

VIEWS AND OVERVIEWS

BY GUIDO CALABRESI*

DURING THE HEIGHT OF THE DEBATE ON FEDERAL SAFETY STANDARDS for automobiles, the *New York Times* ran editorials dealing with the problem. The *Times* took the position that it was outrageous for auto manufacturers to contend that the cost of safety devices be considered in deciding which ones should be required. Where human lives are at stake, thundered *The Times* rather fatuously, no cost is too great. Of course, those who argued that "costs" were relevant were really saying that virtually any cost was too great and so the *Times* was probably on the side of the angels, but this did not make the position taken in the editorials any less absurd.

Accidents and accident prevention are, to a substantial extent, questions of costs. On the one hand, we have the question of how much accidents cost us; on the other, the equally significant question of how much it costs us, either in money spent or in pleasurable activities foregone, to avoid these accidents. We need not have grade crossing accidents—we could abolish grade crossings. But that would cost money. We need not have fatal car accidents—we could banish all cars, or limit them to 20 m.p.h. But that would also, presumably, cost us more than we are willing to pay in pleasures and profits foregone. Short of such drastic measures, we could ban teen-age drivers, or aged drivers, or require certain safety devices. The choice is always basically the same—a choice between the cost of accidents and the cost of limiting ourselves or some of us to less desirable (because more expensive or less pleasant) but safer activities.

The crucial question for any society is not whether it will make a decision to have some accidents and some accident-prone activities—all societies choose to have some accidents—but how it goes about deciding how many it will have. What I have elsewhere called a "decision for accidents"¹—a decision as to the level of accidents deemed desirable in the light of what it costs us to avoid such accidents—has to be made. The question is, simply, how does our society propose to make that decision?

There are two methods which can be used in making this decision. In theory, a society could use only one; in fact, all societies use each to some degree. The first, and the easiest to understand, because we have seen it at work in the recent auto debate, is the "collective" method. We can decide politically that no one below a certain age will drive, or that autos must have certain safety devices. When we do this we decide collectively, in effect, that the costs of these requirements—the higher prices they imply or the

* GUIDO CALABRESI. B.S. 1953, Yale University; B.A. 1955, Oxford University (England); LL.B. 1958, Yale University; M.A. 1959, Oxford University (England); Professor of Law, Yale University.

¹ Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Cost*, 78 HARV. L. REV. 713 (1965).

pleasures they cause some to forego—are smaller than the cost of the accidents they presumably avoid. Conversely, a failure to ban or limit an activity beyond a certain point would imply, if the collective method of deciding accident levels were the only one available, that further reduction of accident costs is not worth the costs necessary to bring it about. Normally we stop short of collective proscription of a whole activity (perhaps the ban on fireworks is an exception), but in our society many, if not most, activities are limited by some collectively-decided rules aimed at making them safer.

The second method is harder to explain and I shall not attempt it fully right now. Shortly stated, it consists of letting market decisions determine the levels of accident costs and of accident-avoidance devices and limitations which will prevail. By this method, the decision for or against accidents is made in much the same way in which an essentially free enterprise society decides how many shoes, as against sandals, are to be produced. For reasons which need not concern us here, I have called the collective approach “specific deterrence of accidents,” and the market approach “general deterrence of accidents.”² The rest of this paper will be concerned with the limitations of each of these methods and their relationship to the fault system.

The recent debate on auto safety should have made us keenly aware of the limitations which inhere in the collective approach. On the one hand, we have had the auto makers declare that “safety doesn’t sell,” that people don’t want to pay more for safer cars. On the other hand, the argument has been made with equal plausibility that if people could be made to pay the accident costs of driving an “unsafe” car when they buy it, they would buy safer cars. This general debate has been repeated with more and more specificity when each safety requirement is considered. Are seat belts worth their costs? How about certain types of brakes and steering equipment? Are cars designed with padding and with the “death seat” facing backwards worth their costs? Consider 16 to 18-year-old drivers; is allowing them to drive worth its costs? What of 18 to 21-year-olds, or people over 70? These questions highlight one problem with the collective method: it doesn’t tell us how to decide the question of what limitations are worth their cost. We know that people over 70 and people under 21 would be very upset if they were barred from driving, and perhaps we can even figure out how many accidents they cause. But we really don’t know, and can’t determine collectively, whether the cost to them of being barred from driving is greater than the accident costs avoided by barring them.

