

SOME THOUGHTS ON YALE AND GUIDO

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I

How did Guido Calabresi come to write his first article, *Some Thoughts on Risk Distribution and the Law of Torts (Some Thoughts)*?¹ Out of respect for his own unique style, I refer to him by his first name as I try to answer that question here, something I usually avoid doing even when writing about historical figures as children, lest I sound overly familiar. My focus is on Yale's influence on Guido's work.

As any historian will acknowledge, decoding impact is a risky business. Asked what was most important about his legal education, Guido himself attested,

I immediately blurted out an answer: "I am a refugee!" And of course, how can I not have been influenced by the fact that we were antifascists and that we left Italy because my father had been jailed and beaten in 1923 and he was a democrat with a small "d"; that we were very, very rich there and came here with nothing because it was against the law [to take money out of Italy] under penalty of death?

Here is someone who arrived in Manhattan on September 16, 1939 at the age of six, knowing but three English words—"yes," "no," and "briefcase"—who was bullied by his New York classmates, and who became an outsider in old New Haven by virtue of his Jewish ancestry, identification with Catholics, and the vowel at the end of his first and last name.³ Perhaps instead of looking to Yale, I should devote greater attention to Guido's flight from Italy. But although I cannot say that Yale explains *Some Thoughts*, I can point to some ways in which the "Blue Mother" may have influenced Guido's first major work, raise some questions about proverbial roads not taken, and consider the implications of *Some Thoughts* for both law and economics and Guido's Yale Law School deanship.

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1. 70 YALE L.J. 499 (1961) [hereinafter Calabresi, *Some Thoughts*].

2. Adam Benforado & Jon Hanson, *The Costs of Dispositionism: The Premature Demise of Situationist Economics*, 64 MD. L. REV. 24, 75 (2005).

3. Interview by Justin Collings with Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch., in New Haven, Conn. (n.d.).

II

One semester after Guido crossed the ocean between Milan and Manhattan, New Haven and Yale claimed him. His mother, Bianca Maria Finzi-Contini Calabresi, earned a Ph.D. in French at Yale.⁴ She became a professor of French and Italian at Connecticut College, then professor and chair of the Italian Department at Albertus Magnus College.⁵ Guido's father, Massimo, who had helped publish and distribute the newspaper of the resistance movement, *Non Mollare*,⁶ had been an associate professor at the University of Milan and had been denied a promised promotion to full professor when the Fascists blocked it.⁷ Yale awarded him a research fellowship in internal medicine in 1940, and he broadcast the message that many Italians opposed fascism.⁸ Massimo Calabresi

4. *The Finzi-Contini Lectures*, YALE U., http://www.yale.edu/whc/calendar/pdf/Finzi-Contini_content.html (last visited Jan 28, 2014).

5. After the war, she also received a doctorate from the University of Bologna. NORMAN SILBER, GUIDO CALABRESI IN HIS WORDS 29 (2012). According to family lore, Bianca Calabresi's adviser, the legendary Henri Peyre, wanted to appoint her to the faculty and was prevented from doing so by the Yale Corporation. The first woman only received tenure at Yale College in 1959. Reacting as many a contemporary academic would, Guido's father vowed to leave Yale for a research university where both could pursue scholarly careers. Bianca Calabresi later told Guido that she had prevented her husband from doing so by admonishing him that he could not uproot her a second time. As she confided, she worried that Guido's father, who spoke heavily accented English far less fluently than she did, would prove unable to make a place for himself elsewhere comparable to the niche he had laboriously carved out at Yale. So Bianca Calabresi taught far more than most university professors and published in retirement. *See, e.g.*, BIANCA MARIA FINZI-CONTINI CALABRESI, ERNEST RENAN ET ÉMILE EGGER: UNE AMITIÉ DE QUARANTE ANS (1979) (It.). After her death, her husband told Guido that he had always known that she had fibbed to protect him. SILBER, *supra*, at 29, 32; Telephone interview with Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch. (June 26, 2012) [hereinafter June Interview with Guido Calabresi].

6. *Renata Calabresi, An Anti-Fascist*, 96, N.Y. TIMES, Dec. 20, 1995, at B15; *see also Massimo Calabresi*, 84, *Yale Medical Professor*, N.Y. TIMES, Mar. 20, 1988, at A20.

7. That denial of a promotion mattered because Guido thought that if his father had been appointed a full professor, the family might have returned to Italy at war's end. June Interview with Guido Calabresi, *supra* note 5.

8. *See Denies Aggression by Italian People; Dr. Calabresi, in Talk at Yale, Declares That They Do Not Hate Foreign Countries; Calls on US to Aid Them; If We Invade Italy We Should Go as Friends, Not as Enemies, Broadcast States*, N.Y. TIMES, Dec. 21, 1942, at 10 [hereinafter *Denies Aggression*]; *Faculty Members Heard Over WTIC*, YALE DAILY NEWS, Jan. 8, 1943, at 1. According to the *N.Y. Times* article, Massimo Calabresi said, "There are in Italy more than 40,000 people, who on the whole, do not hate foreign people, who are not bigoted, who have not an aggressive nationalistic attitude toward other populations," *Denies Aggression, supra* (internal quotation marks omitted). He continued,

When the time comes to carry the war into Italian territory the armies of the United States should not invade Italy as an enemy power . . . They should come to the shores of Italy as friends fighting for liberty from Nazi domination and its Fascist puppets. To give more influence of their intention, there should be Italian volunteers among them, and even the Italian flag. If this should be the case, I am sure that resistance to the United States will be kept at a minimum and that the Italians will be freed from their rulers.

Id. Instead, when Mussolini fell from power in 1943, the Americans cynically negotiated to keep Victor Emmanuel and Prime Minister Badoglio in control and helped plunge Italy into "a brutal three-way struggle in which an estimated 200,000 people died" between anti-Fascists, Fascists, and German occupation troops. ROBERT DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 1932-1945, at 412-14 (1979); STANLEY PAYNE, CIVIL WAR IN EUROPE 202 (2011).

became chief cardiologist at West Haven V.A. Hospital and a member of the Yale Medical School faculty. Like his wife, he received a doctorate from Yale. His was in public health.

Young Guido had contact with the law school as well. He first spoke English outside his home with the daughter of Yale law professor James William Moore. He attended day camp with his future *Yale Law Journal* editor-in-chief, Stephen Shulman, whose father, a professor at Yale Law School, would later become its first Jewish dean.⁹

The exodus of New Haven's affluent young for prep school enabled Guido to follow the well-trodden path of the local elite. As he was finishing Worthington Hooker Elementary School, Foote School was replenishing its male contingent by raiding the public-school system. A scholarship sent Guido to Foote, where he had excellent teachers who lacked other career options because they had married Yale professors.¹⁰ After Foote, Guido, like his older brother, Paul, enrolled at the venerable, all-male Hopkins Grammar School. Guido worked his way through Hopkins on a scholarship and loved it.¹¹ He again followed his brother to Yale's Timothy Dwight College, which at that time attracted those concerned with public policy, including Kingman Brewster and Lowell Weicker.¹² Guido received his B.S. in economics *summa cum laude*

9. Telephone interview with Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch. (May 22, 2012) [hereinafter May Interview with Guido Calabresi].

10. Christopher Hoffman, *At Foote, Yale Dean is Cited as Role Model*, NEW HAVEN REG., May 8, 1994, at A3. For example, Martha Babcock Foote was married to Harry Ward Foote, a Yale chemistry professor. Peter Hall, *East Rock: Facts, Artifacts, and Memories*, J. NEW HAVEN COLONY HIST. SOC'Y, Spring 2002, at 3, 16.

11. Judge Guido Calabresi, Class of 1949 and 1995 Distinguished Alumnus, Hopkins Grammar Sch., Address at the 2010 Reunion Luncheon (June 12, 2010), in HOPKINS VIEWS FROM THE HILL, Fall 2010, at 7 [hereinafter Calabresi, Address at the 2010 Reunion Luncheon], 7–8, available at http://www.hopkins.edu/ftpimages/82/download/VIEWS_Fall201011_FINALweb.pdf. Paul Calabresi had already received a scholarship from Hopkins, and Hopkins had a policy of one merit-based scholarship to a family. “So I had a work scholarship here,” Guido explained in his 2010 Hopkins speech.

In those days, a lot of kids could help pay their way by sweeping the floors and doing other work. The world has changed. Today, that would not be a good idea, but in our day, we were very proud of the fact that we were doing that and that we came here that way.

Id. at 8. Hopkins proved crucial.

[N]ot in Yale College, not at Oxford, not clerking at the Supreme Court, only possibly at the Yale Law School—where I've taught for over fifty years—have I had friends . . . in an academic setting as conducive to intelligent growth and originality as I had at Hopkins,

Guido said. *Id.* at 9. Given the audience, we might take this remark with a grain of salt, but the Calabresis sent their three children to Hopkins, remained active in the Hopkins community, and were both named distinguished alumni. *Distinguished Alumni/ae*, HOPKINS SCH., <http://www.hopkins.edu/distinguishedalumni> (last visited Sept. 7, 2013). Anne Tyler Calabresi had attended Prospect Hill School, a sister school to Hopkins with which it subsequently merged in a union that Guido helped arrange. He represented Hopkins; Yale College Dean and French scholar, Georges May, represented Day Prospect Hill. Calabresi, Address at the 2010 Reunion Luncheon, *supra*, at 8. (Prospect Hill had merged with another school for girls, Day School, in 1960.) *Id.*

12. Later, Timothy Dwight became one of Yale's most boisterous colleges. The Timothy Dwight Fight song proclaims, “Ring the bell, ring the bell! God damn, fuck, hell! Horseshit, assbite! Nobody's

in 1953. At Yale, he worked with the legendary Keynesian, James Tobin, but he took Economics 10, the introductory course, from Warren Nutter, a founder of the Virginia school of political economy. That experience, along with taking classes with William Fellner, launched Guido's argument with conservative economics.¹³

By this time, Guido had come to the attention of Eugene Victor Debs Rostow, another former Yale College wunderkind, who had himself studied economics and attended Yale Law School before joining its faculty. "I have known about Guido Calabresi ever since he was a boy," Rostow would write Justice Hugo Black,

for his father is a distinguished New Haven doctor, and a member of the Clinical Staff of the Medical School. I first heard of Guy, as he is called, when he was in school, for he took one of Yale University President Griswold's daughters to her first dance, when they were both fourteen or thereabouts. Mr. Calabresi is a star of the brightest possible magnitude, and at the same time one of the nicest, most engaging, and most appealing boys, and one of the gayest and most stimulating companions one could possibly imagine. His score on the Legal Aptitude Test was 749, for example—a very rare thing. His Yale College average was 93 He talked to me about going to Law School when he was in Yale College, taking every academic and social honor in sight.¹⁴

Although Rostow hoped that Guido would attend Yale Law School, he remained an anxious suitor. When Guido won the Rhodes Scholarship in 1953 that sent him to Magdalen College, economics still beckoned. At Oxford, Guido studied with two giants who helped shape Keynesian theory, Lawrence Klein and John Hicks, for whom he wrote papers on externalities. He did apply to law school, but the Oxford faculty had other ambitions for Guido. "It is as sure as such things can be that he will attain First Class Honours," Magdalen's Kenneth Tite wrote before Guido's examinations. "He is very good indeed, not only first class, but at that level in the first class at which one begins to think of changing the label to 'Fellowship Standard.'"¹⁵ According to Guido's tutor, Harry Weldon, "If he wanted an academic career in Oxford, he would in my opinion, be a strong candidate for a Fellowship here. Indeed, he already writes, thinks, and takes part in discussion and seminars at the level of a junior Fellow rather than at that of an undergraduate."¹⁶ Guido's written exams proved so good that his assessors waived the oral and awarded him a First in politics, philosophy, and economics. (On the rare occasions that happened, the student would be summoned before all the other examinees and asked just one question so the examiners—who, in this case, included not just Hicks, but Isaiah Berlin as well!—could show him off to the throng.)¹⁷

better than Timothy Dwight!" *Timothy Dwight College*, WIKIPEDIA, http://en.wikipedia.org/wiki/Timothy_Dwight_College (last modified Apr. 29, 2014).

