drivers as the principle dictated.⁶¹

The interesting feature of this proposal is that, as the authors state, it responds to a private law problem with a public law solution: The undercompensation of accident victims characteristic of the existing fault system is remedied by a tax-based expansion of government welfare entitlements. It is equally significant that we could use the tax system to redress existing iniquities in accident-cost burdens. Under the proposed scheme, society could impose a commensurately higher tax upon those individuals or groups who benefit the most from automobile driving.⁶² Presumably, automobile and product manufacturers would pay more for accidents than they do now, thereby vindicating the "deep pocket" and "loss spreading" principles of insurance that Calabresi argues are required by distributional fairness.

60. *Id.* at 83.

61. *Id.* at 84-85.

62. *Id.* at 83, 54-65.

Be that as it may, it is worth noting that Calabresi does not favor reducing secondary accident costs if, by so doing, we impose a greater net social cost. Indeed, he states that future debate over accident reform will likely center on the tradeoff, not between fault and nonfault liability, but between those proposals which favor greater victim compensation, based on social insurance, and those, like his own, which emphasize primary cost avoidance based on the optimal mix of general and specific deterrence.⁶³

But would Calabresi's theory, if adopted, lead to substantially fewer and less severe accidents than the fault system accounts for? I believe that it would not. Consider his objection that in deciding tort cases judges under the fault system look only at the relative abilities of the parties before them to minimize accident costs, where in reality a third party not a trial may be the cheapest cost avoider. In my view that objection is misleading. For under the fault system a party charged with causing harm may seek to prove that not he but someone else was in fact responsible. The defendant's plea of innocence becomes part of the central issue of "reasonable" conduct. According to the test of reasonableness, it is not dispositive in terms of liability that the defendant at trial injured someone; for it allows a court to conclude that the party truly "at fault" may have been, for instance, not the defendant-driver, but the automobile manufacturer, the highway contractor, or the designer of the traffic signals.⁶⁴ Assuming that were true, the defendant may be absolved of liability, or perhaps he may be charged as a joint tortfeasor and seek contribution from the other responsible parties. In any case, there appears no reason for concluding, as does Calabresi, that the fault system is incapable of handling complex problems of causation of harm.

Moreover, if at trials involving similar types of accidents the responsible parties were continually identified and held liable, then insurance companies could begin to isolate accident-prone activities, individuals, equipment, and so forth, and establish the appropriate premiums.⁶⁵ Since it is far from obvious that private liability insurance, properly regulated, is inadequate to the task of efficient subcategorization of risk, or that individuals systematically undervalue the potential for accidents, I believe that the kind of market-ruled

63. Costs, *supra* note 1, at 317-18.

64. See Posner, *supra* note 20, at 645.

65. *Id.*

deterrence of accidents Calabresi argues for can effectively be achieved through the fault system.

Calabresi also objects that the fault system performs poorly in specifically deterring faulty conduct because it judges accident costs only *ex post*.⁶⁶ His argument is that courts determine fault in a factual setting only after an accident has occurred, where the judgment can be of little use as a deterrent. The implication is that risky conduct that does not cause an accident is left unpunished, thereby failing to prevent future accidents. By this interpretation, however, Calabresi has largely distorted the fault system. For he neglects to mention that historically the fault principle and civil liability have operated in conjunction with a separate system of criminal justice.⁶⁷ The specific deterrence of faulty conduct, regardless of whether it results in an accident, is therefore implemented, and properly so, in the forum of the criminal courts. This dual system of civil and criminal liability for wrongful behavior suggests, in contrast to Calabresi, that the unique goal of personal injury law is not one of "deterrence," since that is achieved by criminal sanctions, but rather one of "corrective justice." Professor Englard has, in my view, accurately captured the underlying rationale for tort liability when he writes,

The person aggrieved seeks redress through the court. In suing, the victim is interested in obtaining, here and now, personal compensation. In the ordinary case his concern is not deterrence of the wrongdoer—certainly not in relation to other possible victims. Against this background, the traditional fault system makes good sense: the blameworthy injurer is duty-bound to compensate the injured plaintiff, who may or may not derive additional retributive satisfaction from the official imposition of personal liability on the defendant.

