

THE COSTS OF DISPOSITIONISM: THE PREMATURE DEMISE OF SITUATIONIST LAW AND ECONOMICS

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Every man feels that perception gives him an invincible belief of the existence of that which he perceives; and that this belief is not the effect of reasoning, but the immediate consequence of perception. When philosophers have wearied themselves and their readers with their speculations upon this subject, they can neither strengthen this belief, nor weaken it; nor can they show how it is produced. It puts the philosopher and the peasant upon a level; and neither of them can give any other reason for believing his senses, than that he finds it impossible for him to do otherwise.¹

Judging by common sense is merely another phrase for judging by first appearances; and everyone who has mixed among mankind with any capacity for observing them, knows that the men who place implicit faith in their own common sense, are, without any exception, the most wrong-headed and impracticable persons with whom he has ever had to deal.²

It is better to be roughly right than precisely wrong.³

I. INTRODUCTION

Entering a room for the first time is often a revealing experience, not so much for the raw newness—the materialization of *something* from void—but for the interesting meeting of expectation and reality. On the threshold, before our eyes adapt to the lights, the canvas of our perception may seem to suggest the empty serenity of fresh white gesso. But in truth we face a work in progress—the forms sketched in, colors chosen, a gilt frame cut to size. Although it may all seem novel as the image comes into focus, our first impressions are shaped not only by what is actually there but also by what we expect to find.

1. THOMAS REID, *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* 240-41 (1969).
2. John Stuart Mill, *The Spirit of the Age*, THE EXAMINER, May 1831, at 20.
3. This quip has been attributed to John Maynard Keynes. See, e.g., John Maynard Keynes, at http://en.wikiquote.org/wiki/John_Maynard_Keynes (last modified Feb. 5, 2005). The exact quotation and its original source are unknown.

Entering the ceremonial moot courtroom at *The Costs of Accidents*⁴ Symposium last April, there were many things that might have caught our attention—the architect’s choice of crown molding, the law students milling about at the entrance, the details of the Maryland state flag hanging at the front—yet our gaze was necessarily focused on discovering the main actors of the upcoming drama—the cast whose names appeared on the program—and, in particular, the two stars. And there they were at the front, backs to us, side by side, just as we had pictured it in our heads: Judge Richard Posner on the right and Judge Guido Calabresi on the left.

That the seating plan should feel so cosmically correct is no mystery. Calabresi and Posner are among the small group of scholars credited with launching the law and economics movement, and within that elite cadre they are often held up, as they were at the Symposium, as the bookends to the approach: Posner on the right; Calabresi on the left.⁵

While, as we will discuss later, good arguments can be made to contest these labels, and seemingly more appropriate embodiments of the liberal and conservative scholar can be asserted, we focus on Calabresi and Posner, in part, because of the salience of their perceived ideological leanings. The “left” and “right” labels seem to attach to Calabresi and Posner, respectively, without need for further justification or explanation. When Calabresi is mentioned in scholarship today, it is often with the explanatory aside “a foremost liberal law and economics scholar,”⁶ just as Posner’s image is readily conjured up with the phrase “the conservative law and economics guy.”⁷

Moreover, we focus on Calabresi and Posner because they are commonly offered as the contrasting exemplars of two modes of law and economics. Robert B. Seidman’s summation is typical: “The Law and Economics school has evolved over time into two clearly defined wings, the first conservative, as exemplified by Professor Posner, an-

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

5. Posner and Calabresi are widely held to be among the handful of scholars whose work initiated, and contributed to the success of, the modern law and economics approach. In 1991, they were recognized at the inaugural meeting of the American Law and Economics Association as such, along with Henry Manne and Ronald Coase. See Francesco Parisi, *Palgrave on Law and Economics: A Review Essay*, 20 INT’L REV. L. & ECON. 395, 397-98 (2000) (also pointing out that Posner and Calabresi are identified as two of the ten “founding fathers” of law and economics profiled in *The New Palgrave Dictionary of Economics and the Law*).

6. Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1039 (2003).

7. Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919, 978 (1999).

other liberal, exemplified by Professor Calabresi.”⁸ Numerous articles have focused on the political division within law and economics with Posner representing the conservative camp and Calabresi the liberal.⁹ Indeed, the conservative/liberal divide is often cast as between the Yale and Chicago Schools, with Calabresi and Posner as their respective leaders.¹⁰

Finally, we focus (in that room and in this Article) on Calabresi and Posner because of their significance to law and economics and their importance to this Symposium. They are co-leaders of a shared movement—a new way of looking at the law and, in particular (at least initially), tort law. Where Calabresi would “minimize costs,” Posner would “maximize wealth.” Both were, in their own terms, calling on scholars and policymakers to do the same thing: to take seriously the insights and approach of neoclassical economics in analyzing policy¹¹—a project that one legal historian calls the “Calabresi-Posner Research Programme.”¹²

To be sure, Calabresi may not be, in the words of Wayne Eastman, “the closest analogue to Posner on the liberal side,”¹³ and Posner is by no means the conservative mirror image of Calabresi. Still, the fact that so many scholars and commentators perceive them as significant leaders of a single intellectual movement and as representing two ends of an imagined spectrum within that movement suggests

8. Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutional Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 48-49 (1992) (footnotes omitted).

9. See, e.g., Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 174 n.282 (2000) (placing Posner on the right of the political continuum and Calabresi on the left); George L. Priest, *Henry Manne and the Market Measure of Intellectual Influence*, 50 CASE W. RES. L. REV. 325, 328 (1999) (suggesting that debate over the importance of efficiency between Calabresi and Posner can be understood as a battle between the “ultra liberal” and the “conservative”); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1, 36-38 (1999) (suggesting a divide within law and economics between the conservative school headed by Posner and Frank Easterbrook and a more progressive school led by Calabresi and others).

10. See, e.g., Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1167-68 (2002) (comparing the “Yale/progressive brand of Law and Economics analysis used by Calabresi” with the “Chicago/conservative version espoused by Posner and Easterbrook” as a potential way to understand the choice of opinions for casebooks).

11. For further discussion of the impact of Calabresi and Posner on tort theory and policy, see James R. Hackney Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 L. & HIST. REV. 275 (1997).

12. James R. Hackney Jr., *Law and Neoclassical Economics Theory: A Critical History of the Distribution/Efficiency Debate*, 32 J. SOCIO-ECON. 361, 362 (2003).

13. Wayne Eastman, *Telling Alternative Stories: Heterodox Versions of the Prisoners’ Dilemma, the Coase Theorem, and Supply-Demand Equilibrium*, 29 CONN. L. REV. 727, 728 n.2 (1997).

that there is something to be gained from looking more closely at what lies behind the associations.

A goal of this Article is to describe one major source of those ideological labels in order to shed some light on what it means to hold Calabresi up as the liberal founding father and Posner as the conservative. In the following pages we argue that the substance of this division—or, perhaps, put differently, the origin of our subconscious seating plan—lies in the different ways Calabresi and Posner see the world, in particular how they make causal attributions for behavior. The implications of our arguments go well beyond the topics of this Symposium. As the Conclusion indicates, and as our future work will demonstrate, such attributional distinctions and labels are common to all major policy debates.

A. *Critical Realism and the Dispositionist Spectrum*

To help make sense of Calabresi's and Posner's differing perspectives, this Article adopts a *critical realist* approach. Critical realism is a legal-theoretic method that is based on first establishing a realistic account of the human animal, and only then turning to analysis and theory. Instead of building policy off of an intuitively appealing model of the human actor, critical realism looks to social scientific disciplines devoted to understanding how humans interact with and make sense of their environment—most significantly, social psychology and related disciplines—and to the practices of institutions devoted to understanding, predicting, and influencing people's conduct—particularly market practices.¹⁴

Some examples, and some of the more detailed implications, of the critical realist approach have been examined in other work.¹⁵

14. For a fuller description of critical realism, see Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter *The Situation*], and Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2005) [hereinafter *The Situational Character*].

15. Other pieces in this project include the sources cited in the previous footnote, as well as Adam Benforado, Jon Hanson & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L. REV. 1645 (2004) [hereinafter *Broken Scales*]; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) [hereinafter *Illusion of Law*]; Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004) [hereinafter *Categorically Biased*]; Adam Benforado & Jon Hanson, *Naïve Cynicism: Some Mechanisms of Dispositionism and Other Persistent Attributional Errors* (2005) [hereinafter *Naïve Cynicism*] (work in progress, on file with authors); Ronald Chen, *The Illusion of Ethics: The Legitimizing Schemas of the Legal Profession* (2005) (work in progress, on file with author); Jon Hanson, Ana Reyes & Dan Schlanger, *Attributional Positivism: The Naïve Psychology Behind Our Laws* (2005) [hereinafter *Attribu-*

This Article focuses primarily on the “fundamental attribution error”: our proclivity to ascribe the vast majority of our actions to disposition-based choice and to ignore the more significant role played by situational forces—unseen or underappreciated features in our environment and in our interiors. Although that perceptual proclivity seems to be hard-wired in the human animal, the strength of our dispositionism varies across cultures, individuals, and situations (again, interior and exterior).

A basic claim of this Article is that when scholars invoke Posner as the prototypical conservative legal economist and Calabresi as the prototypical liberal one, their categorizations are being driven largely by Posner’s relative dispositionism and Calabresi’s relative situationism.¹⁶

tional Positivism] (work in progress, on file with authors); Jon Hanson & Adam Wright, *In the Driver’s Seat: Why Promoting Dispositionism Is Good Business* (2005) [hereinafter *In the Driver’s Seat*] (work in progress, on file with authors).

16. The term “relative” here is significant. Posner is by no means the most dispositionist among law and economics scholars. The work of some of the other founders of the field, such as Robert Bork, Henry Manne, and George Priest, are arguably even more dispositionist. Nor are we claiming that Posner is incapable of seeing matters from a situationist perspective. Indeed, he has been criticized by a number of his peers for being too situationist in some contexts, particularly, we would argue, where his situation encouraged it. Posner’s positive theory did not, after all, seek to reverse the situationist trend of tort law during the 1960s and 1970s, though his focus was dispositionist and he clearly did not favor expanding the situationist trend. *See infra* Part II.B.1. In fact, because of his nonreformist conclusions, several of his fellow conservatives were quite upset that he would have devoted himself to legitimating the law as it was, given that it was moving in the situationist direction.

Libertarians like Richard Epstein and Peter Huber, and efficiency-oriented scholars, such as George Priest and Paul Rubin, have all criticized Posner’s positive theory as part of their more general critique of tort law. Still, these same critics otherwise embraced dispositionism. For a summary of these arguments, see Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) [hereinafter *Rescuing the Revolution*]. *See also, e.g.*, PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193 (1989); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981). Their biggest complaint concerning Posner’s work was in the products liability context, where Posner claimed that, upon closer examination, consumers might be optimistic in estimating small-probability product risks. Croley & Hanson, *Rescuing the Revolution, supra*, at 737-38; *see* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 280-84 (1987). Posner’s critics all assumed that consumers were adequately informed in that context, as well, and emphasized the need to treat products liability as a contractual setting where well-informed consumers negotiated to protect their own interests and sellers competed to make consumers happy on every dimension. Croley & Hanson, *Rescuing the Revolution, supra*, at 715-21 (summarizing this “contractarian” position). To the extent that Posner was interested in gaining a more realistic view of the human animal in respect to products liability, and to the extent he was willing to challenge the rational-actor model there, he demonstrated a situational sensitivity.

As his critics underscored, however, Posner’s momentary nonconservative (relatively situationist) conclusions reflected not an unbiased pursuit of the truth, but an analysis

The dispositionist-situationist divide is, we argue, a key difference, and perhaps *the* key difference, between the two founding fathers and the two branches of law and economics with which they are associated.

We spend some time below investigating Calabresi's and Posner's unique individual situations, which we believe go some distance towards explaining their relative situationism and relative dispositionism, respectively. Our main interest, however, is in the divergent directions Calabresi and Posner represent within law and economics.¹⁷ Since our focus is on the distinct examples that they offered to an emerging field, we will concentrate on their early work and will spend little time sorting through or analyzing later pieces in which their views may have shifted.¹⁸

As we will suggest, Calabresi stands as a relative situationist in a particularly dispositionist school of thought. Indeed, Posner's relatively dispositionist approach has dominated law and economic scholarship since the late 1970s. And although it is primarily the focus of other work,¹⁹ we will argue briefly below that because of its greater sensitivity to situation, Calabresi's exceptional outlook and approach has hampered his ultimate influence.²⁰

severely distorted by a prior allegiance to the economic positivism theory that launched his career. He concocted an efficiency explanation for strict products liability, they claimed, precisely because he was committed to the idea that the common law is, on the whole, efficient. The way that critics called on dispositionist common sense to discredit Posner's situationist understanding and accused him of a vested interest is a demonstration of naïve cynicism, the topic of related work. See Benforado & Hanson, Naïve Cynicism, *supra* note 15.

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17. Our purpose is not to attempt to categorize Posner and Calabresi, but rather their approaches. Where we focus on them as individuals, as we do in Part II.B, it is to understand some of the situational factors that we believe informed the directions they staked out.

18. We also focus mostly on Posner's and Calabresi's tort-related work—the work that is most commonly associated with the origins of law and economics—and their then-budding careers. See Jon D. Hanson & Melissa R. Hart, *Law and Economics*, in *A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 311 (Dennis Patterson ed., 1996) (discussing Posner's and Calabresi's early contributions to the economic analysis of tort law). Although we suspect that an investigation of both men's approach to judging would be revealing, given that Calabresi and Posner were not appointed to the bench until well after formulating their legal economic theories and given the particular constraints on, and situational influences of, judicial decisionmaking, such a project is too complex to be completed adequately in the time and space at hand. With the exception of Posner's *Indiana Harbor* opinion—which we highlight as particularly connected to Posner's early tort scholarship and to current tort pedagogy—we avoid their legal decisions altogether. See *infra* notes 53-58 and accompanying text (analyzing the *Indiana Harbor* decision as an example of Posner's dispositionism).

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19. See Benforado & Hanson, Naïve Cynicism, *supra* note 15.

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20. For a more complete description of the dispositionism of economics, law and economics, and most legal theory, see authorities cited *supra* notes 14-15.

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B. *The Connection Between Conservatism and Dispositionism*

1. *Close Ties.*—One goal of this Article is to explore a division within law and economics, the one often understood as the divide between the liberal Calabresian school and the conservative Posnerian school. Again, that divide, we believe, is the consequence of contrasting attributional tendencies that have become linked to, and at times mistaken for, ideology. Because we describe in detail elsewhere the connections between conservatism and dispositionism, on the one hand, and liberalism and situationism, on the other,²¹ we only offer a brief summary here.

There are two main connections between our familiar political-orientation bipolarity and the situationism-dispositionism divide. First, dispositionist attributional schemas, highlighted below, have much in common with prototypically conservative schemas. For instance, the dominant dispositionist-actor model assumes that people have stable preferences and make willful choices based on those preferences.²² That perception shares much with conservative presumptions that, for example, “people are poor because they are lazy, do not improve themselves, cannot manage money, and abuse drugs or alcohol.”²³ Moreover, “[t]he conservative dispositional attributions imply that poor people have a controllable predisposition to stay poor.”²⁴ They are poor, more or less, by choice. Second, some of the motives (and other hard-to-see situational forces) that frequently lead to a dispositionist worldview are, likewise, often responsible for pushing people toward conservatism. Individuals who are uncomfortable with ambiguity, who have a strong need for closure, and who feel a heightened sense of threat, will be drawn more strongly to schemas, conceptions, and worldviews that seem to eliminate ambiguity, provide closure, and reduce threat. Such individuals will be drawn to dispositionism and conservatism. Or it may be more accurate to say that they will be drawn to dispositionism and, therefore, to conservatism. In Parts II.B.3 and II.B.5 of this Article, dedicated to Calabresi’s and Posner’s interior situations, we consider some of the specific motivations that social scientists exploring *political psychology* have identified.

21. See Benforado & Hanson, Naïve Cynicism, *supra* note 15.

22. See Hanson & Yosifon, *The Situational Character*, *supra* note 14.

23. SUSAN T. FISKE, SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY 98 (2004) (citing G.S. ZUCKER & B. WEINER, *Conservatism and Perceptions of Poverty: An Attributional Analysis*, 23 J. APPLIED SOC. PSYCHOLOGY 925 (1993)).

24. *Id.*

2. *The Enigma of Richard Posner.*—Describing Posner as the “conservative” to Calabresi’s “liberal,” as we are doing, is sure to raise some eyebrows. Although Posner is often called a “conservative”²⁵—in particular, due to his hearty embrace of free market ideals²⁶—the designation is sometimes disputed.²⁷ As we noted earlier, among other things, Posner favors strict products liability, a concept that the typical conservative is likely to balk at,²⁸ and many of his ideas about jurisprudence are similarly leftist.²⁹

Understandably, therefore, Posner often seems to see himself as removed from political associations altogether.³⁰ In *The Problems of Jurisprudence*, he states, “[m]y position may seem boringly centrist, but it will provoke both the true centrists in the profession, who want very much to believe that law is autonomous and apolitical, and the political activists who want to move the law sharply to the left or to the right.”³¹

Our response to those observations is twofold. First, if we take the interior motivations and attributional schemas of “conservatism” offered up by George Lakoff and John Jost and his colleagues, discussed in Part II.B.3—as opposed to vague lay meanings of the term—

25. As Richard Bostan writes, “The reputation of Richard Posner among law professors of the Left, its measure being taken from published and casual comments, might not be any blacker if he boiled babies in their own blood and ate them.” Richard Bostan, *The Tempting of Richard Posner*, 2 INDEP. REV. 255, 255 (1997).

26. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 339 (1978) (suggesting that the selling of babies should be regulated less stringently than it currently is, given the high demand and low supply).

27. See Bostan, *supra* note 25, at 269 (“Posner’s views about the judiciary clearly put his jurisprudential position nearer to the camp of the Left than of the Right.”); Mark M. Hager, *The Emperor’s Clothes Are Not Efficient: Posner’s Jurisprudence of Class*, 41 AM. U. L. REV. 7, 9 (1991) (“[T]here are probably judges who would be much worse than Posner on many issues progressives hold dear. I see no reason to predict Posner would swing far to the right on many issues more often than would typical conservative centrist jurists. In fact, Posner’s temperamental and intellectual contrariness might even take the form of some sharp progressive departures from conservative centrism.”); Sanford Levinson, *Strolling Down the Path of the Law (And Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1233 n.60 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990) [hereinafter *PROBLEMS OF JURISPRUDENCE*]) (“Posner’s newest work [*The Problems of Jurisprudence*] will be much more happily embraced by the left than by many of his mundane political allies on the right.”).

28. See *supra* note 16.

29. See Graham Lea, *Who the Heck Is . . . Judge Richard Posner?*, THE REGISTER, Nov. 22, 1999, at http://www.theregister.co.uk/1999/11/22/who_the_heck_is_judge/.

30. See Hager, *supra* note 27, at 8 (“Posner goes to considerable lengths to disclaim identification as an ideologue of any sort.”).

31. POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 27, at 32; see also Hanson & Yosifon, *The Situational Character*, *supra* note 14 (discussing Posner’s claim that positive law and economics has no “political valence”).

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Posner's ideology seems quite consistently conservative, particularly as compared to Calabresi. Second, even if Posner defies classification on the liberal-conservative scale, he is certainly dispositionist (particularly as compared to Calabresi).

Thus, although Posner may occasionally reach policy conclusions that are associated with the left, he usually gets there by taking a dispositionist route. This point is lost on many commentators. Take, for instance, much of the discussion over Posner's opinions on the role of a judge.³² Many writers seem eager to contrast Bork and Posner on the issue, without seeing the similarities between the two.³³ According to Posner, Bork stands for "militance and dogmatism," while he stands for rationality, common sense, and pragmatism.³⁴ What is missed is the fact that both Posner and Bork are strong dispositionists, confident that their views of the world are correct.³⁵ Posner attacks Bork for suggesting "slavish obeisance to the [Constitution's] framers' every metronome marking"³⁶ at the same time that he moves with unwavering obedience to the regular ticking of his own timepiece—an internal one that sounds so much like his heart beating that he does not notice it. Both men have a rigid schematic way of looking at things; Posner's touchstone is just not on display at the National Archives.³⁷

Though Posner may bridle at being called "conservative," we suspect that he would readily accept our calling him a dispositionist.³⁸

32. See POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 27, at 138-41 (discussing proper judicial behavior in implementing government policy and rejecting "original meaning" constitutionalism). R

33. See, e.g., Bostan, *supra* note 25, at 256. Bostan notes: R

Fond though Posner is of free enterprise, his jurisprudence is distinctly at odds with the jurisprudence on which conservatism smiles. . . .

. . . The role of courts and how judges ought to perform their office, every bit as important in jurisprudence as philosophy of law, are issues where there can be said to be a specific conservative position, an orthodoxy with which Posner is out of sync.

Id.

34. Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365, 1369 (1990) [hereinafter *Bork and Beethoven*].

35. In some ways, this oversight is predicted by social psychology. Differences, like dispositions, are salient, while similarities, like situation, are obscure.

36. Posner, *Bork and Beethoven*, *supra* note 34, at 1380. R

37. Thus, Posner may be right that, in general, dispositionism should be expected to be stronger in formalists than in pragmatists. E-mail from Richard Posner, to Jon Hanson & Adam Benforado (Nov. 1, 2004) (on file with authors). Nonetheless, we believe he is incorrect to suggest that pragmatists are somehow immune to dispositionism.

38. Of course, as a dispositionist believing in the power of human agency, Posner seems to believe that he made a situation-free *choice* to be a dispositionist. By way of example, after reviewing an earlier version of this piece, he urged us to "acknowledge the possibility of simple models as a methodological choice, personality-independent." *Id.* We hereby acknowledge that possibility, but think it far less likely to occur than he seems to,

And well he should. It is the foundation, as we will investigate below, of much of his writing.³⁹

II. LAW AND ECONOMICS: SITUATIONIST CALABRESI VERSUS DISPOSITIONIST POSNER

Over the last thirty-five years, law and economics—like neoclassical economics and classical liberalism before it—has been dominated by a dispositionist conception of the human animal.⁴⁰ The individual is presumed to be an independent, choice-making agent whose acts both satisfy and reveal a set of underlying preferences. Overall, legal economists have paid little notice to the lack of realism in their underlying, simplifying assumptions. Rather, focus has remained on the most salient actors in each area of analysis—often the party injured or “the injurer”—with the less obvious actors, systems, and processes often ignored. The goal has been to create straightforward models that seem to lead to clear policy conclusions. Those models often “make sense” of existing arrangements and, correspondingly, minimize considerations that might raise doubts about the legitimacy of the system—for instance, that the law is itself a legitimating cover in the service of inequitable allocative and distributional effects.⁴¹

Moreover, within the movement there has been little awareness that the success of law and economics as a theory may itself be driven by situational factors and, in general, even critics of the approach have assumed that its dominance has occurred through a fair marketplace of ideas.⁴²

even among those who perceive themselves to have consciously chosen, based solely on the merits. As we discuss below, the urge to characterize behavior as rationally chosen, even when confronted with evidence that situational factors may be determinative, suggests strong dispositionism.

39. See *infra* Parts II.A.1.a, II.A.2.a (discussing the dispositionist aspects of Posner’s scholarship).

40. For a more complete discussion of that history, see Hanson & Yosifon, *The Situational Character*, *supra* note 14.

41. See Chen & Hanson, *Illusion of Law*, *supra* note 15; Ronald Chen & Jon Hanson, *Distribution Versus Efficiency: Missing the Taste of the Pie* (2005) [hereinafter *Distribution Versus Efficiency*] (work in progress, on file with authors).

42. See generally Hanson & Yosifon, *The Situation*, *supra* note 14, at 134-39. The work of dispositionist legal economists was not only more attractive to some scholars than the situationist alternative, it was also highly encouraged by forces outside of legal academia. See *id.* at 229-31 (presenting the hypothesis that strong institutional forces operate to reinforce dispositionist tendencies). In part, Calabresi and Posner present especially interesting case studies because their seminal work comes in the area of tort law, an area that has been a major battleground in which pro-commercial and pro-dispositionist influences have succeeded in shifting the debate. See David C. Johnson, Commonweal Institute, *The Attack on Trial Lawyers and Tort Law*, Oct. 1, 2003, at <http://www.commonwealinstitute.org/reports/>

Against this backdrop, this Part begins to explore what set Calabresi apart from the dispositionist mainstream within law and economics, embodied by Posner,⁴³ and what made his view of tort law relatively situationist.

A. *Contrasting Posner's and Calabresi's Attributional Perspectives*

We have claimed that the ideological bookends of law and economics are separated mostly by their contrasting attributional tendencies. To support that claim, we need to first determine how to go about comparing scholars along the dispositionist-situationist continuum. Although there are numerous points of comparison, we will concentrate on four of the most central: the model actor (what moves the person subject to the law?); the goal schema (what moves the law?); the attributional schema (how important are situational influences?); and the lawmaker schema (what moves the lawmaker?).⁴⁴

tort/tortreport.html (arguing that politically conservative groups and business interests use media, think tanks, and grassroots organizations to gain support for tort reform in order to limit constraints on corporations and to achieve a general move to the right in the United States). Calabresi's work, and that of the situationally sensitive legal realists who came before him, indicates the direction in which scholarship was going before the concerted pro-commercial efforts to deeply capture our perceptions and conceptions of tort law. We return to this point in more detail in work now in progress. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

43. It is important to note that, in other ways, Posner does not embody the law and economics mainstream. For example, Posner's approach, even early on, was distinctive in that his was purportedly a positivist project, whereas Calabresi and most legal economists today reject strong-form versions of positivism and instead consider themselves normativists. Keith N. Hylton, *Calabresi and the Intellectual History of Law and Economics*, 64 *MD. L. REV.* 85, 91-92 (2005). Once again, though, our focus is on dispositionism, where Posner's perspective did come to dominate.

44. There are certainly other ways to compare where scholars lie on the dispositionism-situationism spectrum. Another possible approach is to examine their *cost schema*—that is, how far and wide each scholar looks in determining how harmful or costly an accident was. The dispositionist will tend to see costs in relatively narrow terms, paying relatively little attention to those that are more complex and difficult to measure. The situationist, in contrast, will consider costs well beyond the most salient and easy to measure. We have not applied that comparison to Posner and Calabresi here, but we will assert that, on this dimension as well, Calabresi appears to be relatively situationist. In his more recent writings, Calabresi has suggested that common sense draws us only to the most salient of harms—in particular, the economic and physical ones:

[I]f I suffer pangs, feel sick to my stomach, because I see an accident in which people have been killed, I cannot recover damages for that suffering. Yet why should not the "costs" of that accident include my pangs? Why not give people recovery when they drive past a bloody accident and feel the worse for it? That my feelings are for others, rather than for myself, does not make my feelings any less real, or any less a reason why the behavior, which led to the accident and to my feeling ill, should be discouraged. That is—if we were to do a full societal cost-benefit analysis—one of the costs of accepting the deity's gifts of motor cars is surely my feeling ill when I see an accident

On each of those dimensions a scholar can be more or less dispositionist. The following Sections argue that with respect to each of those four schemas, Posner is more dispositionist than Calabresi.

1. *Model Actor*.—The first variable of comparison is the *model actor*—or person schema—envisioned by scholars in the analysis of tort settings.⁴⁵ In analyzing conceptions of the model actor, the key questions revolve around the degree to which consumers, or potential injurers and victims, are understood to be dispositionist and rational. How seriously, for example, does each scholar take into account the role of internal and external situational factors on the conduct of those individuals? More specifically, at what level of situational influence does the scholar begin to question the “free choice” presumption? And does the model actor reflect social scientific research devoted to understanding human behavior or does it rely mostly on common-sense, but untested, assumptions about human behavior?

GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 70 (1985) [hereinafter IDEALS, BELIEFS, ATTITUDES, AND THE LAW]. For Calabresi, if the purpose is to find all of the costs, one cannot simply rely on common-sense notions. Casting the net wide is often a confounding process, and elsewhere Calabresi emphasizes the incommensurability of ideals, values, and attitudes that make closure—real closure—impossible for many questions. As Calabresi and Bobbitt write:

Attempts to weigh precisely the social costs and benefits associated with different responses to a tragic choice result more often in the valuation of only what we can measure than in the measurement of all that we value. Costs which are difficult to measure, such as the affront to the value of human life entailed by a decision to authorize medical experimentation with the terminally ill, will often be left out of the accounting altogether, though the resulting narrowness of the premises will poison the conclusion.

GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 41 n.15 (1978). Not looking at certain costs may make our models more satisfying, but it does not move us closer to the truth.

There are still other lines of comparison that do not create much contrast between Calabresi and Posner. For instance, a major difference between both Calabresi's and Posner's approaches and the critical realist approach is the extent to which each attempts to understand what situational forces are influencing law and legal theory. Moreover, most legal economists, Calabresi included, examine policies as if they are exogenous from one another. Each area of law—from antitrust law to corporate law, criminal law, environmental law, and family law—is treated as an autonomous agent, with its own efficiency-driven disposition. Most policy analysis is, in that sense, dispositionist. This, too, is a weakness that critical realism attempts to address. See, e.g., Chen & Hanson, *Illusion of Law*, *supra* note 15 (connecting corporate law to other areas of law).

45. See Hanson & Yosifon, *The Situational Character*, *supra* note 14, at Part IV (discussing the model actor).

a. *Posner.*—Posner’s dispositionist model actor is thoroughly examined in other work.⁴⁶ We will not repeat that analysis here, but, for purposes of contrast, we will highlight some of its conclusions.

When Posner considers the human interior, it is with the eyes of a dispositionist. Posner began the 1972 edition of his *Economic Analysis of Law*⁴⁷ with the assumptions that “man is a rational maximizer of his ends in life,” that “people respond to incentives” (by which he meant, especially, prototypical incentives such as economic rewards, prices, and criminal penalties), and that resources therefore tend “to gravitate toward their highest valued uses if exchange is permitted.”⁴⁸ More generally, Posner assumes stable preferences and willful choices as the basis of most behavior. Like virtually all economists and legal economists, he takes for granted that actions reflect choices and that choices reveal preferences. When resources gravitate toward their highest-valued use, that is because the exchanges reflect those stable preferences. An exchange does not occur if the person without the resource prefers it less than the person possessing it (as measured by willingness to pay). And, like most economic dispositionists, Posner presumes that individuals are competently able to process available information and make their judgments absent any systematic biases. That strong-form dispositionist actor is roughly whom Posner is imagining in his *rational-actor* model.

Although it is true that, when pushed (by evidence or by the need to confirm his argument), Posner will concede that people may be subject to a small number of choice-making “quirks,” he returns to the fully informed and rational rendition of the dispositionist actor as his firm default. And even if he sometimes allows for imperfect information and occasionally waivers on the rationality assumption, he clings steadfastly to the dispositionism assumption. In defending his conception of the human animal, Posner rarely looks to social scientific insights beyond those offered by economists, who themselves presume dispositionism. The bedrock of Posner’s dispositionist view appears to be his common-sense intuitions, intuitions that he fully trusts. Such *naïve realism*⁴⁹ allows Posner to avoid the sticky (and thoroughly situa-

46. See Hanson & Yosifon, *The Situation*, *supra* note 14; Hanson & Yosifon, *The Situational Character*, *supra* note 14; Benforado & Hanson, *Naïve Cynicism*, *supra* note 15; Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 15.

47. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW 1* (1972) [hereinafter *ECONOMIC ANALYSIS*, 1st ed.].

48. *Id.* at 1, 4.

49. Social psychologists define “naïve realism” as the human tendency to believe that we see the world through unfiltered lenses—in other words, as it really is. Our naïve real-

tionist) question of what lies behind his own intuition-based attributions.⁵⁰

This proclivity is also evident in his approach to being a judge,⁵¹ where he again places great faith in his own common-sense notions

ism allows us to infer that those who are similarly clear sighted will view things the same way. Thus, when encountering individuals who offer conflicting perspectives, we often assume that they lack information or that their lenses are more or less filtered. See, e.g., Lee Ross & Andrew Ward, *Naïve Realism: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103 (Edward S. Reed et al. eds., 1996). For a more complete review of the naïve realism literature, see Hanson & Yosifon, *The Situational Character*, *supra* note 14, and Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

50. Dispositionist naïve realism may be part of what has led Posner to “pragmatism”—an approach that purportedly allows him to reach “practical solutions to current problems” without getting “tangled in metaphysical questions.” Steve Kurtz, *Sex, Economics, and Other Legal Matters*, REASON ONLINE, April 2001, at <http://reason.com/0104/int.sk.sex.shtml>. As Larissa MacFarquhar asserts:

It is one of Posner’s most persistent and confounding convictions that it is possible to practice a purely “pragmatic” jurisprudence. He argues that since there is no objective way to discover the definitive meaning of an ambiguous law, judges should ignore highfalutin morality talk and simply make decisions based on what is sensible and conducive to social welfare—disregarding the obvious fact that deciding what is sensible and conducive to social welfare is a controversial business in which moral principles are inevitably at stake. This problem has been pointed out to Posner many times, and he has conceded it many times, but he always slides back again into his old ways.

Larissa MacFarquhar, *The Bench Burner*, THE NEW YORKER, Dec. 10, 2001, at 88. For some examples of related criticisms of Posner’s pragmatism, see Brian E. Butler, *Posner’s Problem with Moral Philosophy*, 7 U. CHI. L. SCH. ROUNDTABLE 325, 341-42 (2000) (reviewing RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999)) (“Posner’s . . . description of the pragmatic judge’s aim . . . is so bland as to be almost universally beyond reproach.”); Tibor R. Machan, *Posner’s Rortyite (Pragmatic) Jurisprudence*, 40 AM. J. JURIS. 361, 371-75 (1995); Frank S. Ravitch, *Can an Old Dog Learn New Tricks? A Nonfoundationalist Analysis of Richard Posner’s The Problematics of Moral and Legal Theory*, 37 TULSA L. REV. 967, 980 (2002) (book review) (“What is Legal Pragmatism according to Posner? . . . I still do not have a clear answer beyond vague calls for reaching the ‘best answer,’ considering consequences, and making things better.”); Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597, 600 (2000) (reviewing POSNER, *supra*) (“Posner’s writing . . . turns slippery and evasive (by analytical standards) when the time comes to explain what ‘pragmatism’ amounts to.”).