13. June Interview with Guido Calabresi, *supra* note 5.

14. Letter from Eugene Rostow, Dean, Yale Law Sch., to Justice Hugo Black (Jan. 15, 1958) (on file with the Papers of Hugo Lafayette Black, Manuscript Division, Library of Congress, Box 459, file: Personnel, Calabresi, Guido) [hereinafter Letter from Eugene Rostow to Justice Hugo Black].

15. *Id.*

16. *Id.*

17. May Interview with Guido Calabresi, *supra* note 9.

By now, Guido was steeped in politically liberal interventionist economics—though were you a conservative, you called it something else. Guido finished college just after William F. Buckley, Jr. published *God and Man at Yale*, charging that Yale, then one of the most conservative Ivy League institutions, undermined faith in Christianity and the market. Buckley excoriated Yale's Economics Department, as he surely would have attacked Guido's Oxford teachers, for "deifying collectivism" and "statism."¹⁸

Predictably, Magdalen offered Guido a fellowship. But he turned it down. He found theory the most interesting aspect of economics, but he lamented "that suicidal desire of the economist to make his theory so pervasive and detailed that it is rendered utterly useless to the lawyer who lives in the world of men, and even to the law teacher, wherever he lives"¹⁹ and decided law better suited him. When Guido returned home from England to act as best man at his brother's wedding the following spring,²⁰ Rostow gathered him up, took him to the Elizabethan Club, and said he looked forward to Guido's enrollment at the law school.²¹ It looked as if the die had been cast.

Not so fast. "The [Yale] Economics Department went after Mr. Calabresi very hard to persuade him to do graduate work when he returned from Oxford, covered with glory," Rostow recalled.²² Its director of graduate studies advised Guido that because of his record, the department would waive all coursework. He need only take his exams and write an article that could double as a dissertation to receive the Ph.D. Not bad. The bait, as Guido explained, was designed to lure him to economics. But in those days, he had no need for a second degree. Had the economist said that Guido required more knowledge, he might have continued on in both economics and law. But he did not, and Guido skipped further formal economics training. Undaunted, the department sweetened the pot by awarding Guido two sections of Economics 10, the very course he had taken from Nutter. It was not the kind of teaching that most graduate students would do. Instead, Guido taught the whole course, which meant he had an odd schedule as a first-year law student. He would teach Economics 10, then run to the law school for his courses.²³

III

But why choose "the" Yale Law School? Guido and I disagree over how obvious a destination Yale was for him. Ronald Dworkin also went to Magdalen, and he and Guido became friends at their final Rhodes interviews. "Two bright, little boys who somehow convinced the people who gave us the

18. WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE* 89, 90 (50th Anniversary ed. 2002).

19. Calabresi, *Some Thoughts*, *supra* note 1, at 500.

20. *Miss Celia T. Gow New Haven Bride; Boston Therapy Student Wed to Paul Calabresi, Who Attends Yale Medical*, N.Y. TIMES, Apr. 4, 1954, at 94.

21. June Interview with Guido Calabresi, *supra* note 5.

22. Letter from Eugene Rostow to Justice Hugo Black, *supra* note 14.

23. June Interview with Guido Calabresi, *supra* note 5. Each of the two sections Guido taught met for three hours weekly. *Id.*

scholarships that we were athletes,” Guido remembered.²⁴ Together, they went to see John Morris, Magdalen’s law tutor, because they could not decide what to study. Guido was choosing between economics and law; his friend, between philosophy and law. Morris asked how old they were, and each replied that he was twenty. There was no need to read law to save time then, Guido remembered Morris responding. Why not use the time at Oxford to do something else? But Morris then asked where each intended to attend law school. When Guido replied that he intended to go to Yale, Morris advised him to read economics. When Dworkin answered that he planned to attend Harvard, Morris answered that Dworkin would benefit from reading law with him.²⁵ As Morris’s response indicated, Harvard had the reputation of concentrating on law and the legal profession; Yale, on law’s relationship to the social sciences.²⁶

Yale had hitched its wagon to the star of legal realism beginning in the 1920s. Stuck in a law school teetering on the brink of insolvency halfway between New York and Cambridge, Yale professors had long understood the need to claim that they turned out a unique product to attract better applicants and bring the student body up to par with Columbia’s and Harvard’s. As John Langbein has shown, the 1920s was not the first time Yale Law School tried to clamber aboard the interdisciplinarity and public-policy bandwagon.²⁷ But it was the first time Yale did so successfully. Yale became important when the faculty—both through its interdisciplinary scholarship, beginning in the 1920s, and then through its staffing of New Deal agencies in the 1930s—began to play an innovative role in statecraft. The realists’ focus on a functional approach to legal analysis and on treating law as one of the social sciences and as a tool of public policy enabled Yale to edge out Columbia for second place.²⁸ Legal realism imbued Yale with its allure “as the only law school that wasn’t like a law school” and also as a place “where it was possible to do something more than

24. Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 746 (2005) [hereinafter Calabresi, *Neologisms Revisited*]. Guido had been chosen captain of the Timothy Dwight soccer team in 1952–53 on the theory that he could recruit good players. His selection helped give him athletic credibility for the Rhodes, but as he made clear at his Rhodes interview, he prudently benched himself in favor of more skilled peers. He also fenced. Curriculum Vitae, Guido Calabresi (Jan. 15, 1958) (on file with the Papers of Hugo Lafayette Black, Manuscript Division, Library of Congress, Box 459, file: Personnel, Calabresi, Guido) [hereinafter Curriculum Vitae, Guido Calabresi]; June Interview with Guido Calabresi, *supra* note 5.

25. Dworkin ultimately read law with Rupert Cross and famously challenged H.L.A. Hart’s views in his final examinations. A.W. BRIAN SIMPSON, REFLECTIONS ON THE CONCEPT OF LAW 2 (2011). But the law school “continued to be a dumping ground” for weak undergraduates. *Id.* at 65.

26. May Interview with Guido Calabresi, *supra* note 9.

27. “There was a Potemkin-village quality to the Yale Law School in the mid-1870s, with its claim to have become the nation’s premier center of advanced interdisciplinary legal studies.” John Langbein, *Law School in a University: Yale’s Distinctive Path in the Later Nineteenth Century*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 53, 65–66 (Anthony Kronman ed., 2004).

28. LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 20–35, 104–20 (1986) [hereinafter KALMAN, LEGAL REALISM AT YALE]; LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 33–40 (2005) [hereinafter KALMAN, YALE LAW SCHOOL AND THE SIXTIES].

study law” for those interested in careers in the academy, politics, and public policy.²⁹ Every cliché about Harvard and Yale Law Schools signaled the extent to which legal realism was bound up with Yale’s identity and mystique.³⁰

But the law school was operating with smoke and mirrors in 1955 when Guido contemplated enrollment there. Less than a year after becoming dean in July 1954, Harry Shulman died of cancer. The school lost a third of its faculty between 1954 and 1956, because of deaths, retirements and separations. The faculty’s 1954 reversal of its decision, one year earlier, to tenure Vern Countryman—taken, some suspected at the urging of Yale President A. Whitney Griswold because of Countryman’s work defending victims of McCarthyism—had provoked discussion at the Supreme Court, received coverage in the *New York Times*, and split professors into two warring camps.³¹ As Rostow also lamented at the time, Yale Law School was “known as a country-club” among the nation’s undergraduates, and, “if the [Law School Admission Test] ranks have even prima facie meaning, and they do . . . they show that Harvard probably has a better class than we do—a much better class.”³² Surely this was one reason he hoped to nab Guido.

29. Robert Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 629 (1973).

30.

Yale trains judges, Harvard trains lawyers; Yale doesn’t teach you any law, Harvard teaches you nothing but; Yale turns out socially conscious policy-makers, Harvard turns out narrow legal technicians; Yale thinks that judges invent the law, Harvard thinks that judges discover the law; Yale is preoccupied with social values, Harvard is preoccupied with abstract concepts; Yale is interested in personalities, Harvard is interested in cases; Yale thinks most legal doctrine is ritual mumbo-jumbo, Harvard thinks it comprises a self-contained logical system; Yale cares about results, Harvard cares about precedents; Yale thinks the law is what the judge had for breakfast, Harvard thinks it is a brooding omnipresence in the sky.

Victor Navasky, *The Yales vs. the Harvards (Legal Division)*, N.Y. TIMES MAG., Sept. 11, 1966, at 47, 49.

31. Tad Szulc, *Professor Quits; Yale is Accused: Law Associate Said to Feel He Was Not Promoted Because He Acted in Loyalty Cases*, N.Y. TIMES, Dec. 30, 1954, at 6. Attempting to explain the scene in New Haven, Charles Reich wrote to Justice Black,

I was up at Yale this weekend and heard both sides of the story on Countryman. Shulman’s side says he is leaving because his scholarship is inadequate for promotion, although they would have kept him a few more years to prove himself had he been willing to stay. The [Wesley] Sturg[e]s-Fowler [Harper]-[Fred] Rodell side says that Shulman yielded to Alumni pressure because of Countryman’s activities in the [National] Lawyers Guild. I’m sure of one thing—it will hurt the school terribly.

Letter from Charles Reich to Justice Hugo Black (Jan. 17, 1954) (on file with the Papers of Hugo Lafayette Black, Manuscript Division, Library of Congress, Box 466, file: Personnel, Reich, Charles Alan). Countryman had been a clerk for Justice William O. Douglas, who complained repeatedly to Griswold and Shulman about Yale’s failure to promote his protégé. KALMAN, LEGAL REALISM AT YALE, *supra* note 28, at 199; *see* Letters from Justice William O. Douglas to A. Whitney Griswold, Dean, Yale Law Sch., and Stephen Shulman, Dean, Yale Law Sch. (n.d.) (on file with the William O. Douglas Papers, Manuscript Division, Library of Congress). During this period, the law school also denied promotions to two other left-of-center professors, David Haber and John Frank. KALMAN, LEGAL REALISM AT YALE, *supra* note 28, at 195–99; ELLEN SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 252–53 (1986).