In the case of an innocent injurer the loss lies where it falls.⁶⁸

To reemphasize, Calabresi rejects charging personal responsibility to an injurer for a particular victim's misfortune. In dismissing the corrective justice account of liability, he seems to have adopted a theory of relativism about "costs" and "causes." For example, in an article appraising "What Is a Cost of What Activity," Calabresi asks rhetorically "Is a pedestrian-auto accident to be attributed to driving or walking?"⁶⁹ His conclusion is that the issue is not a

66. Costs, *supra* note 1, at 266-77.

67. See Englard, *supra* note 20, at 48.

68. *Id.*

69. *Decision for Accidents*, *supra* note 1, at 725.

“metaphysical search for ultimate causes” but is instead a problem of financial accounting, of “apportioning the costs of an accident among those activities that caused it.”⁷⁰ Elsewhere he calls the concept of “cause” a “weasel word,”⁷¹ referring to the fault system’s malleable concept of proximate cause, and insists, as we have seen, that it be replaced with the concept of statistical accident “involvement”—the search for the cheapest cost avoider.

Calabresi does not disparage the substantial factual difficulties inherent in finding the cheapest cost avoider.⁷² He suggests general guidelines, often rather complex, for selecting the activity responsible for an accident, and in troublesome cases for making “educated guesses”; and he acknowledges his indebtedness to Ronald Coase in the analysis of bargaining, transaction costs, and in his own “best briber” solution.⁷³ But apart from the problems of complexity and uncertainty—ironically the same problems which he says beset the doctrine of proximate cause—the significant point is that, according to this view of responsibility, an automobile driver who has harmed another did not “cause” the accident. Rather it resulted from the activity of automobile driving, say, or from some feature in automobile or highway manufacture or design, so that liability will rest with the improper activity, assuming it can be isolated, and not with a particular injurer. Since it is most likely, in my opinion, that the search for the cheapest cost avoider is as a practical matter unmanageable, and that nonfault systems of liability undercompensate accident victims and require innocent third parties to subsidize faulty drivers’ misconduct, I oppose in this article abandoning the fault system’s use of proximate cause for determining liability.

We arrive, then, at the third area of accident cost reduction that for Calabresi the fault system fails to accomplish, namely, administrative costs involved in the processing of accident claims.⁷⁴ Since in his theory general deterrence is appropriate for most accidents, case-by-case determinations of liability are usually absent. An enterprise charged with responsibility for an accident will normally have no

70. *Id.* See Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 907 (1980). Cf. R. EPSTEIN, *A THEORY OF STRICT LIABILITY* 19 (1980).

71. *Costs*, *supra* note 1, at 6 n.8, 131-97. See generally *Concerning Cause*, *supra* note 1, at 69 (for the proposition that “cause” is inadequate to the task of identifying liability where accident deterrence is the goal).

72. *Costs*, *supra* note 1, at 157.

73. *Id.* at 135-73. See also *Transaction Costs*, *supra* note 1. The reference to Coase is to his article, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960).

74. See *Costs*, *supra* note 1, at 255-63.

choice but to pay for the accident costs, and so the process of adjudication is greatly simplified. However, the theory does provide for exceptions to nonfault determinations of responsibility in the sphere of general deterrence, and these exceptions, if consistently adhered to, arguably swallow up the rule.

