

New York University
Annual Survey
of American Law

DEDICATION TO JUDGE GUIDO CALABRESI

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TRIBUTE TO JUDGE GUIDO CALABRESI

DEAN RICHARD L. REVESZ

Welcome! I'm delighted that you are here tonight to join us in paying tribute to the Honorable Guido Calabresi. As I think all of you know, every year the Annual Survey of American Law, which is one of our journals at the law school, dedicates its volume to a figure of law who has made a significant contribution. Over the years, an incredible group of outstanding people has been selected for this honor. In my eleven years doing this we have had Justice Scalia, Justice Breyer, Judge Posner, Judge Walls, Professor Amsterdam, and Professor Dworkin—it's a star-studded group, and tonight's honoree fits right into that category. It's a bittersweet moment for me because I've actually really enjoyed doing these introductions and welcoming people to these Annual Survey dedications, and it's my last time since I'm completing my eleventh and last year as dean. I'm very pleased that I get to do this for someone who has been my professor, my mentor, and my friend over a period of more than thirty years.

My second year in law school, I took a terrific course: A Tragic—no—A Common Law for the Age of Statutes. Followed the next year by Tragic Choices. (Tragic Statutes was not a course, although maybe it should be. Maybe it would be another book.) These courses are so relevant and vibrant today. I just came from teaching a regulatory policy seminar, and we actually spent a portion of the class talking about tragic choices and talking about the kid in the well and why we are going to spend all this money getting the kid out of the well, but not a lot of money making wells safer. I have some students here who will attest that this in fact happened. These are conversations that go way back to the Spring of 1983 in Professor Calabresi's class—Professor Calabresi, before Dean Calabresi, before Judge Calabresi.

Guido and I began having serious substantive conversations again when I was chosen to be dean of N.Y.U. Law School. I obviously knew, as an alumnus of Yale Law School that Yale had done extraordinarily well under his deanship. But I had begun doing some more research and I realized that the different pieces of Yale had done *extraordinarily* well, and one of them was the Yale Law School Annual Fund, which I realized before I started this job I really should care a lot about. I think it had gone up by close to a factor of ten under Guido's deanship, which is extraordinary. So I

called his chambers and asked if I could come to New Haven and whether I could learn from him how one went about doing that. It was an extraordinary lunch. First, having lunch with Guido in New Haven is basically like meeting the monarch: everyone comes to the table to pay their respects. So that was interesting. But then Guido told me what you needed to do, and it was basically four things, four rules. He said, it's like baseball, lots of statistics: the classes that have the most this, and the most this, and the most that. He told me that we needed to get five-year pledges, which we hadn't done, and we sort of did this every year. There were a couple of other rules of thumb of that sort, and I can tell you that they made an enormous difference in my success as dean. To a large extent, I owe that success to things I learned from Guido. He was enormously generous with his time, energy, and great expertise.

Of course, he is now a very distinguished judge on the Second Circuit. There are people here who will talk about all of these things—I would love to tell you about every aspect myself, but that's not my job tonight. I'll just tell you that Guido's career—very distinguished law professor, very distinguished dean, very distinguished judge—reminds me of another very successful figure of law, although never one who got this award. This figure is actually fictional. His name is Declan Walsh. He was a protagonist in *Vicar of Christ*, and he did all of these things quite well, like Guido, and the last job he took, after having been a judge was he was elected to the papacy.¹ We didn't plan it this way, but it turns out that by the time we did this dedication, that job became open as well.

So I will now let other people tell more about all of these aspects of my teacher, colleague, and friend's career, and I'll leave you in the hands of Ted Kelly. Ted is the Editor-in-Chief of the *Annual Survey of American Law*. So everything that is happening here is happening under Ted's leadership. The *Annual Survey* was enormously wise in making this selection; I'm very grateful for that, and it provides for a very nice moment for me. Ted has been a star here at the law school: he was my student; he was a research assistant to Professors Richard Stewart and Barry Friedman; and hopefully he will pursue a career in an area I care a lot about, the intersection of environmental and energy policy, which is what he is

1. WALTER F. MURPHY, *THE VICAR OF CHRIST* (1979).

looking into. Ted will welcome us on behalf of the journal and then we'll be set for the tributes. Thanks so much!

RICHARD L. REVESZ
Dean, N.Y.U. School of Law
Lawrence King Professor of Law, N.Y.U. School of Law
Director, Institute for Policy Integrity

TRIBUTE TO JUDGE GUIDO CALABRESI

TED KELLY

The Annual Survey was founded in 1942 by Arthur Vanderbilt. Since our founding, we have dedicated each of our yearly volumes to a preeminent member of the legal community in honor of their service to, and their impact on, American law.

Today's honoree, Judge Guido Calabresi, has influenced the course of American law in more ways than almost any other individual. He has been a teacher, a scholar, a mentor, a dean, and a judge. His impact in any one of these fields would be enough to merit this dedication; you need only look at a list of his former students and clerks to see that, even if he hadn't published a word in his life, he would have had a substantial impact on American Law. This isn't even the first time he's been at N.Y.U. at the Annual Survey's invitation. In 2009, Judge Calabresi provided the keynote address for our symposium, *Tort Law in the Shadow of Agency Preemption*.

However, the traditional role of the Editor-in-Chief is to summarize a few of those contributions which inspired our board to nominate the dedicatee. Here at N.Y.U., as students, the primary way we know Judge Calabresi is through reading his scholarly works. Those, therefore, will be the focus of my remarks. Of course, in my brief time up here I will barely brush their surface of Judge Calabresi's scholarship; in particular, I'm focusing on some of his tort law scholarship to the exclusion of his work in a variety of other fields, including the importance of common law and the use of certification by federal courts.

Judge Calabresi's article *Some Thoughts on Risk Distribution and the Law of Torts*¹ was perhaps the first work published in the modern field of law and economics, beating Ronald Coase's *The Problem of Social Cost*² into print by a matter of months, apparently because the journal slated to publish Coase's article was several issues behind; a predicament I must admit that I have some sympathy for. The important insight of Judge Calabresi's article, and the book that followed it,³ was that the main goal of liability rules is to minimize the

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

2. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1959).

3. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

cost of accidents, in a way that takes both efficiency and justice into account.

Perhaps even more influential is Judge Calabresi's famous collaboration with his student Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*,⁴ which has often been ranked among the most cited law review articles of all time. This article contains a number of valuable and novel ideas, but perhaps the most influential has been its recognition of how allocations of rights and remedial decisions can be compared across fields, and decisions about those allocations can be made based on a variety of concerns.