32. Letter from Eugene Rostow, Dean, Yale Law Sch., to Jack Tate, Assoc. Dean, Yale Law Sch., and Charles Runyon, Assistant Dean, Yale Law Sch. (Nov. 13, 1957) (on file with Yale University); *see also* Letter from Eugene Rostow, Dean, Yale Law Sch. to A. Whitney Griswold and Edgar Furniss

Guido and the Yale Law School have become so intertwined that it is difficult to conceive of him choosing to study anywhere else. But I don't consider Yale the obvious destination for him in 1955, particularly once he decided against acquiring a Ph.D. in economics. Arguably, Harvard represented a better choice. It is not because Guido's future wife, Anne Tyler, a descendant of the first governor of New Haven Colony and fellow Foote graduate, was starting her senior year at Radcliffe. Though the two had long known each other, they were not yet dating.³³ It is because, except for his two years in England, Guido had lived in New Haven since he was seven; variety might have seemed in order, and besides many find Cambridge preferable to New Haven. It is also because, assuming the Law School Admission Test reliably indicated intelligence, even Rostow worried that Harvard attracted smarter students. Further, it is because the Countryman case was a *cause célèbre*, and a third of the Yale Law School faculty was vanishing. To be sure, Morris's reaction to the plans announced by Dworkin and Guido suggested that Yale maintained its storied reputation. And I may be anachronistic. Perhaps I project today's world of Internet gossip onto the past, and students prattled less about law school then. But one needed no Internet to realize that Yale was in trouble.

Still, for Guido there was only one choice. For those in his generation, Yale Law School represented the left of center. Indeed, Yale administrators must have rejoiced that Buckley turned his stiletto on the college, for, as Buckley sardonically—and accurately—wrote, “[S]ome of the graduate departments, the Yale Law School in particular, would provide far more flamboyant copy.”³⁴ Buckley later claimed that a conservative alumnus tried to dissuade him from publishing *God and Man at Yale* by reassuring him that President Griswold planned to “clean up” Yale by firing law professor Thomas “Tommy the Commie” Emerson and by “shutting up” Rostow.³⁵ Although Griswold surely lacked such intentions,³⁶ he, like his predecessors,³⁷ regarded the law school as a nest of liberal and left-liberal political troublemakers. For—thankfully, in my opinion—during this period, Yale was such a nest. So when Rostow invited Guido to the Elizabethan Club, Guido was not thinking about tenure denials. He was thinking that Rostow, a famous liberal,³⁸ had boldly branded the

(Nov. 13, 1957) (on file with Yale University). As Guido reminds me, Yale did possess a significantly smaller student body than Harvard, and Rostow may have been using the statistics this way to coax more financial resources from the central administration. June Interview with Guido Calabresi, *supra* note 5. Certainly, Guido and many of his classmates were able to choose between Harvard and Yale. Still, Yale did not yet possess the preeminence that it would acquire later.

33. Anne G.A. Tyler, *Guido Calabresi Are Wed at Yale: Six Attend Bride at Her Marriage in Chapel to Professor of Law*, N.Y. TIMES, May 21, 1961, at 88. Had they been dating at the time, Guido said, he might well have gone to Harvard. June Interview with Guido Calabresi, *supra* note 5.

34. BUCKLEY, *supra* note 18, at lxvii.

35. JOHN JUDIS, WILLIAM F. BUCKLEY, JR.: PATRON SAINT OF THE CONSERVATIVES 90 (1988).

36. See KALMAN, LEGAL REALISM AT YALE, *supra* note 28, at 194–99.

37. *Id.* at 132–36, 158–64.

38. May Interview with Guido Calabresi, *supra* note 9. Later, liberals would revile Rostow for his continued defense of the Vietnam War, then decry his neoconservatism when he became a member

Supreme Court's behavior in the Japanese American–internment cases a “disaster” in 1945³⁹ and urged the reorganization of the American oil industry to eliminate the waste of monopolistic concentration.⁴⁰ He was thinking that the school was ground zero for the defense of liberal judicial activism. He was thinking that unlike Harvard, it had admitted women early.⁴¹ He was thinking that Yale was the place that taught law untraditionally and reached out to the social sciences. (Guido became temporarily alarmed on this visit when he sat in on a property class, and David Haber focused on nineteenth-century New Jersey easements, then relieved and tickled when Haber said he had done so because he had heard students were complaining that he did not teach enough black-letter law.)⁴² The great law schools then, as Guido saw it, were few: Harvard, Columbia, Yale, and perhaps Pennsylvania. Out of those, he stressed, for a liberal interested in what would become “law and”—in Guido’s case, law and economics—only one made sense.⁴³

As it turned out, though he opted for Yale Law School at a perilous moment in its history, Guido made the right choice. The faculty, with a push from President Griswold, chose Rostow as dean after Shulman’s death. Not everyone cheered. Rostow symbolized Yale’s arrogance, faith in meritocracy, liberalism, and “dress British, think Yiddish” mentality. The polished, deliberately jocular Rostow sometimes seemed too cute, and he offended old realists by setting aside the school’s longstanding antipathy towards both Yale’s central administration and Harvard Law.⁴⁴ But he proved an imaginative fundraiser, and Griswold poured money into the law school. Consequently, Rostow could organize what he called a “great talent hunt” in the 1950s.⁴⁵ Rostow’s recruits included Alexander Bickel, Charles Black, Robert Bork, Ward Bowman, Ronald Dworkin, Abraham Goldstein, Joseph Goldstein, Jay Katz, Leon Lipson, Ellen Peters, Charles Reich, Harry Wellington—and Guido. Rostow hired or promoted the school’s next four deans. The faculty he left behind, the *National Law Journal* later said, at yet another of the many periods when Yale was supposedly languishing in disarray, “was as brilliant, diverse and eclectic as group of legal scholars as has ever been gathered at one law school in the country.”⁴⁶

of the Reagan administration. See Todd S. Purdum, *Eugene Rostow, 89, Official at State Department and Law Dean, Dies*, N.Y. TIMES, Nov. 26, 2002, at C19.

39. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

40. EUGENE V. ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY, at xiii (1948).

41. May Interview with Guido Calabresi, *supra* note 9.

42. *Id.*

43. *Id.*

44. KALMAN, LEGAL REALISM AT YALE, *supra* note 28, at 199–207.

45. See Eugene V. Rostow, *The Great Talent Hunt—1955–1959: Renewing the Yale Law Faculty*, YALE L. REP., Winter 1961, at 7.

46. Douglas Lavine, *Has Faculty Lost Its ‘Fizz?’: Yale Law: Fork in the Road*, NAT’L L.J., June 29, 1981, at 1, 26. “Yale [Law School] insists on the weakness of the school through most of its history, which is looked on as a dark age from which the school has only recently emerged,” Grant Gilmore perceptively observed. “Yale looks on itself therefore as free to experiment, as adventurous, creative,

Despite turmoil in the ranks of its faculty at the time Guido arrived, it was not as if Yale's larder was completely bare, either. A distinguished, if diminished, cadre of senior scholars remained—Boris Bittker, Thomas Emerson, Grant Gilmore, Fowler Harper, Friedrich Kessler, Fleming “Jimmy” James, Jr., Myres McDougal, and James William Moore. Of these men, James would prove especially important to Guido as a law student.

IV

Because of his own strange teaching schedule, Guido learned both torts and procedure from James.⁴⁷ The son of an Old Testament scholar, the dogged Democrat and civil libertarian was a graduate of both Yale College and Yale Law School. After a stint as a railroad-defense lawyer, he had taught at Yale since the glory days of legal realism.⁴⁸

A memorable classroom teacher, who excelled in making weaker students look good and taking the arrogant down a notch,⁴⁹ James was an unusually endearing academic of great kindness.⁵⁰ When Georgetown unexpectedly tapped Oscar Gray to teach torts, “a course [he] hadn't thought about much for over twenty years,” he telephoned his first-year professor to ask for aid. James told him to report to New Haven the next day.⁵¹ Arriving, Gray found that James “had the whole torts faculty of Yale lined up to talk to me and give me whatever help they could.”⁵² As he was driving Gray to the train station, James further boosted his confidence by inviting him to become his coauthor.⁵³ As the anecdote suggests, James had a rare gift for transforming students into colleagues, a quality he also exhibited with Guido.⁵⁴ I suspect that James's

vital, exuberant, young.” Douglas T. Yates, Jr., *A Shared Spirit of Excitement*, YALE DAILY NEWS, Oct. 21, 1964, at 1, 6 (internal quotation marks omitted).

47. May Interview with Guido Calabresi, *supra* note 9.

48. Guido Calabresi, “*You Can Call It Thucydides or You Can Call It Mustard Plaster, But It's All Proximate Cause Just the Same!*,” 91 YALE L.J. 1, 3 (1981) [hereinafter Calabresi, *Mustard Plaster*].

49. *Id.* at 2.

50. Or so I remember thinking when I interviewed him shortly before his death. Interview with Fleming James, Jr., Professor Emeritus of Law, Yale Law Sch., in North Haven, Conn. (May 1981).

51. Interview by Don Gifford with Oscar Gray, Jacob A. France Professor Emeritus of Torts, Univ. of Md. Francis King Carey Sch. of Law, in Baltimore, Md. (Mar. 10, 2011), in *Tuesdays with Torts Masters: Oscar Gray*, TORTSPROF BLOG (Apr. 5, 2011), <http://lawprofessors.typepad.com/tortsp/2011/04/tuesdays-with-torts-masters-oscar-gray.html>.

52. *Id.*

53. *Id.*

54. “He was keenly aware of how hard it can be to begin to teach and write at a place like the Yale Law School,” Guido wrote of James.

But, unlike many, he knew what to do about it. I had only been back a few weeks, a year or so after graduating, when Jimmy appeared at my door with a draft of an article he was writing. ‘Can you help me with the second part,’ he said, ‘since you know more about that than I do.’ In retrospect that statement was ridiculous; of course, he did not need my comments. At the time, however, it seemed plausible, and I was fooled, though only into realizing the truth—that we were now *colleagues*, that I could ask *him* to help *me*, to read my drafts without fear of being judged, that age and tenure existed but that the only thing that mattered was carrying the quest further.

example helped shape Guido's humanity and egalitarianism. His scholarship and teaching apparently left a mark too.