In defending a standard of strict liability, Calabresi argues that its applicability will vary with the type of accident-prone activity. For example, he says that with blasting and other ultrahazardous activities the court decision that the blaster is best suited to make the cost-benefit analysis for or against accidents is imposed at a high level of generality: "the decision contemplates virtually no exceptions so long as the injury arises out of the risk which makes the activity ultrahazardous."⁷⁵ But with the activities relating to product manufacturing—the area of strict products liability—he concedes that the judgment that "producers are better suited than users to make the cost-benefit analysis is deemed much less generally applicable, and the manufacturer is allowed to try to show in each specific case that the user was in the best position to make the analysis."⁷⁶ Similar exceptions apply in the area of worker's compensation, where "extra-sensitive" workers are judged to be the most appropriate party to decide upon the risks of their employment.

With the activities of automobile manufacturing and driving, exceptions are also permitted. One must suppose that the manufacture of automobiles is a category of products liability, where Calabresi admits "a fair degree of case-by-case analysis is worthwhile."⁷⁷ And we have seen that the regulation of automobile driving consists partly in specific deterrence, in which case-by-case determinations of fault are essential. Individualized evaluations are no less likely, it appears, in the use of general deterrence, for Calabresi accepts the propriety of "assumption of risk" as a defense to strict accident liability.⁷⁸ Thus, in his view, a driver who injures a pedestrian may not be liable, even under a nonfault rule to the contrary, if the pedestrian unreasonably exposed himself to the risk of harm. The same is true for drivers who misuse their automobiles in a way that the manufacturer could not reasonably have anticipated. The assumption of risk defense is based on the awareness that a nonfault rule will

75. Calabresi & Hirschhoff, *supra* note 1, at 1067.

76. *Id.* at 1068.

77. *Id.*

78. *Id.* at 1065, 1063-64.

sometimes create inefficiencies in the behavior of potential victims, since if they are compensated in any event, they will have no incentive to avoid the costs of their own accidents.

These various exceptions to nonfault liability clearly indicate that despite the superior cost avoidance potential of the injuring party, he may choose to litigate the issue of liability whenever a plausible defense of assumption of risk—a frequently used defense in the fault system—can be made out. Assuming this is correct, the congestion of the court system will not be lessened. For if enterprises who are the best cost avoiders can be denied liability by showing that in a given accident they were unable to exercise their potential, a comparison of relative fault between parties is required which necessitates court intervention. And as this comparison is no different from that which occurs in negligence cases, there exists no basis for preferring the standard of strict liability.⁷⁹ Moreover, apart from the issue of determining relative fault, there is the problem for Calabresi that in choosing between the general and specific' deterrence of a given accident, courts apparently must make highly detailed and individualized factual judgments. It seems, accordingly, that the areas where a nonfault standard of liability will result in optimizing administrative costs may be very limited indeed. On the other hand, the corrective justice view of tort law that is proposed in this article implies that administrative cost reduction is a far less significant issue than vindicating our sense of fairness in isolated cases of personal injury. As one author has concluded, I think correctly, "there is no more important work [that the civil courts] can do than hear the claims of the widowed and the maimed."⁸⁰

III. UTILITY, FAIRNESS, AND THE RULE OF LAW

In Calabresi's scheme, justice is relegated to a decidedly background role: It serves as a constraint, he says at one point, in reducing the sum of primary, secondary, and tertiary accident costs rather than as a goal.⁸¹ In *The Costs of Accidents*, Calabresi equates the fairness of the fault system with vengeance for an injurer's misdeed, and he identifies the injurer's wrongdoing with subjective moral culpability.⁸² Quite apart from whether he was wrongly identified the fault system with retribution, and moral culpability with subjectivity, one may take issue with his unargued assumption that

79. See WHITE, *supra* note 41, at 222. See also England, *supra* note 20, at 44.

80. DeParcq, *supra* note 57, at 507.

81. COSTS, *supra* note 1, at 25.

82. *Id.* at 291-308.

efficiency is the predominant judicial goal of tort litigation. In my judgment efficiency (or social utility) will usually yield to other values, like fairness between parties and equal treatment for those similarly situated. Since neither Calabresi's nor Posner's "economic" theories provide any criteria for determining when efficiency should accede to other values (Calabresi's invokes intuition), one may only conclude that a decision favoring efficiency has been presumed. I accept efficiency or social utility as a value of tort law, though largely a subordinate one, and so the issue reduces to describing its appropriate role. This Part rejects Calabresi's account of fairness and offers one very general solution to the problem of incorporating social utility within a framework of corrective justice.

