

# GUIDO CALABRESI AND THE CONSTRUCTION OF CONTEMPORARY AMERICAN LEGAL THEORY

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## I

### INTRODUCTION

My goal in this article is to situate Judge Calabresi's work, starting with his initial contributions to law and neoclassical economics, against the broader backdrop of American legal theory. I begin this article with a brief biographical sketch highlighting my personal connection with Guido. I then lay out the historical relationship between legal realism and law and neoclassical economics (commonly referred to as law and economics). I subsequently provide the background for Judge Calabresi's initial intervention—in the form of his historic book, *The Costs of Accidents (Costs)*<sup>1</sup>—into the discourse of American legal theory. Next, I discuss what I believe is a fundamental axis around which debates concerning the meaning of law revolve: the science–politics divide. I then describe the ways in which debates amongst the three dominant strands of legal theory in the 1980s—law and economics, critical legal studies, and liberal-rights theory—were centered on the issue of whether law (and legal theory) was fundamentally a political or scientific enterprise. I end this article with an extended discussion of the ways in which Judge Calabresi's post-*Costs* writings, too often overlooked, respond to the science–politics debate in a philosophically pragmatic way that reflects (and has paved the way for) the current state of American legal theory.

Before moving on to the task of placing Judge Calabresi's work in larger intellectual relief, a moment of personal reflection is in order. I first met Judge Calabresi, then Dean of the Yale Law School, as a somewhat timid first-year law student.<sup>2</sup> “Guido,” as all his students affectionately referred to him, was my torts professor. I distinctly remember going to the bookstore as a first-year law student and having amongst my list of texts for Judge Calabresi's course both

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

2. I recently wrote a book consisting of interviews of prominent American legal theorists and their roles in developing contemporary legal theory. One of my few regrets is that editorial constraints prevented me from including Judge Calabresi in the conversation. See JAMES R. HACKNEY, JR., *LEGAL INTELLECTUALS IN CONVERSATION: REFLECTIONS ON THE CONSTRUCTION OF AMERICAN LEGAL THEORY* (2012) [hereinafter HACKNEY, *LEGAL INTELLECTUALS IN CONVERSATION*].

Harry Shulman, Fleming James, Jr., and Oscar S. Grey's *Torts*<sup>3</sup> and a copy of *The Costs of Accidents*, available right alongside *Torts*. Little did I appreciate at the time that those books represent the intersection of a profoundly critical moment in American legal theory, and that I would be privileged to have a "front row seat" to it as Judge Calabresi's student. So why do they represent such a prescient moment?

*Torts* is very much in the legal-realist tradition. In tracing the genealogy of American legal theory, the fact that Judge Calabresi was a student of Fleming James at the Yale Law School has to go noticed.<sup>4</sup> James was a leading figure in the legal-realist movement and also one of the chief architects of the intellectual foundations for strict-products-liability law.<sup>5</sup> Strict-products-liability law is deeply rooted in legal-realist policy prescriptions—loss spreading (the idea that it is better to have losses from accidents be spread widely, instead of imposed on an individual victim) being chief amongst them.<sup>6</sup> However, just when strict products liability began to take firm hold with the adoption of section 402A of *Restatement (Second) of Torts*, the theoretical ground of legal realism was shifting. Strict liability, along with its realist underpinnings, soon came under heavy assault with the rise of law and economics, or, more precisely, law and neoclassical economics.<sup>7</sup>

The intervention of neoclassical economic analysis into tort law is marked by Ronald Coase's seminal piece *The Problem of Social Cost*.<sup>8</sup> Although a relatively slim article, *The Problem of Social Cost* has wide-ranging intellectual importance. Coase forces legal theorists to think of accident costs through an entirely different lens. The prevailing view at the time of *Costs*' first publication was that social costs were properly dealt with through regulation.<sup>9</sup> Coase's profound insight in *Costs*, however, is that private ordering has the power to solve the problem of social costs. In particular, under specific limiting assumptions, nonprohibitive transaction costs among them, private bargaining is sufficient to solve the social cost issue so long as legal entitlements are clearly

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3. HARRY SHULMAN, FLEMING JAMES, JR. & OSCAR S. GRAY, *CASES AND MATERIALS ON THE LAW OF TORTS* (3d ed. 1976).

4. Laura Kalman has astutely discussed the influence of legal realism at the Yale Law School. For a general discussion, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986).

5. James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 490–95 (1995) [hereinafter Hackney, *The Intellectual Origins of American Strict Products Liability*].

6. For a general discussion of legal realism and the development of strict products liability, including Fleming James' role, see *id.*

7. For a general discussion of the rise of law and neoclassical economics, see James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 LAW & HIST. REV. 275 (1997) [hereinafter Hackney, *Science, Politics, and the Reconfiguration of American Tort Law Theory*]. Law and neoclassical economics is the particular strand of economic analysis of law that was spearheaded by Ronald Coase and uses the analytical tools of law and economics.

8. 3 J.L. & ECON. 1 (1960).

9. See *id.* at 17–18.

defined.<sup>10</sup> With regard to tort law, this implies that a legal regime that places liability on the producer of products, such as strict liability, is not necessarily favored over one that only holds the manufacturer liable with proof of “wrong doing,” or negligence.<sup>11</sup>

This theoretical shift from legal realism to law and neoclassical economics, which underlies the change in products-liability doctrine, is part of a broader narrative. American legal theory up to the 1970s can be accurately divided into three eras: the classical era (from the founding of the republic through the Civil War period), the legal-realist era (from the Civil War through World War II), and the legal-process era (with its zenith in the 1950s and 1960s).<sup>12</sup> The advent of law and neoclassical economics can be viewed as a revival of the classical-era tenets and ideological commitments. Law and neoclassical economics shares the classical era’s belief in the certainty of law, its fixation with law as science, and its view that law need not be concerned with distributional consequences.<sup>13</sup> Although closely aligned with law and neoclassical economics, Judge Calabresi, aside from rejecting distribution agnosticism, has always been less tightly bound to the idea of law as science. To this end, there is always an uneasy relationship between the work of Judge Calabresi and the University of Chicago strand of law and neoclassical economics. The development of Judge Calabresi’s work as he has wrestled with this fundamental tension reflects, and is responsive to, some of the major developments in American legal theory.

## II

### THE FUNDAMENTAL CONTRADICTION: POLITICS VERSUS SCIENCE

One way of framing the development of American legal theory, from the classical era to the present, is that it has evolved around the tension between viewing law as either primarily the province of politics or as an essentially scientific enterprise—the science–politics divide.<sup>14</sup> The foremost conception of law at the beginning of the American legal regime is formalism and the quintessential exemplar of the legal formalism that defined this classical era is

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10. See *id.* at 42–44.