It is often alleged—I think unfairly—that the realists destroyed without reconstituting.⁵⁵ As Guido said, no one could say that about James, who exposed the incoherence of traditional tort law and then worked to install a more just regime in its place.⁵⁶ James had witnessed tort law's lack of adaptation to the growth of insurance.⁵⁷ Transporters, government, and insurers, he decided, were best positioned to reduce accidents. As it went for industrial accidents, so it went for ones caused by automobiles. The system of settling automobile-insurance claims based on fault did not do the job, James concluded, and penalized victims, "whom," as George Priest has noted, "James referred to in article after article as 'helpless individuals,' the 'poor and weak.'"⁵⁸

James could think of better alternatives to contemporary tort law. Writing shortly after the end of World War II, he argued (somewhat hopefully) that

[t]here is a growing belief in this mechanical age the victims of accidents can, as a class, ill afford to bear their loss; that the social consequences of uncompensated loss are dire and far exceed the amount of the loss itself; and that more good will come from distributing these losses among all the beneficiaries of mechanical progress than by letting compensation turn upon an inquiry into fault.⁵⁹

For James, "The ultimate outcome of this belief would be some form of social insurance,"⁶⁰ which would protect against "disability from any source, as part of the attack on the general problem of poverty."⁶¹

Until the great day came, James placed his faith in the takeover of accident law by strict liability. As a good legal realist, he pointed to recent studies of accident proneness by psychologists that "emphasize the extent to which large units, such as transportation companies, government, and insurance companies, are in a strategic position to reduce accidents," as well as "the relatively insignificant part" that "the individual's conscious free choice" played in causing or preventing them.⁶² He had no sympathy for "the heaviest artillery" mustered by fault enthusiasts, the argument that "any stricter rule of liability will discourage affirmative activity and unduly fetter desirable enterprise."

Calabresi, *Mustard Plaster*, supra note 48, at 4.

55. See, e.g., *id.* at 1 ("Yet Jimmy was unusual among the legal realists for he knew how to build as well as to tear down.")

56. *Id.*

57. Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 555–56 (1952).

58. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 470 (1985) (quoting Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1167 (1941)).

59. Fleming James, Jr., *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 365 (1946).

60. *Id.* at 365–66.

61. *Id.* at 365–66

62. Fleming James, Jr. & John J. Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 780 (1950).

According to James, “like so many appeals to practical common sense this one probably rests on no solid foundation of fact but simply on a bald assertion of plausible error.”⁶³

Strict liability made sense, he maintained, in the world of “the modern accident,” which was not “a matter between neighbors” and of deciding which of them would bear the loss, as it had been during the mid-nineteenth century, but “usually the by-product of commercial or industrial enterprise, or of motoring.”⁶⁴ Although the casualties of the modern accident as a group, James insisted, typically “fall in the lowest income brackets and are therefore least able to bear the economic loss involved,” the “potential defendants” caught in the strict-liability dragnet “have the means for combining and distributing these losses widely among the beneficiaries of the enterprise” and have “chosen to engage their activity in the face of statistical certainty that it will take a toll of life and limb.”⁶⁵ Just as Guido would argue for controlling the cost of accidents by charging them to the “cheapest cost avoider,”⁶⁶ James contended that strict liability would deter conduct that caused accidents and lauded it for shifting the economic loss “to those who are benefiting from the enterprise which more or less inevitably took the toll,” minimizing the “ill effects” of the loss by spreading it widely, and making “the risk of loss . . . certain and calculable.”⁶⁷ In 1938, James forecast that the concept of absolute liability would “engulf the whole field of accident litigation within a generation or so.”⁶⁸ This pioneer in the development of enterprise liability *championed* basing liability on risk distribution, rather than fault.⁶⁹

He carried that zeal into the classroom. With Harry Shulman, James wrote *Cases and Materials on the Law of Torts*⁷⁰ as an antidote to Harvard law professors Edward Thurston and Warren Seavey’s *Cases on Torts*.⁷¹ The two books underscored the differences between the Harvard and Yale approaches to legal education.⁷² Like its successor edition,⁷³ which Guido would have used

63. *Id.* at 781.

64. Fleming James, Jr., *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293, 296 (1958).

65. *Id.*

66. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135 (1970) [hereinafter CALABRESI, *COSTS*]; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060 (1972).

67. James, *supra* note 64, at 297.

68. Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 716 (1938).

69. Fleming James, Jr., *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1156 (1941).

70. HARRY SHULMAN & FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS* (1st ed. 1942) [hereinafter SHULMAN & JAMES, 1st ed.].

71. EDWARD S. THURSTON & WARREN A. SEAVEY, *CASES ON TORTS* (1st ed. 1942) [hereinafter THURSTON & SEAVEY, 1st ed.].

72. Both books first appeared in 1942. SHULMAN & JAMES, 1st ed., *supra* note 70; THURSTON & SEAVEY, 1st ed., *supra* note 71.

73. WARREN A. SEAVEY, PAGE KEETON & EDWARD S. THURSTON, *CASES ON TORTS* (Warren A. Seavey ed., 2d ed. 1950) [hereinafter SEAVEY, KEETON & THURSTON, 2d ed.].

had he gone to Harvard, Thurston and Seavey's casebook proceeded traditionally from intentional wrongdoing, to negligence, to strict liability. "The student learns," one reviewer noted, "in easy stages, the part which fault has played in the development of tort law."⁷⁴ The Harvard casebook included few extralegal materials. Its emphasis remained on fault, as opposed to loss distribution, for, as Seavey emphasized in reviewing James's torts treatise, "I do not subscribe to the idea that negligence as a factor in liability is passing nor that it should pass out."⁷⁵

In contrast, Shulman and James presented torts as a tool of public policy. They stressed torts as "social engineering" and proclaimed their allegiance to "distributing losses in the socially desirable manner contemplated by the more direct methods of social insurance."⁷⁶ Where the Harvard casebook opened with a mid-fourteenth-century assault and battery case,⁷⁷ Shulman and James began with the 1911 opinion ruling workers' compensation unconstitutional in *Ives v. South Buffalo Railway*,⁷⁸ which became Guido's starting point in torts courses.⁷⁹ In the words of Joseph Page, the book made workers' compensation "its engine" and relegated "intentional torts to the caboose."⁸⁰ Like other realists, Shulman and James thus undercut the public-private distinction and reminded Guido and other students that private law was public law. "The court makes its respectful bow to 'the cogent economic and sociological arguments,' 'philosophical or scientific speculations,' 'the commendable impulses of benevolence or charity,' and 'the dictates of natural justice,'" Shulman and James acidly remarked in a note after *Ives*, at the same time that the judge insisted that such an appeal "must not be made to the courts. Are the courts asses? Are they not at all concerned with economic or sociological consequences or the impulses of morality and philosophy? What is the relation between these factors and so-called 'legal' factors?"⁸¹

Although *Cases and Materials on the Law of Torts* was organized doctrinally, the book bore the imprint of legal realism. First, it was "functional" in the sense that the legal realists used the term.⁸² Shulman and James dedicated

74. Philip Halpern, *A Contrast of Techniques in the Teaching of Torts*, 43 COLUM. L. REV. 552, 557 (1943) (reviewing not only THURSTON & SEAVEY, 1st ed., *supra* note 71, but also SHULMAN & JAMES, 1st ed., *supra* note 70).

75. Warren A. Seavey, Book Review, 66 Yale L.J. 955, 958 (1957).

76. SHULMAN & JAMES, 1st ed., *supra* note 70, at viii. James and Shulman deleted that statement from the 1952 preface to the edition that Guido used. See HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS (2d ed. 1952) [hereinafter SHULMAN & JAMES, 2d ed.]. Perhaps it sounded too visionary for the 1950s.

77. *I. De S. and Wife v. W. De S., Y.B., Lib. Assis. folio 99, platicum 60* (Assizes 1348 or 1349); SEAVEY, KEETON & THURSTON, 2d ed., *supra* note 71, at 5.

78. 94 N.E. 431 (N.Y. 1911).

79. CHRIS GOODRICH, ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL 68–73 (2003).

80. Joseph Page, *Torts Teaching: From Basic Training to Legal-Process Theory: Dominick Vetri*, Tort Law and Practice, 25 SEATTLE U. L. REV. 127, 127 (2001).

81. SHULMAN & JAMES, 2d ed., *supra* note 76, at 15.

82. See KALMAN, LEGAL REALISM AT YALE, *supra* note 28, at 22–30, 87–88.

a chapter to motor vehicles that reiterated “the ultimate solution of the motor vehicle accident problem (so far as civil liability goes) lies in some form of social insurance.”⁸³ Second, in teaching torts as public policy, the casebook included a plethora of social-science materials.⁸⁴

It also asked pointed, provocative questions about cases besides *Ives*, many originally posed by Yale’s Walton Hamilton, a distinguished institutional economist.⁸⁵ For example, soon after *Ives*, the casebook turned the attention of Guido and others to the connection between workers’ compensation and the master’s liability for acts committed by his servant in the scope of employment under the doctrine of *respondeat superior*. Shulman and James reprinted a portion of Young Smith’s classic *Frolic and Detour*.⁸⁶ It explored whether there was any rational basis for imposing vicarious liability on employers whose agents caused harm while engaged in a detour from the employer’s business, but not on those whose agents inflicted harm after they had departed on a “frolic” of their own.⁸⁷ They followed it with an excerpt from Warren Seavey contending that “respondeat superior results in greater care in the selection and instruction of servants than would be used otherwise.”⁸⁸ Then Shulman and James intervened. The common law had given Americans a heritage of liability based on fault and strict liability, they observed.⁸⁹ “Do those cases where the law today imposes strict liability make a consistent pattern? If they do, is the present dividing line between them and the cases where fault is required a rational one?”⁹⁰ Elsewhere in the casebook, they lamented that the “frolic and detour” doctrine “bedevils” motor vehicle cases.⁹¹ The book hums with the authors’ frustration with tort law.

Would Guido’s scholarly development have taken the course it did had he had a different casebook and teacher? Perhaps. As Greg Keating says,

His work is an expression of who he is— . . . a great humanistic scholar. Torts is his natural subject because he cares deeply about harm. He sees both that harm must sometimes be done and can’t be avoided and that its doing raises moral issues because harm must be minimized.⁹²

83. HARRY SHULMAN, FOUNDATION GUIDEBOOK TO ACCOMPANY CASES AND MATERIALS ON THE LAW OF TORTS 35 (1947).

84. *Id.*

85. Calabresi, *Neologisms Revisited*, *supra* note 24, at 740. Hamilton had worked with Shulman in the 1930s to collect the materials on torts that Shulman and James molded into a casebook. See WALTON H. HAMILTON & HARRY SHULMAN, MATERIAL FROM TORTS: MATERIALS PREPARED FOR THE PRIVATE AND CONFIDENTIAL USE OF THE STUDENTS IN THE COURSE KNOWN AS TORTS, GIVEN IN THE YALE UNIVERSITY SCHOOL OF LAW IN THE YEAR 1931–1932 (1931).

86. SHULMAN & JAMES, 2d ed., *supra* note 76, at 112–16.

87. *See id.*

88. *Id.* at 117.

89. *Id.* at 118.

90. *Id.* at 118. *See also* Warren A. Seavey, *Speculations as to ‘Respondeat Superior,’* in HARVARD LEGAL ESSAYS 433 (1934); Young Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923).

91. SHULMAN & JAMES, *supra* note 76, at 674 n.8.

92. E-mail from Gregory Keating, William T. Dalessi Professor of Law & Philosophy, Univ. of S. Cal. Gould Sch. of Law, to author (Sept. 30, 2012) (on file with author).