Calabresi writes that any system of accident law must be "just or fair" and that it must "reduce the costs of accidents."⁸³ He reads this to mean that justice serves as a potential veto on any system of cost reduction but that justice and efficiency are not to be "traded off."⁸⁴ There are two, sometimes confusing senses in which he uses the term justice. In one sense the term relates to fairness in the distribution of social wealth, as one ingredient among others in a broader conception of a just society. He takes the position that courts should achieve the right blend of wealth maximization, its equitable distribution, and "other justice" notions, so that distributional fairness may apparently veto a cost-efficient accident scheme.⁸⁵ Equitable wealth distribution is not, however, synonymous with justice in this view.⁸⁶ In the second, broader sense of justice the term relates to the aim of effecting a "just society." It is, what he elsewhere denies, a "goal," in which the right mix of efficiency and its distribution are the "instruments."⁸⁷

Calabresi refers in this context to Ronald Dworkin's distinction between policies and principles.⁸⁸ He argues that judges rely on both sets of standards, though more often the first, with policies being based "on that mixture of efficiency and distribution that in the particular context is thought by the court to be instrumental toward justice and, in particular, does not violate any fairly precisely defined

83. *Id.* at 24.

84. *About Law and Economics*, *supra* note 15, at 558.

85. *Id.* at 553-54 n.1.

86. *Id.* at 558.

87. *Id.* at 558-59.

88. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-31 (1978) [hereinafter DWORKIN].

rights or veto points.”⁸⁹ He rejects the view that wealth maximization is the exclusive concern of tort law, since gains in wealth must also be distributed fairly, so the question is how these “instruments” relate to the acknowledged goal of a just society.

Professor Dworkin persuasively suggests that Calabresi’s theory is a “compromise” theory—it advocates a compromise or trade-off between social wealth and an equal, or at least equitable, distribution.⁹⁰ He reasons that since Calabresi accepts distributional fairness as a component of value, something “valued for its own sake,” he must also independently value social wealth: One cannot trade off or mix one value for the other unless both are separately desired; hence the notion of a compromise. Dworkin concludes, I think plausibly, that Calabresi values social wealth as a surrogate or “false target” for total utility, and therefore that the “right mix” for Calabresi consists in the highest possible aggregate utility coupled with an equitable distribution. Accordingly, Dworkin calls Calabresi a “teleological utilitarian,” because he values highest average welfare, but he says that he is only “partially” one, since distributional and “other justice” notions may operate as rights constraints.⁹¹

Dworkin, finally, contrasts Calabresi’s view of justice with his own conception, a view he labels a “recipe” rather than a “compromise” theory. Under that theory, which he says is based on the principle of treating people as equals, there is no independent value, as before, in either aggregate utility or wealth equality. The “right mix” of wealth and its distribution is primary, not derivative of the attempt to maximize, and so trade off, each of two separate values. Hence the notion of a recipe, for Dworkin remarks that an increase in either value (or ingredient) beyond the mix called for in treating people equally is counterproductive. The contrast between his own and Calabresi’s conception helps underscore the values implicit in corrective justice. Dworkin writes,

For the compromise theory the question of justice is a question of balance, and the balance is both impersonal and intuitive. Impersonal because individuals become the instruments of achieving aggregate quantities—of equality as much as of utility. Intuitive because the correct balance must be a matter of inarticulate ‘feel.’ For the egalitarian theory, on the other hand, the question of justice

89. *About Law and Economics*, *supra* note 15, at 561.