51. As noted above, we have tried to limit our discussion to Posner’s early tort scholarship that has been (and is) extremely influential in law and economics, and which is close in topic, if not in style, to Calabresi’s *The Costs of Accidents*. We deviate from that approach here and include a brief discussion of *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990)—one of Posner’s later court decisions—because it is one of his opinions that is explicitly based on legal-economic concepts and reasoning (applying some of his own early scholarly insights) and because it has found its way into casebooks as an example of such reasoning. See, e.g., RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 660-69 (7th ed. 2000). We include it also as an example of precisely the kind of case where Posner is situationally encouraged to be a dispositionist. Although it is beyond the scope of this paper, we suspect that a careful survey of all of Posner’s tort law opinions would reveal several patterns. For instance, we hypothesize that Posner is, for a number of reasons, more situationist as a judge than he was earlier in his career as a tort

and has little tolerance for arguments that do not align with what he believes to be the truth.⁵² Although Posner's rational-actor model is rarely made explicit in his judicial decisionmaking, it is generally implicit. Judge Posner's dispositionism is evident, for instance, in his well-known *Indiana Harbor* decision. When a toxic spill forced nearby residents to evacuate their homes near a South Chicago switching yard, Posner was faced with the question of who should be liable for the cleanup costs. From his opinion, it appears that he took the situation around the accident—the fact that large quantities of chemicals are transported through such populated areas—as given, natural, and efficient.⁵³ He seemed unable to imagine it being any other way—that fewer chemicals might be transported or that other routes might exist or even that different sorts of processes or vehicles might act as

theorist. See *infra* text accompanying notes 131-132 (suggesting that being a judge forces one to move beyond the most salient actors). Moreover, we suspect that Posner would be more or less situationist depending upon his situation in a particular case. For instance, where a district court has granted a defendant's motion for summary judgment, Posner (indeed, most judges) would, other things equal, tend to be more situationally sensitive given their charge of determining the existence of any genuine issues of material fact. Put differently, such cases require judges to search for facts that might preclude summary judgment, an inquiry that itself is likely to promote situationism. But other things are not always equal. In cases where the trial court ruled in favor of a dramatic expansion of tort liability, particularly when based on situational reasoning, Posner's dispositionism is likely to intensify. We will outline some of the reasons for that prediction below, but, very roughly, a decision that deviates substantially from the status quo and that is premised on situationist reasoning will tend to create a sense of system threat, which, in turn, will tend to increase a judge's urge to dispositionalize. *Indiana Harbor* was, we believe, such a case. Indeed, early in his opinion, Posner seemed to tip his hand by underscoring the fact that, although the lower court ruled in favor of holding the defendant "strictly liable" for harms caused by the spill of a hazardous liquid (acrylonitrile), "[n]o [other] cases recognize so sweeping a liability." *Ind. Harbor*, 916 F.2d at 1178.

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52. As MacFarquhar summarizes: "In hearing a case . . . [Posner] doesn't first inquire into the constricting dictates of precedent; instead, he comes up with what strikes him as a sensible solution, then looks to see whether precedent excludes it." MacFarquhar *supra* note 50, at 78. Posner admits to finding common-sense solutions very appealing:

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I'm not fully socialized into the legal profession . . . I'm like an imperfectly housebroken pet. I still have difficulty understanding—and this is something that most people get over in their first two weeks of law school—lawyers spouting things that they don't believe. If someone is obviously guilty, why do you have to have all this rigmarole?

Id.

53. *Ind. Harbor*, 916 F.2d at 1180-81. Posner's situational insensitivity in *Indiana Harbor* and, more generally, in much of his case analyses—both as scholar and judge—is developed in much greater detail in work now in progress. Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 15. Aspects of the decision relating to distributional concerns are examined in Chen & Hanson, Distribution Versus Efficiency, *supra* note 41.

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substitutes for rail cars.⁵⁴ Similarly, he seemed not to notice that existing arrangements may be a reflection of the existing liability rule, as much as if they are a reason for preferring that rule. What was salient to Posner were the actors close to the spill and the actors connected to the most salient cause of the spill—a broken outlet lid on a tank car. He knew that they were responsible, even though he did not know exactly how. And, thus, Posner asserted that the costs should lie where they fell because the accident was caused by someone's carelessness,

whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can . . . be shown in court, such accidents are adequately deterred by the threat of liability for negligence.⁵⁵

Posner sees the dispositions of individuals as variable and curable but the situation as static and constant.⁵⁶ In a similar vein, later in the

54. *Ind. Harbor*, 916 F.2d at 1180 (asserting that “[w]ith most hazardous chemicals . . . it is unlikely—and certainly not demonstrated by the plaintiff—that they can be rerouted around all the metropolitan areas in the country, except at prohibitive cost”).

55. *Id.* at 1179. One striking element of Posner's opinion is that it seems to contradict his own theory about how judges should, or can, reach such holdings. As Stephen Gilles has argued:

On the record before the court, Posner's conclusion seems perfectly sound. But surely his ability to arrive at that conclusion undercuts the premise on which he undertook the inquiry in the first place. To conclude that spills of [the hazardous chemicals] probably could not “have been prevented at reasonable cost by a change in the activity of transporting the chemical” is, in substance, to determine that, as a rule, it is not negligent to transport acrylonitrile by rail rather than by other means or by rail through metropolitan areas rather than rerouting to avoid them. That is a rule-based determination of the very same activity-level negligence claims that Posner assumed the negligence standard could not handle.

Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 337 (1992); see also Mark Geistfeld, *Should Enterprise Liability Replace the Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 656 n.137 (1998) (providing additional criticisms of Posner's reasoning).

56. But what if such carelessness cannot be shown? Or what if the lack of care was not of the sort that courts would deem negligent, even under the Learned Hand formula? It is not enough to show that more care might have been taken; even according to his view of negligence, one must show that there is cost-justified care that would have prevented the accident. And what if transporters and/or carriers were made strictly liable for the costs of such spills? Is it so clear that they would not have altered their conduct in numerous ways that Posner has either failed to consider or considered and dismissed? See generally Han-

case, when confronting the possibility that his ruling might leave nearby residents absorbing the costs of toxic spills, Posner again sees disposition:

Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare.⁵⁷

The brutality that Posner senses (or suspects that his readers will sense) is, we believe, a consequence of Posner's blindness to the situation or an assumption that the situation is immutable or otherwise not up for debate. From a dispositionist perspective, the analogy to "building your home between" airport runways seems rather appropriate. The runway resident has no right to complain about rattling windows, jet fumes, and that constant, deafening rumble, because he obviously got a reduced price on the real estate given its location. You asked for it; you got it. In the same way, if individuals are living near railroad tracks where major spills may occur, then they must be there out of choice. Presumably they contemplated the risks of toxic spills and got an appropriate discount, or perhaps they just like the smell. In any event, their actions reveal their preference-driven choices.

The "brutality" of this argument is its obliviousness to the situational influences that may have influenced the "choices" of nearby residents—that, for instance, many of the harmed individuals did not have the resources to live elsewhere in the city or that they may have underestimated the risk (or the likelihood that a judge hearing of such a spill would leave them to bear the costs).⁵⁸ As we will see,

son, Reyes & Schlanger, Attributional Positivism, *supra* note 15 (exploring those questions in detail).

57. *Ind. Harbor*, 916 F.2d at 1181. Posner makes this observation as part of a comparison between two "activity-level" (here, relocation) considerations. *See id.* ("It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic.").

58. Part of the effectiveness of the analogy is in the fact that, in the airport example, the annoyances are extremely salient and there are no other homes in the vicinity—it is very hard to imagine that anyone would build a home between airport runways and not know exactly what she was getting into. In such a case, the dispositionist-actor reasoning seems strong. With that attributional schema activated, it is easy to conclude, as Posner suggests, that the dangers in the toxic spill scenario are just as salient. Yet the two scenarios are quite different, as are the risks (and risk perceptions) of uncompensated toxic spills in a long-existing, densely populated residential area, on one hand, and of jets landing at a major airport on the other.

Judge Posner has emphasized to us that that portion of his opinion is really "just making the Coasean point . . . that one can't just assume that the best way to prevent an

where Posner is likely to glance over such considerations and to emphasize disposition, Calabresi is far more apt to see them as constraints that cannot be ignored.⁵⁹

b. Calabresi.—Where dispositionists are content to assume the validity of common-sense notions of human behavior, situationists are often skeptical.⁶⁰ Moreover, situationists seek to understand what moves us even if the resulting information is not pleasing (that is, not self-, group-, and system-affirming).

Calabresi’s understanding of the human animal in *The Costs of Accidents* is, on that dimension, significantly more situationist than Posner’s. Indeed, on a number of occasions he makes a central situationist claim: despite our notions to the contrary, we humans do not understand ourselves well.⁶¹ We tend to attribute causation, responsibility, and even blame to individuals, and to disregard the often more powerful role played by processes, systems, and situations.⁶² What many believe to demonstrate free choice is often highly constrained behavior—whether the unappreciated constraints come from within us (interior situation), from our environment (exterior situation), or, more likely, from some combination of the two.

(1) *Interior Situationism.*—Calabresi has long doubted that real humans are rational actors. Too often, he believes, people do not

accident or nuisance is to place liability on the injurer, because the victim may be (in Calabresi’s terminology) the ‘cheapest cost avoider.’” E-mail from Richard Posner, *supra* note 37.

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We do not mean to challenge the analytics of his “Coasean point.” Coase teaches that, were people rational actors and were transactions costs zero, then legal allocations of entitlements would be irrelevant. If transactions costs are high in that Coasean world, then efficiency-minded lawmakers would need to make a Calabresian calculation to determine who among the various actors is the “cheapest cost avoider.” Our point is directed, not at Posner’s Coasean analytics, but at the element of his narrative that would lead readers, by his own account, to see his argument as “brutal.” The brutal part, as we argued in the text, is the analogy that Posner so easily offers between living in a neighborhood near the Blue Island yard and “building your home between the runways at O’Hare.” It takes some hard-core dispositionism to see that “analogy” as apt.

59. As explored in other work, there are some exceptions to Posner’s hard-core dispositionism. At times, even in his work on accident law, he allows for the possibility that individuals may be imperfect processors of certain types of risk information, such as risks of consumer products. See, e.g., Croley & Hanson, *Rescuing the Revolution*, *supra* note 16, at 737; Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

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60. Cf. Hanson & Yosifon, *The Situation*, *supra* note 14, at 191-92.

61. See *id.*

62. See *id.* at 149-79; Hanson & Yosifon, *The Situational Character*, *supra* note 14, *passim*.

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make reliable judgments, no matter how well informed they might be.⁶³ As he points out:

[E]ven if individuals had adequate data for evaluating . . . [certain] risk[s], they would be psychologically unable to do so. The contention is that people cannot estimate rationally their chances of suffering death or catastrophic injury. Such things always happen to “the other guy,” and no amount of statistical information can convince an individual that they could happen to him.⁶⁴

Similarly, Calabresi argues that individuals may face cognitive constraints when deciding between temporal tradeoffs. As he puts it, people often “do not know best for themselves . . . where the choice is between immediate cost and long-range cost.”⁶⁵

Calabresi goes further than just doubting individuals’ abilities to calculate. He questions, too, whether individuals always begin with a set of preferences that they hope to satisfy and whether their actions constitute preference-determined choices. In other words, he challenges not just the “rational” part, but also the dispositionist (actor or chooser) part, of standard economic models.

As evidence of the malleability of our inner wants or of the possibility that our behavior may not reveal those wants, for instance, Calabresi points to the fact that “people do not save up for doctors’ bills, do not provide for their retirement, do not insure adequately, and yet are basically happy if they are forced to do so.”⁶⁶ Removing choice from people may, Calabresi suggests, leave them better off—a possibility that flies in the face of hard-core dispositionism.

(2) *Exterior Situationism.*—At points, Calabresi also takes seriously non-obvious influences in an actor’s environment. In that way, his work is consonant with the bulk of social psychological evidence.

In some circumstances, it is hard to miss the impact of situation on people’s conduct. People do not trust, and the law does not enforce, “choices” made under the threat of direct physical violence. A

63. See THE COSTS OF ACCIDENTS, *supra* note 4, at 55-56.

64. *Id.* at 56.

65. *Id.* at 57. It has taken several decades for economists to begin taking seriously the possibility that individuals are so inept. For a summary of the more recent evidence on intertemporal biases and optimism bias, see Hanson & Yosifon, *The Situational Character*, *supra* note 14. But in recent years, the phenomena Calabresi highlighted have been named and empirically verified, and now provide the foundation of a new version of economics known as, among other things, *economic behavioralism*. See *id.*

66. THE COSTS OF ACCIDENTS, *supra* note 4, at 57.

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signature does not reveal consent when the signer has a gun to his head. But when situation is camouflaged even slightly, we tend to lose sight of it and presume that “choices” are made freely.

Probably the most striking and famous demonstration of the power of camouflaged situation was Stanley Milgram’s series of experiments, in which ordinary people were induced to (they believed) administer massive shocks to human subjects.⁶⁷ To Milgram’s surprise—the power of situation was, at first, invisible even to him—most ordinary individuals did not require much coaxing to engage in such heinous conduct.⁶⁸ As Milgram was to demonstrate through hundreds of related experiments, it was the unseen situation behind the conduct, far more than the dispositions of the individuals involved, that explained the disturbing behavior.⁶⁹ Still, it is extremely difficult for humans (particularly Westerners and most especially economists) to attribute the subjects’ behavior in Milgram’s studies to anything other than free choice and wicked dispositions.

Calabresi is not like most economists. He recognizes that “choice” is not always what it seems and that hard-to-see situational factors are often driving forces. Indeed, in *Ideals, Beliefs, Attitudes, and the Law*, Calabresi goes out of his way to warn readers about the illusion of free choice, by comparing two hypothetical settings.⁷⁰ In the first, the power of situation is as salient as a gun to the head: a woman is given a choice by Nazi doctors to either take part in dreadful experiments over a six-month period or spend the time in a concentration camp.⁷¹ There, the constraint on free choice is clear.

In the second setting, the situational influence is less evident, and it is much easier to perceive volition: terminally ill cancer patients are given the choice to take part in a vaccination experiment that would increase their risk of death but potentially save the lives of some babies stricken with herpes meningitis. Yet, as Calabresi highlights, in the second scenario a

question remains—was that which was treated by all concerned (including the hospital experiment committee which

67. For a more comprehensive description of Milgram’s experiments and many subsequent experiments that also demonstrate the unseen power of situation, see Hanson & Yosifon, *The Situation*, *supra* note 14, and Hanson & Yosifon, *The Situational Character*, *supra* note 14. For those wanting to know more about Milgram’s situation, we recommend the recent biography, THOMAS BLASS, *THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM* (2004).

68. Hanson & Yosifon, *The Situation*, *supra* note 14, at 152.

69. *Id.* at 152-54.

70. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW*, *supra* note 44, at 4-5.

71. *Id.*

approved the experiment) as a free choice in fact a free choice, or was it a decision—worth making perhaps, but made by the researcher and the committee—in which individual choices played little role, except to ratify the fact that the researcher had done “the best he could” and the experiment was worthy?⁷²

With such examples, Calabresi underscores that human conduct is not always a reflection of free actions evincing a deep, stable set of preferences. Our behavior might be highly constrained, if not fully determined, by factors as seemingly innocuous as a doctor’s white lab coat. In his judicial opinions, Calabresi has similarly been willing to hold parties liable owing to their situational influence.⁷³

We should emphasize that Calabresi is still presumptively a dispositionist. As he states, “[w]e do not need to deny that there are many areas where people do know best for themselves in order to affirm that there are some where they do not.”⁷⁴ Our focus in this piece is to show Calabresi’s relative situationism within the law and economics movement, and, in particular, to suggest that Calabresi is significantly more sensitive to the situation than Posner.⁷⁵

2. *Law’s Goal Schema.*—Scholars’ positions along the dispositionism-situationism spectrum can also be compared by scrutinizing what end or ends they believe the law should serve—that is, by looking at

72. *Id.* at 4 (footnotes omitted).

73. *See, e.g.,* *Taber v. Maine*, 67 F.3d 1029, 1036 (2d Cir. 1995) (employing an expansive reading of the employer-benefit requirement in holding the military liable for a drunken sailor’s off-base drunk driving accident and reasoning that, “in the end, ‘employer-benefit’ is significant only because it is one way of showing that the harm that drinking causes can properly be considered a cost of the employer’s enterprise”).

74. *THE COSTS OF ACCIDENTS*, *supra* note 4, at 57; *see also id.* at 55-56 (“This approach does not question the general proposition that people know what is best for themselves by and large but is based instead on the view that in the area of accidents they often do not.”). In these examples, Calabresi is referring, in part, to the presence or absence of knowledge—not the presence or absence of dispositionist choice. Still, we emphasize this language because we believe it reveals Calabresi’s presumption that individuals do, and should generally, choose for themselves (based on their knowledge).

75. Calabresi might have been more situationist had he been writing about accident law at a time when the research on situationism was as robust as it has since become. Although Calabresi’s situationist insights are in sync with psychological evidence of the time, many of his psychological claims are offered with little support. In pointing out the irrationality of human behavior in insuring against risk, for instance, Calabresi writes, “[s]ome adduce evidence of this psychological truth from the fact that people are much more likely to carry liability insurance (for injuries ‘the other guy’ may receive) than personal accident insurance (for injuries they may receive).” *Id.* at 56 (citing ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* 128 (1964)). *See infra* Part II.B.4 for more on how Calabresi became familiar with the insights of social psychology.

the *goal schema* (positive or normative) imagined for the laws being analyzed.⁷⁶

As will become clear, the goal envisioned for the law depends significantly upon the model actor envisaged.⁷⁷ Where, as in the most dispositionist accounts, the human animal moves single-mindedly in pursuit of her (usually narrow) preferences, the goal of law is to help humans satisfy those preferences. Where, as in the situationist account, the human animal is complex and moved by many forces, the ends of law will tend to be similarly complex. Any law devoted to increasing human welfare or altering human conduct will need to take those various, complex ends and factors into account.

a. Posner.—Again, since Posner’s narrow focus in analyzing accident law has been thoroughly covered elsewhere,⁷⁸ we will only offer a brief overview of his position. In Posner’s analysis of accident costs, the law’s goal is quite simple—the maximization of wealth. Posner’s thesis (with Bill Landes) is “that the common law of torts is best explained as if the judges who created the law through decisions operating as precedents in later cases were trying to promote efficient resource allocation.”⁷⁹ Individuals are rational dispositionists attempting to maximize their wealth, and the law is, in service to those individuals, designed (consciously or not) to maximize the social wealth that individuals compete for.⁸⁰ A key means of advancing that end is, according to Posner, for the law to encourage contracting and market transactions, which permit resources to travel toward their highest valued use, and to discourage anything that interferes with

76. In other work, one of us, with Ron Chen, identifies three levels of policy schemas—the meta-level schema, defining the general purpose to be served by all policy; the macro-level schema, defining the purpose to be served by a particular subject in law (from anti-trust to family law); and the micro-level schema, defining the purpose to be served by a specific area of law (such as, say, defamation law within tort law). See Chen & Hanson, *Categorically Biased*, *supra* note 15, at 1249. Roughly, this Section compares Posner’s and Calabresi’s macro-level schemas for tort law—though the distinctions may be less significant for Posner, whose schemas are fairly uniform across different levels of analysis.