11. See *id.* at 37–38 (“The objection to the rule in *Boulston’s* case is that . . . [i]t fixes the rule of liability at one pole: and this is as undesirable, from an economic point of view, as fixing the rule at the other pole and making the [producer] . . . always liable. But . . . the law of nuisance . . . is flexible and allows for a comparison of the utility of an act with the harm it produces.”).

12. Given that my focus is on Judge Calabresi, who is primarily concerned with private-law doctrine and in particular torts, the legal-process school, which is principally concerned with public-law issues, does not play prominently in this article. For a broad sketch of the eras referred to in the text, see James R. Hackney, Jr., *Law and The American Mind*, in 3 *ENCYCLOPEDIA OF AMERICAN CULTURAL & INTELLECTUAL HISTORY* 199 (Mary Kupiec Cayton & Peter W. Williams eds., 2001).

13. See JAMES R. HACKNEY, JR., *UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC HISTORY AND THE QUEST FOR OBJECTIVITY* 110–11 (2007) [hereinafter HACKNEY, *UNDER COVER OF SCIENCE*].

14. See HACKNEY, *LEGAL INTELLECTUALS IN CONVERSATION*, *supra* note 2, at 5–6, 9, 26–27, 32–33 for a discussion of the science–politics divide as a central theme in American legal theory.

the treatise.<sup>15</sup> Formalists believe that law can be scientifically deduced from a set of general principles. In this sense, law is a closed system, not susceptible to the pressures of politics. Of course, as legal realists would note, the principles themselves are infused with politics.

I am using the term “politics” in the sense of normative goals (such as distributional concerns) informing legal policy. For example, one principle that heavily influenced classical legal theory is freedom of contract. Freedom of contract is taken to be an inalienable right granted to individuals (including businesses) that cannot be transgressed, except under the most severe circumstances, for the sake of other considerations.<sup>16</sup> This principle has political implications in limiting the role of government and regulation to intervene in contractual relationships on the basis of unequal bargaining power. From a formalist perspective, concerns about bargaining power are extraneous to the fundamental right to unencumbered contracting. An argument to adopt a legal rule that undercuts freedom of contract for the purpose of equality, for example, not only violates the individual’s right, but also deviates from the method (science) of deducing the rule from the basic principle without interjecting “politics.”

The formalist claim of law as science, devoid of context, is what the legal realists principally contest. The realists believe that in order to get at the “truth” of law there must be an accounting for context, including distributional (or political) considerations.<sup>17</sup> A classic example of the difference in approach between formalists and legal realists is the Supreme Court’s opinion in *Lochner v. New York*.<sup>18</sup> The issue before the Court in *Lochner* was whether New York State rules regulating the working conditions for bakers ran afoul of the United States Constitution.<sup>19</sup> The majority opinion, written by Justice Peckham, emphasizes freedom of contract and views the workers in the bakeries as autonomous agents, free to enter into contracts with their employers.<sup>20</sup> In his dissent, Justice Holmes provides a precursor to the legal-realist view of the case. A prototypical legal realist would attack *Lochner*’s formalist methodology and ideological stance. Accordingly, Justice Holmes criticizes the majority for adopting a free-market ideological position with regard to freedom of contract, stating that a “Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the

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15. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 257–58 (1977).

16. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 29–30 (1992) (discussing the relationship between *Lochner* and the elevation of contractual freedom in classical legal thought).

17. See generally Hackney, *The Intellectual Origins of American Strict Products Liability*, *supra* note 5.

18. 198 U.S. 45 (1905).

19. *Id.* at 53–54, 57–58.

20. *Id.* at 57–59.

state or of *laissez faire*.”<sup>21</sup> Furthermore, Justice Holmes argues that the case has been decided by the majority on an “economic theory which a large part of the country does not entertain.”<sup>22</sup> In addition to the arguments raised by Justice Holmes, the standard realist response would assert that the power relationship between workers and employers and distributional implications undercuts the notion of freedom of contract.

One of the primary stages on which this conflict between formalists and realists plays out is that of torts. For formalists, contract plays a prominent role in torts involving products. Privity of contract is an important tenet of classical legal theory. Under this view, where a manufacturer distributes a product via a retailer and that product subsequently injures the ultimate consumer, privity of contract dictates that the consumer does not have a claim against the manufacturer because there exists no contract of sale between the manufacturer and consumer.<sup>23</sup> The consumer is left to lay claim against the retailer with whom she does have a contract. In contrast, a legal-realist approach requires looking beyond the formalism of contract to the substance of the transaction.

*MacPherson v. Buick Motor Co.* is a famous example of such an approach.<sup>24</sup> In *MacPherson*, then Judge (later Justice) Benjamin Cardozo, a leading figure in the sociological-jurisprudence movement that has some affinity with legal realism,<sup>25</sup> decided that a manufacturer operating through a retailer can be held responsible to the consumer despite the lack of a contractual relationship with the consumer.<sup>26</sup> His justification is that the necessity of contract made sense at a time in which consumers had close relationships with manufacturers. With the advent of mass production, however, such relationships became less common and, indeed, an aberration.<sup>27</sup> Thus, irrespective of the ultimate sale through a retailer, it becomes obvious that the manufacturer’s intended customer is the consumer, and that the manufacturer should therefore have an obligation of safety towards the consumer.<sup>28</sup> Later courts build on the insights of *MacPherson* to argue broadly for strict products liability on the basis of deterrence, compensation and (prominently) loss-spreading policy considerations.<sup>29</sup>

The advent of law and neoclassical economics calls into question the basic insights of legal realism. Although the realists attempt to investigate law by examining the context of rules, neoclassical economists decontextualize the analysis of legal rules by adopting a rational-actor model as the basis for

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21. *Id.* at 75 (Holmes, J., dissenting).

22. *Id.*

23. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (N.Y. 1916) (Bartlett, J., dissenting).

24. *Id.* at 1050 (majority opinion).

25. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (13th ed. 1946) (discussing Cardozo’s view of common-law judging as an exercise in policy making).

26. *MacPherson*, 111 N.E. at 1053–54.

27. See *id.* at 1054.

28. *Id.* at 1053–54.