An even more fundamental problem is that we cannot make intelligent collective decisions about everything. And yet almost any decision to do something in a certain way, at a certain time, involves choices between safer and less safe alternatives. We may gear ourselves up to resolving some of the most dramatic cases by collective action (though we might ponder how long it has

² *Id.*

taken us to consider auto safety as being dramatic enough to warrant collective action—and with what dubious and scanty results). But the less dramatic situations which require the great bulk of our decisions—those for or against a safer yet seemingly more expensive material, or those for or against a safer but less pleasurable activity or way of doing an activity—cannot successfully be the subject of collective decisions. Somewhere, somehow, we must use the market device—for if we don't, we are unwittingly, and probably unjustifiably, deciding collectively that (except for those few situations which we do regulate collectively) it would cost more to avoid accident costs than to have them. I don't mean to suggest by this that market decisions can solve the whole problem for us; far from it. But even this bare summary of the limits of collective or specific deterrence should be enough to suggest that we need market devices to control levels of accidents, and that collective decisions may work best when they are *modifications*—made for good and sufficient collective reasons—of a pre-existing market determination as to the level of accidents. In other words, if we have a market method to determine the level of accident costs and accident avoidance devices we want, we can always modify that decision by collectively determined regulations and still not be deciding collectively *for* the unsafe way wherever we don't ban, limit, or regulate activities to accomplish accident prevention.

All this discussion might seem superfluous. But it clearly is not, since there has been a powerful tendency in recent automobile accident discussion toward trying to do the whole job of reducing accident costs through collective decisions. This approach begins by citing the faults of the fault system (faults which, by the way, I more than admit) and specifically the faults of fault as a method of spreading accident costs. It concentrates on the enormous “secondary” costs of accidents under the fault system—failure of rehabilitation, social and economic dislocations, delay in compensation, and so on—and seeks to avoid these in the cheapest way possible. The solution which appears to be cheapest is some sort of social insurance. The trouble with this solution is that if social insurance paid out of general taxes minimizes these secondary costs of accidents, it only does so at a substantial cost: the destruction of the limited amount of market deterrence which the fault system gives us. Once auto accident costs are removed from both injurer and victim, and paid out of general taxes through a social insurance fund, no financial, that is, market, incentive to build safer cars and to limit driving by accident prone age groups remains.

If teenagers (and others for that matter) did not have to pay fantastic insurance premiums for driving, how many more cars and inevitably how many more accidents would we have? These insurance premiums represent an attenuated—since based on fault—market pressure against a dangerous activity, “driving”; and an even greater pressure against an even more dangerous subcategory of that activity, teen-age driving. If social insurance removed this pressure, the market deterrent—weak as it may seem to be—

would be gone and there would be no market control on the level of accidents caused by teen-age or other driving. Inevitably the primary costs of accidents, their number and severity, would increase and pressure would build up for "rules," "regulations," "restrictions"; in short, for a series of collective decisions to limit these primary accident costs. Removal of market pressure toward safety would bring in its wake collective pressure toward safety, and the debates of recent months would be multiplied a thousandfold as we sought politically to decide, to the smallest detail, what safety devices and regulations were "worth their costs" and "mandatory" and which were not and, therefore, totally optional.

Unfortunately, the faults of the fault system in dealing with the secondary costs of accidents are substantial enough so that if no adequate substitute other than social insurance is found, this nightmare of collective rules may well become real. Indeed, fault does a sufficiently bad job even of market deterrence so that quite apart from secondary accident costs, we may find ourselves forced either to abandon fault for a system which achieves better market deterrence, or to supplement it with a plethora of collectively determined rules. This weakness of the fault system may well serve to explain the recent auto safety debate (what financial incentive did the fault system create for placing seat belts in cars?) and may also serve to explain attitudes like those demonstrated in a recent broadcast by Bob Considine (sponsored by an insurance company) which told of nothing but the federal regulation of driving we could look forward to. The program cheerily forecast physical and mental examinations, losses of licenses right and left and so on, all by fiat of the federal government and all on the unspoken assumption that the great collective would somehow decide that these devices were the ones which were worth their costs in accident avoidance, while others were not. Before we accept such a world as inevitable, we should consider the possibility of achieving more through market pressure. In doing that, however, we should also be aware of the limitations in using market deterrence.

