

FOREWORD

LAW AND ECONOMICS: THE LEGACY OF GUIDO CALABRESI

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There is no doubt that what is generally known as law and economics is now a well-established scientific approach, settled in our intellectual landscape. Its importance is today not only theoretical but also—and quite importantly—practical. The law-and-economics perspective is so relevant in dealing with problems arising from everyday-life interactions of human beings embedded in a given legal setting that it now qualifies as a sort of programmatic approach for law practitioners and scholars. Indeed, the use of economics—economic reasoning and economic modeling—as a tool to tackle otherwise difficult and complex legal problems is now frequent, to say the least. Moreover, an increasing number of judges and legal scholars have taken economics courses and are influenced by the material, certainly in the United States and now more than ever in Europe. Economics did not always have such a role in law.

This change is the result of a movement that began before World War II, gained structure in the 1950s, took further shape in the 1960s, and established itself in the 1970s, essentially under the influence of economists and legal

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scholars from the so-called Chicago school, particularly. Ronald Coase¹ and Richard Posner² (an economist and a legal scholar, respectively). They and others helped to create a field of studies at the intersection of economics and the law. Henry Manne played also a crucial role in the movement, although he is not a Chicagoan.³

The other non-Chicagoan founding father of the law-and-economics discipline is Guido Calabresi.⁴ Indeed, one cannot—and probably nobody would—consider the current intense interplay between law and economics without recognizing the role played by the “outsider” Guido Calabresi, whose work “enabled Yale to carve out its own niche in the field,” after “the ‘boom’ period of law and economics, the late 1960s and early 1970s, [when] Chicago dominated.”⁵ Calabresi really initiated an original approach: of course different from what most legal scholars did, but also from what economists—Coase, for instance, or Aaron Director—started to do.⁶ With his unique approach, Calabresi somehow simultaneously anticipated and set himself apart from what Posner did in the early 1970s at Chicago. To put it differently, Calabresi helped popularize the use of economics to study and analyze legal problems, but did so in his own specific way.⁷

Calabresi’s publishing career started with the remarkable article *Some*

1. Ronald Coase was awarded the Nobel prize for economics in 1991. Peter Passel, *The Nation: For a Common-Sense Economist, A Nobel – And an Impact in the Law*, N.Y. TIMES, Oct. 20, 1991, at E2. His article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) [hereinafter Coase, *The Problem of Social Cost*], is usually viewed as the article that marked the passage from old to new law and economics. George Stigler, another winner of the Nobel prize for economics, George J. Stigler, *Reflections of a Nobel Prize Winner: The Economist as Preacher*, N.Y. TIMES, Oct. 24, 1982, at 126, wrote that “[i]n the field of law and/or economics, B.C. means Before Coase.” *Law or Economics?*, 35 J.L. & ECON. 455, 457 (1992). For a summary and analysis of Coase’s views, see the special issues published by the *Journal of Law and Economics, Markets Firms, and Property Rights: A celebration of the Research of Ronald Coase*, 54 J.L. & ECON. (SPECIAL ISSUE) 1, and the *European Journal of Law and Economics, Ronald Coase and The Problem of Social Cost*, 31 Eur. J.L. & Econ. (ANNIVERSARY ISSUE) 1.

2. Posner invented what is now know as the economic analysis of law; he was the first to use the expression for the title of his *magnum opus* textbook and, as George Stigler wrote in his memoir, “almost single-handedly has created the field of the economic analysis of the law.” GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 160 (1988).

3. See Henry G. Manne, *An Intellectual History of the George Mason University School of Law*, GEORGE MASON UN. SCH. L. (1993), <http://www.law.gmu.edu/about/history>.

4. To be more precise, in 1991, the American Law and Economics Association granted the title of “founding fathers” of the law and economics movement to Calabresi, Coase, Manne, and Posner. AM. L. & ECON. ASS’N, <http://www.amlecon.org/> (last visited June 25, 2014).

5. LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* 243 (2005).

6. See generally Alain Marciano & Giovanni B. Ramello, *Consent, Choice, and Guido Calabresi’s Heterodox Economic Analysis of Law*, 77 LAW & CONTEMP. PROBS., No. 2, 2014 at 97; Steven G. Medema, *Juris Prudence: Calabresi’s Uneasy Relationship with the Coase Theorem*, 77 LAW & CONTEMP. PROBS., No. 2, 2014 at 65.