29. See, e.g., *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

determining the impact of legal rules on economic decisions.<sup>30</sup> The Coase theorem is a classic illustration of this. In *The Problem of Social Cost*, Ronald Coase illustrates his theorem by way of its application to nuisance law.<sup>31</sup> A standard policy position in law, he notes, is that polluters should be made to pay for the cost of their pollution. Thus, a factory that damages the property of an adjacent landowner should be liable for damages.<sup>32</sup> Coase, however, argues that, in a hypothetical world without prohibitive transaction costs, there is no need for the law to levy damages in such a situation because the adjoining landowners will contract their way to an efficient solution.<sup>33</sup> This solution obviously suits the classical notion of contract as the central feature of an economy based on capitalism with as little interference from government as possible. Coase's insights point towards an emphasis on contract as remedy that harkens back to the classical focus on privity of contract. The distributional concerns, particularly in the form of loss spreading, that animate legal-realist arguments for strict products liability play no role in Coase's formulation of the problem of social costs because, as an exponent of neoclassical economics, particularly of the University of Chicago sort, distributional matters are outside the scope of economic science.<sup>34</sup> Richard Posner has argued that economics of this sort, and their scientific emphasis, are indeed the identifying feature of the common law.<sup>35</sup>

It is against this backdrop that we can appreciate Judge Calabresi's contribution in formulating law and neoclassical economics.<sup>36</sup> His initial insights can be seen as melding the burgeoning discipline of law and neoclassical economics with the principal legal-realist policy in tort: loss spreading (and the

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30. See Coase, *supra* note 8, at 41–42.

31. See *id.*

32. *Id.*

33. See *id.* at 18, 36–38, 44. Coase's earlier recognition of transaction costs as a serious issue in economic analysis would set him apart from others in the Chicago-school law-and-neoclassical-economics movement who, for the most part, elide the transaction-costs issue. See generally R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (arguing that firms are organized to allocate resources in place of markets when transaction costs in markets are too high). Coase's analysis in *The Problem of Social Cost*, however, fails to account for issues of power in bargaining relationships, which are necessary to place a transaction in context.

34. HACKNEY, UNDER COVER OF SCIENCE, *supra* note 13, at 110–11.

35. Richard A. Posner, *A Theory of Negligence*, 1 *J. LEGAL STUD.* 29 (1972) [hereinafter Posner, *A Theory of Negligence*].

36. An alternative, and insightful, reading of Judge Calabresi's work suggests he is an institutionalist. Given Judge Calabresi's connection to legal realism, concern with distributional matters, and refusal to blindly accept the rationality assumption, associating him with institutional economics has obvious merit. Arguably, Judge Calabresi infused neoclassical economics with institutionalist insights. Of course, one might also say that he infused institutionalism with neoclassical insights. In this article, I establish Judge Calabresi's contribution to the discipline of law and neoclassical economics. For an earlier argument I made regarding Judge Calabresi as representing a competing strand within the law-and-neoclassical paradigm, see James R. Hackney, Jr., *Law and Neoclassical Economics Theory: A Critical History of the Distribution/Efficiency Debate*, 32 *J. SOCIO-ECON.* 361 (2003) (arguing that Calabresi represents a contemporary liberal appropriation of law and neoclassical economics as opposed to Richard Posner's conservative appropriation).

doctrine of strict products liability that was argued for, in large part, under the rubric of loss spreading).<sup>37</sup> This helps explain the tilt towards strict liability in *Costs*,<sup>38</sup> in which Judge Calabresi uses economic analysis to undercut negligence. Although he admits to not having the requisite amount of evidence to argue for the superiority of other possible regimes (including strict liability), Judge Calabresi points out so many shortcomings with negligence that he makes the case that there must be a better resolution.<sup>39</sup>

Looking beyond the lens of economic analysis, with its empirical indeterminacy, the key to that something better is, for Judge Calabresi in *Costs*, “justice.”<sup>40</sup> Judge Calabresi mentions the concept of justice on several occasions in *Costs*, prominently as a “constraint” to the primary economic goal of accident law—encouraging cost-beneficial outcomes, or, as Judge Calabresi phrases it, “reduc[ing] the sum of the costs of accidents and the costs of avoiding accidents.”<sup>41</sup> There is very little in *Costs* regarding the substance of justice. However, justice seems to stand for something more than distributional concerns. Even so, distributional issues are addressed in Judge Calabresi’s discussion of the role of loss spreading in economic analysis and criticism of economists for refusing to accept a fundamental proposition: that wealth has declining marginal utility.<sup>42</sup>

In terms of the science–politics divide, justice, for Judge Calabresi, can be viewed as the font of political and normative values. Judge Calabresi’s position that justice is actually prior to economic concerns is in stark opposition to the Chicago-school stance, particularly that of the “early” Richard Posner, that the new economic analysis can rid law of politics, consequently resolving the science–politics tension and countering the legal realists’ incursion of normative concerns, particularly distribution, into American law.<sup>43</sup> This emphasis on justice is the reason why Posner finds such great fault with Judge Calabresi’s formulation in *Costs*. It is not just that Judge Calabresi lacks an empirical basis for his claim that negligence is not the preferred legal regime for tort, which serves as the basis for some of Posner’s criticism, but that Judge Calabresi melds “political” concepts onto neoclassical economics (interpersonal comparison of utility and justice) that are anathema to the Chicago-school “scientific” framework.<sup>44</sup>

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37. See Hackney, *Science, Politics, and the Reconfiguration of American Tort Law Theory*, *supra* note 7, at 492.

38. See CALABRESI, *COSTS*, *supra* note 1.

39. See, e.g., *id.* at 306 (criticizing the negligence standard for failing to comport with societal norms of justice because it places a burden on a relatively guilty party that “is substantially unrelated to wrongdoing or to penalties inflicted on similar wrongdoings in other areas of law”).

40. See *id.* at 24–26.

41. *Id.* at 26.

42. *Id.* at 39–40.

43. See *id.* at 25–26.

44. See Hackney, *Science, Politics, and the Reconfiguration of American Tort Law Theory*, *supra* note 7, at 288–91 (discussing the central role that discrediting the concept of interpersonal comparisons of utility played in constructing neoclassical economics).

What makes the post-*Costs* evolution in Judge Calabresi's writings so fascinating is that in working his way through the science-politics penumbra he has to confront not only his Chicago-school colleagues in the new law-and-economics movement, but also a burgeoning critique from the left of the science-politics divide (as best represented by the critical-legal-studies movement) and a well-entrenched, but evolved, liberal rights-theory perspective. I will spend the balance of this article describing how Judge Calabresi navigates the waters between Chicago-school economics, liberal-rights theory, and critical legal studies with regard to the science-politics divide.