In theory, market deterrence operates very simply. If we can determine the costs of accidents and allocate them to the activities which cause them, the prices of activities will reflect their accident costs, and people in deciding whether or not to engage in particular activities will be influenced by the accident costs each activity involves. They will be influenced without having to think about it, for the accident costs will simply be a part of the price which will affect whether they buy one product or engage in one activity rather than another. If insurance charged for teen-age drivers accurately reflected the accident costs such driving causes—regardless of fault—and if teenagers have to carry insurance, the price of a car to a teenager will be the price of the jalopy plus the price of the premiums. At that price, some may still decide to drive (the price is worth it to them) but others will walk, and use the money saved in other ways. The effect will be that individuals, through the market, will have limited teen-age driving because of its accident

costs. Similarly, if manufacturers of cars without seat belts were charged the accident costs which resulted from the absence of belts, no federal law would be needed requiring seat belts. A beltless car would save the cost of the belt, but bear the accident costs which resulted; a car with a belt would save on accident costs but bear the cost of putting in a belt. The decision as to whether belts were worth it would be made by buyers of cars in the light of the price of each kind of car. The question of whether safety sells would be given a market answer rather than the purely conjectural one to which we have been accustomed.

Of course, things aren't actually so easy. In the first place, it is very hard to say what the costs of accidents are. And a "perfect" market system would require "perfect" cost determinations. Actually, knowledge of what accident costs are is just as necessary for accurate collective (non-market) determination of what activities are worth their costs. But we don't think of this much in the collective context because we are accustomed to allowing collective decisions to be rather fuzzy ones. Still, so long as our determinations of accident costs are inexact, we cannot expect the market to do a perfect job for us.

Secondly, and perhaps more important, market decisions for or against accidents—such as the decisions as to how many and which teenagers will drive, and the decisions as to whether we will have seat belts or not—are inevitably affected by the distribution of income in our society. The rich man gets more of a say in the market than the poor man. By and large, we tolerate this when income distribution affects only the availability of goods and services (though we modify income distribution by progressive taxation), but we are not so willing to tolerate it when life and death are at stake. The current debate on the draft and our unwillingness to raise an army of volunteers by offering sufficiently high wages to attract enlistments indicates just this. We might allow this in peace time, but not when lives are at stake. Market decisions on accidents fall somewhere between these two extremes. We are not likely to allow a 10-year-old millionaire to drive simply because he can pay for the accidents he causes, but we may well let people decide whether they want one or two cars on the basis of their wealth (so long as they pay extra premiums for the extra car) even though we know that more cars mean more accidents. The fact that market decisions are based on unequal votes depending on wealth explains why we may wish to modify the market decision by collective regulations; regulations determined through the political process where supposedly all votes count equally. The fact of income inequality does not mean, however, that the market is not a very good first stage on which to base that relatively limited number of collective decisions which a society can intelligently make.³

³ Such collective revisions can go either way. We may decide collectively that drunks may not drive regardless of ability to pay for accidents; on the other hand, we may decide to subsidize driving by the aged or the handicapped despite the fact that they can't pay for the accidents they cause.

Thirdly, the market method can be more expensive than it is worth. It costs money to allocate accident costs to the activities which cause them. And the more precise the allocation, the more it costs. As a result, the market method may be more effective in determining the level of relatively broad activities (driving by age groups, driving by people who live at various distances from work, and so on) than in controlling the smaller subcategories of these activities (driving at night, driving through a yellow light, etc.). These subcategories or subactivities, which we often call "acts," are perhaps better controlled through collective regulation than through any attempt to let the market regulate for us. Collective regulations are limited in that we can not rule collectively as to every act or activity, but there are some acts and even some activities whose proper level can be determined and controlled more efficiently by collective means than through the market. The reasons for this are analogous to those which keep insurance companies from differentiating risks beyond a certain point—it simply costs too much to do it in comparison with the accident costs avoided by doing it.

The final, and perhaps most difficult, problem with the market method of determining the appropriate level of accident costs is that for the market to work properly we must be able to decide which activities are responsible for which costs, and to do this perfectly is as impossible as it is to decide perfectly how much any accident costs. But just as the determination of the cost of accidents is as necessary to intelligent collective decisions as it is to market decisions, so the decision as to who is responsible for the cost is unavoidable under either collective or market approaches. In fact it is easier to decide what activities ought to bear accident costs when the aim of such decisions is to enable the market to operate effectively to reduce accident costs than it is to decide what activities are responsible for accident costs for the purpose of deciding what activities ought to be regulated collectively and to what degree. The problem of allocating accident costs to achieve optimal market deterrence is too complex to examine thoroughly here. Some indications of how the question can be handled, however, are possible.