7. See generally Marciano & Ramello, *supra* note 6; Medema, *supra* note 6.

*Thoughts on Risk Distribution and the Law of Torts (Some Thoughts)*⁸—written in the 50s when Calabresi was still a student, and published in 1961—in which he provided many seeds that in the subsequent five decades have germinated, transforming a fragile bud of an idea into a mature and robust discipline. This probably explains why, more than fifty years later, the article is still worth reading—for its legal dimension, for how it mixes a legal and an economic reasoning, and also for broader, let us say, ethical and philosophical reasons. Yet *Some Thoughts* is remarkable not just because it is foundational for law and economics, but also because it is foundational for Calabresi. Indeed, a lot of Calabresi's ideas about law, economics, justice, liability, and so forth, can be traced back to this original work. But, returning to the the article's greater influence, *Some Thoughts* had a huge impact on lawyers and economists, both inside the United States and outside it—especially in Europe. All this influence is the subject of this issue of *Law and Contemporary Problems*: The authors in this issue trace the impact and the legacy of Calabresi's 1961 article and, more broadly, of Calabresi himself, of his specific way of applying economics to legal problem solving. The goal of the authors in this issue is to analyze the origins and influence of Calabresi's works, their ideological, technical, and methodological aspects, as well as the connections, similarities, and differences between Calabresi's works and the other major works in law and economics or economic analyses of the law. Put more simply, the authors in this issue evaluate Calabresi's legacy in the academia. Scholars from different fields using different methodologies propose a multifaceted view of Calabresi's contributions to legal studies and to law and economics.

This issue of *Law and Contemporary Problems* starts with Guido Calabresi's own article, entitled *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*—a significant title indeed, revealing how important and even necessary it still remains for Calabresi, after more than fifty years of work and writings, to clarify his views.⁹ This is not to say that Calabresi's views were not clear; rather, as is the case with all important scholars (especially judges), there is always room for interpretation. Calabresi's clarification begins with the premise that torts scholars who view the area as one of private law (for example, those who assert that torts is only about just compensation, or that it is only about redressing private wrongs) miss the public function of the field, a function that would remain there even if the private link between injurers and victims were eliminated.¹⁰ After showing this misapprehension for what it is, Calabresi then demonstrates the public function of torts: The liability rule (in both torts and in takings and eminent-domain law), is not used principally, much less solely, to approach the result that would occur in a free market of consensual exchanges (were such a market available), but is instead used approach inalienability (that is, a fully collective result) in

8. 70 YALE L.J. 499 (1961).

9. 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 1.

10. *Id.* at 2–3.

those instances when a criminal-law solution is not desired.¹¹ Calabresi expands on this argument by showing that the liability rule (of the collectively set price) is used to achieve goals that are neither purely libertarian nor purely collectivist, but are properly viewed as social democratic.¹² With this last argument, Calabresi sets the tone of this issue of *Law and Contemporary Problems* and also provides evidence useful in resolving one of its central topics: namely, where he stands between the “left” and the “right,” between critical legal studies and Chicago neoclassical law and economics.

Part of the answer lies in Calabresi’s personal history. In effect, even if technical and methodological analyses are necessary to make sense of his ideas, they do not suffice. Laura Kalman, in her contribution to this issue of *Law and Contemporary Problems*, provides just such a personal history, in the form of what may very well be the first intellectual biography of Calabresi.¹³ Many of the details and insights provided by Kalman cannot be found in previously published articles and books, and yet they are critical to explaining the foundations of his Calabresi’s research. Kalman structures her article by using historical detail to link Calabresi’s life and career to important influencing elements, paramount among them, Yale.¹⁴ Yale in the 1950s and 1960s, after Calabresi’s family had left Italy, fleeing fascism, such that Calabresi was in a sense a refugee and an outsider.¹⁵ Yale also in the sense of a place different than Chicago.¹⁶ In effect, in 1960, Edward Levi offered Calabresi a tenured position at Chicago.¹⁷ Calabresi was only twenty-eight years old. He had not even published his first article. Yet he turned Levi’s offer down.¹⁸ He wanted to stay at Yale, where he had his American roots and where he would eventually spend his entire career.¹⁹ Although it is hard to tell how and to what extent all this influenced Calabresi, it is equally impossible to ignore these events. For these reasons, Kalman’s article provides a perspective critical for understanding the scholarship of Calabresi.

James Hackney’s contribution provides a complement to this historical perspective by locating Calabresi’s contribution in the American legal scholarship.²⁰ And, besides situating Calabresi’s, Hackney’s historical sketches

11. *Id.* at 8–9.

12. *Id.* at 9.

13. Laura Kalman, *Some Thoughts on Yale and Guido*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 15.

14. *Id.* at 15.

15. *Id.*

16. *See id.* at 40–41.