### III

#### THE CROSSCURRENTS OF AMERICAN LEGAL THEORY

A critical moment for American legal theory came in 1980 when Judge Calabresi participated in a *Hofstra Law Review* symposium issue that includes various responses to Posner's defense of law and economics on efficiency grounds.<sup>45</sup> The crosscurrents of the symposium highlight the tensions running through liberal-rights theory, law and neoclassical economics, and critical legal studies—each of which is represented in the symposium. Judge Calabresi's piece<sup>46</sup> is directed at the attack on law and neoclassical economics leveled by the leading liberal-rights theorist—Ronald Dworkin. In a highly influential piece Dworkin raises the question “Is wealth a value?”<sup>47</sup> He criticizes the enterprise of law and neoclassical economics as far as it has as its premise the normative idea that wealth is a value in and of itself.<sup>48</sup> In making this argument, Dworkin calls to task what he refers to as Posner's “immodest” attempts to utilize wealth as a value, as well as “modest” attempts to do so by Judge Calabresi.<sup>49</sup> These modest attempts, according to Dworkin, consist of arguments that allow for tradeoffs between justice and wealth.<sup>50</sup> Space does not allow me to fully recount Dworkin's critique, but it is widely accepted, even by Posner, as dealing a devastating blow to the defense of law and neoclassical economics on the grounds of moral theory.<sup>51</sup> Importantly, for rights theorists such as Dworkin, this clears the way for moral foundations of law, in particular liberal-rights theories.<sup>52</sup> An important note to the Dworkin critique is that although he is critical of the metaphysical underpinning of law and neoclassical economics, he allies himself with the legal economists in staking out the terrain for viewing legal theory not as a political enterprise, but as a rights-based enterprise.<sup>53</sup>

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45. Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

46. Guido Calabresi, *An Exchange About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980) [hereinafter Calabresi, *An Exchange*].

47. See generally Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

48. *Id.* at 196–201.

49. *Id.* at 194–96, 201, 205.

50. See *id.* at 201–05.

51. See HACKNEY, LEGAL INTELLECTUALS IN CONVERSATION, *supra* note 2, at 58–59.

52. See *id.* at 37–39, 58–59.

53. See Dworkin, *supra* note 47, at 194.

Another attack from the left comes from critical legal theorists who criticize the law-and-economics enterprise as an attempt to mask politics in the form of science,<sup>54</sup> a broader critique than that leveled by rights theorists. The critical-legal-studies challenge is well summed up by two contributions to the *Hofstra Law Review* symposium issue: Ed Baker's *Starting Points in the Economic Analysis of Law*<sup>55</sup> and Morton Horwitz's *Law and Economics: Science or Politics?*<sup>56</sup> Baker makes the point that no discussion of wealth maximization could be coherent without some initial determination regarding starting points (which demarcate the initial distribution of wealth).<sup>57</sup> The same point is made by Dworkin in *Is Wealth a Value?*<sup>58</sup> However, Baker goes the critical step further to argue that "those with power to choose rules will, when possible, choose as their givens or starting points those preferences and distributions that further ruling class interests."<sup>59</sup> Baker's position reflects the critical-legal-studies view that politics plays a critical role in law.<sup>60</sup>

Horwitz's charge is against law and neoclassical economics as a discipline, alleging that it is "only the most recent claimant to draw upon the prestige of the natural sciences in the effort to create a system of legal thought that is objective, neutral, and apolitical."<sup>61</sup> The principal political tilt that Horwitz ascribes to law and neoclassical economics of the Posner or Chicago school was refusal to account for distributional concerns.<sup>62</sup> He does take note that Judge Calabresi raised distributional concerns that are considered not part of the neoclassical economics framework for Chicago-school adherents,<sup>63</sup> but shares Dworkin's critique that Judge Calabresi engages in trading off efficiency and justice.<sup>64</sup> In the end, Horwitz predicts that law and neoclassical economics will be "pluralistically assigned to the class of one of the many 'ideologies' from which one may pick and choose."<sup>65</sup>

Judge Calabresi is also subject to criticism within the law-and-neoclassical-economics field. Richard Posner, in a book review of *Costs*, astutely identifies its theoretical implications and significance within the history of American legal intellectual thought.<sup>66</sup> Although Posner lauds Judge Calabresi for bringing to bear economic analysis in a comprehensive manner in the field of torts, he

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54. See, e.g., Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905–06, 912 (1980) [hereinafter Horwitz, *Science or Politics?*].

55. 8 HOFSTRA L. REV. 939 (1980).

56. Horwitz, *Science or Politics?*, *supra* note 54.

57. See Baker, *supra* note 55, at 939, 951, 953.

58. See Dworkin, *supra* note 47, at 207–08.

59. Baker, *supra* note 55, at 968.

60. See, e.g., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE OF LAW (David Kairys ed., 3d ed. 1998) (a collection of essays by critical legal scholars focusing on role of politics in law).

61. Horwitz, *Science or Politics?*, *supra* note 54, at 905.

62. *Id.* at 905–06.

63. *Id.* at 910.

64. *Id.* at 911 n.13.

65. *Id.* at 912.

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

laments that Judge Calabresi clings to the legal-realist past.<sup>67</sup> The recognition that Judge Calabresi's contribution constitutes a moment in intellectual history is evident from Posner citing Thomas Kuhn's *The Structure of Scientific Revolutions* in arguing that, given the ascendance of law and neoclassical economics, there is no longer any place for legal-realist residue.<sup>68</sup> The realist backdrop and break from neoclassical economic analysis, at least as articulated by University of Chicago adherents and dominant in the early applications of law and neoclassical economics, is Judge Calabresi's insistence that the secondary dislocation costs of accidents be taken into account.<sup>69</sup> However, dislocation costs are based on distributional considerations that fall outside the disciplinary parameters of law and neoclassical economics.

#### IV

#### JUDGE CALABRESI'S RESPONSE AND THE EVOLUTION OF LAW AND ECONOMICS

Judge Calabresi's post-*Costs* dilemma is clear: He must determine how to navigate the shoals between rights theory, Chicago-school law and economics, and critical legal studies. This penumbra can be framed more broadly as how best to negotiate the science-politics divide. In *Costs* the science-politics divide is implicit in Judge Calabresi's references to justice, but without any in-depth exploration of the concept. Even he later admits in discussing his past writings on justice, "I am clearer on this point in some of my writings than in others."<sup>70</sup> Indeed, Judge Calabresi's writings following *Costs* paint a rich picture of the evolution of his thoughts concerning justice and, by extension, the science-politics divide.