Perhaps the importance of Judge Calabresi to the field of law and economics can be best understood by considering the areas where he diverges from its other founders. Even Judge Calabresi's earliest work recognized that justice, both for individual parties and as a societal matter, is a key consideration in any decision about legal rules.⁵ In a more recent discussion of the *Cathedral* article, he explained that for him, the most interesting part of the article was not what it had to say about efficiency but what it had to say about justice: its recognition that we might want to allow decisionmakers to respond to, for example, distributional desires through the legal system.⁶

In another piece, which in fact took the form of a letter to the great legal scholar Ronald Dworkin, who is already much missed here at N.Y.U., Judge Calabresi argued that some fields are better at reaching what should be our universal goal as lawyers—justice—by focusing on justice as an end point while others are at their best when they focus on the road signs which point towards that goal.⁷ He put law and economics in the second category, and suggested that criticisms that law and economics often focused on concerns like efficiency rather than justice were not wholly on point for this reason.

Law and economics may, indeed, be a field which can make its best contributions by focusing on the road signs of efficiency and cost, but it is a stronger field, and American legal theory as a whole is richer, because Judge Calabresi has always been there to remind

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

5. See Calabresi, *supra* note 1.

6. See Guido Calabresi, Remarks, *The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201 (1997).

7. Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980).

us that justice is the end goal. For those and many other reasons, on behalf of the Board of Editors of the N.Y.U. Annual Survey of American Law, I am honored to welcome you as we dedicate our seventieth volume to commemorate the contributions to American law of Judge Guido Calabresi.

TED KELLY
Editor-in-Chief
N.Y.U. Annual Survey of American Law

TRIBUTE TO JUDGE GUIDO CALABRESI

CHIEF JUDGE ROBERT. A KATZMANN

Guido Calabresi is an internationally renowned figure, recognized and saluted for the perspicaciousness of his capacious mind, for his work of far reaching consequence. His role in the law over the past half-century has been seminal, as a scholar, as a teacher, as a dean, as a jurist. He has been celebrated, rightly so, in published symposia devoted to his work, in international conferences, by universities awarding him honorary degrees across the globe. How do I begin to pay tribute to someone of his stature? I speak from the perspective of a judge on his circuit, the U.S. Court of Appeals for the Second Circuit, to offer some thoughts on Guido Calabresi's important role on our court. I leave to others, indeed to future symposia, an examination of his jurisprudence. My concern is with a little-studied but vitally significant question: how does an individual judge affect the life, the functioning of a court? More specifically: how has Guido Calabresi affected my court in his two decades on the bench? My theme is that of the role of the teacher as judge or the judge as teacher. I have experienced Guido, first as a student at Yale Law School, and then as a colleague. From him, I have learned, and continue to learn, so much.

The Second Circuit Court of Appeals is an ensemble of twenty-two players. The resonance of the court's timbre, its tone, comes not so much from differences of philosophy, as Guido once observed, but from the diversity of backgrounds and experiences: some from practice, others from academia; some from district court; some from politics. Music is a helpful metaphor in thinking about Guido and his contributions to the Second Circuit and reminds me of what the late Judge Frank M. Coffin of the First Circuit said about a great appellate court:

It is not like a string quartet or a brass assembly or a set of timpani. All of the members of the symphony can read music, that is a given, but each plays a slightly different or greatly different instrument. It is the difference in the instruments that accounts for the depth and richness of symphony sound.¹

1. Judge Frank M. Coffin, Judge, U.S. Court of Appeals for the First Circuit, Remarks on the Occasion of the Swearing in of Judge Robert A. Katzmann as a Judge for the U.S. Court of Appeals for the Second Circuit (October 1999).

My friend Judge Coffin's analysis is truly insightful. A great orchestra, like a great court, is grounded in a shared sense of mission, a shared view of and deep commitment to the values and purposes of the enterprise. Its players, even if of differing approaches, labor in ongoing and noncompetitive relationships with one another; value one another's strengths; forego ego for the greater good; honor civility, mutual respect, patience, and compromise; and recognize that the excellence of the final product results from the combined energies, skills, experiences, and insights of the full complement of players. Even if a prior life brought the satisfaction of the virtuoso performer, the players of court understand that the music would be jarring if such virtuosity were not submerged for the benefit of a collaborative sound.² As music is a subtle process of unfolding, appellate decisionmaking is one of graduated decisionmaking—a discipline of justification in the search for the appropriate result, marked by subtle nuance.

In any courtroom sitting, Guido sets the tempo. To watch him in our court is like listening to Rudolf Serkin perform Beethoven's Fifth Piano Concerto with the New York Philharmonic. His impact on the Court is manifold. As a former dean of the Yale Law School, he is in a tradition of distinguished predecessors: Judge Henry Wade Rogers, Judge Thomas Swan, and Judge Charles Clark. Independently, his international academic renown reinforces the perception that the Second Circuit is—and I believe it in fact is—a weighty court. Often times, I will meet a lawyer or scholar from abroad, who when I indicate that I am a judge on the U.S. Court of Appeals for the Second Circuit, will respond: "Isn't that Guido Calabresi's court?" Moreover, Judge Calabresi's extraordinary prowess as a teacher has contributed much to our court. At her best, a teacher encourages us to think deeply, to probe, to challenge our own assumptions. In the way that he himself approaches cases, Guido Calabresi does just that: strengthening the decisional process and encouraging all of us to undertake our work such that we meet the highest standards. In the way that he thoroughly and com-

2. This is not say, as Judge Harry Edwards wrote, that there is "homogeneity or conformity, which would make for a decidedly unhealthy judiciary." Judge Harry Edwards, *A Conversation with Judge Harry T. Edwards*, J.L. & POL'Y 61, 63 (2004). Collegiality, Judge Edwards continued, "is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered." *Id.* at 64. The different styles and techniques can be observed in a variety of venues: as to particular cases, at oral argument, in exchanges among colleagues at conference, in post-conference, in opinion writing; and as to the administration of the court, at court meetings, in memoranda, and in informal exchanges about particular issues.

pletely prepares for cases—his detailed handwritten notes, his searching questions at oral argument—he offers by his example a lesson on how to do our work. At many an oral argument, as he communicates with both litigants and the other judges on the panel, he raises questions I would not have thought of, adding to the richness of the decisional process. And, he takes care never to leave litigants feeling diminished after a tough series of questions, not infrequently saying to counsel on all sides: “Well-argued counsel.” His post-argument memoranda get to the point, respectfully anticipate different points of view, and are a subtle, nuanced effort to persuade, to find common ground. He is assiduous in responding quickly to memoranda and draft opinions emanating from other chambers, with diplomatically phrased, constructive criticism. And his opinion style reflects a life immersed in active learning, thinking, and engagement, with fidelity to the principles he holds dear.