77. See Hanson & Yosifon, *The Situational Character*, *supra* note 14.

78. See authorities cited *supra* note 59.

79. LANDES & POSNER, *supra* note 16, at 1.

80. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-36 (1972) (arguing that judges pursued efficiency goals even before economic logic of this posture was fully understood); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487-88 (1980) (arguing how wealth maximization is an “ethically attractive norm in common law adjudication”); Richard A. Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT’L REV. L. & ECON. 131, 133 (1984) (arguing that wealth maximization is the only “value that courts can do much to promote”).

those mechanisms:⁸¹ “By a process of voluntary exchange, resources are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest. When resources are being used where their value is highest . . . , we say that they are being employed efficiently.”⁸² Posner’s strongly presumptive deference to contracts and markets also evinces his dispositionism.⁸³

Relatedly, Posner has, with Bill Landes, made the case that the law should defer to customary practices in determining what injury-causing conduct is or is not negligent (that is, inefficient or efficient):⁸⁴ “If transaction costs are low, an optimal allocation of resources to safety as to other activities will be achieved by negotiation regardless of the liability rule in force. In these circumstances whatever is customary is, at least prima facie, optimal.”⁸⁵ That logic, too, turns on dispositionist presumptions: custom reflects choices, choices reflect preferences, and, thus, what is customary is good.⁸⁶

In the name of narrowing their model even further, Landes and Posner base their analysis on “an extremely simple economic model of tort law—a model in which, for example, risk aversion and therefore insurance play no role.”⁸⁷ Thus, even when focusing on efficiency, Posner eliminates considerations that most scholars, Calabresi first among them, not only include, but also consider extremely important.⁸⁸

Overall, Posner is quite resolute in disregarding or dismissing possible non-efficiency ends of law,⁸⁹ another manifestation of his dispositionist view of the law’s goals. With respect to “distributional concerns,” for example, Posner writes, in a review of Calabresi’s *The Costs of Accidents*, that although the goal of bringing about an efficient level

81. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 9-16 (6th ed. 2003).

82. *Id.* at 9-10.

83. Because individuals are perceived as acting to pursue preferences that only they can directly access, contracts and markets are viewed as the only reliable means of ensuring allocative efficiency. *See generally* Hanson & Wright, *In the Driver’s Seat*, *supra* note 15.

84. LANDES & POSNER, *supra* note 16, at 131–39.

85. *Id.* at 132.

86. *See* Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 15 (examining Landes and Posner’s analysis of custom in greater detail).

87. LANDES & POSNER, *supra* note 16, at 22. That is not to say that Posner and his co-authors do not discuss and offer justifications for that exclusion. They do. *See id. passim*.

88. *See* Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 15 (providing a more expansive critique of Landes and Posner’s decision to exclude insurance considerations).

89. Again, here, we are only highlighting a conclusion that is defended in far greater detail in other work. *See* Chen & Hanson, *Distribution Versus Efficiency*, *supra* note 41 (reviewing, analyzing, and comparing Posner’s and Calabresi’s arguments about non-efficiency considerations).

of accident costs may be “subject to the constraint that the methods chosen to do so be consistent with ‘justice[,]’ [i]n practice this constraint turns out to be rather unimportant” because notions of justice likely correspond with efficiency considerations.⁹⁰

Posner made his distaste for distributional concerns evident, too, in his *Indiana Harbor* decision. There he underscored his view that the law is concerned more with the “*allocative* rather than the *distributive*,” by which he meant “that the emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there.”⁹¹ According to Posner, the plaintiff’s attorney strayed from that schema at oral argument where she pointed “out that [the defendant] is a huge firm and the [plaintiff is a] fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred.”⁹² Posner’s response was characteristically terse: “Well, so what? A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability.”⁹³ Non-efficiency concerns simply do not have a place in Posner’s playbook.⁹⁴

90. Richard A. Posner, Book Review, 37 U. CHI. L. REV. 636, 638 (1970) [hereinafter Book Review]; see also LANDES & POSNER, *supra* note 16, at 13–14 (making a similar argument); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1983) (same); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 127 (1979) (noting that “the purely formal characteristics of a just legal system . . . can also be derived from the wealth-maximization principle”); Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 777-78 (1975) (same).

91. *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181-82 (7th Cir. 1990).

92. *Id.* at 1182.

93. *Id.*

94. Although our focus is on the narrowness of Posner’s dispositionist gaze, there are other problems with Posner’s rebuke. One problem, for instance, is that the party’s size and wealth may have deterrence—that is allocative—implications. For instance, an insolvent defendant may not respond to any general deterrence message that tort law attempts to send.

Also, in response to an earlier draft of this Article, Posner indicated that we may have misunderstood his point about “deep pockets,” which, he explains, is that “[i]ncreased liability will be experienced by the firm as increased marginal costs, which will lead to a price increase and therefore to higher prices for consumers, and probably also lower employment because the price increase will reduce the demand for . . . the firm’s products. The result is that the distributional effect of increased liability is uncertain.” E-mail from Richard Posner, *supra* note 37. Perhaps we *have* misunderstood his original point; in any event, we will confess to now being confused. First, we are not clear on how that “distributional effect” would connect to the “deep pockets” issue that we thought he was addressing in his opinion. Second, if the point is that one cannot easily “trac[e] the incidence of a cost” resulting from an allocation of liability, *Ind. Harbor*, 916 F.2d at 1182, then that too would seem as lethal to an efficiency analysis as it is to a distributional analysis. Very simply, knowing the deterrence effects of a rule depends upon knowing who bears the costs.

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b. *Calabresi.*—In *The Costs of Accidents*, Calabresi focuses mostly on “reduc[ing] the costs of accidents.”⁹⁵ While on the surface this seems to align with Posner’s goal schema—cost minimization and wealth maximization being two sides of the same coin—Calabresi has a notably different understanding of the details.

Moreover, that “distributional effect” does not seem to be a *distributional effect*, as conventionally understood among legal economists. Indeed, it seems more accurately described as an allocative efficiency effect—specifically, the prototypical *activity-level* effect. See generally Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 67–75 (1991) (describing and examining the care-level and activity-level effects of different products liability rules and challenging the conventional wisdom that courts are any better able to “know” the care-level effects of a liability rule than they are the activity-level effects). As one of us has noted in work now in progress, it is striking that Posner otherwise omits conventional activity-level issues when arguing in *Indiana Harbor* that there was no activity-level justification for strict liability. See Hanson, Reyes & Schlanger, *Attributional Positivism*, *supra* note 15; see also *id.* (arguing that activity-level considerations tend to receive less attention by courts than care-level considerations, not because they are, in fact, more costly for courts to estimate, but because they tend to be, with exceptions, attributionally less salient).

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We had thought that Posner, in his *Indiana Harbor* opinion, was echoing the fairly standard economic argument that courts applying legal rules should focus on allocational concerns and ignore distributional concerns, in part, because they lacked the expertise and mandate to make the necessary value judgments. Calabresi makes the critique this way:

Unfortunately, the use made of economic analysis of law by many of its practitioners—for example, Judge Richard Posner—lends itself precisely to the criticisms that have been thrown at it. These practitioners seem almost to say that because “we” cannot say anything “scientific or scholarly” about starting points or distributional values, we must ignore them and analyze law only on the basis of economic efficiency defined narrowly to mean wealth maximization. Elsewhere I have tried to demonstrate that the critics of economic analysis of law are correct in that, without a basis in these other values, wealth maximization is a meaningless concept. My claim is that Posner and his followers must be making surreptitious assumptions about starting points and about desirable distributions of wealth in order to define that “wealth” which they claim law does (or should) maximize.

Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833, 833-34 (1984) (footnotes omitted).

On a slightly different point, Posner’s description of a corporation as a nexus of contracts is no more perfect a metaphor for a corporation than is the “person” metaphor that may or may not have been imagined by the plaintiff. And the fact that tort claimants typically do not have a contractual relationship with defendants leads one to wonder about the wisdom of deferring to that metaphor in this context. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1920 (1991) (reasoning that contract law should not guide liability determinations with respect to tort creditors of corporations since unlike contract creditors they cannot evaluate the creditworthiness of the corporation before an injury occurs); Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147 (1998) (discussing the implications of basing tort liability on the contractual relationships among corporate entities).

95. THE COSTS OF ACCIDENTS, *supra* note 4, at 24; see *id.* at 26 (“Apart from the requirements of justice, I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”).

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Instead of excluding various efficiency considerations because of their complexity, Calabresi makes his analysis more complex in order to include various efficiency considerations. Indeed, in dividing cost minimization into several subgoals, he underscores that, for each one, the analysis is more complicated than generally presumed. With respect to the primary deterrence subgoal, for instance, Calabresi emphasizes that how one frames the “cheapest cost avoidance” question can have important implications for overall cost reduction:

Because the interaction among activities is complex, accident cost allocations made only on the basis of the cheapest cost avoidance in each accident case or only on the basis of cheapest cost avoidance in each *type* of accident case may not *in sum* be optimal in terms of total reduction of such accident costs.⁹⁶

Looking at each accident scenario in isolation may be simpler, but it will not get us to the desired outcome.

Part of Calabresi’s project is, thus, to untangle the intricate relationships between the many questions we ask in accident law. By maintaining a broad focus, Calabresi identifies the fact that our goals are often interconnected and that choosing between them involves tradeoffs:

In concentrating on any one goal, we may lose sight of the fact that no system of accident law should be designed with only one goal in mind. The significance of some goals may depend on the existence of others. If primary accident cost avoidance were not a goal, for example, the compensation aim could very easily be discussed in terms of its ideal solution—a system of general social insurance—and this may be precisely what is at the root of some of the approaches I have categorized as social insurance and welfare legislation plans. But given the goal of primary accident cost avoidance, general social insurance may not always be the best solution. Conversely, primary accident cost avoidance may not, standing alone, suggest any particular system.⁹⁷

It is a world of webs and pushing on one strand may pull on another. As Calabresi identifies, for example, there is a “basic conflict between the spreading we want and the allocation of accident costs according to accident-proneness (primary cost deterrence) we seem to need.”⁹⁸ Most commentators, Calabresi claims, would miss that

96. *Id.* at 156.

97. *Id.* at 37.

98. *Id.* at 50.

conflict and blindly “proceed on the assumption that wide loss spreading is the goal, while at the same time bemoaning the fact that there is not greater differentiation into risk categories.”⁹⁹ Calabresi sees the fine silk threads glinting in the sun and moves in for closer observation.¹⁰⁰

Calabresi argues that it is no excuse to ignore a concept like justice just because it seems “negative and elusive” or is difficult to fit into a model.¹⁰¹ Instead of celebrating closure or more simplistic analyses, Calabresi delights in the nearly endless options available to policymakers and the choices required of them in balancing the many concerns. As he puts it,

in considering the bases of accident law, there are virtually no limits on how we can allocate or divide the costs of accidents. What we choose, whether intentionally or by default, will reflect the economic and moral goals of our society. Accordingly, one aim of this book will be to suggest which goals and subgoals are implied in different possible systems of accident law and what importance different possible allocations must in fact give to each of the different goals and subgoals.¹⁰²

Calabresi does not stop at the “goals” and “subgoals” of accident law. Even “outside goals” can be significant in shaping the law.¹⁰³ For instance, Calabresi points out how powerful desires for procedural and substantive consistency both in respect to other fields of law and within accident law may act as a straitjacket on what policy approaches will be considered fair by the public.¹⁰⁴ Elsewhere he explains how a regime that “exacerbates unequal distribution of income or favors monopolies will violate our moral framework”¹⁰⁵ and in appearing unjust

99. *Id.*

100. And ultimately, Calabresi suggests, we must consider not just this particular web but all the other webs that might be built in other patterns, in other crooks of trees, in other forests:

[W]e must always keep in mind the cost of establishing and effectuating the approach, as well as the benefits the approach is expected to bring about. These costs and benefits, moreover, must be compared with the costs and benefits of alternative approaches. We must, in short, always ask whether the game is worth the candle, not only in terms of the cost of the candle but also in terms of other games we might be playing.

Id. at 23.

101. *Id.* at 25; *see id.* at 24 (“What, then, are the principal goals of any system of accident law? First, it must be just or fair; second, it must reduce the costs of accidents.”).

102. *Id.* at 23.

103. *See id.* at 31-33 (discussing goals outside of accident law).

104. *Id.* at 293-94.

105. *Id.* at 32.

will be less readily accepted by the public.¹⁰⁶ More recently, he has also stressed the value of closure—policy decisions coupled with legitimating reasons—in policymaking.¹⁰⁷

106. *Id.* As Calabresi points out:

Whether this is a good result in any given case will depend not only on whether there are outside means for redressing the undesirable outside effects of the proposed system of accident law, but also on whether the undesirable effects will *in fact* be redressed if the system of accident law is adopted.

Id. at 32-33. Elsewhere, Calabresi writes of the potentially distorting effects of our morality schemas:

Moral attitudes are . . . complex. They involve, at the very least, whole categories of acts that have come to be considered “good” and whole categories that have come to be considered “evil.” No system of accident law can operate unless it takes into account which acts are deemed good, which deemed evil, and which deemed neutral. Any system of accident law that encourages evil acts will seem unjust to critic and community even if economically it is very efficient indeed.

Id. at 294. Again, echoing the insights of social psychologists on the powerful, and often harmful, effects of stereotyping, he continues:

We have, over time, stigmatized certain acts because of the accident costs we think they cause; we have stigmatized other acts for other reasons. Accident reduction plans involving acceptance of acts in the latter category will be considered just or fair by the community much less readily than plans involving the former category regardless of whether a critic could argue as to each category that the reasons why the acts were originally deemed wrongful no longer apply.

Even within the former category I have suggested that we must not anticipate that an expected reduction in accident costs will change the public’s attitude quickly or even in some cases, ultimately. Moral attitudes develop and decay slowly. They become encrusted with significance that is often quite foreign to the situation that engendered them. The longer the history of a moral attitude toward an act, the more likely it is that the attitude will have become separated from its cause and the more difficult it will be to change the attitude even if the cause is no longer valid. All this is just a way of saying that, almost by definition, “moral” status has a strength of its own apart from the original source of the status.

What I have said of individual acts is also true of legal systems. Over time, they too become encrusted with moral imperatives.

Id. at 296.

Indeed, because Calabresi is attuned to the way humans actually think, he takes a different, less sanguine view of the law than Posner does. In Calabresi’s situationist view: “We must always remember that the community’s sense of justice is not, and never can be, simply a rational reaction, and that it must be reckoned with whether or not it is sensible.” *Id.* at 294. Reason and efficiency are not pulling the strings: “People may require a one-to-one world of payment and compensation even if logic and economics make it unnecessary and even, in some sense, unjust.” *Id.* at 304.

107. As Calabresi & Bobbitt write:

Patternless tragic decisions, moreover, exacerbate one of the process costs to human emotions Deep anxiety and frustration are a necessary part of a process which makes a crucial decision against someone, but which fails to explain why. One needn’t read Kafka to get a sense of the costs of such a process; we have all experienced analogous frustrations with results which, because unexplained, seem arbitrary.

CALABRESI & BOBBITT, *supra* note 44, at 61.

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With so many goals on the table, the policymaker's decision is significantly more challenging, not only substantively, but also procedurally. With Calabresi, market outcomes do not enjoy the privilege given to them by Posner and many other legal economists, because they provide just one of numerous legitimate benchmarks. In fact, market-fostering or -mimicking policies may not be good policy:

[A]lthough the market can help us to decide how far we wish to go to avoid accidents, it cannot solve the whole problem for us. And when we overrule the market and ban an accident-causing activity that can pay its way or subsidize an activity that cannot, we are not violating absolute laws. We are making the same type of choice between accidents and accident-causing activities that the market makes, but we are choosing, for perfectly valid reasons, to make it in a different way. We are preferring a collective approach or method (e.g. because it enables consideration of nonmoney costs which the market cannot deal with, or because in the particular instance it is cheaper) to a market approach, even though the market might allow for individual differences in tastes and desires that the collective decision might tend to ignore.¹⁰⁸

Thus, for Calabresi the danger lies not in the lack of surety (and clear direction) involved in removing "sacred cow status" from market considerations, but in continuing to treat tools of human betterment as ends in themselves.

In those and other ways,¹⁰⁹ Calabresi is a relative situationist in his analysis of the goals of accident law. Where the choice is between contending with difficult nuance and sacrificing realism, he does not hesitate.