Perhaps not. What if Guido had gone to Harvard, for example, and studied torts with Seavey? He still would have received a splendid education. Seavey was a giant of torts and agency whose work denouncing proximate cause as “a legalism used to indicate the presence or absence of liability”⁹³ and advocating its replacement with the risk theory⁹⁴ became an important precursor to Guido’s. He was also a brilliant teacher who supposedly rivaled Socrates in his mastery of the Socratic or (perhaps more aptly) “Seavey” method.⁹⁵ His inexhaustible supply of hypotheticals about tort feasons and tigers dazzled generations of law students.⁹⁶ But Seavey, who thought that “on the whole our American courts have done a magnificent job,” proved more satisfied with the status quo than James.⁹⁷

Certainly, Guido shares James’s desire to shake things up, as well as his appreciation for risk distribution and enterprise liability. “[T]he fault system is so ineffective that even if we cannot choose with total certainty among possible substitutes we can certainly do better than we are doing now,” Guido memorably wrote in *The Costs of Accidents*.⁹⁸ “We can do better, that is, with regard to every goal of accident law except the goal of retaining the status quo.”⁹⁹ Guido also told George Priest that he could not understand the Calabresi corpus without first reading James, and after doing so, Priest agreed.¹⁰⁰ In Priest’s view, *The Costs of Accidents* marries “the most persuasive economic analysis” with James’s evaluations of “how we can justify eliminating tort law and substituting a general system of social insurance.”¹⁰¹

Assuming Guido and Priest correctly identify the intellectual significance of James’s work for Guido, James’s impact proved larger because Guido also saw him as a great human being and an electrifying teacher. “I first fell in love with the subject fifty-five years ago in Fleming James’s torts class,” Guido said. “That interplay between Hamilton’s and James’s vision of torts, between economics and everything else torts is concerned with, was made to order for me.”¹⁰² Thanks to Hamilton, Shulman and James included in their casebook “a

93. WARREN A. SEAVEY, COGITATIONS ON TORTS 32 (1954) [hereinafter SEAVEY, COGITATIONS].

94. *Id.* at 34.

95. WARREN A. SEAVEY & DONALD B. KING, A HARVARD LAW SCHOOL PROFESSOR: WARREN A. SEAVEY’S LIFE AND THE WORLD OF LEGAL EDUCATION 35–37, 87 (2005); Robert Keeton, *Warren Abner Seavey—Teacher*, 79 HARV. L. REV. 1333, 1333 (1966).

96. Livingston Hall, *Warren Seavey and the Age of the Restatement*, 79 HARV. L. REV. 1329, 1329 (1966).

97. SEAVEY, COGITATIONS, *supra* note 93, at 70.

98. CALABRESI, COSTS, *supra* note 66, at 316.

99. *Id.*

100. George L. Priest, *The Rise of Law and Economics: A Memoir of the Early Years*, in THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 350, 379 n.29 (Francesco Parisi & Charles K. Rowley eds., 2007) [hereinafter Priest, *The Rise of Law and Economics*].

101. *Id.*

102. Guido Calabresi, *Remarks on Accepting Prosser Award*, 8 IND. HEALTH L. REV. 333, 333 (2011).

series of questions that a kid who knew economics would react to many years later. So that when James, teaching that kid, said, ‘We don’t know why this is so, we don’t know why that is so,’ the kid, me, answered, ‘Hey, but it is perfectly obvious.’”¹⁰³

The answer related to the cost of the activity, be it workers’ compensation or employee detour. Smith came “very close” to explaining the reason for the scope-of-employment limitation on master–servant liability when he argued “that accident costs not connected with the enterprise should not be placed on it because they don’t belong there economically,” Guido realized.¹⁰⁴ But Smith stopped short. As Guido would put it,

a cost of an activity is not any the less real because the employee was not authorized to undertake it, or because he acted willfully. If it arose out of an enterprise it should be just as chargeable to that enterprise as negligent torts; both should be reflected in prices.¹⁰⁵

That conclusion about the internalization of external costs had broader implications. Why not look at all torts and “indeed all law” from the economic perspective, Guido remembered wondering?¹⁰⁶

V

This question helped to inspire *Some Thoughts on Risk Distribution and the Law of Torts*. Ironically, Guido received a B in torts because he misread the facts in a hypothetical on his final exam.¹⁰⁷ Nevertheless, he finished first in his class each year,¹⁰⁸ and also distinguished himself by winning an A in both elementary and advanced taxation during the same semester of his second year.¹⁰⁹ Thus, Guido made law journal after his first term, writing a note on the Robinson–Patman Act,¹¹⁰ which he dismissed as “law and economics of the most traditional or boring sort.”¹¹¹

Thinking he needed to produce a full-blown comment to become an officer, Guido then wrote a draft of *Some Thoughts on Risk Distribution and the Law of Torts*. But although he was chosen note editor, the outgoing editorial board disliked his comment.¹¹² “It was clear that my draft had disappointed the

103. Calabresi, *Neologisms Revisited*, *supra* note 24, at 740.

104. Calabresi, *Some Thoughts*, *supra* note 1, at 501–02 n.12 (1961).

105. *Id.* at 545.

106. SILBER, *supra* note 5, at 61.

107. *Id.*; Jonathan Zasloff, *Is Richard Epstein Autistic?*, LEGAL PLANET: ENVTL. L. & POL’Y BLOG (Feb. 24, 2012), <http://legalplanet.wordpress.com/2012/02/24/is-richard-epstein-autistic/>

108. Accordingly, he won the Cullen, Jewell, and Frank prizes. Curriculum Vitae, Guido Calabresi, *supra* note 24.

109. Letter from Eugene Rostow to Justice Hugo Black, *supra* note 14.

110. Guido Calabresi, *Robinson-Patman Curtailments on Distribution Innovation: A Status Sought for Functional Discounts*, 66 YALE L.J. 243 (1956).

111. SILBER, *supra* note 5, at 61.

112. The departing editor-in-chief, Robert W. Blanchette, would head Penn Central; Arthur Liman, later a prominent attorney and chief counsel of the senate’s Iran–Contra Affair investigation, was a comment editor. Eric Pace, *Robert W. Blanchette, 68, Former Head of U.S. Railroad Agency*, N.Y. TIMES, Sept. 30, 2000, at A18; Clyde Haberman, *Arthur L. Liman, A Masterly Lawyer, Dies at 64*, N.Y.

outgoing board, which included people of unusual brilliance who today properly dominate the profession,” Guido recalled. “It was too complex and it didn’t sound like law.”¹¹³ Seeing the reaction, he asked if the editors would mind if he did not publish it. He knew that he would become a law professor and decided he could wait. With evident relief, they acquiesced. “This was very important because my article, had it been published as a student Comment in 1957–58 never would have been noticed,” Guido said.¹¹⁴

I wonder. What if Guido had published the comment in 1957 or 1958? Although custom would have prevented him from signing it, his c.v. would have indicated authorship. Certainly, famous unsigned student law review notes and comments from the period exist. “We” know Lewis Sargentich wrote *The First Amendment Overbreadth Doctrine*;¹¹⁵ and William Stevens, *The Common Law Origins of the Infield Fly Rule*.¹¹⁶ Why would a *Yale Law Journal* comment by Guido Calabresi not possess the cachet of a *Yale Law Journal* article by Professor Guido Calabresi? We will never know because Guido shelved the draft while he finished school.

Justice Black now invited Guido to become his clerk after receiving an endorsement from Rostow expressing every certainty “that we will call him to our Faculty, after a year or two of experience.” The dean intimated that, next to Guido, the rest of the class was, to put it colloquially, chopped liver. Rostow concluded,

Mr. Calabresi is obviously not a flash in the pan. His record has always been the same—at Yale, at Hopkins Grammar School, at Oxford and at the Law School. He will be almost 26 when he graduates, and we all share the judgments from Oxford . . . Alex Bickel says he’s the best student he’s had so far and “absolutely first class: cool, clear, incisive, quick, measured, polished—all you could wish.” The professors at Yale College sing the same enthusiastic chorus. Mr. Calabresi is a marked man. Yet he is mild, pleasant, easy, and cheerful, as universally popular with the whole group as any student I’ve ever seen here. There is a transparent personal quality of niceness about him that is most winning. He is slight and rather youthful in appearance, with a ready smile, and a bright eye. He is lively and active without being in the least overpowering, and without apparent vanity or pettiness of any kind. I’ve never heard an envious, hostile or mean remark from him, or about him—remarkable, after all, in a class where a dozen men all expected, with good reason, to be first. I think they are all proud of him and proud to be associated with him.¹¹⁷

A glorious year at the Supreme Court followed. Both Justices Black and Frankfurter took Guido under their wing, and both thought he should practice law before he taught. Frankfurter even prevailed on Dean Acheson to tout the glories of law practice to Guido. But Guido resisted.¹¹⁸

TIMES, July 18, 1997, at A23.

113. Guido Calabresi, Commentary, in Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1482 (1981) [hereinafter Calabresi, Commentary on *Some Thoughts*].

114. Calabresi, *Neologisms Revisited*, *supra* note 24, at 737.

115. 83 HARV. L. REV. 844 (1970).

116. 123 U. PA. L. REV. 1474 (1975).

117. Letter from Eugene Rostow to Justice Hugo Black, *supra* note 14.

118. SILBER, *supra* note 5, at 62–63.

Unusually, he stressed, he had a research agenda. In those days, law schools snapped up people with his grades and journal experience without worrying about what they intended to write. But as Guido interviewed at law schools, he talked about the ideas in *Some Thoughts on Risk Distribution and the Law of Torts*.¹¹⁹

Guido's career thus reminds us how much law teaching has changed since the mid-twentieth century. Imagine an aspiring law professor today with Guido's credentials. Because so many academics at elite law schools possess dual degrees, that person would almost surely pursue a Ph.D. in economics along with a J.D. That trend has produced wonderful work. But I worry that that although this interdisciplinary turn has brought the law school laudably closer to the rest of the university, it has caused a fragmentation within law professors as they strain to master two separate disciplines, each with its own professional code. I fear that professors are now isolated from each other and from their students who actually want to practice law.¹²⁰ Certainly, it has made a career like Fleming James's and, perhaps, Guido's, less likely.

Be that as it may, Guido interviewed at all the outstanding law schools—Yale, Columbia, Michigan, Pennsylvania—except Chicago and Harvard. At that time, Harvard hired almost exclusively from the ranks of its own graduates.¹²¹ Nor did Chicago come calling, though, like Harvard, it would later.¹²² All the others extended offers. Except for Yale, only Michigan appealed to him. Its senior comparativist was retiring, and professors there thought that Guido's languages and background made him an ideal replacement.¹²³

Here is another fork in the road. What if Guido had gone to Michigan and become a comparativist? Would left-of-center law and economics even exist? Again, we will never know, because for all its interest in Europe, he recalled, Michigan showed little in Washington and the Supreme Court. Consequently, the “choice” boiled down to Yale.

VI

Now an assistant professor—but still Guido to his students, as he would always remain¹²⁴—Guido resubmitted *Some Thoughts on Risk Distribution and the Law of Torts* to the *Yale Law Journal* “with very few changes,”¹²⁵ and the

119. *Id.* at 63.

120. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 241–46 (1996).

121. JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 122 (1978). Naturally, there were exceptions, such as Louis Loss and Lon Fuller, but they proved the rule.

122. Guido visited at Harvard in 1969–70. Guido Calabresi, *In Tribute: Frank Michelman*, 125 HARV. L. REV. 879, 879 (2012).

123. We have been unable to identify the senior comparativist with certainty. It may have been Hessel Yntema. June Interview with Guido Calabresi, *supra* note 5.

124. “I bounce around. I’m Guido. I’m an elf,” Calabresi told a reporter. “It’s the same as a great writer who uses an unusual construction to stop people who are reading too fast and get them to focus.” Patrick Dilger, *Calabresi Ends an Era at Yale Law School*, NEW HAVEN REG., July 17, 1994, at A1.

125. Calabresi, *Neologisms Revisited*, *supra* note 24, at 737.

journal enthusiastically accepted it.¹²⁶ What accounts for the different response? One possibility is that the 1960–61 editors feared rejecting the article of a professor who could provide recommendations. But *Yale Law Journal* editors do not lack egotism or self-confidence. Harrison Goldin, who recalled editing Guido’s piece, stressed that the 1960–61 Board had “no inhibition about accepting/rejecting articles by Yale Law School Faculty members.”¹²⁷ Typically, no more than one article by a Yale professor appeared in each issue of the 1960–61 journal. In explaining the difference in editorial board reactions, Guido has suggested that “[p]erhaps there were new readers, or the times had changed.”¹²⁸ I doubt times had changed all that much, but there were new readers. The 1960–61 board included two future law professors, Robert Hudec and David Trubek, to whom Yale would later deny tenure in an episode Guido has called “the slaughter of the innocents.”¹²⁹

Unfortunately, the 1960 version of the article differed from the 1957–58 draft in one important respect.¹³⁰ The earlier version contained what Guido later characterized as “a fairly full analysis of causal reciprocity which paralleled that which [Ronald] Coase made so famous in *The Problem of Social Cost*.”¹³¹ But when economist Ward Bowman, the only professor other than James whom Guido acknowledged in the article,¹³² read Guido’s discussion of why a car-pedestrian accident was not caused by either party individually, but by both, he told his young colleague it was wrong.¹³³

Why?, Guido asked. “Pigou,” Bowman replied.¹³⁴ Guido and A.C. Pigou shared a concern for poverty and an interest in wealth redistribution, market failure and government intervention. According to Charles Rowley, in the Calabresian world, “damage awards simply replace Pigouvian taxes as the mechanism for internalizing external costs.”¹³⁵ But as Richard Posner has said, although Pigou does refer to “liability for tort damage . . . it is only in retrospect that you would view that as economic analysis of the tort system.” Guido, however, would become one of the first two individuals “who ever used economics to discuss torts cases.”¹³⁶

126. Calabresi, Commentary on *Some Thoughts*, *supra* note 113.

127. E-mail from Harrison J. Goldin, Founder, Goldin Assocs., to author (June 11, 2012) (on file with author).

128. Calabresi, Commentary on *Some Thoughts*, *supra* note 113.

129. KALMAN, *YALE LAW SCHOOL AND THE SIXTIES*, *supra* note 28, at 234.

130. Guido himself has characterized the excision as “unfortunate.” Calabresi, *Neologisms Revisited*, *supra* note 24, at 738.

131. Calabresi, Commentary on *Some Thoughts*, *supra* note 113, at 1483.

132. Calabresi, *Some Thoughts*, *supra* note 1, at 499.

133. SILBER, *supra* note 5, at 63.

134. *Id.*

135. Charles K. Rowley, *An Intellectual History of Law and Economics: 1789–2003*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS*, *supra* note 100, at 3, 18.

136. Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 227 (1983).

Further, Guido's work significantly diverged from Pigou's: In a Pigovian world, the person who promoted environmental quality was subsidized, while the one who harmed his neighbor by polluting and producing negative externalities was taxed.¹³⁷ Guido, by contrast, was thinking of cost to driver *and* pedestrian, polluter *and* pollutee. Guido recalled arguing with Bowman,

"I know Pigou and Pigou assumes, for cultural, or maybe good but unstated economic reasons"—I didn't say reasons related to 'transaction costs' since that wasn't in the air yet, but that was my concept—that it makes sense to hold the polluting party liable. But as an *a priori* matter, causation is symmetrical."¹³⁸

The point, as Guido explained later was that,

"Maybe it is right to put the cost on the polluter, but it isn't *a priori* right, because it depends on whether you think that this is a cost of having a lovely place next to a polluter, or of being the polluter." Is it the cost of a pedestrian or of a car? It's all the same thing. It depends.¹³⁹

Nevertheless, Bowman continued citing Pigou for the proposition that costs should be imposed on one party, rather than both: in nuisance law, on the polluter, rather than the pollutee, or the noisemaker, instead of the person seeking silence. Whether Bowman fairly characterized the work of Pigou is a question for intellectual historians, just as it is a question for them whether Coase accurately summarized Pigovian theory.¹⁴⁰ As an economist, Bowman used "Pigou" as shorthand for contemporary accepted economics. For his part, Guido contended that although imposing the cost on the polluter or noisemaker might prove desirable, it was not necessarily correct because "it takes two to tango."¹⁴¹

Bowman insisted, however, that the article was already controversial. Why include something that so many would find mistaken?¹⁴² "I was young and took the point out," Guido recounted. "I still thought the professor wrong, and as a result, put in a footnote, which questioned why, when there is a car-pedestrian accident, it is automatically viewed as a cost of driving rather than a cost of walking."¹⁴³ In its entirety, the footnote read,

In effect such a result would amount to a decision that automobile accidents are more a true cost of walking and of living generally, than of automobile driving. Actually they are probably a cost of both.

I have not, in this article, attempted to probe what influences our decision that a particular "cost" is caused by one activity rather than another. Clearly this is an important question. Indeed, it is the next step in any thorough analysis of risk distribution. At this stage of analysis, however, when we have not yet examined the

137. See generally ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

138. SILBER, *supra* note 5, at 63; see also Calabresi, *Neologisms Revisited*, *supra* note 24, at 738.

139. SILBER, *supra* note 5, at 64.

140. See generally R.H. Coase, *Law and Economics and A.W. Brian Simpson*, 25 J. LEGAL STUD. 103 (1996); Herbert Hovencamp, *The Coase Theorem and Arthur Cecil Pigou*, 51 ARIZ. L. REV. 633 (2009); A.W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53 (1996); A.W. Brian Simpson, *An Addendum*, 25 J. LEGAL STUD. 99 (1996).

141. SILBER, *supra* note 5, at 64.

142. *Id.*; see also Calabresi, *Neologisms Revisited*, *supra* note 24, at 738.

143. Calabresi, *Neologisms Revisited*, *supra* note 24, at 738.

need and effect of charging activities with those costs which all agree they cause, that step seems somewhat far removed.¹⁴⁴

As Guido soon realized, that “next step” did not prove nearly as “far removed” as he had anticipated.¹⁴⁵ In May 1961, a few months after the publication of *Some Thoughts on Risk Distribution and the Law of Torts*, Coase’s *The Problem of Social Cost* appeared.¹⁴⁶

VII

“Together, these two articles, *The Problem of Social Cost* and *Some Thoughts about Risk Distribution and the Law of Torts* started the new ‘Law and Economics,’” Guido has said. “It was both of them that started it.”¹⁴⁷ This assertion, while “Guidocentric,” is not grandiose. But neither is it universally accepted.

If we turn to “citology,”¹⁴⁸ we see, thanks to Fred Shapiro and Michelle Pearse’s study of the “most-cited law review articles of all time,” that as of 2012, Coase’s *The Problem of Social Cost* proved a strong first-place winner in the citation sweepstakes with 5157 citations.¹⁴⁹ Guido and A. Douglas Melamed’s *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral (One View of the Cathedral)*¹⁵⁰ ranked sixth with 1980 citations, while *Some Thoughts on Risk Distribution and the Law of Torts*, came in “just” sixty-ninth at 739 citations.¹⁵¹ So we might assume that along with *The Costs of Accidents*, it was Calabresi’s celebrated “rule four” laid out in *One View of the Cathedral*, rather than his earlier insights, that proved his most important contribution to law and economics.¹⁵² But both *The Costs of Accidents* and *One View of the Cathedral* rested on the scaffolding of *Some Thoughts on Risk Distribution and the Law of Torts*, so we should not count it out.

144. Calabresi, *Some Thoughts*, *supra* note 1, at 506 n.24.

145. Calabresi, Commentary on *Some Thoughts*, *supra* note 113, at 1483.

146. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Although *The Problem of Social Cost* was dated October 1960, the *Journal of Law and Economics* was running behind schedule.

147. SILBER, *supra* note 5, at 67. *But see* Alain Marciano, *Guido Calabresi’s Economic Analysis of Law, Coase and the Coase Theorem*, 32 INT’L REV. L. & ECON. 110, 112–13, 117 (2012) (arguing that rather than “law and economics,” Calabresi’s article represented the sort of “economic analysis of law” usually assumed to have been launched ten years later by Posner); Alain Marciano & Giovanni B. Ramello, *Consent, Choice, and Guido Calabresi’s Heterodox Economic Analysis of Law*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 97, 99–100. Calabresi himself considers the article law and economics. SILBER, *supra* note 5, at 67–69.

148. The term is used in Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1484 (2012).

149. *Id.* at 1489.

150. 85 HARV. L. REV. 1089 (1972).

151. Shapiro & Pearse, *supra* note 148, at 1489.

152. Calabresi & Melamed, *supra* note 150, at 1120. “The fourth rule, really a kind of partial eminent domain coupled with a benefits tax, can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.” *Id.* at 1116. The rule represents “an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule.” *Id.* at 1123

Citology also suggests that *Some Thoughts* had a greater impact on legal scholars in the early years of law and economics than did *The Problem of Social Cost*. By 1975, *Some Thoughts on Risk Distribution and the Law of Torts*, had been cited 214 times in the more than 1600 periodicals usefully gathered together in HeinOnline.¹⁵³ In contrast, *The Problem of Social Cost* had been cited in just fifteen—which, along with my fear of economics, may help to explain why I was able to coast through law school in the mid-1970s without even hearing of Coase.¹⁵⁴ His citation heyday in the legal academy came later, and we should beware reading his contemporary popularity into the past.

Citation counts are, of course, a silly way of resolving arguments about intellectual influence. But there is other evidence that Coase did not immediately take the legal world by storm and that his later influence was built on a foundation to which Guido greatly contributed. According to Priest, Coase was initially “appreciated by [the] *cognoscenti*, but the Theorem could be (and was) dismissed by the large majority because of the unrealism of the transaction cost assumption.” Guido and Richard Posner, however, “forced the legal community to give attention to the economic approach.”¹⁵⁵ I give the last word on the provenance of law and economics to Dean Ron Harris of Tel Aviv University Law School:

Some refer to Guido Calabresi’s 1961 *Some Thoughts on Risk Distribution and the Law of Torts* as equivalent to Coase’s contribution to the foundation of Law and Economics. Others view Calabresi as the founder of the New Haven School of Law and Economics, as distinct from the Chicago school of Law and Economics.¹⁵⁶

Like Guido, I prefer the former interpretation, but either way, he did well!