Whenever the choice of cost bearers is between activities which bargain with each other with respect to the price of a product or service involved in an accident, it will, in theory, make no difference which of the activities bears the accident cost. In theory, it doesn't matter if car owners or car manufacturers are charged with car accident costs. The manufacturers will charge more for cars if they bear the costs; the owners will demand lower prices if they bear the costs. If both sides estimate the costs the same way, the same total price for the product and its accident costs will result. And combinations of activities and ways of doing them which minimize the sum of accident costs and costs of avoiding accidents will become established regardless of who is liable.

In practice, the results can be quite different. It is on the basis of this difference that we can decide which of two (or more) activities is the better

cost bearer. First, those in charge of one of the activities may be better aware of the risk of accident costs: to an individual the chance of being injured or of injuring is an unknown; to an auto manufacturer it is a known statistic. Secondly, one activity may be able to insure more cheaply than the other. Thirdly, placing the cost on one activity may be more likely to result in efficient allocation of the cost to subcategories of activities than placing the cost on the other.⁴ Finally, placing the cost on one activity rather than another may result, for political or practical reasons, in removing it from both, thus destroying market deterrence altogether. If liability is placed on drivers, but they insure inadequately and as a result fail to pay damages, or if the government steps in and pays the damages out of a generalized social insurance fund, neither the drivers nor the manufacturers will include these damages in future prices. What economists call externalization will have occurred and the price of the product will not reflect its accident costs.

While these criteria for determining the better cost bearer in a bargaining situation may seem very sketchy and indefinite as given here, they probably suffice in most situations to tell us which of several "bargaining" activities is the best cost bearer in terms of getting the optimal market deterrence. Occasionally they will indicate that it makes no difference, and that is, of course, all right too; it simply means that as good a job of market deterrence will be achieved regardless of who is liable.

The problem of cost allocations to achieve optimal market deterrence is harder when the choice of cost bearers is between independent parties or activities, parties who are not in a bargaining relationship with each other—for example, pedestrians and drivers, or pedestrians and car makers. Here, at first glance, it would seem as if the choice is crucial and a mistake in allocation would prevent the market from working tolerably at all. Suppose pedestrian-auto accident costs are allocated to car manufacturers or to owners and it turned out that the cheapest way of limiting such accident costs (by this I mean the lowest sum of accident costs and costs of avoiding accidents) is for pedestrians to wear flashing lights at night rather than for anyone to

⁴ Different allocations may result in different subcategories of activities being efficiently reached, and then the choice can be quite hard. For instance, if auto manufacturers bore accident costs, differentiation in price according to accident records of different makes of car, and of cars with and without various safety features like seat belts, would be relatively easy. Instead, differentiation by age of driver, and by drivers' previous accident records, which are relatively easy if drivers are made liable, would be hard. Thus one allocation—to auto manufacturers—makes reaching the subcategories of brand of car and of cars with safety features easier, but another allocation—to drivers—makes reaching other subcategories, such as age and experience of drivers, easier. The question then is which subcategories is it most important to reach. In theory, either allocation could result in all subcategories being reached, but in practice this will not be so. Car manufacturers could, in theory, sell at different prices to different age drivers, but in practice this would be too expensive to work out and to police. Conversely, drivers, if they were made liable, could, in theory, demand different prices from cars according to the safety features, but again in practice this cannot come about to any adequate degree.

improve cars or their drivers. At first glance, it would seem as if a market pressure which might result in car or driver improvement had been exerted instead of pressure being exerted toward the more desirable change in how pedestrians behaved.

Recent economic writings associated with Professor Ronald Coase, of Chicago, indicate that the issue is not so cut and dried.⁵ Coase has pointed out that, if there were no costs involved in establishing a bargain between car makers and pedestrians, car makers in my example would pay pedestrians to wear flashing lights because this would be cheaper than either paying for accident costs or changing how cars are made. In effect, Coase's analysis points out that, in theory, any "independent" situation can be transformed into a bargaining situation. Of course, as he is the first to realize, establishing such bargains may be expensive business—so that we cannot be indifferent to what activity bears accident costs. But all this means is that one further practical consideration must be considered in deciding who is the best cost bearer in such "independent" cases.