With his experience as an institution builder at Yale, he encourages us, his colleagues, to think institutionally, to appreciate how what we do will affect the court and its constituencies. He also teaches by his example that institutions, though resilient, are fragile and that the relationships which sustain them must be nourished. On a personal note, you can well imagine the sense of awe I felt when I joined the Second Circuit, a sense reinforced by the knowledge that I would be a junior colleague to two former professors: Guido Calabresi and Ralph Winter. But to all judges who join the court, Guido Calabresi (like Ralph Winter, I might add), is supremely welcoming, available to offer counsel about matters large and small. If he wants to talk about something, he will come to *your* office, a measure of his great courtesy. Striking is his civility, the respect with which he treats everyone—his colleagues, staff, clerks, litigants from the well-heeled to the pro ses, to whom he will patiently explain the legal landscape. His and his marvelous spouse Anne’s acts of personal kindness are legion. His gracious presence alone fosters a collegial atmosphere and high civility, adroitly facilitating the resolution of difficult, sometimes contentious cases, without rancor. All at once, he is brilliant and generous, a formidable presence with a twinkle in his eye. The memorable social gatherings at the Calabresis’ home, the personal gift of olive oil from their grove at holiday time, remind us that though work is important, friendship is too; indeed, personal goodwill allows a court, with its diversity of human beings, to function harmoniously, regardless of differences in individual cases.

When I think of the Second Circuit in the years ahead, and my own tenure on it, I know that Guido's inimitable, powerful voice will continue to have a significant role. To Guido, I say: thank you, bravo, and hugs.

CHIEF JUDGE ROBERT A. KATZMANN
U.S. Court of Appeals for the Second Circuit
Adjunct Professor of Law, N.Y.U. School of Law

TRIBUTE TO JUDGE GUIDO CALABRESI

AKHIL AMAR

I first heard the expression, “a life lived greatly in the law,” as I first learned of many important things: in Guido Calabresi’s torts class. And I’d like to talk with you a little bit this evening about what that means: “a life lived greatly in the law.”

The most important thing, I think, actually has not so much to do with law. It ultimately is about “a life lived greatly.” And I think that that greatness of living comes from a greatness of soul. I don’t think I can put it any better—I wouldn’t try to.

Let me back up. I consider Guido my fairy godparent. Children learn what they live, they learn by example—Guido has been my godfatherly example. I don’t think I can put the point about “greatness of soul” any better than how Guido’s biological son, Massi, put the point at Guido’s seventieth birthday party. We were all in the barn together—and again, children learn what they live—and Massi said: “The thing about my dad is that he likes helping people. I bet he’s helped each and every one of you gathered here today. I bet he’s done you a favor.” And I started nodding my head, just instinctively, and I started looking around and each person was nodding his or her head, quite instinctively, and there we were all together in this barn, all nodding our heads—it was a barn of bobbleheads. It was really quite extraordinary, because Massi had cut at precisely to the bone of the truth.

So that’s the most important thing. But now what about this part, “in the law”—“a life lived greatly in the law.” The other tributors and I haven’t coordinated, but it’s really quite extraordinary to think that all of us are focusing on at least four of the same dimensions: a life lived greatly as a law teacher; a life lived greatly as a legal scholar; a life lived greatly as the dean of a great law school (not the only great law school, but a great law school); and a life lived greatly as a judge. And we’ve all mentioned that—quite independently—there are very few people in the world, you see, that have that greatness along all four of these dimensions. And then it was also mentioned: a greatness as a mentor. I think that pulls all of these together, in a way.

So how does one measure greatness of a teacher? It’s a hard thing to explain to someone who wasn’t in the classroom. I do think it’s quite striking that so many of us up here on the podium and previously at this podium have been classroom students of

Guido; I think that's not a coincidence. I think it's striking as I look out, here in the audience, that I see other folks who were classroom students of Guido. But if one had to measure these things—they're very difficult to measure—I don't think that there's anyone I know who has had a more distinguished group of students in law in the world. Students who describe themselves, not just as people who happen to be in your classroom, but people who say, "I was Calabresi's student." And some of us have done torts—and I'm looking at one now—and some of us have done other things, but we are all Guido's students because he was a great teacher.

Just as an aside that way: my third year of law school, when I decided I wanted to be a teacher, I actually sat in on my favorite teacher's class a second time, if you can believe it. I sat in on Guido's class just to hear the stories one more time. I'm not a torts scholar, and yet I remember *Ives v. South Buffalo*,¹ *Western & Atlantic Railroad v. Henderson*,² *Holmes v. Math[v]er*³—which is how he pronounced it—*Leame v. Bray*,⁴ and *Rylands v. Fletcher*.⁵ Therein hangs a tale: I remember every one of these silly torts cases, and I don't do torts! You see, because he was a teacher, and he made every class memorable—so memorable, I remember this stuff thirty years later. Way more, frankly, than I remember anything that happened in Constitutional Law.

Calabresi as a legal scholar. Well, you know the statistics: youngest professor in the history of Yale; the author of not one, but several of the most-cited law review articles of all time, including one that by acclamation is one of the very handful of greatest law review articles ever, one co-authored with a student, and Guido co-authored so many with so many things with so many different students.⁶ You see, they're connected, there are connections. Not all great teachers are great scholars, not all great scholars are great teachers, very few of them are half-decent administrators, and then you when add the judicial dimension—these skillsets, they don't always overlap. Okay, but you know the statistics: author of two books that won the highest awards of the American Bar Association, the

1. 201 N.Y. 271 (1911).

2. 279 U.S. 639 (1929).

3. [1875] Ex. 261 (Eng.).

4. (1803) 102 Eng. Rep. 724 (K.B.); 3 East 593.

5. [1868] H.L. 330 (Eng.).