17. *Id.*

18. *Id.*

19. *See id.*

20. James R. Hackney, Jr., *Guido Calabresi and the Construction of Contemporary American Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 45.

also depict the broader intellectual *milieu* in which Calabresi wrote.²¹ Hackney tries to determine where Calabresi stood and how he navigated between critical legal studies, liberal-rights theory and law and economics.²² In the course of his analysis, Hackney shows that Calabresi was subject to criticisms from the left—where critical legal theorists criticized “the law-and-economics enterprise as an attempt to mask politics in the form of science”²³—and also from neoclassical economists like Posner, with whom Calabresi reciprocally disagreed.²⁴ Hackney shows how Calabresi answered these criticisms and, following a “long and winding” path, built his own legal theory.²⁵ One important element of Calabresi’s contribution to law and economics emphasized by Hackney is Calabresi’s “creative use of economic analysis with realist insights.”²⁶ This probably explains why, in the 1960s, Calabresi was pioneering something akin to what we could today define a behavioral approach in law and economics. At least, this is one of Hackney’s conclusions.²⁷

Steven Medema’s article also deals with the differences between Calabresi, Coase, and Posner, and each’s respective views on law and economics.²⁸ Medema analyzes a very interesting matter, namely the past and future perception of Calabresi as one of the inventor of the Coase theorem.²⁹ Professor Kalman’s article provides some evidence of this perception,³⁰ and Medema explores the view through a methodical reading of Calabresi’s writings in light of the similarities and the differences that exist between Calabresi’s ideas and the Coase theorem, all the while taking care to conduct his analysis at a historical level, without an ideological dimension. Medema illustrates that Calabresi’s understanding of the Coase theorem evolved over time: that Calabresi “increasingly converged toward Coase’s larger message in *The Problem of Social Cost* and away from the silliness that makes up so much of the commentary, pro and con, on the Coase theorem.”³¹ Medema further specifies what, exactly, Coase’s larger message was, and concludes that Calabresi is close to Coase—at least to the “real” one who can be found in the original versions of his works rather than to the narrow and standard version of Coase that can be found, for instance, in Stigler’s account of the Coase theorem.³² Medema’s view of the two Coase’s echoes what Calabresi said in

21. *Id.* at 47–52.

22. *Id.* at 54–62.

23. *Id.* at 53.

24. *Id.* at 53–54.

25. *Id.* at 62.

26. *Id.* at 63.

27. *Id.*

28. Medema, *supra* note 6, at 65.

29. Kalman, *supra* note 13, at 33–36.

30. Medema, *supra* note 28, at 94.

31. *Id.* at 92–95.

32. GEORGE J. STIGLER, *THE THEORY OF PRICE* 113 (3d ed. 1966).

1991³³ when he identified the “young socialist” of *The Nature of the Firm*³⁴ and the “middle-aged libertarian” of *The Problem of Social Cost*.³⁵ Pushing Medema’s conclusion about which Coase Calabresi agrees with a bit further, one may say that it also illustrates the distance that separates Calabresi from the standard, neoclassical approach in economics. This is somewhat different from Hackney’s thesis, but similar to what Alain Marciano and Giovanni Ramello, and then Enrico Colombatto, argue.

In their article, Marciano and Ramello follow this implication of Medema’s conclusion by insisting on the differences between a neoclassical approach to law and economics on the one hand and Calabresi’s view on the other.³⁶ Their analysis starts with reminding the reader that mainstream neoclassical economics is limited to analyzing choices made under given conditions.³⁷ Consent (to those conditions) is not discussed.³⁸ Put another way, the straightforward—although not always explicit—assumption is that choosing evidences consent, because dissent would translate into the absence of choice.³⁹ Posner’s economic analysis of law and Coase’s law and economics both rely upon this notion. But this is not the case for Calabresi, who takes a different view: Consent occupies an important place in Calabresi’s reasoning as early as *Some Thoughts*, when, for the first time, besides showing the utility of the resource-allocation criterion, he emphasizes the importance of considering “starting points” and distributive principles.⁴⁰ In Calabresi’s view, the law-and-economics scholar cannot remain neutral about the distribution of resources.

Colombatto disagrees, stressing in his article that questions about distribution and justice—upon which Calabresi insists—pertain “to political philosophy, rather than to economics.”⁴¹ According to Colombatto, Calabresi’s insistence on distributive considerations, besides differentiating Calabresi from neoclassical scholars, also differentiates him from free-market advocates—but in only one, albeit significant, way. Under Calabresi’s approach, the implication is that liability may exist even if there is no injurer.⁴² But, according to Colombatto, that is the only difference between Calabresi and free-market advocates.⁴³ This is a novel viewpoint worth of attention: By departing from the

33. Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1211 (1991).

34. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

35. Coase, *The Problem of Social Cost*, *supra* note 1.

36. Marciano & Ramello, *supra* note 6.

37. *Id.* at 101–02.