Judge Calabresi responds directly to Dworkin's criticism in his 1980 piece entitled *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*.<sup>71</sup> He begins by stating that he agrees with Dworkin on key points criticizing law and neoclassical economics: First, it is impossible to have a meaningful discussion regarding an increase in wealth without clearly defined starting points; and, second, even with defined starting points, wealth does not constitute a stand-alone value.<sup>72</sup> However, taking issue with Dworkin's critique, Judge Calabresi denies ever arguing for a tradeoff between efficiency or distribution and justice. Instead, the issue for Judge Calabresi is what goals (values) one should use to determine whether an increase in wealth or a change in distribution has enhanced justice.<sup>73</sup> Judge Calabresi explicitly lists utility and equality as possible goals, but is careful to state that "[n]ot being a philosopher,

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67. *Id.* at 642-44, 646-47.

68. *Id.* at 637 n.3 (citing T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962)).

69. See CALABRESI, *COSTS*, *supra* note 1, at 21, 27-28.

70. Guido Calabresi, *An Exchange*, *supra* note 46, at 557.

71. *Id.* at 553.

72. *Id.* at 554-56.

73. *Id.* at 556-58.

I would not myself require a precise complex of goals to be spelled out. I am even skeptical of such an exercise in an open society.”<sup>74</sup> Judge Calabresi also emphasizes the difference between a philosophical approach to justice issues and a “lawyer-economist’s” approach:

[I]f lawyer-economists do not make the mistake of claiming too much for what they are doing, and if they are willing to work at defining and analyzing pretty good instruments leading toward the just society, philosophers ought not be troubled. Indeed, they might even find it profitable to reexamine critically their conclusions as to particular rights and particular manifestations of justice when the lawyer-economists’ instruments seem to conflict with, rather than further, the results which the philosophers’ particular conception of justice would seem to call for.<sup>75</sup>

He does, however, posit that thinking about the blend of efficiency and distribution plays an instrumentalist role in achieving justice.<sup>76</sup> Justice still serves as the ultimate measuring rod and a veto constraint (or “rights” constraint, if Dworkin would prefer such language) for efficiency or distribution concerns,<sup>77</sup> but Judge Calabresi declares that the exact relationship between justice, distribution, and efficiency must be studied further.<sup>78</sup> He later sets out the path to that study, which includes a more explicit discussion of assumptions regarding distribution.<sup>79</sup>

In 1982, Judge Calabresi, in a piece entitled *The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence? (New Economic Analysis)*,<sup>80</sup> fleshes out themes articulated in his 1980 response to Posner,<sup>81</sup> but is also responsive to the crosscurrents in American legal theory critical of the law-and-neoclassical-economics enterprise: “[I]n the last few years [law and neoclassical economics] has been increasingly and powerfully attacked by distinguished critics. Some of these might describe themselves as Marxists, others as traditionalist conservatives, still others seem to fit the category of the radical chic or Hampstead socialists.”<sup>82</sup> This is an indirect reference to the amalgam of rights and critical theorists who share critiques of law and neoclassical economics. Against these withering attacks on law and neoclassical economics, Judge Calabresi is well prepared to concede to certain criticisms, but

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74. *Id.* at 556.

75. *Id.* at 561.

76. *Id.* at 558 (“[A]n appropriate blend of efficiency and distribution is highly instrumental toward, and closely correlated with, achieving what many would view as a just society.”).

77. *Id.* at 559.

78. *Id.* at 559.

79. In a footnote, Calabresi referenced I.M.D. Little’s *A Critique of Welfare Economics* as one of the texts that does do the type of distributional analysis that Calabresi is calling for. *Id.* at 560 n.23 (citing I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* (2d ed. 1957)). The reference to Little is interesting because Duncan Kennedy, who was an economics major as was Calabresi, in an interview with the author, made the point that Little’s critique of neoclassical economics was a fixture in his economics training at Harvard and was heavily influential. See HACKNEY, *LEGAL INTELLECTUALS IN CONVERSATION*, *supra* note 2, at 35.

80. 68 PROC. BRIT. ACAD. 85 (1982) [hereinafter Calabresi, *The New Economic Analysis of Law*].

81. See Calabresi, *An Exchange*, *supra* note 46.

82. *Id.* at 85.

distinguishes the force of those criticisms based on the differences between his strand of neoclassical economic analysis and that of “Professor Posner and his followers,”<sup>83</sup> whom he claims engage in “sophistry.”<sup>84</sup> The label sophistry applies to the Posner line of law and neoclassical economics because advocates of that position argue that distributional “starting-points” are not the proper subject of economic analysis because concern regarding distributional matters is a political undertaking and economics is a scientific enterprise.<sup>85</sup> Judge Calabresi, by contrast, reasons that “what wealth *is* depends on what people want, and what people want depends on the allocation of starting-points.”<sup>86</sup> Law defines starting points by defining rights, so, by definition, law can never be apolitical. According to Judge Calabresi, law is concerned with wealth maximization and distribution as factors in justice. In this sense, we should not look upon parties to litigation as disembodied variables in an equation to be maximized but must determine, in the case of torts, the “right” and the “wrong” person to have suffer.<sup>87</sup> This determination, however, requires a theory of justice to guide our distributive and allocative choices.

Judge Calabresi offers up two broad categories of people whom we generally want to protect as a society—the poor and the elderly.<sup>88</sup> This is a departure from Judge Calabresi’s earlier articulation, which, while explicitly recognizing the need to account for distributional concerns in conjunction with efficiency, never explicitly articulates the grounds for distributional choices. To the extent that the distributional choices reflect the personal politics of those adopting the “Calabresian proposition” without them revealing it as such, this constitutes “self-indulgence.”<sup>89</sup> How then are lawyer–economists to discuss distributional concerns in a way that constitutes scholarship and avoid the pitfalls of sophistry and self-indulgence?

In *New Economic Analysis*, Judge Calabresi raises the possibility of overarching theories of distribution such as John Rawls’ *A Theory of Justice* and utilitarianism (for which Judge Calabresi shows some approval).<sup>90</sup> He also references Jules Coleman’s influential piece *Efficiency, Exchange, and Auction*,<sup>91</sup> discussing Coleman’s use of ordinary-language analysis to investigate the dominance of different distributional theories in various contexts.<sup>92</sup> Judge Calabresi, however, is “not convinced that [Coleman] actually succeeds in

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83. *Id.* at 90.

84. *Id.*

85. For a general discussion of the formation of neoclassical economics and the exclusion of distributional concerns as part of its scientific construction, see Hackney, *Science, Politics, and the Reconfiguration of American Tort Law Theory*, *supra* note 7.