6. See Guido Calabresi & Alan Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi, *Some Thoughts on Risk Distributions and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

Silver Gavel Award and the Certificate of Merit, and the Order of the Coif Book Award.⁷ That just begins to scratch the surface, if you just focus on those things, because very few people change not just their field, but change how we think about law. A song lyric comes to me, I think it's from Paul Simon: "Architects may come and architects may go and never change your point of view."⁸

Calabresi changed our point of view, and not just about torts. Who would have thought, in 1955, that the central question, or at least a central question, one of the preeminent questions of tort law, was: how to minimize the cost of accidents, and their avoidance? That that was, if not the central question, then a central question. Forget torts, just the perspective that economics could bring to legal questions. How many people fundamentally changed how we think about law? Ronald Dworkin was mentioned, and I think appropriately so, in this room, and in law and economics; I think Coase was already mentioned; I think we should mention Posner. Very few people change actually how we think about law. I can't resist telling you a story that Guido once told me (and I'll come back to this): as a very young man, he went off to Germany and he presented some of these ideas, and a traditionalist said, "That is not the law"; and the young Calabresi said, "Yes, but it will be." That's Calabresi as a scholar.

Now, why not just, you know, quit while you're ahead? But that wouldn't be Calabresi. You know, he actually—and this is really quite extraordinary—in mid-career decided to do something different, something actually that he could have failed at, after having been the preeminent scholar of his generation—one of the preeminent legal scholars of the century. He could have just quit, but instead he decided to become a dean, and he could have just flopped; you know he made some very risky appointments early on (after all, he hired me). And by acclamation, I think he is reckoned one of the truly towering deans of the twentieth century. And there was maybe a Silver Age before Dean Calabresi, maybe a Bronze Age, but he ushered in a Golden Age of the Yale Law School. There have been many Golden Ages—and you heard Dean Revesz talk about the great skills of Calabresi as a legal academic—I mean, as a legal administrator, as a dean—and just to remind you, the skillset for that does not typically overlap with the skillset of a great scholar, of a great teacher.

7. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW* (1985).

8. SIMON & GARFUNKEL, *So Long, Frank Lloyd Wright, on BRIDGE OVER TROUBLED WATER* (Columbia Records 1970).

And then, he did it one more time! So that's what Dean Revesz was getting at with the Vicar of Christ—you know, not one great career, not two great careers. And he could have flopped once again, as a judge—and you heard from Judge Katzmann. So okay, four epic careers—and again, how do you measure greatness in a judge? I've given you some indices of greatness as a scholar—that's probably the easiest to measure—and greatness as a teacher, and we could measure greatness as a dean, and Dean Revesz has already told us some of the statistics, for example on reviving the Yale Law School financially and in other ways. So how do you measure greatness in a judge?

One way—it's not the only way—might be to think about his clerks. Because it's connected to this idea of mentorship. I don't think there's anyone in American law who has the collection of law clerks, of alumni of Judge Calabresi's chambers, that Guido Calabresi has. Not even most justices on the Supreme Court; it's really quite extraordinary.

So, now, to sum up: that's greatness. But I want to come back, in the end, to 'greatness of a life.' Because these are very—they're extraordinary—achievements, but what's so special about Guido? I would say it's a combination of brilliance, ambition, generosity, and humility. So let me just tell you, on the last dimensions, a story that Calabresi told me. You see, because you don't achieve these things if you're not hugely ambitious, and you can't if you're not brilliant, but then how many brilliant and ambitious people are *genuinely* generous and *genuinely* modest? That's the rare combination. I know some brilliant people, and I know lots of ambitious people, but brilliant, ambitious, *and* generous, *and* modest? A conversation with Guido—I think it comes from a deep place of comfort. A lot of people, here's the best you do: I'm okay you're okay. With Guido it's: I'm good! I'm really good! And so are you. And he makes you feel good about yourself, partly because I think he feels good about himself—that's about generosity.

So here's what he said to me. We were talking about someone, a person who may have lived a very great life in the law but said something a little sour at one point, and I was trying to understand what that was all about, and Guido said to me, "Oh, you know, this person has lived really greatly in the law, but maybe feels disappointed. Akhil, don't be like that." He said, "Look at me." He said, "I'm an economist, and I never won the Nobel" (although it's not too late, just like the papacy). He said, "I was an administrator, and I never became university president. I was a judge and I never got on the Supreme Court." Now first of all, think about the epic ambi-

tion. Just to think about these things as even within reach! And these weren't unrealistic ambitions for him, and yet the modesty, the generosity. He said, "Other people have done very great things too. I am what I am. I'm comfortable with that." Just extraordinary. And even then, trying to teach me something very deeply, basically about life. Mentor above all.

So, in conclusion Guido, all I can say is: I love you. You are and always will be my role model. I cannot imagine who I would be, what I would have been able to do, had I not met you.

AKHIL AMAR
Sterling Professor of Law
Yale Law School

TRIBUTE TO JUDGE GUIDO CALABRESI

KENNETH S. ABRAHAM

I'm grateful to Dean Revesz and the editors of the Annual Survey for inviting me to join you tonight. I'm delighted to be part of this happy celebration and to be in such distinguished company.

Forty-five years have passed since I first walked into Professor Guido Calabresi's course in torts in the fall of 1967. Although he was young then, he was already a legend for his brilliance as a teacher and a scholar. We thought that he talked directly to the gods, and that if we could only understand what he was telling us, we could overhear his conversations with them. But we were so, so far behind him. I offer myself as a humble—one might even say pathetic—example.

I distinctly remember coming to the realization, but only some time in October, that a defendant on whom liability was imposed would not necessarily end up as the ultimate bearer of the costs of that liability. Rather, the defendant might pass these costs on to customers, employees, or others, or it might be covered by liability insurance. Students who were only just beginning to grasp *that* idea were not going to comprehend conversations between Calabresi and the gods, which probably were held partly in Italian anyway just so that they could not be overheard.

These were the years when Guido was still working out ideas such as this, which he then developed in his great work, *The Costs of Accidents*.¹ Though of course we didn't know it at the time, in retrospect, I can see that sometimes he was working out these ideas in our classroom itself and that we were witnesses to the thinking that became the argument of that book.

The Costs of Accidents was that most unusual of works. It actually deserved being called "seminal." In that book and the articles in the sixties that preceded it, Guido did what most academics can only dream of doing. He invented a whole new field of study: the economic analysis of civil liability. His articles in the next decade extended his analysis and he became the preeminent torts scholar of his time.