38. *Id.* at 102.

39. *Id.* at 97.

40. *Id.* at 105.

41. Enrico Colombatto, *A Free-Market View on Accidents and Torts*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 117, 132.

42. *Id.*

43. *Id.*

neoclassical vision of the Chicagoans, which is incompatible with free-market tenets, Calabresi “sides with the free-market perspective.”⁴⁴ Therefore, Calabresi’s “way of framing the law-and-economics debate is more fruitful,” from Colombatto’s libertarian, free-market perspective, “than the standard neoclassical version.”⁴⁵ A free-market supporter, argues Colombatto, has much to learn from Calabresi’s rejection of the neoclassical concepts of efficiency, wealth creation, and reciprocity—all of which are objectionable from a free-market perspective because they can be used to advocate violations of freedom of contract—and also from his analyses of uncertainty, which counsels against regulations and judicial intervention.⁴⁶ More broadly, Colombatto’s discussion implies that the nature of liability and the right to be compensated are not only technical matters—determined by objective and neutral notions such as wealth or efficiency or uncertainty or costs—but rest on fundamental, superior, not to say ideological, principles.

Those principles were present in Calabresi’s mind when he wrote *Some Thoughts*. His views about liability and compensation were not guided by efficiency only. This might be why he paid so much attention to insurance and also why, as Joni Hersch and W. Kip Viscusi write in their article, he established the “insurance objective of tort liability,”⁴⁷ recasting “tort liability as providing an implicit form of insurance.”⁴⁸ That this was an important move is evidenced by the fact that “[t]his framework remains the linchpin of economic theories of tort liability as a compensation mechanism.”⁴⁹ Hersch and Viscusi then proceed by analyzing “[h]ow and when tort liability does in fact serve [Calabresi’s claimed] insurance function.”⁵⁰ They conclude that there are circumstances, situations in which the “insurance objective” of tort liability cannot be fulfilled—because some losses cannot be “fully insured.”⁵¹ For example, on limitation on insurable losses is that “[i]nsurance is only viable if losses can be anticipated and priced accordingly.”⁵² In those cases, other forms of regulation should be used to complement tort liability. Indeed, Hersch and Viscusi conclude that “the insurance function of tort liability has limits” and that “tort liability has a limited constructive role to play,” and add that “there are other social institutions, such as government regulation, that can serve a constructive function by working in tandem with tort liability.”⁵³ Despite Hersch and Viscusi’s conclusion that tort liability’s insurance objective is unfulfillable, they

44. *Id.*

45. *Id.* at 133.

46. *Id.* at 131–33.

47. Joni Hersch & W. Kip Viscusi, *Assessing the Insurance Role of Tort Liability after Calabresi*, 77 LAW & CONTEMP. PROBS., no. 2, 2014 at 135, 135.

48. *Id.* at 162.

49. *Id.*

50. *Id.* at 136.

51. *Id.* at 162–63.

52. *Id.*

53. *Id.* at 163.

nonetheless assert that “tort liability retains a valuable risk-spreading function in many situations and may be superior to alternative institutional mechanisms in fostering incentives”

Mark Geistfeld’s article, the last in this issue of *Law and Contemporary Problems*, complements Hersch and Viscusi’s.⁵⁴ In effect, Geistfeld concludes the issue by noting that a *compensatory* tort rule—a tort rule based on the the Pareto principle—cannot be reduced to a form of accident insurance.⁵⁵ Thus, Geistfeld interprets tort law in the compensatory terms of the autonomy-based Pareto principle—he replaces a welfarist approach to tort law, aimed at minimizing the social costs of accidents, with a nonwelfarist approach based on individual autonomy and equal freedom.⁵⁶ To Geistfeld, the Pareto principle is appealing because it embodies a form of compensation that can be used to define a compensatory tort rule “that limits (nonconsensual) compensatory exchanges to forms of risky behavior that do not disvalue the autonomy of those threatened by the behavior.”⁵⁷ Geistfeld then shows that such a rule distributes risk in a way “that those who benefit from new instances of risk behavior satisfy the reasonable compensatory demands of those who would otherwise be disadvantaged.”⁵⁸ Thus, a compensatory tort rule does not simply improve the allocation of resources but also contributes to shifting the Pareto frontier outwards.⁵⁹ In other words, a compensatory tort rule creates more wealth for society.

54. Mark A. Geistfeld, *Risk Distribution and the Law of Torts: Carrying Calabresi Further*, 77 *LAW & CONTEMP. PROBS.*, no. 2, 2014 at 165.

55. *Id.* at 168.

56. *Id.* at 171–74.

57. *Id.* at 172.

58. *Id.* at 188.

59. *Id.*