3. *Attributional Schema.*—The third way to compare scholars' attributional tendencies is to examine their *attributional schema*. More specifically, this Section will examine the extent to which each scholar

108. THE COSTS OF ACCIDENTS, *supra* note 4, at 20.

109. In his more recent work, Calabresi has tied his situation-dependent actor more closely to conceptions of law. To dispositionists, recall, preferences are given, independent of situation, and law is intended to allow for the expression of those preferences through markets or, when absolutely necessary, market-mimicking alternatives. Calabresi's view, despite his training in economics, allows for the possibility that preferences may sometimes be context-dependent and variable. Consequently, he does not make the comforting assumption that lawmakers should treat preferences as given. As Calabresi points out, "[l]aw, unlike economics, is not concerned only, or even primarily, with reduction of costs, 'given tastes.' It is fundamentally concerned with *shaping* tastes." CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 84.

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considers the role of situation in the creation of accident costs. Where the scholar tends to focus mostly or solely on the plaintiff and defendant, as the existing laws define them, in his or her analysis, he or she can be said to be relatively dispositionist. Where, in contrast, the scholar takes seriously the possibility of less obvious causes and larger, more systemic dynamics in creating accident costs, that scholar would be described as relatively situationist.

a. Posner.—In numerous ways, Posner’s analysis suffers significantly from the fundamental attribution error. First, he seems to be unaware that such a bias exists and overlooks the very distinct possibility that it has played a role in judicial judgments over the last two hundred years.¹¹⁰ Thus, he tends to accept the causal attributions of courts and ignores the risk that his efficiency analysis is skewed by the same error. More generally, he seems fairly uninterested in looking for possible systemic (situationist) contributors to accident costs. Instead, he sees the most evident actors—the direct injurer and victim—as the most relevant. And between those two parties, he tends to presume that the victim is primarily responsible, reflecting, we think, the salience of the injured party and the dispositionist presumption that outcomes reflect choices. To be sure, those dispositionist presumptions are rebuttable, but the threshold for doing so is set high, reflecting the strength of the dispositionism.

To better understand Posner’s attributional inclination, it may first be helpful to provide some contrast.

b. Calabresi.—Calabresi’s attributional scope when confronting the problem of accident costs is far broader than Posner’s. Indeed, the very title of his book, *The Costs of Accidents*, is a telling clue that Calabresi is interested not in making sense of tort doctrines and the practices that resolve disputes and allocate losses between prototypical “injurers” and “victims,” but in addressing the problem of system-wide accident costs. Consequently, Calabresi is less interested in determining which of those two parties may have behaved inefficiently and far more interested in understanding what institutional and systemic (that is, situational) forces give rise to many such accidents.

In *The Costs of Accidents*, Calabresi repeatedly cautions readers not to be distracted by the salient parties involved and to look to the situation. Early on in the book, he calls it a “myth” “that the costs of an accident [must] be borne only by the victim or by the party who may

110. This characterization of Posner’s dispositionist presumptions is developed more expansively in Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 15.

in some sense be said to have injured him.”¹¹¹ And later he reminds readers that

The effect of case-by-case decisions is to center on the particular or unusual cause of an accident. If one asks, as case-by-case determinations tend to do, “What went wrong in this case?” the answer will most likely center on the peculiar cause. Yet there is a very good argument for the notion that the cheapest way of avoiding accident costs is not to attempt to control the *unusual* event but rather to modify a recurring event. It may be that absentmindedness is a cause of one particular accident, too much whiskey the cause of another, and drowsiness the cause of a third. But it may also be that a badly designed curve or inadequate tires are causes of each of these as well.¹¹²

The fault system, according to Calabresi, harmfully narrows the scope of analysis. While Posner tends to zoom in on the conduct of the parties in a lawsuit, Calabresi pans out to the situation. In large part because of their attributional proclivities, the two scholars have very different opinions about the tort system. While Posner celebrates the efficiency of negligence law, Calabresi laments its myopic nature. In his view, “[t]he fault system, because it centers on the possible *particular* cost avoider, is very likely to ignore the recurring cost avoider and hence fail altogether to consider some potential cheapest cost avoiders such as highway builders or tiremakers.”¹¹³

Posner has addressed this apparent difference between his approach and Calabresi’s. He argues that, if in fact there were some way to have prevented an accident at a cost lower than the burdens of precaution for the parties to a lawsuit, then you can be sure that there would soon enough be new parties to that lawsuit. There is nothing “inherently bilateral” about tort litigation.¹¹⁴ According to Posner, “a plaintiff who was injured in an automobile accident that would have been avoided either if the driver of the other car had been sober or if the tires of that driver’s car had not been defective would . . . sue *both* the driver of the car and the manufacturer of the tires.”¹¹⁵ Thus, if a party is not brought into a lawsuit, then that party must not have been an efficient accident cost avoider. The burden is on the obvious actors—the victim and the direct injurer—to show that the other situa-

111. THE COSTS OF ACCIDENTS, *supra* note 4, at 17.

112. *Id.* at 256.

113. *Id.*

114. Richard A. Posner, *Guido Calabresi’s The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 20 (2005) [hereinafter *A Reassessment*].

115. *Id.*

tional actors are at fault. Until that can be shown decisively, “the manufacturer of the automobile, the contractor who built the roadway, [and] the city that installed (or failed to install) the traffic signals” remain literally “stranger[s] to the proceeding.”¹¹⁶

Calabresi is less inclined to impose such a burden. For a situationist like Calabresi, these individuals are not “strangers to the proceeding” but potentially important participants in the multilateral, interconnected, web-like production of accident costs.¹¹⁷

Posner’s response assumes away the problem, which, again, is that tort law is subject to the fundamental attribution error. Thus, if accident costs are the consequence of numerous, hard-to-see situational forces, there is little hope that new parties will be added to a lawsuit, because tort law—indeed, virtually all of our laws¹¹⁸—are themselves highly dispositionist. They have no place for such situationist claims.¹¹⁹ That Posner has trouble appreciating this argument is, we think, a symptom of the fact that the situation is itself difficult to appreciate—another symptom of dispositionism.

4. *Lawmaker Schema.*—A fourth way to compare scholars’ attributional propensity is to examine their *lawmaker schema*¹²⁰—that is, the extent to which the policy responses offered by scholars reflect attention to situational tendencies in those who apply the law. For instance, is the scholar mindful of the human tendency to engage in, say, defensive attributions or system legitimation, or does the scholar

116. Posner, Book Review, *supra* note 90, at 645.

117. To Calabresi, the process of assigning causation—indeed, the meaning of causation—is extremely complex. Posner, on the other hand, sees the area of accident law as a relatively easy one to figure out, particularly given “the fact that accidents, unlike some other important subjects of interest to the student of legal institutions, such as collusion, are not covert.” *Id.* at 648. Because much of what is important is visible, the efficiency calculation is relatively straightforward.

It is noteworthy that Calabresi was a leader in challenging simpler notions of causation upon which much legal theory and lay understanding had been based. He was perhaps the first to suggest the economic significance of probabilistic notions of causation. See Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

118. See generally Hanson & Yosifon, *The Situation*, *supra* note 14, at 299-303 (describing the dispositionist presumptions of several areas of law); Hanson & Yosifon, *The Situational Character*, *supra* note 14 (same); Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 15 (same with respect to tort law).

119. See generally Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 15 (describing how the obesity epidemic is, in large measure, a reflection of situational forces and how, because of the dispositionist presumptions, laws and lawmakers have done little to address the epidemic).

120. We use the term “lawmaker” broadly to include all those individuals or institutions that might help write or apply laws—from legislators to jurors.

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presume that the unexamined interpretations of those who decide cases can be trusted as unbiased?¹²¹

a. Posner.—When Posner explicitly describes what moves lawmakers, he is generally quite dispositionist in his approach. Lawmakers are more or less presumed to be pursuing their own ends.¹²² And often those are the prototypical ends of the rational actor—money, influence, votes, and the like.¹²³ Judges, though, are a little different than other lawmakers. As Judge Posner put it in relatively recent work, the “insulation” of judges (particularly federal appellate judges) “from accountability . . . makes their behavior . . . a challenge to the economic analysis of law, and more broadly, to the universalist claims of the economic theory of human behavior.”¹²⁴

It is, in part, because of that judicial independence that Posner, in many of his earlier writings on tort law, has little to say about the underlying goals of the judges whose opinions he is explaining.¹²⁵ But that poses a problem, because it is hard to understand why self-interested judges would tend to act *as if* their goal were to serve the public interest—that is, the goal of wealth maximization.

Feeling the tension, Landes and Posner concede in their book on the economic structure of tort law that they “have not explained the incentive of judges to cooperate in the production of this good.”¹²⁶ Landes and Posner assert that judges’ motives are probably sufficiently public-spirited (and their situations sufficiently constrained) that they will act more or less in the public interest:

[O]f course judges are not completely independent; and persons are not likely to be elected or appointed as judges if they do not share the basic values of the dominant political

121. In other work, the question of how to look at lawmakers from a critical realist perspective is developed in greater detail. See Chen & Hanson, *Categorically Biased*, *supra* note 15, at 1219-20, 1222-28; Hanson & Yosifon, *The Situational Character*, *supra* note 14, at Part IV; Ronald Chen & Jon Hanson, *Theorizing Illusion: Some Laws Behind Our Laws* (2005) (unpublished manuscript, on file with authors).

122. *E.g.*, Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 340 (1974).

123. See, *e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (indicating that lawmakers are prepared to trade laws for “campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes”).

124. RICHARD A. POSNER, *OVERCOMING LAW* 112 (1995) [hereinafter *OVERCOMING LAW*].

125. See LANDES & POSNER, *supra* note 16, at 19 (“To regard judges as simply the agents of legislators who have decided to provide an efficient law of torts as they have decided to provide for the national defense ignores the fact that the judicial office is hedged about with various safeguards designed to make judges independent of legislative preferences.”).

126. *Id.*

groupings in society. We shall not attempt in this book to develop a theory of judicial incentives and relate it to the positive economic theory of tort law, but we feel on fairly safe ground in assuming that judges are good enough agents of society's dominant groups that if an efficient system of tort law is demanded judges will supply it—although less consistently than if they were perfect agents.¹²⁷

We think it revealing that, in this instance, Landes and Posner are notably situationist—emphasizing the incomplete autonomy of judges and the powerful effects of the judicial selection processes, shared values, and the demands of “society's most dominant groups”—in the service of their conclusion that judges act *as if* dispositionally motivated to create rules that maximize wealth.¹²⁸

Posner, like most of us, tends to look to situation only when motivated to do so.¹²⁹ And, here, the motive for Posner to do so is fairly strong. Where the dispositions of most actors are generally presumed to be quite selfish and where the judge-made law is said to advance public-interested rules, there needs to be a story for why judges would create such rules. It is *situationism* to the rescue—but a limited and ad hoc situationism meant only to advance the larger dispositionist analysis.¹³⁰

There is a related, but slightly different, point to make about Posner's acknowledgement of situation. Posner has attributed his own change in views, in part, to a shift in his own situation from that of a full-time academic to that of a judge. Indeed, he admits that his time

127. *Id.*

128. The validity of that positive claim is itself a subject of considerable doubt, but that is a topic of other work. See, e.g., J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (reviewing LANDES & POSNER, *supra* note 16); Hanson, Reyes & Schlanger, Attributional Positivism, *supra* note 15. For a criticism of Posner's attempts to read economic efficiency goals into state statutes, see Paula M. Taffe, *Imputing the Wealth Maximization Principle to State Legislators*, 63 CHI.-KENT L. REV. 311, 312 (1987) (“Judge Posner imputes to the legislature efficiency concerns that are not supported by the language of the statute, the available legislative history or, in one case, statements of the state supreme court. . . . [T]he use of economic analysis in statutory interpretation involves unacceptable speculation and, more importantly, is violative of the judicial role and potentially violative of federalism concerns.”).

129. See Hanson & Yosifon, *The Situation*, *supra* note 14, at 157–58.

130. More recently, Posner has described and analyzed possible elements of “the judicial utility function,” including “prestige,” “the desire to promote the public interest,” and “avoiding reversal.” POSNER, *OVERCOMING LAW*, *supra* note 124, at 117–18. In that sense, Posner has provided a dispositionist account of judicial behavior. In our view, however, Posner has simply dispositionalized several of the possible situational influences that may well influence the behavior of many other actors in many other contexts, and he has done so without providing a theory for when those factors, or which situational factors, should be considered.

on the bench has modified his dispositionist presumptions in favor of market solutions and against governmental intervention:

[T]he experience of being a judge is bound to moderate one's views. When you are dealing with large doctrinal policy issues in a rather abstract way, it's very easy to allow your general outlook on things to carry you to foreordained conclusions. But when you are actually forced to consider both sides of the case, often you realize there is more to be said on the other side of the case than you might have thought. So a lot of statutes that I would have ridiculed as preposterous interventionism in the economy, when looked at up close in the context of the specific case, make more sense. I have learned there is more to be said for some of these interventionist laws than I had initially thought.¹³¹

Posner's shift in perspective is to be predicted. Dispositionism is a powerful baseline for all of us, and for most of us it is not until we "are actually forced to consider both sides" of an issue that we can begin to realize the importance of situational variables.

As these examples help to demonstrate, it is possible for even a strong dispositionist to see matters from a situationist perspective when his situation encourages it. But insofar as situations are stable, as they typically are,¹³² the illusion of dispositionism persists.

b. Calabresi.—In contrast to Posner, when Calabresi considers lawmakers and regulators, the project inevitably involves delving into the complexities of their interiors. While his approach in work like *The Costs of Accidents* lacks the vocabulary and supporting evidence of the field today, Calabresi has the instincts of a social psychologist. As he tries to understand the way regulators behave, he uncovers some of the human animal's central interior proclivities—from attributional biases to cognitive dissonance and from motives to affirm one's self, one's group, and one's system to the motive to provide legitimating reasons for decisions.¹³³

In fact, much of Calabresi's work criticizing the fault system of liability reveals an implicit understanding of the fundamental attribution error. For instance, in the accident law context, Calabresi makes the point that the fault system "emphasizes choices that are often illu-

131. Kurtz, *supra* note 50.

132. See Hanson & Yosifon, *The Situation*, *supra* note 14, at 174–76.

133. All of those interior situational features are detailed in Hanson & Yosifon, *The Situational Character*, *supra* note 14, at Part III.

sory and makes use of scapegoats.”¹³⁴ In other words, notwithstanding the disproportionate role played by situation in many cases, “much of tort law hinges—even today—on fault and on reasonableness of behavior.”¹³⁵ As Calabresi understands, using scapegoats appeals to something in our interiors. There are reasons for the fundamental attribution error—interior motivations—that Calabresi realizes need to be identified and counteracted in order to achieve the broader understanding of the law that both he and Posner seek.

As Calabresi also appreciates, policymakers are motivated to see themselves as good, fair, and just. When a lawmaker or judge is compelled by situational forces to take actions that challenge that self-conception, he or she can cope with the resultant dissonance between values and actions through various forms of self-deception. Thus, according to Calabresi and Bobbitt, when lawmakers are forced to decide between two conflicting values and, in effect, ignore one for the sake of closure, they must engage in a sort of self-delusion: “Evasion, disguise, temporizing, deception are all ways by which artfully chosen allocation methods can avoid the appearance of failing to reconcile values in conflict.”¹³⁶ In the end, dispositionism is like a pair of blind-

134. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 18. With Philip Bobbitt, Calabresi has gone further and demonstrated an intuitive understanding of many of the interior motives for a dispositionist worldview, including the motive to affirm the legitimacy of the system:

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The appeal of a fault or worthiness approach . . . goes beyond the fact that it permits a greater use of an irresponsible agency; by transforming the decision, society attempts to deny the tragic element implicit in the choice. Society announces that *it* will not choose to sacrifice lives or fundamental rights, that *it* will not violate conceptions of equality, that the sacrifices which do occur are due not to a societal unwillingness to forgo other goods but to individual failings. . . . We do not think tragic choices are to be understood without realizing society’s compounding of sacrifice with blame, of insult with injury if you will, in order to absolve itself. The literal origins in this practice of the word *scapegoat* should warn us of the awful dangers of its appeal.

CALABRESI & BOBBITT, *supra* note 44, at 76-77.

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Similarly, Calabresi reveals some harmful effects of dispositionist out-grouping when exploring the suggestion that “insurance categories be based *not* on outside characteristics but rather on previous driving records”—a suggestion, he points out, “much favored by all right thinking people like the editorial writers of the *New York Times*.” CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 38. There are problems with such experience-based categories because

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Individual members of those groups find themselves disproportionately charged with the financial burden of accidents, and are—unnecessarily, if past accidents are poor predictors of future ones—kept from future participation. In addition, society tells them that they have no one to blame but themselves, for the standard is one which even the *Times* finds unbiased.

Id. at 39.

135. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 18.

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136. CALABRESI & BOBBITT, *supra* note 44, at 26.

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ers. It is a means of not seeing what might trouble us, a way of believing that everything is all right—that we are safe, that our groups are deserving, and that our systems are fair and safe from collapse.¹³⁷

Calabresi also suggests the importance of cognitive biases—salience, counterfactual thinking, and elastic justification, among others—in shaping the way that we see policies. A decision not to save a particular life is far different than a decision not to invest in technologies that might reduce the death rate.¹³⁸ By way of illustration, Calabresi and Bobbitt urge us to

Consider the different attitude we all share toward the failure of Congress to pass truly effective safety legislation, as against the attitude we would have were it unwilling to appropriate funds for the rescue of a trapped hostage. Lives may be discarded in both examples, but the choice is less exposed in the first case and therefore less destructive of some of the basic values involved.¹³⁹

The example seems again to reveal an understanding of the fundamental attribution error. When harms are caused situationally—absent any obvious choice on the part of anyone other than the victim—there is no one to blame (except, perhaps, the victim). But situation is not, despite perceptions, given. Situations, too, can be framed as the consequence of choice, and when they are, our reactions change. In *Ideals, Beliefs, Attitudes, and the Law*, Calabresi shows us how the situation—in this case, the absence of effective safety legislation—can be reframed as a dispositionist choice, an evil deity who offers

a gift, a boon, which would make life more pleasant, more enjoyable than it is today . . . anything you want . . . in exchange for one thing . . . the lives of one thousand young men and women picked by him at random who will each year die horrible deaths.¹⁴⁰

Without the explicit choice offered by the evil deity we can continue on with the naïve belief that “our society does not establish an acceptable number of auto deaths, but that this figure results from thousands of independent, atomistic actions.”¹⁴¹ As we would put it,

137. These themes are central to the critical realist project. See, e.g., Chen & Hanson, *Illusion of Law*, *supra* note 15; Hanson & Yosifon, *The Situational Character*, *supra* note 14; Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

138. See Hanson & Yosifon, *The Situational Character*, *supra* note 14, at Part III.B.2.c (describing counterfactual thinking and the act-omission bias).