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

The insights he developed in just three of his articles during the 1970s—on strict liability,² on causation,³ and on the different domains of property rules and liability rules (*his* famous view of the cathedral)⁴—would have been enough on their own to give him a lasting place in the history of tort law scholarship. The idea that was at the center of it all was one of the great contributions to modern legal theory.

This was the idea that liability should be imposed on what he called the “cheapest cost avoider”—the party who is in the best position to decide whether to risk an accident or to invest in precautions that would reduce this risk, and then to act on that decision.⁵ But, of course, there were many articles and several books on other subjects as well. One of the great virtues of all of them is their creativity. Read anything by Guido Calabresi and his genuine creativity shines through.

Today, in the pages of the law reviews and of the Federal Reporter, Guido Calabresi continues to “push the quest further,”⁶ as his teacher, Fleming James, long ago praised him for doing. Guido’s recent article on the way our common law forbearers conceptually divided up the worlds of accidents and accident law is only one example of his continuing creativity in pushing the quest further.⁷ To paraphrase what the late Ronald Dworkin once said of his teacher, H.L.A. Hart, the province of tort law is now the province that Guido Calabresi traveled, and in each corner, his is the view that others must take as their point of departure.⁸

In fact, Guido has gone from strength to strength even as he now moves briskly forward in his eighty-first year. It is probably most gratifying for Guido’s former students, however, that he is still in his Torts classroom every fall, engaged in what I am pretty sure he

2. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

3. Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

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

5. See CALABRESI, *supra* note 1, at 135 n.1.

6. See Guido Calabresi, *Dedication*, In *Tribute: Frank I. Michelman*, 125 HARV. L. REV. 879, 880 (noting how Frank Michelman, in reviewing *The Costs of Accidents*, “pushed the quest further”); Calabresi & Hirschoff, *supra* note 2, at 1085 (expressing the wish that retirement for Fleming James, Jr. be an opportunity for him to “push the quest further”).

7. Guido Calabresi, *Toward a Unified Theory of Torts*, J. TORT L., Oct. 2007, at 1, available at <http://www.bepress.com/jtl/vol1/iss3/art1>.

8. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

would say has always been his primary calling, as a teacher. Undoubtedly, he is still regaling his students with references that only a few of you here will get, but which I cannot resist mentioning because the memory of them so warms my heart. I'm sure he still talks of old Judge Werner,⁹ of adult fools,¹⁰ of Minelda's pelvis,¹¹ of other scholars' wonderful worlds,¹² of entrants onto Guidacres,¹³ and that he uses many, many other "Guidoisms" that I have since forgotten or that he has since invented.

Apart from the enormous scholarly depth and productivity of the Yale Law School faculty, I think that the most significant characteristic of the Yale Law School over these past decades has been its combination of humanity and support for its students. And no one has exemplified that combination more than Guido Calabresi. Great law schools, like Yale and like N.Y.U., thrive on great leadership. As a faculty member and then as an enormously successful dean, Guido has been the public face and guiding spirit of the Yale Law School.

His exuberant leadership while he was dean, his dedication to the Yale Law School community, and the palpable love he has for the people who are part of it, imbue the whole enterprise with kindness and sensitivity. And throughout all the years, indeed to this day, in the halls of the Yale Law School itself and in the hearts of its graduates elsewhere, there has been heard the joyful noise of Guido Calabresi.

For me personally, Guido has been a source of support for nearly forty years. But my case is just one of many hundreds of examples of Guido's supporting his and the Yale Law School's former students, over an entire lifetime. To some who are in the academic world, he has paid the high compliment of suggesting that they too have pushed the quest further. And of course he has supported and helped not only obscure law professors, but also people who became governors, U.S. senators, and justices of the Supreme Court of the United States; secretaries of state and presidents, too.

9. See *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271 (1911).

10. See Calabresi, *supra* note 3, at 94 (distinguishing cheapest cost avoider of injuries to children from cheapest cost avoider of injuries to "adult fools").

11. See *Lange v. Hoyt*, 159 A. 575 (Conn. 1932).

12. See Guido Calabresi, *Fault, Accidents, and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); see also Calabresi & Hirschhoff, *supra* note 2, at 1058 (referring to the "wonderful, let us freely admit, fantastic world of Professor Posner").

13. See Calabresi & Melamed, *supra* note 4, at 1106 (discussing the property "Guidacres").

Guido has been on the bench for nearly two decades now, but there has been an admirable connection between his scholarship and his judging. Let me give you just one of many possible examples. In his wonderful 1975 article on causation in torts, Guido analyzed the two conventionally understood notions of causation—cause-in-fact and proximate cause—and then added a third, new notion. He called this the “causal link.” There is a causal link between an event and an injury, he said, when the occurrence of the event increases the probability of the injury.¹⁴ If I fail to light the stairs in an apartment house I own, that negligence increases the risk that people will fall on the stairs, even if no individual person who falls will be able to prove that the absence of light caused her fall.

Further, the article argued, the presence of a causal link might be a substitute for the requirement of cause-in-fact, which Guido said was “far from being the essential, almost categorical imperative it is sometimes described to be.”¹⁵ This conception then influenced the development of the law in a number of areas. I would trace the development of market share liability, and a physician’s liability for reducing a patient’s chance to survive, directly to the notion of causal link.¹⁶ The cases adopting these doctrines do not cite Calabresi, but he is nonetheless the intellectual godfather of the thinking that underlies these doctrines.

Now fast forward to 1998; Judge Calabresi is on the bench and writes the opinion in *Zuchowicz v. United States*.¹⁷ In that case a woman was given a negligent overdose of a prescription drug and then developed a very rare disease, whose causes were only partially understood. Invoking the notion of causal linkage, the court held that, because overdoses of prescription drugs often increase the risk of negative side effects, the plaintiff had introduced legally sufficient evidence of cause-in-fact.¹⁸ Far from being the categorical imperative that it is sometimes thought to be, proof that the overdose was a but-for cause of the disease was not essential.

14. See Calabresi, *supra* note 3, at 71.

15. *Id.* at 85.

16. See *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (adopting market share liability); *Herskovits v. Grp. Health Coop.*, 664 P.2d 474 (Wash. 1983) (imposing liability for reduction in the chance to survive).

17. 140 F.3d. 381 (2d Cir. 1998).

18. *Id.* at 390–91.