Most of the factors considered in the bargaining situation remain relevant in the non-bargaining situation. First, who can gauge the risk more precisely? Second, is the cost, if put on pedestrians, more likely to be removed, that is, externalized, from both car makers and pedestrians, than if it were put on car makers or drivers?⁶ Third, is the cost, if put on car makers or car drivers, more or less likely to affect subcategories of activities than if put on pedestrians? The question is: placing the cost on which of the independent activities results in the greatest degree of what economists would call internalization; that is: what cost allocation can efficiently affect the greatest number of subcategories of activities involved in the accident so that we maximize the chance of market pressure being placed on those subcategories which, if modified, can reduce accident costs most cheaply?

The fact that the activities involved are independent (that is, not in a bargaining relationship with each other) adds one factor to the search for the best bearer of accident costs. Suppose we have guessed wrong and allocated the costs to the wrong activity? Which mistaken allocation can be cured most cheaply by parties entering into transactions with each other in the market? If we place costs of auto-pedestrian accidents on pedestrians and the cheapest way of avoiding these is to change how cars are made, it would cost too much for pedestrians to gather together in the market to pay car

⁵ See, e.g., Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

⁶ This could happen either because politically we believed the spreading of costs which would come about if pedestrians were left with the burden was inadequate and therefore decided to pay the cost out of general taxes, or because the only way pedestrians could efficiently spread the burden would be by buying a general accident policy against all accidents and not solely against car-pedestrian accidents. This, in turn, would result in failure of the cost of these accidents to affect pedestrian behavior, because the cost as borne by pedestrians would have been transformed into a general cost of living and would no longer be a cost of pedestrianism.

makers to change how cars are made.⁷ It would be much cheaper for car makers to pay pedestrians to wear flashing lights, if car makers had wrongly been held liable and flashing lights, instead of differently made cars, avoided the cost most cheaply. In other words, unless we are collectively quite sure as to which of two or more independent parties can most cheaply avoid accident costs—can make the best choice between accident costs and the costs of avoiding them—we should put the burden on the party which can cure a mistake most cheaply if one has been made, and thus help the market to operate as effectively as possible.⁸

All this sounds very difficult, and, of course, it isn't easy. But it may be of some comfort to remember that when we collectively decide to ban or limit an activity to diminish accident costs, we are making exactly the same guess as to who can avoid what accident costs. The only difference is that we are giving ourselves less of a chance to let any mistake be corrected than if we make the choice according to the market methods I have been describing. In other words, the choice, though hard, cannot be avoided, regardless of what method of determining the level of accident costs we decide to use.

One further comment on choosing who is responsible for what accident costs is needed. I have been talking as if the choice were an all or nothing one—as if all the costs had to go on drivers or on pedestrians—and that isn't true at all. The best market pressure may well be achieved by splitting costs—or more likely, by splitting costs not merely quantitatively but also qualitatively. Thus car makers or drivers may be the best suited to choose between paying pedestrian-auto accident costs involving property damage, medical care and lost wages costs, and spending money to avoid them. Pedestrians, on the other hand, may be the cheapest cost avoiders of such highly individualized items as pain and suffering, or of unusual injuries like the special value of a hand to a great violinist. It may well be that the cheapest way to avoid most auto accident costs is to change cars or drivers, but that the cheapest way to avoid pain and suffering injuries to a hypersensitive person is for that person to stay home in bed and let someone else do her shopping!

I am not, of course, suggesting that these divisions of costs are the most desirable. I am, at this stage, only outlining very roughly the things we should be looking for in deciding what system can maximize market deterrence and, therefore, minimize the need for collectively decided rules and

⁷ This is, in part, because some pedestrians would fail to pay their share, for the same reasons which cause some people to fail to get vaccinated: "There is no danger of disease as everyone else is vaccinated, so why should I bother." Since the cost of excluding these pedestrians from the benefits of more safely made cars is prohibitive, it almost always happens that the bargain—even though clearly advantageous—can't come about in the market.

⁸ It should not be necessary to point out that I am not in this analysis advocating car manufacturer liability as against, say, driver liability; I am only illustrating how liability by one party rather than another can result in more, or in less, desirable market effects.

regulations. I am doing this in order to point out how far from the goal of maximizing market deterrence the fault system is. For it is only when we realize this that we can appreciate the fact that the fault system is the single most significant source of pressure moving us towards collectively determined rules and regulations on the one hand, and generalized social insurance to cover accident costs on the other. With that in mind, let us look at fault for a moment.