90. Dworkin, *Why Efficiency?*, 8 *HOFSTRA L. REV.* 563, 563-73 (1980).

91. *Id.* at 571.

is a matter of fairness person-by-person rather than fairness of aggregate sums—and one's judgment about fairness to persons depends on judging arguments for a particular result, not on striking intuitive and indeterminate aggregate balances.⁹²

The issue of wealth distribution is, in my view, inadequately dealt with by Calabresi. We have seen that equity in distribution comprises part of his notion of justice, but at other points in his writing he assimilates wealth distribution to his account of economic "costs." He states that the principles of accident cost spreading and deep pocket insurance (both of which he joins under the heading of secondary accident costs) can be distinguished from economic efficiency but not because they are inherently normative or nonmonetizable. "We do indeed trade off some economic efficiency for spreading," he says, "but we do this because in a peculiar way we believe we are comparing costs and not . . . because we are willing to give up some fairness for economic efficiency."⁹³ So he acknowledges not a trade-off between justice and efficiency but rather a comparison of monetizable costs. Elsewhere he states that avoiding undesirable changes in income distribution may properly be treated as part of "cost reduction."⁹⁴

Unfortunately, in each of these assertions what Calabresi has attempted to do is isolate some distributional issues from "fairness," rename them "costs," and then claim that the object is to minimize costs without concern for where those savings or burdens might fall. As Professor Steiner in commenting upon Calabresi's work has written, "This [assimilation] is just another way of describing a cost-benefit analysis, which compares total losses to total gains without regard to their incidence."⁹⁵ It is worth observing, in addition, that since the goal according to Calabresi is to maximize the market value of economic output, he must operate within the framework of the existing distribution of wealth and resources. Therefore, by conjoining justice notions with costs, he presupposes that the existing distribution is "fair." If the thesis of this article is correct, the normative issue of distribution is a basic issue he must, but has yet to address.⁹⁶

92. *Id.* at 569.

93. Calabresi & Bass, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 75-77 (1970).

94. COSTS, *supra* note 1, at 24 n.1.

95. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 241 (1976).

96. Although Calabresi acknowledges that the initial distribution of resources is different

What relationship is there, then, between cost reduction and fairness in tort law? Calabresi maintains that they are intimately related and that for most accidents since strict enterprise liability optimizes costs, it is a fortiori the fairest system. He regards "fault" or negligence as a moral concept, though several tort scholars (Hand, Coase, and Posner, among others) have interpreted it entirely in economic or utilitarian terms. In this section I describe one avenue of reconciling the Kantian corrective justice position I defend elsewhere⁹⁷ with the concern for maximizing social wealth.

Many legal writers, including the authors of the Restatement of Torts, account for liability by arguing that the injurer violated the victim's "interest."⁹⁸ We may, according to this view, classify interests in various ways—e.g., an interest in property, in reputation, or in privacy. But it is preferable, it seems, to view an interest more basically, as something in which a person has a genuine stake. An interest has been defined as the "most general term that can be employed to denote a right, claim, title, or legal share in something."⁹⁹ For Joel Feinberg, an interest is "something a person always possesses in some condition, something that can grow and flourish or diminish or decay, but which can rarely be totally lost."¹⁰⁰ He goes on to say that the advantage of this interpretation is that it "permits us to appraise harms by distinguishing between more and less important interests, and between those interests which are, and those which are not, worthy of legal recognition and/or protec-

from their efficient allocation, he wrongly states that, for economic theory, the former should promote the latter. He writes, "Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before." Calabresi & Melamed, *supra* note 1, at 1093-94. This description is in fact the "Kaldor-Hicks" criterion of efficiency, which is a highly value-laden and disputed concept. It is not, as implied, mainstream positive economic theory. Nonetheless the Kaldor-Hicks concept has been interpreted by a federal court as the rationale for Calabresi's "best briber" guideline for identifying the cheapest cost avoider. Under that test, courts in cases of uncertainty are to impose liability on the party who can most easily transact with the true cheapest cost avoider, if a mistake is made, for purchasing the latter's entitlement. In *Union Oil Company v. Oppen*, a Santa Barbara oil spill case, the court held that this capacity to "buy out" another's right was the "real focus" of Calabresi's approach, which the court then adopted. *Union Oil Co. v. Oppen*, 501 F.2d 558, 569-70 (9th Cir. 1974).