A more important question relates to the identification of the two schools and the significance of the differences between them. Using politics as his axis, Harris assumes that Coase is the founder of neoclassical Chicago-style law and economics. Guido sees it differently. In his mind, he and Coase created law and economics, while Richard Posner and other Chicagoans established the economic analysis of law.¹⁵⁷ Guido has compared the difference between Calabresian–Coasean law and economics and Posnerian economic analysis of law to that between Mill and Bentham.¹⁵⁸ Mill criticized Bentham for

153. Search for citations to *Some Thoughts* before 1975, HEINONLINE, http://www.heinonline.org/HOL/LuceneSearch?cited_by=true&specialcollection=&terms=%2270+Yale+L.J.+499%22&subject=ANY&journal=ALL&yearlo=&yearhi=1975&sortby=cited_by&collection=journals&searchtype=advanced&submit=Search§ions=any&other_cols=yes&collection_true=journals (last visited May 22, 2014).

154. Search for citations to *The Problem of Social Cost* before 1975, HEINONLINE, http://www.heinonline.org/HOL/LuceneSearch?cited_by=true&specialcollection=&terms=%223+J.L.+%26+Econ.+1%22&subject=ANY&journal=ALL&yearlo=&yearhi=1975&sortby=date&collection=journals&searchtype=advanced&submit=Search§ions=any&other_cols=yes&collection_true=journals (last visited June 23, 2014).

155. Priest, *The Rise of Law and Economics*, at 350.

156. Ron Harris, *The Uses of History in Law and Economics*, 4 THEORETICAL INQUIRIES L. 659, 662 n.6 (2003).

157. SILBER, *supra* note 5, at 69.

158. *Id.*

approaching all ideas as a stranger and dismissing them as “vague generalities” if they did not fit his theory.¹⁵⁹ Recall Mill’s observation that “Bentham’s knowledge of human nature . . . is wholly empirical, and the empiricism of one who has had little experience.”¹⁶⁰ That is, Bentham—along with Posner, perhaps?—did not realize that in those vague generalities lay the experience of the human race. The economic analysis of law, as Guido views it, calls for applying theory to law and discarding ill-fitting law as “nonsense on stilts.”¹⁶¹ Like Mill, however, Guido is a philosophical liberal who understands the importance of learning by observing, empathizing, experiencing, making moral judgments and tragic choices, and of working with theory without being limited by it.¹⁶² Law and economics maintains that if the economic theory doesn’t fit law and the world, theory and law both need to change to produce better theory, law, and world.¹⁶³ For Guido, law and economics proves the more challenging and worthwhile endeavor.¹⁶⁴ By nature, it is heterodox and less likely to produce “a school” than the Chicago-style economic analysis of law. In Guido’s hands, for example, law and economics is moral theory.

VIII

Although *Some Problems on Risk Distribution and the Law of Torts* and *The Problem of Social Cost* were written independently of each other, and Coase and Guido did not interact until later,¹⁶⁵ the two articles shared the same seed ground. Coase and Guido both vetted their ideas at the University of Chicago. Chicagoans love the story of how Coase presented his views in Aaron Director’s living room. The verdict at the beginning of the evening was “twenty votes for Pigou and one for Ronald” and the reciprocity of causation.¹⁶⁶ But Coase, then decades older than Guido, stood his ground, and at evening’s end, “[t]here were twenty-one votes for Ronald and no votes for Pigou.”¹⁶⁷ Only then

159. John Stuart Mill, *Art. XI. – The Works of Jeremy Bentham: now first collected under the superintendence of his Executor, John Bowring*, 31 LONDON & WESTMINSTER REV. 481 (1838).

160. *Id.* at 483.

161. SILBER, *supra* note 5, at 69.

162. Guido is like Bentham in one respect. Each symbolizes his institution. “[I]n London University they wheel out the mummy of Bentham to preside . . . and at Yale Law School[,] not having a mummy of Bentham, they tend to wheel me out,” he jokes. Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch., Graduation Remarks at the Yale Law School (June 1, 2011) (transcript available at http://www.law.yale.edu/documents/pdf/News_&_Events/Calabresiremarks.pdf).

163. SILBER, *supra* note 5, at 69; Guido Calabresi, Lecture at the International University College of Turin: History and Meaning of Law and Economics (Jan. 24, 2012) [hereinafter Calabresi, History and Meaning of Law and Economics], available at http://www.youtube.com/watch?v=UDz8R_PhscY.

164. Although *Some Thoughts on Risk Distribution and the Law of Torts* won him tenure, Guido has provided an institutional explanation for the greater popularity of economic analysis of law. “If you are a young scholar looking to write and get tenure, which is an admirable thing to do, it’s easy to turn this out.” Calabresi, History and Meaning of Law and Economics, *supra* note 163.

165. June Interview with Guido Calabresi, *supra* note 5.

166. Edmund Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 221 (1983).

167. *Id.*

did Director ask Coase to write a paper expressing those views for the *Journal of Law and Economics*, which Coase did in the summer of 1960.¹⁶⁸

That fall, Dean Edward Levi invited Guido to interview at the University of Chicago Law School and gave him the opportunity to vet his work in front of the same critics. How much Chicago interested Guido was unclear. Soon after he had arrived back in New Haven from his clerkship, he and Anne Tyler had begun dating, and at the end of his second term at Yale, Guido had written Black to say that he hoped to see the Justice that summer. “And who knows I may even bring a nice young lady with me for you to meet. As you can guess from that last remark, I have had a very enjoyable year back in New Haven!”¹⁶⁹ The visit did not occur, but in October, Guido sent another letter:

I write you very happy and bursting with good news. Next weekend my engagement to a very wonderful girl will be announced. (I suppose everyone says that—but heck *I do* think she is wonderful.) Her name is Anne Tyler. She is currently teaching school in New York, but is originally from New Haven. As a result I have known her for years—though well only for the last year or so. Her father is a lawyer in New Haven—I fear he is mostly a corporate-insurance company lawyer. But he is of the courtroom variety and sufficiently keen on civil rights to redeem any faults he may have in the torts area. Joking aside, he is a very fine man, and like all of Anne’s family, seems to get on delightfully with my family—which, if not crucial, is helpful if Anne and I are to live in the same city with both families. . . . I am sure you will like her. She is not only very bright but very feminine and very good looking. Oh well you can see I am in love!¹⁷⁰

When he had chosen Yale, Guido had told Rostow that his salary did not matter because he was single.¹⁷¹ Consequently, the cynic might assume that like other academics contemplating a family, Guido saw interest from another institution as a way of improving his circumstances, particularly because relative to other institutions, Yale did not then pay its law professors well.¹⁷² But Guido

168. *Id.* See generally Steven G. Medema, *A Case of Mistaken Identity: George Stigler, The Problem of Social Cost, and the Coase Theorem*, 31 EUR. J.L. & ECON. 11 (2011). The outcome led to Coase’s offer from Chicago and enabled him to escape Charlottesville, where his wife had heard him characterized as “someone to the right of the John Birch Society.” Thomas Hazlett, *Looking for Results: Nobel laureate Ronald Coase on Rights, Resources, and Regulation*, REASON, Jan. 1997, at 40, 43.

169. Letter from Eugene Rostow to Justice Hugo Black, *supra* note 14.

170. Letter from Guido Calabresi to Justice Hugo Black and Elizabeth Black (Oct. 30, 1960) (on file with the Papers of Hugo Lafayette Black, Manuscript Division, Library of Congress, Box 459, file: Personnel, Calabresi, Guido). Guido’s mother retained her high opinion of Anne Tyler—and of her son Paul’s wife, too. After Bianca Calabresi died suddenly in Italy, the friend who had seen her the day she passed away told Guido that when the friend had remarked on how happy Bianca Calabresi seemed, Guido’s mother responded, “It is easy to be happy if you’re fortunate in your daughters-in-law.” Just before she left Connecticut, she had received a letter from a professor at the École de France announcing that, “From now on, Renan scholarship begins with you.” SILBER, *supra* note 5, at 30. I like to think that she died happy.

171. June Interview with Guido Calabresi, *supra* note 5. Rostow responded by asking Guido the highest salary any other university had offered him, and, when Guido answered, \$10,000, matching it. *Id.*

172. Minutes of Meeting of the Faculty, Yale Law Sch. (May 10, 1960) (on file with author) [hereinafter Yale Law Faculty Meeting Minutes] The attendees stressed the need for higher salaries. Fleming James said that Yale was “8th from the top in both median and average salary [not counting Chicago which will not be counted]. This, said Bowman, makes us 9th.” The recording secretary was

insisted that he was not so motivated. He agreed to interview at Chicago, he said, only because Levi approached faculty recruitment as he did fundraising and refused to leave Guido's office until he agreed to give a talk there.¹⁷³ Indeed Guido recalled accepting the invitation rather grudgingly.¹⁷⁴

Alarmed Yale law faculty members began talking about promoting him. To be sure, Guido had only taught at Yale for a year, and the faculty did not ordinarily promote anyone until five years after he or she had graduated from law school. But, as Rostow wrote the tenured members of the Governing Board just before Thanksgiving,

While Mr. Calabresi is not five years out of Law School, he did study for two years with great distinction at Oxford, Chicago is trying very hard indeed to lure him away, offering both tenure and money, the five year 'rule' is not a rule, but a flexible working practice, and Mr. Calabresi is Mr. Calabresi.¹⁷⁵

In the meantime, Chicago professors asked Guido whether he wanted to circulate a paper in advance of his talk, and he sent out *Some Thoughts on Risk Distribution and the Law of Torts*. The December journey to Chicago proved fraught at both ends. Snow delayed the train from New Haven, and Guido feared that he would miss his connection. Arriving in New York, however, he found his train still in its platform and his fiancée beside it. She had held the Twentieth Century Limited for him, Anne Tyler majestically announced. Then Harry Kalven met him on the Chicago platform waving a copy of his article and saying: "It's wrong, wrong, wrong, but I wish I'd written something as wrong."¹⁷⁶

Obviously, as Bowman had predicted, the article had provoked some controversy even without the full discussion of the reciprocity of causation. Kalven's reaction heralded the start of the debate between Guido, Kalven, and Walter Blum, which would call further attention to *Some Thoughts on Risk Distribution and the Law of Torts*, helping it garner more citations.¹⁷⁷ Even more mystifying than Kalven's response was an office visit with Aaron Director. Director asked whether Guido knew of Coase. Yes, Guido replied. He had read Coase's 1959 article, *The Federal Communications Commission*.¹⁷⁸ But understandably, Guido then asked Director what Coase had to do with *Some*

Guido Calabresi. *Id.*

173. May Interview with Guido Calabresi, *supra* note 9.

174. *Id.*

175. Letter from Eugene Rostow, Dean, Yale Law Sch. to the Governing Board of Yale Law Sch. (Nov. 18, 1960) (on file with author).