139. CALABRESI & BOBBITT, *supra* note 44, at 40.

140. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW*, *supra* note 44, at 1.

141. CALABRESI & BOBBITT, *supra* note 44, at 20; see also *id.* (stating that “when the first-order determination of a tragic choice appears to be no more than a dependent function

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where the deaths are situationally caused, we tend not to see them or mind them. Place the same deaths at the end of one person's choice to harm another—particularly when that person is maliciously motivated—and the deaths take on a new meaning and our anger at, and desire to punish, the wrongdoer become overwhelming.¹⁴²

B. The Situational Sources of Attributional Perspective

Part II.A focused on comparing Posner's and Calabresi's substantive policy analyses to determine the extent of their dispositionism. We did not explicitly seek out or highlight any possible situational sources—internal or external—for the scholars' dispositions. That is the topic of Part II.B, which looks to evidence in each scholar's situation that might help explain a propensity toward dispositionism or situationism.

For several reasons, this is bound to be a speculative and controversial exercise. To begin with, the power of the social psychological evidence discussed above lies mostly in what it tells us about humans, generally, in this culture. None of this evidence can fully explain a specific individual's attributional tendencies in a particular context. Furthermore, we do not have enough information about the attributional dispositions of Calabresi and Posner to say anything with much confidence. Although the evidence we do offer seems to confirm our claims about Posner's and Calabresi's relative attributional styles, we caution the reader to treat the following analysis in the spirit in which it is offered: a potentially illuminating and somewhat suggestive, but far from conclusive or complete, explanation for Posner's relative dispositionism and Calabresi's relative situationism.¹⁴³

of the second order, it will usually be the case that the connection is illusory, serving to obscure the fact of tragic scarcity and—while the illusion lasts—evading the tragic choice”).

142. In some ways, the changing perceptions of the tobacco industry over the last two decades reflect that very sort of dynamic. For a summary of the evidence that led to that shift in attributions of causation, responsibility, and blame, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

143. Wherever possible, we will rely on Calabresi's and Posner's own assessments of their interiors (in particular, their motivations and aims), rather than attempting to draw conclusions from particular exterior situations. We avoid, for instance, conjecturing on how a brief encounter with the Rosenberg children after their parents were put to death might have shaped Posner's dispositionism. Although others have highlighted that experience, Posner thinks it more memorable than meaningful:

I didn't "know" the Rosenberg kids. Their stepparents, friends of my mother, brought them to our house to receive my electric trains (which I had outgrown), and I showed them how to work the trains and that was that. The only reason I

Second, people often resent being categorized, or seeing people they identify with being categorized, along the political spectrum. As the sentiment is sometimes expressed, “labels are for cans.” There are likely numerous reasons for that aversion, some of which connect to ideas discussed above. Naïve realism,¹⁴⁴ for instance, may offer significant insight into our widely shared distaste for political labels. Insofar as we see ourselves as unbiased, independent, autonomous, discerners of truth, labels pegging us as potentially beholden to, and biased by, a political ideology may conflict with our positive self-image. Labels that seem tailor-made for others feel uncomfortable against our own skin. The blue bow tie of conservatism seems to constrict our intake of oxygen, even as critics suggest it suits us. Furthermore, as with any situational influence, we tend to have better access than others do to our own attitudes and positions. We believe we know where they come from and how they differ from the positions associated with a particular ideology. Because of our privileged access to our own interiors, others insult us when they boil our complex opinions down into a single word—particularly when that word is often wielded disparagingly.¹⁴⁵

With those concerns expressed, we now throw caution to the wind and turn to a situational view of Posner’s and Calabresi’s contrasting attributional tendencies. We begin with Posner and Calabresi’s shared exterior situation, before turning to each scholar’s unique individual interior and exterior situations.

1. *Calabresi and Posner’s Shared Exterior Situation.*—To set the backdrop for more localized situational influences, it is useful to consider briefly the historical environment in which Calabresi and Posner each began to form his approach to legal scholarship. By considering

remember their visit is the notoriety of their recently executed parents. The brief encounter could hardly have influenced my mature thought.

E-mail from Richard Posner, *supra* note 37.

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We will try to take into consideration instances where Posner offers his own assessment of his proclivities and tastes. In the few cases where we highlight exterior situation, we do so because we find the environmental elements to be particularly noteworthy and the causal connection to be particularly strong. As discussed earlier, it should not be forgotten that exterior situation does play a vital role in shaping how we see the world.

144. See *supra* note 49 and accompanying text (discussing the theory of naïve realism).

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145. This is a variant of the actor-observer bias (seeing the role of situation far more readily for ourselves or for members of our groups than we do for others or members of other groups). See Hanson & Yosifon, *The Situation*, *supra* note 14, at 157 n.110.

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the situation they shared in common, it may be possible to better understand what distinguished them.¹⁴⁶

As indicated previously, our baseline dispositionism is only a starting point on both an individual and societal level. Shifts in our environment—whether they are cultural developments, scientific breakthroughs, changes in business practices, or otherwise—can lead us to see more or less of the situation. Relatedly, anyone powerful enough to manipulate our environment can also manipulate the strength of our dispositionism.¹⁴⁷

The 1960s and 1970s—when both Calabresi and Posner were developing their most important work on accident law—marked a distinct shift in the way many within academia and without approached the most important policy questions. During that time, people began seriously to question some of their dispositionist presumptions. There was a growing understanding that situation was, indeed, a major influence and that existing situations were as much man-made and alterable as they were natural and fixed. In particular, the system-legitimizing, dispositionist accounts of race and gender were being challenged, and, as those challenges gained traction (much of it coming from within academia and the media), situationist conceptions began to trickle into law and legal theory. The “consciousness raising” associated with various movements was, in part, a heightened awareness about the role of situation in outcomes that had historically been treated as neutral in origin and effect.

Those trends touched many areas of law. The policies associated with the “war on poverty,” for instance, were designed to address the situational forces that led to poverty more than they were intended as a battle against identifiable individuals. Similarly, within tort law, scholars started to look more expansively at systems, enterprises, and situations, and to go beyond the dispositionist focus on salient, choice-making “injurers” and “victims.” Legal realists had pushed in that direction for decades,¹⁴⁸ and their tort-specific influence, combined with the larger, cultural developments, ultimately undermined the

146. The very brief history contained in this Section is a concise, assertion-based summary of other work now in progress. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

147. See Hanson & Yosifon, *The Situation*, *supra* note 14, at 229-31 (arguing that dispositionism in America generally reflects the shared goals and collective efforts of commercial interests); see also Benforado, Hanson & Yosifon, *Broken Scales*, *supra* note 15 (same, with particular focus on the food, health, and diet industries).

148. For a description and dispositionist critique of that trend and the arguments behind it, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

simplistic idea that accident law should be formulated by answering the question: Who pays when *A* hits *B*?

Particularly during the 1960s, scholars and judges were increasingly apt to step back and consider injuries in their context—as taking place within a situation. From that vantage point, there was more to see than just the *A* and *B* of a given case. There were classes of *As* and *Bs*, and institutional forces and incentives hedging them about. Wealth, power, and larger socioeconomic dynamics became a central part of any analysis. To be sure, looking at the injury without looking at the situation was tantamount to learning the pronunciation of a word without learning its meanings and connotations.

With the general push towards situationism underway, legal academics could respond in at least two ways: they could generally embrace the movement or they could generally reject it. Just as many chose to expand upon these new attributions, many others lashed back in an attempt to legitimate the systems that were being upended by situationist thinking. In the following Sections we argue that, because of their situations, Calabresi endorsed situationism while Posner worked to reinforce dispositionism.

2. *Posner's Exterior Situation.*—Although there was no course in Chicago-style economics—and very little economics at all—when Posner was a student at Harvard Law School in the late 1950s and early 1960s,¹⁴⁹ he was nonetheless exposed to powerful scholarship responding to the situationist impulses and claims of legal realism. As legal realism had made its primary home at Yale,¹⁵⁰ the legal process school was coloring the halls at Harvard.¹⁵¹ In response to legal realism, legal process scholars set out to legitimate the law. In part, rejecting the wide-ranging gaze of realists and the open-ended and often ambiguous nature of their scholarship, legal process scholars attempted to construct a new consensus and prove that there was some greater purpose moving the law.¹⁵²

149. Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163, 198 (1983).

150. Eugene Rostow put it this way: legal realism “has represented the prevailing approach to legal studies at the Yale Law School to a greater extent than has been the case in any other law faculty of the world.” EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* xv (1962).

151. Lucas Powe, Jr. has called legal process “the Harvard jurisprudence.” L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENT. 267, 267-68 (1989).

152. Describing the situation that helped shape the legal process school, Duncan Kennedy explains that a “search was on, from World War II onwards, for a new method to replace the deductive approach of the late nineteenth century with some criterion for

Although Posner appears not to have been persuaded by many of the answers of the legal process school, he seems to have adopted their questions. That is, when imagining what a legal theory should aspire to, Posner appears to have been influenced by the legal process school's ambition to make sense of existing arrangements.¹⁵³ As Posner describes:

The positive analysts [within law and economics] such as myself resemble traditional doctrinal analysts in believing that there really are rules of law—that the law is not wholly a matter of judicial discretion, as the more extreme Legal Realists believed. We use economics to inquire to what extent the common law is a coherent system of rules concerned with promoting efficiency.¹⁵⁴

Posner's move to the West Coast and then to Chicago several years after law school brought him into contact with a new breed of dispositionist scholar—economists who had clear and simple intuitions about what moved the human animal and what, therefore, the ambitions of policy should be.¹⁵⁵ During his first year teaching at Stanford, Posner met Aaron Director and George Stigler, both visiting from the University of Chicago.¹⁵⁶ Through them he made the acquaintance of Ronald Coase and Milton Friedman.¹⁵⁷

judicial lawmaking other than open-ended, contextualized policy analysis, one that would be plausibly non-political." Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 468 (Peter Newman ed., 1998).

153. The efficiency theory that Posner was to develop went as far as any theory before it in making sense of the law. The power of that theory is evident today in most common-law courses where efficiency explanations for basic doctrines are standard fare in the readings and in classroom discussion. Still, Posner's work represents only an early step in the efficiency or libertarian backlash against situationism. As other dispositionist scholars joined in and the topic turned from tort law generally to products liability specifically, many of Posner's erstwhile supporters criticized him for being insufficiently dispositionist. We describe that process in other work now in progress. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

154. Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113, 1120 (1981) [hereinafter *Present Situation*]; see also Hanson & Yosifon, *The Situation*, *supra* note 14, at 189-90 (summarizing Posner's legal-theoretic ambitions).

155. See Chen & Hanson, *Illusion of Law*, *supra* note 15, at 7-31 (describing the general policy scripts of Chicago School economists at the time).

156. MacFarquhar, *supra* note 50, at 86.

157. See Kurtz, *supra* note 50. Kurtz quotes Judge Posner as follows:

Aaron Director had retired. He was living near Stanford and had an office in the Stanford Law School. I recognized the name when I started teaching at Stanford in 1968, and I went into his office and introduced myself. I became very friendly with him. Then in that spring quarter, George Stigler visited Stanford, and through Aaron I became very friendly with George. Through Aaron Director I was put on a task force on antitrust policy for the president-elect, the infamous

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Posner found their simple approach appealing and relevant for understanding law. As Posner explains, “I think Ronald and Aaron share a quality of being able to demonstrate the power of a simple economic model, and a simple economic model clearly described is something that lawyers find accessible.”¹⁵⁸ Whether it was primarily a result of his interactions with dispositionist scholars or more a result of earlier situational influences, by the late 1960s Posner was well on his way to becoming a solid dispositionist, a move that was solidified a year later when he accepted a position at the University of Chicago where he would join those economists and others like them.¹⁵⁹

Economics at Chicago was different than at other schools, especially Yale, a difference that implicated the way law and economics evolved at the two universities. At Chicago, the economics department, which was defined by its dispositionism and more general quest for simple, pro-market theories, was ascendant.¹⁶⁰ It had a major effect on many of the departments at Chicago—not least of which was the law school.¹⁶¹ At Yale, the economics department had little impact on the law school, where legal realism reigned and economists

Nixon. The task force was headed by George Stigler, and Ronald Coase was one of the members. I met Milton shortly afterwards. That year I learned about the Chicago approach to antitrust.

Id.

158. Kitch, *supra* note 149, at 226.

159. MacFarquhar, *supra* note 50, at 86.

160. *Cf.* Kitch, *supra* note 149, at 176 (“If you look at the way Yale, in that period, thought of an economist it was no different from how they thought of a sociologist. As far as I can remember, it was only at Chicago that you had what we call economics put into the law in that way.”).

161. The Chicago School movement also had attracted funding from private sources seeking to “promote private enterprise.” The Volker Fund, set up by a wholesale furniture distributor to provide funds to certain types of scholarship, brought a number of important economic scholars to Chicago. *Id.* at 180 n.22. As Aaron Director articulates:

What happened was that Hayek, through, I think, Hardy, met a person called Luhnow, who was then responsible for a lot of money in the Volker Fund. He persuaded Luhnow to give a certain sum of money to establish a center that would promote private enterprise. It was earlier decided that Chicago was the only place that was likely to accept such a project, and it was decided that the law school was the only part of the University of Chicago that would accept such a project.

Henry Simons was the one who suggested to Hayek that I should be the person in charge of the project. Apparently the dean of the law school, Wilbur Katz, then wrote in one condition. It was that I should be permitted to teach one course in the law school. The course, of course, was economic analysis. Henry Simons had tired of teaching it by then and had been trying to get the law school to get me to teach it.

Id. at 180-81 (footnote omitted). For a history of the importance of Hayek and the Chicago School’s influence on policymaking, see Chen & Hanson, *Illusion of Law*, *supra* note 15, at Part II.B.2.

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looked more like sociologists and less like their Chicago counterparts. And it seems that members of the two law schools saw little worth emulating in the approach taken by the other. Indeed, as Milton Friedman has stated, “[t]he natural development of legal economics at the University of Chicago then centered on a person [Henry Simons] who was opposed to almost everything that the institutionalists and legal realists stood for.”¹⁶² Unsurprisingly, “law and economics” had a different flavor at each institution. As Posner would later describe, “[t]he normative branch of the economic analysis of law can be viewed as a direct descendant of Legal Realism, by way of Guido Calabresi; the positive branch comes from outside the law, from the work of economists such as Ronald Coase and Gary Becker.”¹⁶³

3. *Posner’s Interior Situation.*—One of the difficulties in discussing the interior situations that we believe led Posner and Calabresi to be more or less dispositionist is that dispositionism is itself an interior situation. Few of us are consciously aware of attributional tendencies that we, or others, have. We view the world through attributional lenses that we perceive as neutral, though they are not. Dispositionism is a schematic force that shapes the way we see, interpret, interact with, and remember our environs. One way of demonstrating that a person is a dispositionist, therefore, is by showing that he behaves like a dispositionist—and tends to emphasize disposition and to downplay situation in his attributions. It is another version of the basic “walks like a duck, quacks like a duck” test for identifying ducks. We have already provided some of that evidence above. Posner walks and quacks like a dispositionist.

But there are other ways of demonstrating the interior situational sources of dispositionism. For this purpose, we will look to less direct but still quite revealing evidence of characteristics that social scientists have discovered correlate with the brand of dispositionism that Posner exhibits. Specifically, we will consider the work of George Lakoff on the morality models of conservatism and liberalism¹⁶⁴ and the work of John Jost and his colleagues regarding the cognitive and motivational antecedents or underpinnings of dispositionism.

a. *The Strict Father.*—Through his work in cognitive linguistics, George Lakoff has identified the guiding conservative model of

162. Kitch, *supra* note 149, at 176.

163. Posner, *Present Situation*, *supra* note 154, at 1120 (footnotes omitted).

164. As we describe elsewhere, the conceptual schemas underlying conservatism are closely linked to dispositionism. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 15.

morality as the “strict father.”¹⁶⁵ Under that “strict father model,” children are born bad and must be made good through discipline. Properly raised, children become personally responsible for their lives as they mature—they either succeed as self-reliant entities making free choices or they fail, in which case they deserve to be cut loose to face up to the hard discipline of the outside world.¹⁶⁶ That view is in contrast to the liberal “nurturant parent model.” Nurturant parents attempt to be responsive to their children’s needs, “[to] nurture them, and raise their children to nurture others.”¹⁶⁷ More than anything else, “[n]urturance requires empathy and responsibility.”¹⁶⁸

Posner, in that sense, is a strict father.¹⁶⁹ Throughout his writings, he reveals a strong presumption that individuals should operate as self-reliant and disciplined entities, and, as such, do not require nannying and do not merit special assistance.¹⁷⁰ Thus, Posner’s affinity for Nietzsche:

The idea—a bit banal, I’m afraid, when stated in summary form—is that a person is responsible for his own life. External forces and events are just the raw materials out of which we make a life, and we have no right to blame anyone else for the result because it was ours to make or muff.¹⁷¹

165. Lakoff’s work is discussed in significantly more detail in *Naïve Cynicism*. See *id.* Briefly, Lakoff suggests that liberals and conservatives adopt the distinct positions that they do based on each side’s conception of “morality,” at the center of which is a cognitive model of the family. *Id.* These models and their associated conceptual metaphors make political positions appear moral or immoral. *Id.*; see GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002).