97. S. Kiholm, *Political Theory and Modern Tort Law* (unpublished Ph.D. dissertation, University of California, Santa Barbara (1985)) (on file at *Pacific Law Journal*) [hereinafter KIHOLM].

98. RESTATEMENT (SECOND) OF TORTS § 1 (1965).

99. BLACK'S LAW DICTIONARY 729 (5th ed. 1979).

100. J. FEINBERG, *SOCIAL PHILOSOPHY* 26 (1973) [hereinafter FEINBERG].

tion.”¹⁰¹ For Feinberg interests are distinguishable from, say, property rights in that they not only have “weight” but they are malleable—their relative importance may vary over time. They are also distinguishable from what he calls claim rights and manifesto rights. We may, in Feinberg’s view, account for liability by invoking the concept of violating a “legitimate interest”—one worthy of legal protection, but one that is entirely context dependent.

The variance over time in the legitimacy of a purported interest allows, I submit, arguments of cost efficiency or utility to play a role in determining liability. In my judgment there are two levels of inquiry that courts must deal with in tort cases. At one level—the level of distributive justice—courts must decide upon the initial system of property rights, including the separate question of rights of ownership. Here the consideration of efficiency or utility may properly impinge upon the decision to award one party the entitlement to act, or to be unencumbered by another’s action, but it is not dispositive. Indeed I believe, following Marshall Shapo,¹⁰² that the need for redressing inequalities in bargaining power between opposing litigants will take precedence over the value of cost reduction—it is, in other words, a weightier social interest. Shapo’s position, with which I agree, is that judges in tort cases should assess the relative equities of the parties and impose liability in accordance with moral or political arguments of fairness. His reasoning is that those parties, like large corporations or government entities, which control greater power—in resources, information, or access to courts—may misuse that power in ways harmful to those in inferior and dependent positions. Such power-based mismanagement will therefore carry a defeasible presumption of liability.¹⁰³

Professor Shapo denies that tort judges should balance opposing interests from the standpoint of aggregate utility (as Calabresi argues), since maximizing social wealth is not always consistent with achieving

101. *Id.*

102. M. SHAPO, *THE DUTY TO ACT—TORT LAW, POWER, AND PUBLIC POLICY* (1977) [hereinafter SHAPO].

103. It is arguable that the best justification for a strict liability rule in cases of ultrahazardous activities, products liability, and worker’s compensation is this notion of inequality. There is no necessary inconsistency in defending the fault system for use in some activities, like automobile driving and medical malpractice, while denying it in others. And it is interesting that the justification for strict liability in the accepted cases may be rooted in contract values, not those of tort. See, e.g., Posner, *supra* note 20, at 640-41. As was noted earlier, despite their acceptance of the fault system, the compensation scheme of Blum and Kalven—which I favor—allows for a tax-based recovery for accident victims of nonblameworthy conduct.

the fair resolution of a case; in fact, he correctly points out, the two values may often conflict.¹⁰⁴ This is especially true where, as under the aforementioned Kaldor-Hicks criterion, the court decision will turn on which party has greater wealth with which to purchase the sought after legal entitlement. But assuming distributional fairness is not in conflict, both Shapo's and my own position hold that judges may look at any impact on social wealth, whether favorable or unfavorable, as one reason among others for adjudicating a tort dispute.