176. SILBER, *supra* note 5, at 65; June Interview with Guido Calabresi, *supra* note 5. Elsewhere, Guido repeated Kalven's remark slightly differently and situated it at a University of Chicago Law School office. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U.CHI. L. REV. 69, 69 (1975).

177. See, e.g., Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U.CHI. L. REV. 641 (1965); Walter J. Blum & Harry Kalven, Jr., *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U.CHI. L. REV. 239 (1967); Guido Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965). But see Marciano, *supra* note 147, at 111 (suggesting that "Calabresi's works were mostly ignored by economists and by legal scholars" between 1961 and 1968).

178. 2 J.L. & ECON. 1 (1959).

Thoughts on Risk Distribution and the Law of Torts? Even after he returned to New Haven and studied Coase again, he remained perplexed. Only after *The Problem of Social Cost* appeared did Guido realize that Director, its editor, referred to that piece.¹⁷⁹

IX

Neither Guido's "wrong" approach nor ignorance of Coase damaged him in the eyes of his Chicago suitors. Contrary to what Rostow had told the governing board, Guido had assumed that Chicago might offer him an associate professorship without tenure. But at the end of his day in Hyde Park, Levi astonished Guido, then all of twenty-eight years old, by offering him a full professorship.¹⁸⁰ (As Guido says, if Harvard was then a monarchy over which Dean Erwin Griswold presided, and Yale represented anarchy, Chicago was an oligarchy in which Levi, Kalven, and a few others called the shots.)¹⁸¹

Levi insisted that Guido delay his response until he returned for another visit with his fiancée, and Guido again acquiesced. He and Anne Tyler reserved separate roomettes on the Twentieth Century Limited, which was "considered very daring by old New Haven."¹⁸² By this time, Guido was well aware of Yale's recent tenure denials, and both he and his fiancée found Chicago "interesting."¹⁸³ But "New Haven was our place."¹⁸⁴ Moreover, Guido loved watching process theorists trained at Harvard, such as Alexander Bickel and Harry Wellington, and old Yale realists play off each other at the law school.¹⁸⁵

More what ifs. Suppose Rostow and his colleagues had not devised the counteroffer that resulted in Guido's becoming an associate professor in 1961 and, in 1962, at twenty-nine, the third youngest full professor at Yale in its history, just three years after he began teaching there?¹⁸⁶ Suppose the Calabresis and Tylers had not gotten along, and the young couple had seen Chicago as a haven from parents and in-laws? What if Guido had gone to Chicago? How would Chicago have changed him, and he altered it?

Humanists marvel at the amount of time that law professors spend together. Perhaps it helps explain the development of shared ways of thinking.¹⁸⁷ Once legal realism had begun to permeate Yale, it had a better chance of pervading

179. SILBER, *supra* note 5, at 66.

180. *Id.*

181. June Interview with Guido Calabresi, *supra* note 5.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *12 Faculty Members Receive Full Professorships*, YALE DAILY NEWS, May 16, 1962, at 1; *Guido Calabresi, at 29 Named Law Professor; Former Rhodes Scholar*, YALE DAILY NEWS, Sept. 20, 1962, at 15; *Youngest of the Century*, YALE DAILY NEWS, May 22, 1963, at 5.

187. After interviewing the principals at Chicago about the rise of law and economics, Edmund Kitch was struck by "the repeated emphasis on the importance of . . . face-to-face communication." Kitch, *supra* note 136, at 223.

because so many of Yale's professors ate lunch with each other, just as legal-process theory had a better opportunity to spread at Harvard for the same reason. Would Chicagoans have converted Guido to "Chicago-style" economic analysis of law or Coasean law and economics, in which case Reagan might have appointed him to the bench? Or would Guido have turned Chicagoans to the left? Or, as I believe most likely, would Guido have remained something of an ideological outlier among Chicagoans? Although he yielded to Bowman, Guido has a strong personality and, like Chicagoans, is not easily bent. In that case, Clinton might still have appointed him to the bench, and Guido might still have had the satisfaction of citing *Some Thoughts on Risk Distribution and the Law of Torts* in an opinion that broadly construed the doctrine of *respondeat superior*.¹⁸⁸

Other counterfactuals also suggest themselves. As either a draft comment in 1958 or article in 1961, Guido's piece predated Coase's *The Problem of Social Cost*. It is not too late for Guido to win the Nobel Prize. What if Guido had resisted Bowman's insistence that he delete the discussion of reciprocity of causation? Would we talk of the Calabresi, rather than the Coase theorem?

At the very least, might the trajectory of the Coase theorem have changed? Many have associated it with laissez-faire economics. But the Calabresi version of the Coase theorem, like all of *Some Thoughts on Risk Distribution and the Law of Torts*, promoted government intervention. And because Guido believed in the salutary effects of multiple independent discovery and thought that "advances in scholarship are richest when they occur independently to several people whose work imparts differing nuances to the insight," he mourned deferring to a senior colleague and reducing his discussion of causal reciprocity to a footnote. Had he followed his instinct, he said, "it would have been impossible for many to reject 'Coase's Theorem' as mere 'right-wing' ideology, since a 'liberal' version would have been available at the creation," and those who "tried to make of economic analysis of law a basis for blindly supporting the status quo would have found their path more difficult."¹⁸⁹ Might a Calabresi version of the Coase theorem in *Some Thoughts on Risk Distribution and the Law of Torts* have rescued both Coase and law and economics from the left's charge that they embodied politics, not science?¹⁹⁰ I am not an economist, and I leave these questions to those more qualified to answer them.

X

As a historian of Yale Law School, I see something significant in Guido's treatment, however abbreviated, of the reciprocity of causation. I see a clue to his deanship, about which I have never been objective. One review of my book on Yale and the 1960s that made me laugh aloud observed that in my epilogue,

188. *Taber v. Maine*, 67 F.3d. 1029, 1034 (2d Cir.1995).

189. Calabresi, Commentary on *Some Thoughts*, *supra* note 113, at 1484.

190. See, e.g., Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

when I began discussing Dean Calabresi's emphasis on "excellence, with humanity and decency,"¹⁹¹ negotiation of the law school's financial independence from the university,¹⁹² fundraising skill, concern for outsiders (a theme in Guido's jurisprudence as well),¹⁹³ and creative approach to student activism, I set aside my bemused stance and intimated that Yale Law School had been "governed by a deity."¹⁹⁴ Fair enough!

And so when I came to read *Some Thoughts on Risk Distribution and the Law of Torts* and saw the footnote about reciprocity of causation, I thought of a favorite story from Guido's deanship. In 1990, Yale's *Journal of Law and Liberation* invited Abdul Alim Muhammad, a spokesman for the Nation of Islam, to speak on the effects of the drug war on the black community. Guido joined a picket line of 200 to protest Muhammad's anti-Semitism and carried a placard reading "Racism is garbage no matter who spews it." He issued one letter to the community, "speaking as Dean . . . remind[ing] all of you of the rules of this School and this University that guarantee complete freedom of speech to all visitors invited by appropriate groups"; and another, "as a *member*" of the community arguing that the invitation was "a terrible wrong."¹⁹⁵ But Guido repeatedly stressed "it takes two to tango," to hurt and be hurt:

And yet what can I say of those who would invite such a [person] . . . ? Can I say that they cannot be members of a community with me, that they cannot be my friends? No, I would denounce what for me is their error—their lack of feeling and of sensitivity, their, admittedly unintended, support of bigotry—but still embrace them. And what can I say of those who would no longer deal with those who made such an invitation? Would I exclude them? No. Again I would attack what I view as their error—their concentration on their own justifiable pain, their lack of understanding of the terrible needs of others—and then embrace them . . . I pray that all in this fragile but worthy place will try to understand what motivates those who hold, so deeply, views, so different, on this issue, in the hope that in time, the wounds that this event is causing on all sides may heal, and that even from these wounds we may all have learned something of value.¹⁹⁶

Do Fleming James and Guido's scholarship explain his style as dean? To end where we began, Who knows what accounts for human behavior? As I have thought about Guido, I have come to believe that what was most important was that answer: "I am a refugee!"¹⁹⁷ Think of Massimo Calabresi's response when

191. Gerry Boyle, *The Principal Principle*, COLBY MAG., Summer 2001, available at <http://www.colby.edu/colby.mag/issues/sum01/campus/2brody.shtml>.

192. Guido had been saying that "he felt that we were getting something of a raw deal from the University" since he joined the faculty and became its recording secretary. Yale Law Faculty Meeting Minutes, *supra* note 172.

193. See, e.g., *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012) (holding that a New York town's practice of opening legislative sessions with religious prayers violated the Establishment Clause); *Arar v. Ashcroft*, 585 F.3d 559, 638 (2009) (Calabresi, J., dissenting) (expressing deep discomfort with the majority's treatment of the *Bivens* doctrine when a Syrian national was sent to Syria under the powers of extraordinary rendition and allegedly tortured).

194. Clyde Spillenger, Book Review, 25 LAW & HIST. REV. 681, 682 (2007).

195. KALMAN, YALE LAW SCHOOL AND THE SIXTIES, *supra* note 28, at 341.

196. *Id.* at 341–42.

197. Benforado & Hanson, *supra* note 2.

Guido asked him why he had joined the anti-Fascist movement: “Everybody talks about the banality of evil; nobody talks about the banality of good.”¹⁹⁸ Or think of Guido talking about his postwar visit to a farmer on his family’s lands who had first hidden Jews and Allied servicemen caught behind the German lines; then, Nazis on the run. “I went to see him because I was very young and I thought that this was terrible; that this was someone who did not understand the difference between right and wrong, that he couldn’t distinguish between hiding people who deserved to be hidden and hiding criminals,” Guido recounted. “I already sounded like a lawyer, I guess.” What did he care about politics, the farmer replied? “When they came here, when they were running away, each one of them was in trouble. ‘Eran tutti figli di mamma.’—They were each the child of some mother somewhere.”¹⁹⁹ Perhaps only an outsider who had witnessed the ambiguity of the human condition could explain the reciprocity of causation and teach Yale law students that intelligence alone was never enough.

But then again, Coase did not flee persecution, and other law school deans have hugged as much as Guido.²⁰⁰ Book learning has to count for something. Whether Fleming James helps us make sense of Guido’s approach to torts, and whether Guido’s approach to torts helps explain his approach to administration and life, only Guido and his biographers can say (and they might be mistaken). Without a doubt, though, it does take two to tango.

198. Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch., Graduation Remarks at the Yale Law School (June 1, 2011) (transcript available at http://www.law.yale.edu/documents/pdf/News_&_Events/Calabresiremarks.pdf).

199. Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch., 70th Commencement Address at Connecticut College (May 1, 1988) (transcript available at <http://digitalcommons.conncoll.edu/cgi/viewcontent.cgi?article=1023&context=commence>); E-mail from Guido Calabresi, Senior Judge, U.S. Court of Appeals for the Second Circuit and Sterling Professor Emeritus of Law, Yale Law Sch., to author (Oct. 10, 2012) (on file with author).

200. John Sexton, for example. See Mark Levine, *Ivy Envy*, N.Y. TIMES MAG., June 8, 2003.