Causal linkage has proved to be a functional alternative to but-for causation in a number of other Second Circuit cases as well.¹⁹ There is a developing jurisprudence of causal linkage. There is even a quintessentially Calabresian concurrence in one of the later decisions in that line of cases in which the very author of the opinion in *Zuchowicz* speculates about what was really going on in that case, as if he were just an outside observer trying to figure out what that court had in mind but did not say.²⁰

Are you getting this? The author of the opinion, speculating about what was really going on in the case whose opinion he wrote. But then, he would probably respond that the opinion was not only his text, but also the text of the court, and also a text that had taken on a life of its own, and that he was as justified in speculating about its meaning as anyone else. And that kind of response would simply be additional evidence of the continuity between scholarship and judging that Guido has perfected in his time as a judge.

I can hardly believe the good fortune we have all had from Guido Calabresi's presence in our professional and personal lives all these years. Few people have the accomplishments and are regarded with such affection that they are known around the world simply by their first names: Hillary. Elvis. Santa. Guido. What a career. What a fellow. What a life. And may there be much, much more to come.

KENNETH S. ABRAHAM

David and Mary Harrison Distinguished Professor of Law
University of Virginia School of Law

19. *See, e.g.*, *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112 (2d Cir. 2006); *Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411, 422–32 (2d Cir. 2004) (Calabresi, J., concurring); *Liriano v. Hobart Corp.*, 170 F.3d 264 (2d Cir. 1999).

20. *See* *KFC Nat'l Mgmt. Co.*, 391 F.3d at 423 n.3.

TRIBUTE TO JUDGE GUIDO CALABRESI

KENJI YOSHINO

So I clerked for Guido from 1996 to 1997, as Ricky just mentioned, and in 2006 I was named the inaugural Guido Calabresi Professor of Law, an honor I received from Yale in part because I had been a former clerk of Guido's, I suspect.

And in 2009 Guido married me and my spouse, Ron Stoneham, an office he only performs for his former clerks. As even this summary of my relationship with Guido suggests, clerking for him has been a transformative experience.

I would like to speak of Guido today from that perspective, and have titled my dedication *The Clerk's Tale*. While Guido is known for his contribution in law and economics, he is also a passionate supporter of law and literature. His mother and his daughter Bianca—Bianca is here today—both hold doctorates in literature, so I know that when I invoke *The Clerk's Tale*, his mind will go to Chaucer and his twenty-nine pilgrims on their way to Canterbury.¹

Chaucer's Clerk is quiet, mild-mannered, and even taciturn. He is described as poor, but committed to scholarship, and, having come down from Oxford, he spends all of his money on books.² Like many of Guido's clerks, he is not just a student, but a teacher. Indeed, the description of him in the General Prologue ends with the phrase, "and gladly would he learn and gladly teach."³

The Clerk's formal reserve adds to the horror of the tale he tells. It is a tale of patient Griselda, originally from Petrarch.⁴ An Italian count named Walter sweeps up a virtuous peasant woman named Griselda and marries her after asking for her free consent and absolute obedience.⁵ He then exacts a series of appalling sacrifices from her to test her virtue. She gives birth to her daughter, whom he takes away, ostensibly to have her killed.⁶ She then gives birth to a son who meets with the same fate.⁷

1. GEOFFREY CHAUCER, *THE CANTERBURY TALES* (1475), *reprinted in THE COMPLETE WORKS OF GEOFFREY CHAUCER* (F.N. Robinson ed., 2d ed. 1957), *available at* <http://name.umdl.umich.edu/CT>.

2. *Id.* at 20.

3. *Id.*

4. *Id.* at 101–14.

5. *Id.* at 104–05.

6. *Id.* at 107.

7. *Id.* at 108.

The sadistic Walter then pretends to annul their marriage so that he can marry a younger woman. He sends Griselda summarily home, but then recalls her to prepare the castle for his new wife. Griselda bears all these affronts with preternatural patience.⁸

At the end, Count Walter is finally assured of her virtue and reveals to her that his supposed new wife is actually their now-grown daughter, and that the daughter's squire is actually their son.⁹ Yet it is an awkward reconciliation for all the needless suffering that has preceded it, and even the Clerk, in his closing envoy, recoils from his own brutal fable.¹⁰

You may think I'm retelling *The Clerk's Tale* as a drama narrative: having given my free consent and absolute obedience to an Italian noble, I was subjected to increasing exactions as his clerk, only to be sent home and then recalled for the sole purpose of preparing his chambers for a younger clerk.

But that is not the purpose of this retelling. To understand Guido's actual role in *The Clerk's Tale*, we must know something more about him. My first real conversation with Guido was when I interviewed for my clerkship. I had just finished some interviews in D.C., and had flown up that evening to the tiny New Haven airport to make a 9PM interview at Guido's chambers.

Please remember that the clerkship process was not then the stately and dignified pageant it is today. I was racing to the taxi stand while wielding an electric razor and I almost rammed into Guido, who had come to the airport, unannounced, to pick me up.

So we got acquainted in the front seat of his car—as human beings—and he asked me why I hadn't taken any classes with him. In fact, I had never been Guido's student, and I gave him an answer during the interview that I was sure would sink me, even though it was an honest one, and the answer was I took Tragic Choices, and then I dropped it. And I took Common Law, and then I dropped it.

And both times I dropped it because—and actually this is Akhil's term—Guido conducted his classes in such a liturgical way: there was a call, and then there was meant to be a response. And I knew that there was a right answer, and that I just felt that Guido was so far ahead of me as has just been described that there was nothing that I could ever do to change his mind on any subject. And so I said, you know, I thought that I could benefit reading his work, but that I shouldn't take his class.

8. *Id.* at 109–10.

9. *Id.* at 113.

10. *Id.* at 114.

What I didn't tell him, and what I'm telling him for the first time tonight, is that there's an additional reason I shied away from Guido. And this was that during orientation, when in his last year as dean, he gave the incoming class a stirring oration on how they should conduct their law school careers. He ended it with a single closing injunction: "Love each other."

And at the time I had a huge chip on my shoulder and I felt that this was simply too good to be true; that it was somehow mawkish, and sentimental. But by the end of this interview I had with Guido I was not so sure. During my clerkship two years later I went on the teaching market. Guido advocated tirelessly on my behalf. In particular, he underscored that I should not back down on my main scholarly interest, which was—and remains—gay civil rights. Others told me I was committing professional suicide.