86. Calabresi, *The New Economic Analysis of Law*, *supra* note 80, at 91.

87. *See id.* at 93.

88. *See id.* at 102–03.

89. *See id.* at 98–99.

90. *Id.* at 97–99.

91. *Id.* at 105 (citing Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980)).

92. *Id.* at 105–06.

identifying contexts in which *As* are to be preferred over *Bs* solely for distributional reasons.”<sup>93</sup> This determination is what is needed for lawyer–economists, as scholars, to recommend law reform based on distributional considerations, and it “impl[ies] that the society ha[s] adopted certain starting-points and distributional preferences in certain contexts and that the task that remain[s] [i]s to achieve the greatest possible net wealth gain, given these preferences.”<sup>94</sup> In this regard, the role of economic analysis still seems scientific in nature.<sup>95</sup> In terms of the role of legal scholars exploring distributional issues generally, Judge Calabresi provides the following roadmap:

Distributional preferences do exist and are essential to any criticism of law. The legal scholar, therefore, cannot act as though they were not there or were none of his business. He must either develop theories that law-makers will decide ought to apply in particular contexts, or he must try to demonstrate what distributional preferences are, in fact, applied by our societies in particular contexts.<sup>96</sup>

This is a clear recognition that politics (“distributional preferences”) are a central feature of law. Does this mean that Judge Calabresi has given up on the idea of law as a nonpolitical enterprise? No.

In a later work, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, Judge Calabresi stakes out his ground in the critical legal studies–law and neoclassical economics debate over the nature of politics in law.<sup>97</sup> He argues that a clear understanding of starting points, as previously articulated in *New Economic Analysis*, is necessary not only in considering efficiency concerns, but also in weighing distributional considerations.<sup>98</sup> As such, he levels a critique against Duncan Kennedy, a leading critical-legal-studies scholar and staunch critic of legal neoclassical economists (and rights theorists) for eliding the political dimensions of law: “To Duncan Kennedy [justice] means ideology or his own intuitions about what is just.”<sup>99</sup> Judge Calabresi does not flesh out this criticism of Kennedy, although it seems clear that he is chiding Kennedy and others in the critical-legal-studies movement for attempting to pull law and, by extension, legal theory, too far into the realm of politics (or perhaps politics on a different and more confrontational plane). For Judge Calabresi, legal theory, at least in some good part, is still a scientific enterprise.<sup>100</sup> But how do we undertake an analysis of distribution, an obviously political subject, by way of scientific

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93. *Id.*

94. *Id.* at 106.

95. Among economists, Judge Calabresi cites the work of Amartya Sen, Abba Lerner, and I.M.D. Little as providing direction on how to think about distributional matters along these lines. Guido Calabresi, *An Exchange*, *supra* note 46, at 560 nn.22–24. For another reference to Little, see *supra* note 79 and sources cited therein. (That note also mentions the general popularity of I.M.D. Little and Duncan Kennedy’s reference to Little’s *A Critique of Welfare Economics*.)

96. Calabresi, *The New Economic Analysis of Law*, *supra* note 80, at 107.

97. 69 IOWA L. REV. 833 (1984).

98. *Id.* at 850.

99. *Id.* at 833.

100. *See id.* at 833–34, 846–47.

discourse? In place of abstract discussion regarding efficiency and distribution (that ignores starting points), Judge Calabresi argues that scholars engage in what he refers to as “middle theorizing.”<sup>101</sup>

Judge Calabresi provides an extended example of middle theorizing and placing normative values at the center of legal scholarship in *Ideals, Beliefs, Attitudes, and the Law (Ideals)*.<sup>102</sup> Ideals, beliefs, and attitudes, he notes, are all proxies for our political values.<sup>103</sup> *Ideals* is therefore an exercise in examining the ways in which our political values impact tort-law doctrine and ultimately what they have to say about the controversial constitutional issues concerning abortion.<sup>104</sup> For purposes of this analysis, Judge Calabresi’s torts discussion is most relevant because it provides a direct connection to his initial articulation of the role of economic analysis in *Costs*.

The central framing device for *Ideals* is the narrative of the “gift” of the evil deity.<sup>105</sup> The deity offers up to society the prospect of a gift that would make life more enjoyable, but at the price of 1000 people per year put to death in a random, horrible fashion.<sup>106</sup> Judge Calabresi uses this hypothetical to highlight what he has referred to elsewhere as tragic choices.<sup>107</sup> Citing the carnage caused by automobiles as an example, Judge Calabresi argues that, as a society we tend to shy away from the prospect that our enjoyment and pleasure comes at the cost of injury to the lives of others, even though it is a common occurrence.<sup>108</sup>

The aim of *Ideals* is to highlight the considerations (values) that act as a constraint on the efficiency norm.<sup>109</sup> Although Judge Calabresi spends a brief amount of time discussing the choice between strict liability and fault—still professing his preference for a strict liability regime—he uses the bulk of the book to examine the values at play in carving out exceptions to the reasonableness criterion in our negligence (fault) regime. From an economic-efficiency perspective, we can describe the fault system as reflecting the norm that the “principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”<sup>110</sup> This norm is also articulated in mathematical fashion ( $B < PL$ ) by Judge Learned Hand in the oft-cited *United States v. Carroll Towing Co.*,<sup>111</sup> which Richard Posner has argued reflects the “economic meaning of negligence.”<sup>112</sup> Judge Calabresi, by contrast, invites us to

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101. *Id.* at 851.

102. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985) [hereinafter CALABRESI, IDEALS].

103. *Id.* at 9, 15.

104. For a general discussion, see *id.*

105. *Id.* at 1–2.

106. *Id.* at 1.

107. See GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18–20 (1978).

108. CALABRESI, IDEALS, *supra* note 102, at 5–6, 13, 16.

109. See *id.* at 84–85, 85 n.313.

110. See CALABRESI, COSTS, *supra* note 1, at 26.

111. 159 F.2d 169, 173 (2d Cir. 1947).