166. See Benforado & Hanson, *Naïve Cynicism*, *supra* note 15. R

167. See The Rockridge Institute, *The Progressive Worldview*, available at <http://www.rockridgeinstitute.org/projects/strategic/nationasfamily/npworldview/view> (last visited Nov. 22, 2004).

168. *Id.*

169. We are not making any claims as to the nature of Posner’s interactions with actual members of his family. See LAKOFF, *supra* note 165, at 364 (explaining that a person might adopt “the Nurturant Parent mode for [his] family life and the Strict Father model for politics”). Posner assures us that his children found him anything but strict. R

170. It may be noted that in his private life, Posner seems to demand a similar sort of rational self-reliance. MacFarquhar, *supra* note 50, at 78, 80. Jokingly, he likens his personality to that of a cat. *Id.* at 80. R

171. *Id.* at 86. According to MacFarquhar:

Nietzsche is perhaps the philosopher who has had the deepest influence on Posner. Posner takes from him a conception of morality (made by humans, not found in the world), a conception of ethics (tenth-hand bromides, clung to by those lacking the courage or imagination to think for themselves), and, most of all, an intellectual temperament (delighting in muscular language and the power to shock).

Id. at 84.

Similarly, Posner shows little patience for the nurturant parent alternative. In *Indiana Harbor*, for instance, Posner makes clear his view that the residents threatened by the chemical spill are adults, who are responsible for their own circumstances and are not to be coddled.¹⁷² Similarly, when the lawyers for the plaintiff suggested that the defendant's wealth was far greater than the plaintiff's, Posner's response was "so what?"¹⁷³ More generally, Posner is intolerant of moralisms and seems uninterested in living in or fostering a "nurturing" environment for himself or anyone else.¹⁷⁴ Such basic beliefs about a person's success or failure in life are the stuff out of which Posner builds his particularly potent brand of dispositionism.

b. Underlying Motivations.—In their recent work, Professors Jost, Glaser, Kruglanski, and Sulloway have identified a number of motivations that underlie conservatism—and, we would argue, dispositionism. Specifically, they found that conservatism is positively correlated with "dogmatism and intolerance of ambiguity; uncertainty avoidance; fear of threat, loss, and death; system instability; and epistemic needs to achieve order, structure, and closure, as well as negatively related to openness to experience, integrative complexity, and (to a lesser extent) self-esteem."¹⁷⁵ Part of the reason that people adopt a conservative outlook is that "it serves to reduce fear, anxiety, and uncertainty; to avoid change, disruption, and ambiguity; and to explain, order, and justify inequality among groups and individuals."¹⁷⁶ As we illustrate in the following paragraphs, those (interior situational) motivations seem far stronger in Posner than in Calabresi.

172. See *supra* text accompanying notes 53-58 (discussing Posner's *Indiana Harbor* opinion). R

173. *Ind. Harbor Belt R.R. Co. v. Am. Cynamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990).

174. Some have attributed Posner's disdain for moralisms to his disdain for his mother's communist sympathies. See MacFarquahar, *supra* note 50, at 84 (citing Posner's friend, Martha Nussbaum). Posner describes his mother, who was a teacher in New York City public schools, as R

one of these bright fools . . . quite a bright person, but very limited. The other thing that annoyed me about her was that I worried about her politics interfering with my career. . . . It was an annoying piece of baggage. Then eventually she became senile and forgot about politics and actually became very benign. . . . I breathed a sigh of relief.

Id. at 83.

175. John T. Jost et al., *Exceptions That Prove the Rule—Using a Theory of Motivated Social Cognition to Account for Ideological Incongruities and Political Anomalies: Reply to Greenberg and Jonas* (2003), 129 PSYCHOL. BULL. 383, 383 (2003) [hereinafter *Exceptions That Prove the Rule*].

176. John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339, 340 (2003).

Posner’s entire project is intended as a clear, simple explanation for tort law (indeed, the entire common law) as is. And, to achieve that end, he routinely resists or assumes away complicating considerations. Thus, Posner continues to assert the benefits of the single maximand of wealth maximization, even as he recognizes that it favors the wealthy.¹⁷⁷ For him, the goal of tractability overrides any desire for a more normatively attractive model.

Posner’s self-descriptions seem similarly to confirm that his is a conservative disposition. His need for order, structure, and closure in his scholarship and writing¹⁷⁸ seems to define his life habits as well. Posner describes himself as “rigid and Germanic” in his adherence to a strict routine¹⁷⁹ (although he stresses that those labels are more aspirational than achieved¹⁸⁰). And his critical gaze is not just aimed internally.

Posner is intolerant of ambiguity in the writing of his peers.¹⁸¹ Moreover, when confronted with evidence that people’s behavior does not comport with his simplistic model, he often resists that evidence as flawed, reinterprets it as consistent with his model, and indicates that the more complex depictions of human behavior pose a threat to the system—frequently by invoking the specter of totalitarianism.¹⁸²

177. See, e.g., POSNER, *ECONOMIC ANALYSIS*, 1st ed., *supra* note 47, at 13-14 (discussing the distributional effects of wealth maximization). R

178. Posner’s attack on critical legal studies in *The Problems of Jurisprudence* is typical: Critical legal studies has not yet penetrated a single area of law, partly because of the confrontational, *épater les bourgeois* style of many of its practitioners, partly because its politics are extremely left-wing, but mainly because of its all-encompassing negativism about the possibility of either coherent doctrine or constructive reform. This negativism acts as a damper on useful proposals for changing or reconceptualizing legal doctrines.

POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 27, at 441. R

179. MacFarquhar, *supra* note 50, at 82 (“Posner doesn’t like to waste time, so he sticks to a routine But it is not just his regular habits that allow him to be as productive as he is: he has structured his life so as to free his mind from any distractions whatsoever.”). R

180. E-mail from Richard Posner, *supra* note 37. R

181. Posner seems unsettled by scholarship that critiques without offering counter-solutions. In his reassessment of *The Costs of Accidents*, appearing in this issue, he renews his criticism of Calabresi in this regard—haranguing him for attacking the fault system as “irrational” and “absurd” without offering a “substitute.” Posner, *A Reassessment*, *supra* note 114, at 18 (quoting *THE COSTS OF ACCIDENTS*, *supra* note 4, at 276, 285). As Posner laments, Calabresi “discusses many alternatives, but discards them all.” *Id.* Calabresi’s scholarship is built around ambiguity, and it is not surprising that Posner has trouble accepting it. R

182. See, e.g., Hanson & Yosifon, *The Situation*, *supra* note 14, at 186 (discussing Posner’s criticism of work in the field of behavioral economics); see also Hanson & Yosifon, *The Situational Character*, *supra* note 14, at Part V.C.1 (describing Posner’s “counterfeit realism”). R

Posner seems particularly fearful of societal instability. Indeed, he explains that part of the reason he began to drift towards the right during the end of the sixties was because “he disliked the disorder of the student riots.”¹⁸³ In 2001, he indicated that he travels abroad infrequently because he is “prone to anxieties about foreign thieves and muggers.”¹⁸⁴

Posner seems eager to shelter himself from the threats of the world. He went to college at the age of sixteen and admits that, in the years that followed, he had few interests and engaged in few activities outside of his work.¹⁸⁵ Today, too, he prefers to avoid social life and describes his relationship with his wife “as the traditional Jewish one, in which the pasty-faced scholar husband stays home and studies while the wife attends to worldly activities.”¹⁸⁶ It is not just a matter of being a workaholic: Posner may want to be a prolific scholar and a respected judge, but his bookish habits may also reflect his aversion to uncertainty, world experiences, and unstable social situations.

Consistent with that dispositionist disposition, Posner is also untroubled by inequality.¹⁸⁷ In his scholarship, he rejects any conception of economic equality as a legal goal¹⁸⁸ and excludes distributional considerations from the vast majority of his policy analyses.¹⁸⁹ Where he does champion redistribution, the purpose is to protect rich peoples’ possessions against envious poverty-stricken hordes.¹⁹⁰

183. MacFarquhar, *supra* note 50, at 86.

184. *Id.* at 82.

185. *See id.* at 83. Additionally, Posner has stated, “If I’d had more interests or activities and lost that work time, I think my career would have suffered.” *Id.*

186. *Id.* at 82.

187. As MacFarquhar writes, “One reason [Posner] could never be a liberal (in the current sense of the word) is that, like many conservatives, he finds the idea of ordinary happiness uninspiring. He has no interest in a politics whose goal is to give people shelter and enough to eat. He loves fierceness and glory and heroism.” *Id.* at 83.

188. POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 27, at 381-82.

189. *See* Chen & Hanson, Distribution Versus Efficiency, *supra* note 41 (summarizing Posner’s view); Hager, *supra* note 27, at 19 (noting that Posner “repeatedly omits consideration of distributional factors relevant to his efficiency analyses and conclusions”).

190. *See* POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 27, at 344; *cf.* Richard A. Posner, *Equality, Wealth, and Political Stability*, 13 J.L. ECON. & ORG. 344, 344 (1997) (arguing that increasing “average incomes in a society . . . increases[s] political stability). By focusing on “envy”—a personal failing—Posner again shows himself to be a solid dispositionist. *Cf.* Hager, *supra* note 27, at 20 (“His focus on envy, moreover, identifies the problem as a defective state of mind among the poor, rather than as the social order which perpetuates poverty and yields such a state of mind. Posner seems to defend redistribution, yet readers who accept his premises will easily conclude that envy is a moral flaw among the poor for which a response of redistribution is not warranted.”). Posner also has a habit of interpreting criticism as envy-motivated. *See* Hanson & Yosifon, *The Situation*, *supra* note 14, at 143-44 (noting Posner’s response to criticisms of the study of law and economics). Similarly,

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Calabresi characterizes Posner's indifference to inequality as genuine and suggests that it is a valid personal belief; at the same time he criticizes Posner for assuming that blind wealth maximization is the aim of all members of society:

I do not doubt that there exists an unspecified complex of goals—that can be spoken of in justice-value terms—that are better served by wealth-maximization, without redistribution, than by other “measurable” instruments. I also do not doubt that Dick Posner, in a not totally systematic way (of which as I said I do not disapprove), “holds” these goals. I only suggest that in holding to these, he is in a very small minority. And I would suspect that most people would say, and indeed do say, “Your goals, Richard, are fine for you, but without a lot more in the way of equality (pass, for now, of what) they are totally unacceptable to me.”¹⁹¹

As we shall see in the following Sections, Calabresi counts himself in the mass of people who care deeply about equality.

4. *Calabresi's Exterior Situation.*—Calabresi began his academic career during the 1950s at Yale—a place heavily influenced by, and indebted to, the legal realist legacy. As Laura Kalman describes:

A remarkable ferment in legal education had occurred at Yale during [Wesley] Sturges's deanship. Between 1948 and 1954, Yale professors published twelve new casebooks. Half of the faculty—thirteen of its twenty-six members—had participated in the preparation of those casebooks. All of them reflected the impact of legal realism. . . . [R]eviewers during the late 1940s and early 1950s generally admitted that Yale law professors had subordinated legal doctrine to factual situations in their casebooks, employed a large amount of non-legal material, and considered issues of social policy.¹⁹²

Thus, the scholars around Calabresi were much more sensitive to the insights of social science, including social psychology, than at Harvard or the University of Chicago, and more likely to take up destabilizing, situationist views.¹⁹³ In 1956, changes in the Yale curriculum pushed

Posner prefers economic analysis because it ignores questions of power, and he criticizes those social scientists who attempt to take power seriously. *Id.* at 196-97.

191. Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 557 (1980) [hereinafter *Letter to Dworkin*].

192. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 193 (1986).

193. Posner himself has recognized the important influence of legal realism on Calabresi's work: “Calabresi's brand of normative economic analysis of law shares with Legal Realism a desire to perform radical surgery on the common law; for example, Calabresi

the trend further by emphasizing specialization and interdisciplinary programs.¹⁹⁴ While at Chicago pure economists were teaching courses and the discipline was being held up as distinct and superior to the law's conceptions of "fairness" and "justice," at Yale the emphasis, as articulated by Dean Eugene Rostow, was for law, economics, and the rest of the social sciences to be incorporated "within the single human mind":

After talking a great deal over the years about integrating law and other social sciences, we propose to do it on a much larger scale than it has ever been done before—not in the interest of making lawyers into economists, historians, or sociologists, but in order to make them better and more deeply trained lawyers.¹⁹⁵

In the words of G. Edward White, this suggested that "lawyers could *use* other disciplines, such as sociology, economics, psychology, or history, but they need not *become steeped* in other disciplines: their role after all was to 'translate knowledge . . . into a just and workable plan.'"¹⁹⁶

That environmental contrast may go some distance towards explaining the ultimate directions that Posner and Calabresi took. In Calabresi's estimation:

The lawyer economist uses law to push economic theory just as much as economic theory to push law. The difference, say, between me and someone like Dick Posner . . . [is that] Dick uses economic theory to deal with law, [while I] use law to change economic theory and then economic theory also for law¹⁹⁷

For Calabresi, the relationship is an exchange—one of many that appear in his work.

Calabresi's academic environment was certainly influential in shaping his approach to legal scholarship, but so were his interactions outside the classroom and library. Like Posner, Calabresi's friendships seem to have helped sculpt his attributional outlook, giving form to his situationism. Indeed, one of his close classmates at Yale actually took part in Milgram's famous experiments studying the power of un-

wishes to do away with fault as the basic guide to allocating liability in accident cases." Posner, *Present Situation*, *supra* note 154, at 1120.

194. See KALMAN, *supra* note 192, at 204.

195. *Id.*

196. *Id.*

197. Interview with Guido Calabresi in New Haven, Conn. (Mar. 26, 2004).

seen situation to influence human behavior.¹⁹⁸ In addition, several members of Calabresi's family were doctors, a few actually psychologists, a fact that partially explains his interest in the study of human behavior.¹⁹⁹ Calabresi notes being particularly affected by his "brother's experience as a cancer researcher doing experiments and trying as hard as he could to get people to be in a position where they could consent as freely as possible and yet realizing at least at some level that it was never free."²⁰⁰ While Milgram's studies may have had only a latent influence, the mark of his brother's experience is more evident. Indeed, in *Ideals, Beliefs, Attitudes, and the Law*, Calabresi offers examples that draw directly from the ethical dilemmas his brother faced as a doctor.²⁰¹

Calabresi's situationism is less the product of one or two key events and more the consequence of a developing nexus. Early situational forces interacted with later ones, as Calabresi himself underscores:

I think when I write, I write without trying to push a particular agenda. I write as a scholar. On the other hand, I am who I am. And when I describe myself in particular ways it's because I think it is inevitable that we are shaped by our experiences. And so, while I am not trying to push an agenda, I follow the truth where I think it leads me, though the heavens fall On the other hand, how can I say I am not apt to be influenced by a whole series of experiences? Somebody once asked me, "What is the most important part of your legal education?" and 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 under penalty of death? If I write about capital punishment or if I make a decision, I am not going to be writing to push an agenda but, on the other hand, I would be pretty foolish not to be aware of the fact that that is in my background.²⁰²

198. *See id.*

199. *See id.*

200. *Id.*

201. *E.g.*, CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 3-4.

202. Interview with Guido Calabresi, *supra* note 197. One might argue that Posner, too, was an "outsider," who, despite being raised by Jewish immigrant parents (including a communist mother), found his way, like Calabresi did, to Yale. But their situations were quite different, at least in perception. Posner described to us his sense of things this way:

In this statement Calabresi uncovers a central struggle of the situationist scholar—he acknowledges that he perceives himself to be a neutral seeker of truth, and at the same time he realizes that the powerful situational forces in his life must render him biased. He has uncovered naïve realism, but, like all of us, cannot escape it.

It was his situation that allowed him this specific perspective and, on a more general level, a freedom after graduating from law school to delve into less system-affirming notions than other contemporary scholars. Indeed, Calabresi believes, and we agree, that having immense success early in his career freed him from much of the pressure to produce reassuring dispositionist scholarship within law and economics.²⁰³

5. *Calabresi's Interior Situation.*—

a. *The Nurturant Parent.*—As summarized above, George Lakoff has demonstrated that the liberal conception of “morality” is based on the “nurturant parent,” which assumes “that the world is basically good and can be made better and that one must work toward

I have never thought of myself as having been “born an outsider.” It is true in a literal sense that my parents were immigrants, but they came to the U.S. as small children, spoke flawless English, and were well educated. I attended private schools in New York (Walden, Columbia Grammar, Ethical Culture) until we moved to Scarsdale, where I attended fine public schools, and then of course to Yale and Harvard. My father was well off and paid for my college and law school education. (At Yale in my day, scholarship kids had to wait on tables.) I did sense being Jewish as something of an obstacle, as it was in the 1950s, but I didn't think it would be a big one, as of course it hasn't been. I certainly wasn't uncomfortable at Yale or Harvard. I have always thought of myself as leading a privileged existence.