On my account, maximizing utility is a subordinate value to redressing inequities in power at the level of distributive justice, but utilitarian values may at times be relevant and perhaps even controlling. The "reasonableness" test of the fault system I would favor for most accident-related activities is not self-defining, and the court determination of which litigant to a case has the stronger interest is often a difficult task. It is difficult because courts must be able to respond to change in our social environment, and so enhance utility, but they must also operate within an institutional setting whereby their decisions affix rules of law from which individuals may make rational expectations for guiding their behavior. As the literature critical of the law-and-economics movement has shown,¹⁰⁵ the morality of utilitarianism (or a more narrowly defined wealth maximization) at some point conflicts with personal autonomy and the respect for persons, for if legal entitlements are determined solely by the vagaries of a utilitarian (or wealth maximizing) calculus, parties whose factual circumstances are no different from prior litigants may not be similarly treated by the courts. If the "rule of law" means anything, it is the entitlement of persons to have their behavior governed by rules publicly fixed in advance.

A plausible solution to this dilemma is to view the entitlement of *stare decisis* as defeasible: it operates only until such point as heavily adverse consequences for social utility, or perhaps distributional equity, militate against its observance. Stephen Munzer defends a position that permits retroactive disruption of legal expectations in cases where those expectations are neither "rational" nor "legiti-

104. SHAPO, *supra* note 102, at 49, 51, 71.

105. See, e.g., Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 *ETHICS* 649 (1984); R. DWORKIN, *A MATTER OF PRINCIPLE* ch. 12 (1985); Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 *U. TORONTO L.J.* 307 (1980).

mate.”¹⁰⁶ His theory contains a complex account of when expectations should or should not be protected, and it is based on a mixed ethical system of utility and Kantianism. In Munzer’s view, retroactive rule making carries a special burden of justification, especially when, as with criminal law or procedure, it affects personal liberties. On the other hand, he says that retroactive laws affecting private property, especially laws which redress gross distributional inequities, are more easily justified. His basic point, which I accept, is that strongly undesirable consequences for either utility or distributional fairness may “disentrench” certain legal expectations. And so a person’s right to have his case follow the rule of law is *prima facie* only, though if this account is correct, it will be rare when a case will not.

At the level of distributive justice, where courts determine the strength or legitimacy of competing interests, utility competes with other values, like redressing the misuse of power or the inequity of wealth distribution or achieving doctrinal consistency, for consideration. In my view, the mismanagement of power which culminates in a civil injury will warrant *prima facie* liability, and, in exceptional cases, serve social disutility or wealth-distributional inequity will permit discarding judicial precedent for a given factual setting.

The second level of court inquiry I would argue is indispensable for tort adjudication—that of corrective justice—is designed to vindicate the legitimacy of the winning litigant’s interest and hence restore the system of legal entitlements to its prior equilibrium. This is the realm of fairness between the parties and enforcement of the rule of law. It depends on case-by-case decisionmaking and so bars direct appeal to social utility or wealth maximization. Most importantly, it views judges as law appliers rather than as law makers.

In a constitutional democracy such as our own, judges are not, like legislators, publicly elected and accountable officials. Therefore, in my opinion, they are obligated by social norms to conform their decisions with existing judicial precedent. On my account—which is shared in part by Professors Dworkin and Rolf Sartorius¹⁰⁷—courts are duty bound in adjudicating cases, even hard ones, to declare preexisting legal rights and thereby strengthen the security of legal expectations.¹⁰⁸ In this view, there exists a uniquely correct judicial

106. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425 (1982).

107. See, e.g., DWORKIN, *supra* note 88; R. SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* (1975) [hereinafter SARTORIUS].

108. Sartorius argues that even an “act utilitarian”—someone who appraises each act,

decision for any given factual description, or at least judges should proceed on the assumption that there is. Speaking for myself, utility or cost-efficiency may play a part in court decisions if earlier cases not recanted justify their use; but then their use in a factual setting would be generally known in advance and there would be nothing unexpected in the decision on the basis of which a losing litigant could claim unfairness.