112. Posner, *A Theory of Negligence*, *supra* note 35, at 32–33.

examine how exceptions to the reasonableness doctrine (and its economic logic) embody values that trump the efficiency norm.<sup>113</sup> This ties in directly with the dilemma posed by the evil deity because such value-driven exceptions to the reasonableness criterion can very well lead to more injury and death. The subsequent distributional question is, Who should bear the costs of these harms? Here, Judge Calabresi makes declarative statements about the types of distributional choices he believes are just:

[W]e do care a great deal about who wins and who loses, as a result of our acceptances and our rejections of the evil deity's offers. A great increase in life-years for the very rich, achieved at the cost of brutalizing and shortening the lives of the very poor, is not a gain—even if the total of additional life-years comes out “in the black.”<sup>114</sup>

In tort law there is a general standard, the reasonable-person standard, that we must all adhere to or find ourselves culpable for injuries that result from not meeting the standard, from being negligent.<sup>115</sup> This standard in the conventional analysis equates to the efficiency norm. Judge Calabresi, however, goes further, beyond economic analysis, and considers the social meaning of the reasonableness standard, stating that attitudes (values) concerning what is reasonable “inevitably derive from the point of view of those who dominate law-making in a given society.”<sup>116</sup> Judge Calabresi later continues, “I do not think I am exaggerating this tendency of the previously dominant group to offer equality, but only when the group seeking it accepts the culture of the group granting it.”<sup>117</sup> These statements have a decidedly critical feel to them, explicitly recognizing the role of power in shaping law. Judge Calabresi goes on to argue that, of course, the reasonable-man standard was established with a male prototype in mind to the exclusion of women's attributes.<sup>118</sup> He also observes that, given the source, we can assume that the reasonable-person standard has a racial dimension as well, based on “white” cultural norms.<sup>119</sup> The cultural biases built into the reasonableness standard run afoul of our diversity value. If certain groups cannot (or choose not to) live up to the behavioral norms of the reasonable-person standard and are therefore punished for their deviation by being deemed negligent, and thus legally liable, this has a distributional consequence.<sup>120</sup>

Judge Calabresi notes that these distributional implications are particularly nefarious because some of the cultural differences might be the result of the pervasive racism and sexism within society.<sup>121</sup> As a consequence, even if a member of the subjugated group were to conform to the reasonableness

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113. CALABRESI, IDEALS, *supra* note 102, at 50–51, 85–86.

114. CALABRESI, IDEALS, *supra* note 102, at 11.

115. RESTATEMENT (SECOND) OF TORTS § 283 & cmt. b–c (1965).

116. CALABRESI, IDEALS, *supra* note 102, at 22.

117. *Id.* at 29.

118. *Id.* at 31–32, 44.

119. *Id.* at 26–28, 44.

120. *Id.* at 32–34, 37–42.

121. *Id.* at 27–28, 43–44.

standard and avoid legal liability, he or she would still suffer the cost of conforming and subsuming his or her cultural inclinations.<sup>122</sup> If viewed outside of the dominant paradigm, however, we might deem those cultural deviations to be positive attributes. Judge Calabresi bemoans the phenomenon of acculturation that leads to values (he uses as examples women's child caregiving and Mediterranean attitudes towards life) being engulfed in the American norm of reasonableness.<sup>123</sup> A tort standard that penalizes unreasonable behavior supports this bias.<sup>124</sup> However, we are caught on the horns of a dilemma because we have also said that the reasonableness standard promotes the value of economic efficiency.

The example that gives Judge Calabresi the most pause is that of racial differences that manifest in riskier behavior on the part of subjugated groups.<sup>125</sup> His background assumption regarding race is fascinating from the perspective of the intellectual history of American legal theory. Although he does not come out squarely on the issue, it seems as though Judge Calabresi adopts the position that racism is pervasive in America. Echoing the "permanence of racism" theme articulated in critical race theory, most famously by Derrick Bell in *Faces at the Bottom of the Well*,<sup>126</sup> Judge Calabresi's position on race is decidedly different from that taken by Chicago-school economists who are more apt to discuss racism as a rational response to information or a case of market failure.<sup>127</sup> Judge Calabresi ventures even deeper into the race thicket with his statement that he agrees with those "who don't believe in race, and don't understand what the concept means except as a nasty social construct."<sup>128</sup> These critical ideas thereafter form the backdrop to an economic analysis of how to deal with the existence of groups who present different levels of risk to society regarding particular conduct most specifically in the context of driving.

For the sake of argument, Judge Calabresi posits that we accept the oft-asserted proposition that there is a relationship between race and accident rates.<sup>129</sup> From a purely economic perspective, this correlation justifies higher rates of insurance based on racial classification. Thus, the economic solution goes against one of our core values—that we should not discriminate on the basis of race.<sup>130</sup> As a result, we may pass laws to outlaw differential insurance rates based on racial classification. However, Judge Calabresi, in undertaking neoclassical economic analysis, astutely notes that profit-maximizing firms will find other indicia of risk in order to construct the most efficient insurance pools

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122. *Id.* at 28–30.

123. *Id.* at 30–31.

124. *Id.* at 32, 35–39, 42–44.

125. *Id.* at 40–44.

126. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

127. See, e.g., GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

128. CALABRESI, *IDEALS*, *supra* note 102, at 41.

129. *Id.* at 41–42.

130. *Id.*

possible.<sup>131</sup> For example, there might be an insurance risk premium for drivers who listen to a certain type of music loudly.<sup>132</sup> If insurance companies find proxies for race that mirror the outcome that would have occurred by basing premiums a priori on race, the economic outcome is the same, but we might feel better about it as a society. However, those who are burdened with higher insurance rates, due to the disparate impact, will be suspicious that, although society has facially banned discrimination, they are being made scapegoats for the costs of accidents.<sup>133</sup>

Another possibility ties insurance rates to accident history. Unfortunately, this strategy has the consequence of concentrating losses on those who happen to be part of the accident-prone group and who also happen to be unfortunate enough to be involved in an accident.<sup>134</sup> Judge Calabresi concludes that in order to save ourselves from the multitude of unintended economic and societal consequences associated with the private tort system we should move to a regime of government-funded insurance (that is, social insurance).<sup>135</sup> However, Judge Calabresi is a realist and recognizes that such a subsidy is very unlikely to be granted to groups who are disenfranchised due to societal discrimination in the first place: Why would the same society turn around and give this group a benefit?<sup>136</sup> Again, this sort of racial realism echoes that found in some of the more controversial writings of Derrick Bell.<sup>137</sup>

In an interesting move, Judge Calabresi highlights his point with a hypothetical narrative that also resembles critical-race-theory storytelling:

On occasion I have gotten insurance executives rather drunk and they have “confided” in me that accident involvement statistics “show” that low-income blacks have many more auto accidents than low-income whites and many, many more than middle-income whites. They then added, almost as an afterthought, that middle-income blacks have the fewest accidents of all, considerably fewer than middle-income whites.<sup>138</sup>

Again, Judge Calabresi requests that we “for the moment accept these doubtful statements as true.”<sup>139</sup> Taking the position that race is a socially constructed concept, Judge Calabresi adopts a sociological perspective. He argues that if a group is treated poorly due to their definition as societal others, then “however fictitious, fanciful, and absurd the basis of the definition is, it is not unlikely that members of the group will react to their mistreatment, to their separate

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131. *Id.* at 35–37.