When I landed at Yale Law School, Guido mentored me from my first day as a junior professor all the way to having the chair that bore his name. And then, when I told him that I needed to leave New Haven for personal reasons, he did the hardest thing a mentor can do: he let me go with his blessing.

In 2009, Guido married me on his farm in Woodbridge. There is one date that was particularly auspicious for me and Ron. Guido and Anne postponed a vacation—on Anne's motion—so that we could hold our wedding on that day.

Guido sat us both down beforehand and gave us a talk that is too personal to repeat here, but which has been a talisman of our marriage. And then the chivying began. "Don't wait," he said to us repeatedly, "you are both born to be parents." We needed no persuasion, and in the past two years, Ron and I have welcomed a daughter and then a son into this world.

It was not until I was rereading *The Clerk's Tale* in preparation for tonight's ceremony that I recalled that patient Griselda had had a daughter, and then a son. I reflected that I could have easily have led a life in which I would not have had a spouse, a daughter, or a son.

In 1995, the year I was clerking, Andrew Sullivan published his pro-gay manifesto entitled *Virtually Normal*.¹¹ His defense—note that this was his *defense*—of gay people was that they were "[u]ncumbered by children, [and so] they may be able to press the limits of the culture or the business infrastructure, or the

11. ANDREW SULLIVAN, *VIRTUALLY NORMAL* (1995).

boundaries of intellectual life, in a way that heterosexuals, by dint of a different type of calling, cannot.”¹²

In this narrow regard, the struggle for gay equality has been the mirror image of feminism. While women struggled to work as well as to have families, gay people have struggled to have families as well as to work. The role of Count Walter in my fable was played by a conventional wisdom that said that gay individuals should not have children—a conventional wisdom to which I could easily have surrendered all of my personal aspirations, my husband, my daughter, and my son.

But I had what Griselda did not: a mentor who protected me from that tragic choice. Guido is not the Count in the story, but the person who interrupted its narrative flow for me. He was not the only person who held this aegis over those more fragile and fundamental aspirations, but he was one of the most important. So in honoring Guido today, I hope we do not forget his role as a mentor.

Guido's brilliance is so dazzling that it is easy to forget his kindness. But he himself leaves no doubt as to which attribute we should hold more dear. This is what this clerk has so gladly learned from Guido, and what, on his best days, he hopes to gladly teach.

KENJI YOSHINO

Chief Justice Earl Warren Professor of Constitutional Law
N.Y.U. School of Law

12. *Id.* at 204.

TRIBUTE TO JUDGE GUIDO CALABRESI

VINCENZO VARANO

When I was invited to be part of today's event, which honors Guido Calabresi—a great scholar, a great judge, and a great person—I felt honored myself; I felt I was very fortunate to be visiting N.Y.U. during this semester. As much as I lived another fortunate coincidence, almost twenty years ago, when I was visiting N.Y.U. for the first time, and I was invited by Guido to New Haven for his inauguration as a federal appellate judge.

For my tribute to Guido, I decided to go back to some significant episodes of my forty-plus years of uninterrupted fond personal relationship with him and his family, and especially his wife Anne. I haven't been Guido's student, I did not sit in one of his legendary classes—unfortunately I do not belong to the crowd of students and law clerks who surround him with their love and admiration—but I admire and love Guido as much as all of his former students and clerks. All of us have learnt great lessons from him, one way or the other.

My relationship with Guido began with a couple of fortunate circumstances. When Guido decided to spend his sabbatical, back in 1969, at the Institute of Comparative Law in Florence, directed by his friend, and my mentor, Mauro Cappelletti, I was at the beginning of my career. Mauro asked me whether I knew of some nice house on the hills for his great friend, Professor Calabresi, and his family. I didn't, but I found one in Bagno a Ripoli; a charming house on a hill, surrounded by the typically Tuscan landscape of olive trees, vineyards, and cypresses, owned by a very distinguished Barone Franchetti.

So, my first approach to Guido was as an amateur but successful real estate agent. I think that house, and that location, have really meant something for the Calabresi family, and have favored their everlasting love for Florence, the Tuscan countryside, and its olive trees. Some of you may know that they now own a small olive grove, where they come back every fall for the olive-picking season, and to make their own oil. But at this point let me say something about Anne, also because it is impossible to honor Guido without honoring Anne at the same time. While in Bagno a Ripoli, Anne began a real field study, on Tuscan "contadini and their families." I think that Anne recorded dozens of cassettes. If published, as they should be, they could provide an extremely important anthropolog-

ical study of the Tuscan countryside, the people who lived on it, their participation in the Resistenza, and their centuries-old culture and traditions. Most of the old peasant families have disappeared, their children have left their home to find jobs in the city, and the old traditions have been lost. They live in Anne's cassettes!

The other fortunate circumstance which contributed a lot to our friendship was Guido's book; I mean *The Costs of Accidents*,¹ which he was still writing, or polishing, while in Florence. At the time, the most part of Italian legal scholarship was unaware of law and economics developments. They had no or very little knowledge of English, and they looked with at least some suspicion on the common law world (and especially on the United States) as a sort of terra infidelium: "Is there law over there?" My young colleagues at the Florence Institute and I did not know anything of law and economics, but at least we knew English, and had already spent a year at Stanford. Three of us agreed to engage in the translation of Guido's book into Italian, something which would have certainly suited Guido's background, and would have introduced him to the Italian academic world where only a handful of scholars were working along similar lines (for example, Stefano Rodotà and Pietro Trimarchi).

Guido, I have to be frank: it was something like a nightmare. The book was extremely difficult. Of course, we knew the basics of the law of torts (fault versus no fault, damages, causation), but what about deep pocket, transaction costs, and general deterrence? Well, indirectly at least, we became Guido's students. As comparative lawyers, though in our formative years, we were aware that a literal translation of certain foreign expressions didn't make any sense. We had to study, and ask Guido for some tutorials, so as to convey these unfamiliar concepts appropriately to the Italian readers. In the end, I think we did a fairly good job. The book was a success, Guido's ideas began to circulate much more widely than before, and the number of his Italian students grew as well as their migration to Yale, to experience Guido's exciting teaching.