My point here is that utility or wealth may be relevant at the level of determining the legitimacy of competing interests, but without supporting what Dworkin calls arguments of "policy." Doctrinal consistency and arguments of "principle" will almost always prevent courts from maximizing utility or wealth for the benefit of some collective goal in an ad hoc fashion. I therefore propose that we distinguish corrective from distributive justice for the purpose of emphasizing that court deliberations in tort cases should focus on achieving fairness between discrete litigants. Apart from that distinction, which I think is important,¹⁰⁹ it is uninteresting whether tort judges do or should perceive their task as consisting of two "levels" of inquiry.

One final distinction worth noting, which follows from the previous one, is the distinction between "interests" and what Professor Feinberg calls "claim rights."¹¹⁰ With the position I have described, once an interest is deemed "legitimate" the person who possesses that interest acquires a "claim right," as defined by Feinberg, against anyone who might infringe it; and so the victim of an accident may demand compensation, as of right, against his injurer. In this view, a claim right vindicates a legitimate interest; it is the species of which the interest is the genus.

The significance of the concept of a claim right is that it serves as a claim one holds against a specific individual and it arises out of a specific wrong. Feinberg, for example, distinguishes claim rights

rule, or institution by its effect upon social utility—will support social norms that exclude direct appeals to utility because their acceptance provides greater security of expectations and therefore greater long-term utility. SARTORIUS, *supra* note 107, at 118.

109. It is important because some tort scholars, like Christopher Arnold, wrongly interpret the substantive content of corrective justice as utilitarian. Professor Arnold argues that "ideal" theories of distributive justice, like Rawls' or Dworkin's, cannot account for the utilitarian values often called for in identifying and remedying civil harms. He separates ideal distributive theories from his own, more adaptable theory of corrective justice. According to my position, in contrast, it is distributive justice which accounts for utilitarian values, while I reject their use in an "ideal" theory of corrective justice. See Arnold, *Corrective Justice*, 90 *ETHICS* 180 (1980).

110. FEINBERG, *supra* note 100, at 58-61.

from "manifesto rights," where the latter are purported rights—to health care, education, or a decent standard of living—that do not correlate with duties imposed on a specific individual and do not result from an isolated occurrence of wrongdoing.¹¹¹ Claim rights, I submit, are in one sense more important than interests in that they provide for victims a needed measure of self-respect. They characterize the moral value of claiming something in one's own name, which is the basis perhaps of personal autonomy and human dignity. The argument for allying compensation with victim claim rights forms the groundwork for my rejection elsewhere of a now-popular justification for nonfault automobile insurance.¹¹²

IV. CONCLUSION

An economic or deterrence rationale for accident liability, as supported by Calabresi, contrasts markedly with a theory of liability that focuses on injurer particularity and responsibility. This article has indicated that the theory of corrective justice warrants imposing liability as a means of redressing violations of the prior equality between affected parties. I have argued that corrective justice, accurately viewed, particularizes the issue of injurer fault, so that blameworthy injurers, and they alone, are held responsible for compensating victims of their untoward conduct. Therefore I have suggested a theory in which—with the exception of accident losses occasioned by nonblameworthy conduct—a victim's right to recompense correlates directly with his injurer's duty to repay. The proposed theory is rooted in moral responsibility, not culpability or retribution; and though accident deterrence and victim compensation are consequences of liability, they are not its sole justification. I have argued that despite Calabresi's disclaimers, the fault system, with case-by-case adjudication and a well-designed scheme of liability insurance, in fact accomplishes most of the goals Calabresi sets out for any system of accident law. This article has concluded that the most important of those goals is not efficiency or an optimal deterrence of accidents but rather the protection of individual autonomy.

111. *Id.* at 67.

112. Kiholm, *supra* note 97, chapter III.