E-mail from Richard Posner, *supra* note 37. There were parts of his background that Posner occasionally found frustrating: R

The fly in the ointment—my mother's communist views, and possible CP membership—came solely from the fact that it complicated working for the government. As late as 1981, when I was appointed a judge, I had to explain first to the Justice Department and then to Strom Thurmond's chief investigator that I did not share my mother's political views! . . . [M]y mother was an admirer of Joe Stalin!

Thus, while Calabresi continued in his career to be informed by his family's historical identity and to look at the world with the skeptical eye of an outsider, Posner saw himself as a privileged insider and, if anything, hoped to sever his embarrassing familial ties—particularly, any association with pro-communist views. For both reasons, it is not surprising that Posner could embrace the reassuring notions of dispositionism.

203. *See* Interview with Guido Calabresi, *supra* note 197 (“Have I been pressured to do it? It's hard to say. When you are as lucky as I am and got where I was as quickly, people can't very well put pressure [on you] . . . I've been criticized . . . but I've never felt it effectively as pressure.”). R

that.”²⁰⁴ Part of one’s duty is to take care of others, an empathetic approach that requires the ability to “project your consciousness into other people so that you can feel what they feel.”²⁰⁵ Calabresi falls into this model rather neatly. Much of his work is dedicated to trying to step into others’ shoes in an effort to gain a more accurate and complete perspective of the world.

Whereas Posner, in examining the desirability of the reasonable person standard in tort law, emphasizes the wealth-maximizing consequences of Learned Hand’s famous formula ($B < PL$), Calabresi is prepared to ask whether the reasonable person standard is itself sufficiently empathetic. He suggests, for instance, that the standard might be adjusted to include values that women “have traditionally nurtured,” such as “gentility, gentleness, and perhaps even a bit of reticence in sexual matters.”²⁰⁶ Putting aside the question of whether such a reform might reinforce essentializing stereotypes and, thus, do more harm than good, what is striking about Calabresi is his willingness to think seriously about how the law might be altered to better reflect the differing perspectives of different groups.

More generally, Calabresi believes that individuals are not to be left totally on their own, to fend for themselves. Those that require help should not simply be ignored in lawmaking. Whereas Posner downplays distributional considerations, Calabresi indicates that they may be important:

Unless the distribution of income—and therefore goods and services—is satisfactory, it may be foolish to say that society is best off if all consumers can choose what they want for themselves after seeing what the true costs of their possible choices are. Instead, prices that falsify the costs of various items may actually be preferable if, because they falsify, they lead to a more satisfactory income distribution. Thus, if a society found that the poor were too poor and that they used widgets in great quantities, that society might be better off if widgets were made cheaper (i.e. “subsidized”) by not being made to bear their accident costs, than if they bore all their costs in full.²⁰⁷

204. Bonnie Azab Powell, *Framing the Issues: UC Berkeley Professor George Lakoff Tells How Conservatives Use Language to Dominate Politics*, NEWSCENTER, Oct. 27, 2003, at http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.shtml (quoting Lakoff).

205. LAKOFF, *supra* note 165, at 114.

206. See CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at 30, 31.

207. THE COSTS OF ACCIDENTS, *supra* note 4, at 78; see *id.* at 79 (“[I]t is at least theoretically possible that a system of allocating accident losses could be found that would be

To Calabresi, Posner's approach is fundamentally out of touch. The maximization of wealth, divorced from distributional concerns, fails to address the "complex of goals . . . apparently adhered to by most people in a society":

It only necessarily serves "utility" on the most peculiar, not to say absurd, assumption about the relationship between wealth and utility, namely, that \$1 is as likely to be worth as much to the rich person as to the poor person. One can be quite an agnostic about interpersonal comparisons and still say that *that* particular assumption is "a" lousier one than most. It clearly does not serve equality. It might, ironically, serve a bastardized maximin, but only under a series of uncertain empirical assumptions, perhaps more commonly made in the nineteenth century than today, about the trickling down of wealth.²⁰⁸

Calabresi believes that making the world better involves assisting those who have less in the world. This does not mean foregoing efficiency completely as a goal; it means balancing. As he argues, "an appropriate blend of efficiency and distribution is highly instrumental toward, and closely correlated with, achieving what many would view as a just society."²⁰⁹

b. Underlying Motivations.—Overall, the factors that John Jost and his colleagues identified as having the strongest effect on ideological positioning—dogmatism and intolerance of ambiguity; lack of openness to experience; uncertainty avoidance; personal needs for order, structure, and closure; and sense of system threat—seem to be much less potent in Calabresi than they are in Posner.²¹⁰ Of course, this is not to say that Calabresi seeks uncertainty and risk wherever he can find them; the point is that as a liberal situationist, Calabresi "seem[s] to be less troubled by them and less preoccupied with their management in comparison with conservatives"²¹¹ like Posner.

The situationist approach that Calabresi adopts tends to push against order, structure, and closure. Since the tether lines of dispositionist assumptions are severed, situationist works are often difficult to grasp and may move in many directions at once. Because hard-to-see factors are made central, the process of policy analysis is far messier

politically feasible and would accomplish a desired redistribution of income more cheaply than taxation, or with less misallocation of resources.").

208. Calabresi, *Letter to Dworkin*, *supra* note 191, at 556-57.

209. *Id.* at 558.

210. See Jost et al., *Exceptions That Prove the Rule*, *supra* note 175, at 383, 390.

211. *Id.* at 383.

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and more complex for situationists. In the end, a situationist work like *The Costs of Accidents* can be overwhelming; each page is filled with observations, responses to possible critiques, and qualifications of those responses. We, as readers, are constantly having to flip back and reread. We must contend with dense pages, counterintuitive twists, and, worst of all, the typical situationist caution: “Not all of these reasons, however, always apply.”²¹²

For a dispositionist scholar like Posner, Calabresi’s style in *The Costs of Accidents* feels “sinuous and elusive.”²¹³ To be sure, situationist scholarship need not be so difficult, but the aims of clarity, succinctness, and clear organization pose bigger challenges for the situationist than they do for the dispositionist. That is true not simply because the situationist has a tougher writing challenge, but also because the situationist is herself often less troubled by lack of clarity or closure. To the situationist, framing the question properly or understanding a problem can be more important than providing a clear answer or solution.²¹⁴ As Calabresi puts it: “If you asked me what I was most comfortable with, it is process and thought and questions and I am much more skeptical of any answers that I give. I think that is part of the role of a professor, of an academic—to look into dark places, to ask questions, to come up with solutions, but to be very skeptical.”²¹⁵

212. THE COSTS OF ACCIDENTS, *supra* note 4, at 151.

213. Posner, Book Review, *supra* note 90, at 642 (also making note of the “excellent if sometimes protracted discussions of detail with which the book abounds”).

214. In the beginning of *Tragic Choices*, Calabresi and Bobbitt admit to just such an approach: “We will attempt no simple definition to separate the difficult choice from the tragic, or the trivial from the difficult . . . we have few prescriptions and no solutions.” CALABRESI & BOBBITT, *supra* note 44, at 17. In the introduction to *Ideals, Beliefs, Attitudes, and the Law*, Calabresi similarly warns us that his hope is not to summarize or offer a solution but to “draw forth a sufficient number of ideas or impressions so that [he] can then discuss more generally the role of ideals, attitudes, and beliefs in our legal system.” CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW, *supra* note 44, at xiv-xv. Even as he addresses one of “the most complicated, the most searing, issue of beliefs and the law . . . the abortion question,” he admits that he does “not hope to come up with any solutions to the abortion issue, but . . . will try to see how the things we will have discussed in the earlier chapters relate to that particular problem.” *Id.* at xv.

215. Interview with Guido Calabresi, *supra* note 197. By striving for the most realistic view, by being cautious about overstating and noting when things have been simplified, it becomes far more difficult for the author to suggest a single legal rule. Yet, this does not mean that progress cannot be made. As a situationist, Calabresi works hard to understand conflicting viewpoints and data, and when he offers up a summary he does not throw up his hands in despair, nor does he just choose one viewpoint and vigorously defend it for the sake of closure; instead, he moves forward as far as the constraints allow. In his words, “[t]o say that the goals [of accident law] are ultimately inconsistent with one another is far from saying that a change cannot further all of them somewhat, especially if the change is from a system that developed haphazardly, with none of these goals specifically in mind.” THE COSTS OF ACCIDENTS, *supra* note 4, at 94.

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That approach stands in stark contrast with Posner's. Predictably, in his book review of *The Costs of Accidents*, Posner disparages Calabresi for not reaching any definitive answers on the issue of accident law regimes:

Calabresi concludes that the fault system is "absurd" and "ineffective" as a system of accident control. But while asserting that we could do better, Calabresi proposes no alternative system. The last part of his book is devoted to an inconclusive discussion of the same proposals for reform with which he opened. He finds that they cannot be accepted or rejected without further study.²¹⁶

For Posner, Calabresi's approach is a threat; it points out the weaknesses of existing structures without replacing them with anything solid.

Inevitably, both the situationist and the dispositionist must contend with "difficult facts"—evidence or ideas that do not square either with our preconceived notions or our desires. How these difficult facts are dealt with reveals a lot about a scholar's interior situation. The situationist embraces such evidence as essential points of study—facts that are especially important to pay attention to because they are counterintuitive. The dispositionist ignores or assumes such evidence away for the sake of maintaining a workable model. The dispositionist impulse within traditional economic scholarship to round the edges always troubled Calabresi. In Calabresi's words:

Irrationality in economics simply means something that is not part of the model that is being used. That is, something is done which is actually happening and you can either call it irrational or if it is an analysis of something you can call it bias. But what it really is is a model that is incomplete and so it is something that is not explained by the model. The question is whether when you see that something doesn't fit, you try to expand the model and even expand the model in ways that become a little fuzzy, less definite or if you say because I can't fit it in the model, well I will ignore it.²¹⁷

216. See Posner, Book Review, *supra* note 90, at 642 (footnote omitted). Moreover, "Calabresi's work is an uncertain portent, too, not so much because he himself has declined to move beyond prefatory statements of general principle as because he apparently considers such statements an adequate substitute for examining how the legal system works." *Id.* at 646. "The book, in short, furnishes a useful perspective on the problem of accident control but not a predicate for deciding between competing solutions, and this I suspect will be a frequent characteristic of the new version of legal scholarship exemplified by *The Costs of Accidents*; at least it is a major pitfall." *Id.*

217. Interview with Guido Calabresi, *supra* note 197.

Calabresi, as a situationist, is less interested in some ideal image of reality—what he refers to as the “economist’s perfect world”²¹⁸—than he is in the real world.²¹⁹ Calabresi emphasizes that economic theory (just like dispositionism more generally) can be a helpful tool—that it can make the complex seem simple and can help provide answers to difficult questions²²⁰—but that it also has the potential to be a huge limiting agent:

Teaching economics [to undergraduates] as I was doing throughout law school, I kept saying to myself there are some things in economics which don’t speak to the world as it is, and many of them are the result of assumptions that economists make which make life easier for them but are not necessary as such. They are contingent. They are ones that are easy, and so they do it, but they get in the way of answering questions. This is a long way around of saying that it put me in the position of saying . . . early, that it isn’t just using economic theory to explain, contradict, or reaffirm legal rules that a legal economist should be doing . . . that’s part of it . . . but the other is to use the situations of the real world, which we, as lawyers, are much more apt to see than to understand, to say this isn’t explained by economic theory, and yet it is there and yet it needs to be explained. Is there any reason why economic theory can’t modify itself so that these things can be explained?²²¹

The situationist impulse is not only to be open to all the facts—including difficult ones—but also to seek them out. It is, in Calabresi’s words, to look in the “dark places” where other people would not look. For Calabresi, this eagerness to discover new perspectives seems

218. THE COSTS OF ACCIDENTS, *supra* note 4, at 60.

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219. A good example of Calabresi’s contemporary focus comes in his discussion of the merits of the fault system:

The fault system may have arisen in a world where one injurer and one victim were the most that society could handle adequately, and in such a world it probably was a fairly good mixed system. . . . [But that world] is not today’s world. Today accidents must be viewed not as incidental events linking one victim with one injurer, but as a more general societal problem.

Id. at 307-08.

220. For instance, Calabresi points out that “making models is useful because it shows you whether there are empty boxes, as in ‘The View of the Cathedral.’” Interview with Guido Calabresi, *supra* note 197 (referring to Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)); see also Guido Calabresi, *Neologisms Revisited*, 64 MD. L. REV. 736, 752-53 (2005).

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221. Interview with Guido Calabresi, *supra* note 197.

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intuitive. In fact, he finds it odd that others in legal academia manage to cling to dispositionist notions:

Making that leap, I would have thought, should come easy to a lawyer who thinks in terms of peripheral vision. One of the qualities we think of as lawyers is being able to see very broadly. Things that don't look important to other people and how they fit. How something that someone else thinks is different, you can make look the same. And how something that other people think looks the same you can make look different. That is almost the game of law. And that's something from earliest childhood I always did. Looking back on it, it was something I was good at, that I liked to do. . . . I wasn't going to stop doing it just because I was doing economics. And instead, the economist has always tended to the other thing—to simplify, to structure, to make a model, to make it easy²²²

At the same time that Calabresi is confident that his complexifying approach moves things closer to the truth, he realizes that the dispositionist view has its advantages:

I have been very aware of the fact that it is much easier to have disciples, and to have many people do exactly what you are doing, if you make things simple and you leave out all of the contingencies, all the complexities, all of the things that the model cannot encompass. And I have always been aware of it—I expected it and then I saw it, very early on. That people would be quoting and copying—you know, you put things in the same meat grinder and it comes out with the same meat. I saw that, but I have never been tempted by it because it didn't seem right²²³

Ultimately, by being situationist, his scholarship is bound to be less popular.²²⁴ As he explains, out of all the articles that he has authored, *The Cathedral*

is the one that has been cited most, and relied on most, and has had the most influence, because it is the most simple-minded It's been so easy for people to take off on it because you can put everything in little boxes and it is fun to do that. But the world is much harder than that.²²⁵

222. *Id.*

223. *Id.*

224. *See id.* (“I have never had a review of something that I wrote at the time that I wrote it which was totally favorable. It has always been respectful, because I was doing some things which were clearly new, but puzzled. But puzzled because it didn't quite fit.”).

225. *Id.*

Situationists, in short, think outside the boxes.

III. CONCLUDING THOUGHTS: THE FORGOTTEN PATH OF *THE COSTS OF ACCIDENTS*

In the end, there is no mistaking the influence of economics on Guido Calabresi's *The Costs of Accidents*. And it is no accident that the book itself is considered a foundational piece in law and economics. Calabresi largely accepts the dispositionist view of the human actor common to most economic scholarship—indeed, central to most legal theory and law.²²⁶ Still, as we have argued, the book is remarkably sensitive to situation and stands out as an exception among legal-economic texts published in the last three-and-a-half decades.

What we have hoped to demonstrate, then, is a vital distinction within law and economics. *The Costs of Accidents* stands at the threshold of a thirty-five-year journey. Calabresi, as a pioneer in the field, offered a distinct track to follow.²²⁷ Yet, at the fork in the road, the mass of law and economics scholars set off in the other direction—one that led, in time, to a far more dispositionist landscape than the passage Calabresi started us toward.²²⁸ It was Posner's route that became the beaten path.

The evidence of those two general paths and the fact that one has been far less traveled than the other raises several questions that we have only begun to explore in this piece. First, why did dispositionism win out—at least thus far?²²⁹ Second, why were situationist accounts

226. See Hanson & Yosifon, *The Situational Character*, *supra* note 14, at 157-76 (discussing the fundamentals of dispositionism). R

227. See Posner, Book Review, *supra* note 90, at 636 (suggesting that Calabresi's work "mark[s] a new direction in legal scholarship"). R

228. More recently, some economists and legal economists have, without seeing the connection to Calabresi, begun to tread back toward the path that Calabresi broke.

229. In his recent reassessment of *The Costs of Accidents*, Posner suggests that the reason that the vision articulated in the book has not carried the day is that it lost out in the marketplace of ideas; in effect, it did not gain adherents because it was less close to the truth. As Posner writes:

[T]hirty-four years after his book was published, and thirty-seven years after [Calabresi] predicted that the fault system "is so poor a system of compensation that it bids fair to be replaced by the worst possible general system of market deterrence, namely generalized social insurance," the system remains essentially unchanged. To the extent it has changed, it has not been in the direction of Calabresi's proposals for reform.

Posner, *A Reassessment*, *supra* note 114, at 20-21 (footnote omitted). For Posner, the dispositionist approach to law and economics was superior to the alternatives, not only within law and economics, but without. He misses the possibility that there may be hidden influences in our exteriors and interiors causing distortions in the market for the truth, and situationally advantaging the dispositionist account. That is, he again overlooks the situation. See generally Hanson & Yosifon, *The Situation*, *supra* note 14, *passim* (arguing that the R

of the sort offered by Calabresi ever countenanced among legal academics? Third, how have commentators from outside of legal academia confronted the sorts of situationist arguments offered by Calabresi and others regarding the proper place of accident law?

The answers to those questions are important because they shed light on a range of policy debates well beyond the field of law and economics and the issues posed by tort law. In other work, we investigate how the backlash against situationism and the promotion of dispositionism has provided a barrier to entry into the marketplace of ideas and policy discourse for situationists. In essence, the story of the last thirty years, since *The Costs of Accidents* was published, has been a story of market failures. What has made Posner popular is what renders his conclusions unreliable. What has made Calabresi less influential is what makes his outlook and approach worth emulating.

The prospect for the future is hopeful. For the first time, economics and law and economics seem to be slowly catching up with Guido Calabresi. The rise of economic behavioralism and related approaches may presage a return to that situationist road not taken. Although vines hang menacingly across the way, the track is still visible. It is our hope that rumors of the demise of legal economic situationism have been greatly exaggerated.