Following the translation of *The Costs of Accidents*, I began to think with a very good colleague and friend of mine, as well as Guido's, that we should do something to make Italian lawyers more aware of what was going on in foreign legal scholarship. So, in the early eighties, we started a new series: *Giuristi Stranieri di Oggi*. So far we have published the translation of over fifty books, introducing Italian academics to a number of foreign innovative authors with

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

whom they probably would never have become acquainted.² Which book opened the series, one of the very few translated by its two directors? *Tragic Choices*, of course, another landmark in Guido's bibliography, written with Philip Bobbitt.³ In 2006, we celebrated in Rome, at the Accademia dei Lincei, the twentieth anniversary of the series; at the same time, we celebrated Guido, his co-author, and their book, which had reached in that very year, the second edition—the only book in the series to have had such a success.

I know, at this point, that I must conclude my tribute. Allow me, however, just a couple of final remarks. As a comparative lawyer, I have always admired Guido, because he has never felt constrained within the boundaries of national law, neither as a scholar nor as a judge. Guido is a lawyer—or maybe better, a philosopher, or both—who looks at problems in a universal perspective. How can we forget the much celebrated sentence, “Wise parents do not hesitate to learn from their children,” when he referred to the experience of the Constitutional Courts of Germany and Italy (the children) as a model for the courts of this country (the parents) when dealing with old statutes which have become increasingly dubious?⁴ The truth is that Guido Calabresi is a person of immense culture, great wisdom, and great vision; he is open-minded and quick to catch the ever-changing problems of an ever-changing society; he is always young in his perception of life. He has another quality not many persons of his caliber have: he is generous with his learning. He is ready to hand it over to those, young or less young, who turn to him for guidance. He is always available, and he is always in a good mood. That's why we all admire and love him, and are grateful to him for all we receive from him.

VINCENZO VARANO

Professor of Law, University of Florence
Global Visiting Professor of Law, N.Y.U. School of Law

2. See *Giuristi Stranieri di Oggi*—Diretta da Cosimo Marco Mazzoni e Vincenzo Varano, GIUFFRÈ EDITORE, <http://www.giuffre.it/it-it/products/20000696.html> (last visited Oct. 31, 2014).

3. GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* (1978).

4. *United States v. Then*, 56 F.3d 464, 466–69 (2d Cir. 1995) (Calabresi, J., concurring).

TRIBUTE TO JUDGE GUIDO CALABRESI

CHIEF JUDGE JUDITH S. KAYE

I am so pleased to be here at my alma mater to add a word or two about a great star of the judiciary and the world of law, now part of the constellation of dedicatees of the Annual Survey of American Law: Second Circuit Judge Guido Calabresi.

The distinguished background of this extraordinary gentleman is widely known—indeed, in several languages, starting with *summa* and *magna cum laudes*, Phi Beta Kappa, Order of the Coif, and *Emeritus* this and that. Or, staying with foreign tongues, maybe just plain “*mensch*” says it best. Always it is a joy, whether absorbing one of his lectures or writings, or hearing him engaging counsel from the bench, or just sitting across a dinner table from Guido and Anne.

What beautiful tributes we have heard from Judge Calabresi’s Yale colleagues and students! Though a proud NYU alumna, I too am a student of Judge Calabresi—but in another sense. I am a devoted fan of his writings, and in particular one favorite book, *A Common Law for the Age of Statutes*.¹ As a judge of New York State’s highest court—by tradition a great common law court—over my twenty-five year tenure on that bench in an age of proliferating statutes, I greatly appreciated Judge Calabresi’s help in melding the two worlds. So, Guido, to all of the tributes to you I add a state judge “bravo” for all your magnificent assistance.

Actually, there is one additional connection to Judge Calabresi that I would like to linger on: he is a certified, and certifying, genius. By that I have in my mind our by now well-established certification process, where New York law questions are sent by other courts—most particularly federal circuit courts—to the Court of Appeals of the State of New York for final resolution. The process began in New York State in 1985—nearly three decades ago—through constitutional, statutory and rule amendment, and has been immensely assisted by Judge Calabresi.

The process rests on the fact that, in our great democracy, founded on dual independent state and federal sovereignties, it is the state courts that have the last word on questions of state law. Federal courts are of course free to decide them—we have concurrent jurisdiction—but they risk reversal if the law question (be it

1. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

state common, statutory, or constitutional law) later reaches the state high court and the state court takes a different view. What a sensible thing it was to allow a federal circuit court in such a situation—instead of abstaining or erroneously deciding a novel state law issue—immediately to certify the issue directly to the state high court. And what a triumph it was to secure the necessary paper reforms to permit the procedure to be adopted into New York law.

But as we all know, getting a new procedure adopted is one thing; getting people to use it is too often quite another. Change is hard. And here's where our hero, Guido Calabresi, became such an important facilitator.

Judge Calabresi immediately saw the wisdom of the reform, and was quick to make it an everyday reality. I will never forget once listening to a taped Second Circuit argument when it was not the parties but Judge Calabresi himself who suggested that they consider certification to the New York Court of Appeals.² And, wonder of wonders, they heartily embraced the Judge's suggestion. I am delighted to report that the New York State Court of Appeals has thus far successfully resolved 115 certifications, overwhelmingly from the Second Circuit. I'm sure that Guido had a hand in a major number of them.

I would like to focus on just two of the enormous benefits of the process, from the perspective of a judge of the Court of Appeals of the State of New York (even if a retired one).

The first, of course, is one of law. The certification process puts before the state high court what another court has determined is an important open issue of state law. Would that the Second Circuit reviewed all our applications for leave to appeal! Only the law issue goes to the state high court. The rest of the case remains for resolution with the certifying court, which will thereafter apply the state court's law determination to the facts. Just think: the state court has the chance to settle a pure issue of state law—and an important one at that—unencumbered by factual details that sometimes get in the way of a nifty law question. What a treat at both ends of the process.

The second benefit is one for which I especially thank Judge Calabresi: it's the human part. How we think about the law is of course vitally important, but so is how we think about one another.

The certification process, as it has been actively and vigorously employed by the Second Circuit, has done an enormous amount to bridge the gap between our state and federal court systems. I cannot remember a time in my own long career at the New York Bar

2. Oral Argument, *Tunick v. Safir*, 209 F.3d 67 (2d Cir. 2000) (No. 99-7823).

that we have enjoyed such camaraderie, collegiality, and mutual respect. And much credit for this I give to our distinguished honoree, through his judicial, academic, and personal brilliance.

Yes, a certified, and certifying, genius.

CHIEF JUDGE JUDITH S. KAYE
Chief Judge, New York State Court of Appeals
Of Counsel, Skadden, Arps, Slate, Meagher & Flom