The first thing that strikes everyone about fault is that it is an extremely expensive system. From the standpoint of market deterrence, another system which did as well or nearly as well, but was cheaper to administer, would be clearly superior. Much of the expense of fault derives from the fact that most cases must be decided on a case-by-case basis, and hence by a jury—it is virtually impossible to establish who is at fault by general rules. It can be shown that if the aim is to find the cheapest accident cost avoider—that is, to allocate costs in order to maximize market deterrence—instead of to find the faulty party, there is little advantage in making decisions on such an individualized basis. Scheduled damages, if kept up to date, and rules of thumb as to division of costs between activities involved in an accident, do as good or better a job of market deterrence as case-by-case decisions.

The second most obvious thing about fault is that it spreads the costs of accidents inadequately. As a result, it is a very unstable system, constantly under pressure from those who would substitute for it a system which compensated better—which did a better job of minimizing economic and social dislocations and other such secondary costs of accidents. In theory, a “perfect” system of market deterrence would also be a poor spreader. (With perfect foreknowledge there would be no insurance and each person would bear exactly the costs of the accidents he would cause.) In fact, however, it can be shown that the insurance categories which would arise from a system which sought to maximize market deterrence efficiently would give us much more spreading of losses than we have under fault—enough spreading, indeed, so that most current demands for adequate and speedy compensation would be met. All this is very important in evaluating fault as a system of market deterrence, because one of the faults of fault as a system of market deterrence is that it 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.⁹

The third problem with fault as a system of market deterrence is that in deciding who ought to bear accident losses, it considers many factors (by and large, moral factors) which are irrelevant to market deterrence and which are expensive to deal with. Conversely, fault does not take into ac-

⁹ I say “general system” since there are undoubtedly situations where any system of market deterrence is not worth its costs, and in such areas social insurance is as good a system as any.

count those criteria which I have roughly summarized before (such as which cost bearer can correct an error in the market most cheaply) which are crucial to market deterrence. From this point of view, it is worth noting that fault fails to divide costs where neither side is "at fault," and yet from the standpoint of market deterrence, a division in these cases may well be essential.¹⁰

For all these reasons, and others, fault is not at all a good system of market deterrence. This fact can be summarized as follows: Fault uses the market in an expensive and unstable way to reduce fault-caused accidents, while from the standpoint of market deterrence, we want to use the market in an efficient and stable way to reduce accident costs, whether they are fault-caused or not.

The foregoing discussion, of course, cannot serve to condemn fault altogether. If fault were a good device for achieving collective non-market deterrence of accidents, or if fault served other ends which we can loosely call justice, it might well be worth its costs and its weaknesses as a market deterrent. In fact, however, it can be shown that where moral elements are strong and collective deterrence rules and regulations are desired and desirable, far more effective and efficient methods than a fault system, which allows insurance, are available. Uninsurable tort fines are possible examples. Similarly, it has been suggested that though the so-called justice elements of fault may make sense when the choice of ultimate loss bearer is limited to the parties immediately involved in the accident, they make no sense in the real world, where loss bearing can be spread or re-allocated among a much greater universe of possible loss bearers. Indeed, as Professor Conard's massive study indicates, in the world as it is, the "justice" of fault is much more a belief of some "experts" than an accurate reflection of what people at large feel—at least if other methods of punishing wrongdoers are available.¹¹

These last considerations, of course, deserve far more space than can be given to them here—and they are not really directly relevant to the main theme of this article. That theme is simply this: Our society is inevitably faced with the need to decide how many accident costs and how many costs of avoiding accidents we want. This decision can be made mainly collectively, or mainly individualistically through market choices. If we, as a society, are generally committed to a free market, we should try to retain, expand, and make more efficient the market part of that decision. Fault, because it is expensive, because it is inadequate as a market system, and because it is such a poor spreader of accident costs that it is politically unstable, not only has resulted in more collective rules and regulations than might be needed, but seems likely to be ultimately replaced by other systems (like

¹⁰ Consider, for instance, the effect of allocating nonfault work accidents to employers under workmen's compensation.

¹¹ A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATION* 106 (1964).

social insurance paid for out of general taxes) which will inevitably call forth even more collective rules and regulations. Under the circumstances, it may well be that it is "conservative" in the best and proper sense of the word to abandon fault and replace it with any of several systems which would give better, and more efficient market deterrence, together with sufficient spreading of losses as to be politically stable.