132. *Id.* at 36.

133. *Id.* at 37–38.

134. *Id.* at 38–39.

135. *Id.* at 40.

136. *Id.* at 40–41.

137. See BELL, *supra* note 126, at 53–54 (discussing the interest-convergence theory’s interpretation of racial discrimination, or movement away therefrom, in particular that “blacks gain little protection against one or another form of racial discrimination unless granting blacks a measure of relief will serve some interest of importance to whites”).

138. CALABRESI, IDEALS, *supra* note 102, at 40–41.

139. *Id.* at 41.

classification, in their general behavior.”<sup>140</sup> This, according to Judge Calabresi, might be reflected in lower-income blacks being more aggressive in their driving due to resentment towards a racist society and, consequently, middle-income blacks being more careful.<sup>141</sup>

Judge Calabresi takes the hypothetical and asks what we should do as a society. He uses the tools of neoclassical economic analysis and simultaneously evokes our basic values. We are told by Judge Calabresi that “[c]harging higher insurance rates on the basis of race combined with low income is surely intolerable and should be prohibited.”<sup>142</sup> One solution is for society to subsidize insurance companies for insuring low-income blacks.<sup>143</sup> As noted previously, it is unlikely that any society with the racial animus that contributed to blacks being put in this low-income position in the first place would then go on to subsidize their “unreasonable” behavior. Judge Calabresi also argues we do not want to lower our common law standard of reasonableness to accommodate behavior that is harming innocent victims,<sup>144</sup> however, our current solutions to this problem, including “ignoring” it by not requiring that insurance be purchased, all have negative policy effects.<sup>145</sup> This hypothetical, Judge Calabresi admits, might not be “true,” but the critical point is not the truth of the hypothetical, rather, it is the essential societal rub it highlights:

[W]e are unwilling to admit openly that some groups in our flawed society may have attributes which are *undesirable and even dangerous*. However, because we are in a deep sense responsible for the existence of these attitudes, we would like both to deny their existence and to avoid hindering or excluding further those who have such attitudes. We would like to do this without in any way suggesting that the attitudes themselves are to be tolerated, let alone encouraged.<sup>146</sup> It is this ambivalence that so often pushes us into subterfuge and wishful thinking.

Political choices seem to be inescapable.

## V

### JUDGE CALABRESI’S PRAGMATISM: A SIGN OF OUR TIMES

The trajectory from *The Costs of Accidents* to *Ideals, Beliefs, Attitudes, and the Law* is long and winding. It is a lengthy journey for legal academe as well.<sup>147</sup> The 1960s saw Judge Calabresi and others help usher in the era of grand theory in the American legal academy with the pathbreaking scholarship of law and neoclassical economics. The 1970s thereafter heralded a plethora of theoretical

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 41–42.

144. *Id.* at 42.

145. *Id.* at 42–43.

146. *Id.*

147. Judge Calabresi’s personal trajectory has taken him from professor to Dean of the Yale Law School and to the U.S. Court of Appeals for the Second Circuit, where he currently sits as a federal judge. *Guido Calabresi*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/judges/bios/gc.html> (last visited June 23, 2014).

breakthroughs, including feminist theory, critical legal studies, law and society, liberal-rights theory, law and society, law and philosophy, and critical race theory. What ensued can aptly be described as the “theory wars,” chief amongst them being the battle between law and neoclassical economics and critical legal studies (with liberal-rights theory as a foil for both).<sup>148</sup> Although the wars have subsided from their zenith in the 1990s, legal theory is still thriving in the legal academy. However, the tenor is notably more subdued. As opposed to declarations of theoretical superiority, there is a pragmatic (in the philosophical sense) approach to law. Legal theory today is much more of an amalgam of theoretical approaches.<sup>149</sup>

One of the more interesting aspects of Judge Calabresi’s theoretical development is that it in many ways reflects the broader trend in legal theory. Judge Calabresi is a leader in the move to high theory, though notably less rigid in terms of disciplinary parameters than Chicago-school adherents, and has settled into what some have referred to as the “new pragmatism.”<sup>150</sup> Notably, one of the other founders of law and neoclassical economics, Richard Posner, also now a U.S. Circuit Court judge, has also landed in the pragmatist camp (or—as Judge Calabresi would describe it—middle theorizing).<sup>151</sup> Judge Calabresi’s pragmatism is reflected in his creative use of economic analysis with realist insights. It is those insights that are hinted at in the evocation of loss spreading and justice in *The Costs of Accidents*. However, fleshing out ideals of justice requires more than the philosophizing of a sole academic. Justice is a multifaceted enterprise that requires a variety of perspectives. This variety is what has also developed in the American legal academy over the last few decades with the increasing diversity on law school faculties (both demographically and methodologically).

Today, some of the most interesting work in the law-and-economics field, in particular, is decidedly more methodologically flexible than the original wave—and more technical as well. Running through much of this work is a decided trend towards a more behavioral approach to law and economics, taking into account some of the “sociological” aspects of economic phenomenon.<sup>152</sup> This

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148. See HACKNEY, LEGAL INTELLECTUALS IN CONVERSATION, *supra* note 2, at 11–12.

149. See *id.* for a general substantive discussion of this characterization of American legal theory’s evolution.

150. See *id.* at 16.

151. See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 1 (2003) (“[P]ragmatism is the best description of the American judicial ethos and also the best guide to the improvement of judicial performance—and thus the best normative as well as positive theory of the judicial role.”); see also RICHARD A. POSNER, OVERCOMING LAW (1995).

152. See, e.g., Jennifer Arlen et al., *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1 (2002) (discussing how “endowment effect”—the observed differential between an individual’s willingness to pay to obtain an entitlement and her willingness to part with one—plays a role in corporate agency); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991) (utilizing empirical analysis and behavioral insights to discuss discrimination in the car-sales market); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006) (using bounded-rationality theory to construct a general account of how debiasing through law does or could work to address legal questions across a range of areas).

turn owes much to Guido's original contributions to the field, his subsequent development, and the general trajectory of American legal theory. For this, we all—including that kid, me, who sat timidly in Judge Calabresi's first-year torts class at the Yale Law School in awe of his brilliance, and who is still now awestruck of Guido, even as a tenured member of the legal academy—are tremendously indebted to Judge Calabresi.