

# CONSENT, CHOICE, AND GUIDO CALABRESI'S HETERODOX ECONOMIC ANALYSIS OF LAW

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## I

### INTRODUCTION

It is today widely accepted, even if not unanimously admitted, that the works that develop at the intersection between law and economics can be roughly classified into two groups. First, there is the approach known as “law and economics,” perfectly exemplified by the works of Ronald Coase, which puts the main focus on economic problems, and takes legal rules and institutions into account only insofar as they can influence economic activities and serve to restore the full working of markets.<sup>1</sup> From a methodological perspective, this law-and-economics approach rests on a definition of economics centered on its subject matter, that is to say, on its scope. It is assumed that economic activities are specifically defined—around the production, consumption, and distribution of wealth—and that the economist’s objective and task is essentially to study those activities. Coase consistently and repeatedly claimed this to be his perspective, describing himself primarily as an economist who was not interested in studying the working of the legal system *per se*.<sup>2</sup> This latter approach, that is, one centered on the legal system, instead

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1. For instance, Coase explained that “in ‘The Problem of Social Cost’ I used the concept of transaction costs to demonstrate the way in which the legal system could affect the working of the economic system, and I did not press beyond this.” R.H. Coase, *The Nature of the Firm: Influence*, 4 J.L. ECON. & ORG. 33, 35 (1988). Elsewhere, he added, “[F]or me, ‘The Problem of Social Cost’ was an essay in economics. It was aimed at economists. What I wanted to do was to improve our analysis of the working of the economic system.” R.H. Coase, *Law and Economics at Chicago*. 36 J.L. & ECON. 239, 250 (1993). In this respect, ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920), which prompted Coase’s research and gave the role of fostering efficiency to the state rather than to the market, endorses a similar attitude whereby laws and institutions essentially exist to serve the economic system.

2. For instance, Coase said,

corresponds to the second approach to studying the intersection between economics and law, referred to as the “economic analysis of law.” The economic analysis of law is in many ways an opposite viewpoint to law and economics, because it defines economics not by its subject matter—but by its method—a method that can be applied to analyze any kind of problem. In other words, economics is defined as a method that can be used by legal scholars and policy makers for positive and normative analysis, and sometimes for directing adjudication.<sup>3</sup> Essentially, under the economic-analysis-of-law approach, economics becomes functional to law. As a consequence, efficiency, which a number of scholars consider to be somehow inherently ingrained in common-law systems,<sup>4</sup> becomes the main guiding principle inspiring lawmaking and law enforcement. Efficiency has become such a lodestar that some even rely on the rather programmatic hypothesis that laws can in general best be explained in terms of promoting economic efficiency.<sup>5</sup> It follows, from this hypothesis, that legal institutions must simply be evaluated in terms of their welfare-enhancing ability, meaning their capability to promote the optimal use of resources, and that this paradigm should similarly guide the normative perspective.

Formally, the economic analysis of law was “invented” by Richard Posner at the beginning of the 1970s when he published the discipline’s eponymous masterpiece,<sup>6</sup> launched the *Journal of Legal Studies*, and started to write articles in which he explained that economics is an important tool that can be used to

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As I see it, the subject is divided into two parts which are separating more and more as time goes by. One is—and here Judge Posner is the person who has made the greatest contribution—the use of economics to analyze the law, the economic analysis of law. And this part embraces the use of economic approaches and economic concepts, first, to discuss the doctrines with which lawyers work and, second, to discuss the working of the legal system. Now, an economist really isn’t much interested in this part of Law and Economics—at least this economist isn’t. I am interested in the working of the economic system and that doesn’t mean that I’m not interested in the legal system. I’m interested in the effect that the working of the legal system has on the working of the economic system. What difference does it make if you have a different legal system? What difference does it make if the laws are changed? What difference does it make if you have regulation of this type or some other type? That’s why I’m interested in Law and Economics.

Richard A. Epstein, Gary S. Becker, Ronald H. Coase, Merton H. Miller & Richard A. Posner, *The Roundtable Discussion*, 64 U. CHI. L. REV. 1132, 1138 (1997).

3. See Sophie Harnay & Alain Marciano, *Posner, Economics and the Law: From “Law and Economics” to an Economic Analysis of Law*, 31 J. HIST. ECON. THOUGHT 215 (2009) (discussing the methodological foundations of an economic analysis of law and showing the connection between Posner and Becker in terms of how to define economics as a method versus an approach).

4. An increasing number of articles sustain the idea that common-law systems are better equipped for protecting property rights and accordingly fostering economic growth. See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

5. See, for instance, Landes and Posner’s assertion that “trademark law, like tort law in general . . . can best be explained on the hypothesis that the law is trying to promote economic efficiency.” William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 265–66 (1987).

6. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973).

analyze (in particular) legal phenomena.<sup>7</sup> Posner's innovation, however, was preceded—by slightly over a decade—by Calabresi's *Some Thoughts on Risk Distribution and the Law of Torts* (*Some Thoughts*) in 1961.<sup>8</sup> And in the early 1960s, just as Coase published his seminal *The Problem of Social Cost*,<sup>9</sup> Calabresi instead somewhat reversed the Coasean trajectory and departed from the standard legal scholarship of his time by using economic tools and analysis to investigate legal questions and the broader issues embedded therein. More specifically, Calabresi's approach diverged from Coase's because he decided to use economics as a tool, that is, as a rigorous methodology that could be used to better understand the working of legal issues. In other words, starting with *Some Thoughts* and continuing thereafter, Calabresi applied economic methods to analyze legal questions and consequently, according to the aforesaid distinction between economics-as-a-subject-matter and economics-as-a-methodology, was proposing an economic analysis of law.<sup>10</sup>

The above evaluation is not an ex post reconstruction; commentators on Calabresi's works perceived it at the time of publication. For instance, Walter Blum and Harry Kalven observed the novelty of Calabresi's perspective as soon as they started to study and comment on his work, and noted that he had “crystallized the *economic analysis of liability*.”<sup>11</sup> Posner himself also underscored the change of direction initiated by Calabresi with respect to Coase in his 1970 review of Calabresi's *The Costs of Accidents*.<sup>12</sup> Moreover, in 1971 Frank Michelman, also commenting on *The Costs of Accidents*, noted that Calabresi “provide[s] a conceptual apparatus for describing, comprehending, and evaluating systems of accident law.”<sup>13</sup> Yet Calabresi himself continues to insist that his work should be viewed as a form of law and economics rather than as an economic analysis of law, and that he prefers to see his contribution grouped with Coase's rather than with Posner's, whom he strongly disagrees with and even opposes.<sup>14</sup>

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7. *Id.*; Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971)

8. 70 YALE L.J. 499 (1961) [hereinafter Calabresi, *Some Thoughts*].

9. 3 J.L. & ECON. 1 (1960) [hereinafter Coase, *The Problem of Social Cost*].

10. See Alain Marciano, *Guido Calabresi's Economic Analysis of Law, Coase and the Coase Theorem*, 32 INT'L REV. L. & ECON. 110 (2012).

11. Walter Blum & Harry Kalven, Jr., *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 240 (1967) (emphasis added).

12. See Richard A. Posner, Book Review, 37 U. CHI. L. REV. 636, 638 (1970) (“The Costs of Accidents is an ambitious effort to employ a social science perspective (again that of economics) in a field of law in which, when Calabresi started his work, there was no supportive tradition, no pioneering work by economists or other social scientists, on which to rely. In its bold break with conventional legal analysis of tort questions, Calabresi's work may be a portent of the future direction of legal scholarship in fields that, unlike antitrust, remain bastions of the traditional approach.”). Although acknowledging the innovative dimension of Calabresi's work, Posner nonetheless reduced it to one domain, tort law.

13. Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647, 648 (1971).

14. See Laura Kalman, *Some Thoughts on Yale and Guido*, 77 LAW & CONTEMP. PROBS., no. 2,

It is certainly difficult, to say the least, to contradict how a scholar himself views his own work and impose upon him a classification he expressly rejects. However—and this is the purpose of this article—we shall here attempt to reconcile the view that Calabresi’s work is a departure from law and economics with Calabresi’s own perception of his work. More specifically, we will continue to maintain that what Calabresi develops is, strictly speaking, an economic analysis of law, because he uses economics as a tool for analyzing legal issues. At the same time, though, we will show that Calabresi also departs from the neoclassical conception of the economic analysis of law, because he provides a broader cognitive and conceptual paradigm for reasoning about legal issues that makes his approach on the whole distinct from both. In accordance with the economic analysis of law, Calabresi uses economics to guide legal action; although he does recognize that in certain settings “traditional economic theory [can] be of little help,”<sup>15</sup> in accordance with the law-and-economics view, he equally acknowledges the role of laws in fostering economic efficiency. This twofold orientation not only places economics and law on an equal footing, it also treats them both as instruments serving higher goals connected with basic individual liberties, which the market alone is not always able to promote.

Our argument rests on the possible distinction between choice and consent. Usually, at least in neoclassical economics, individual choices are supposedly made under certain conditions, to which the choosers are assumed to implicitly consent. Consent is thus never discussed or considered in any way distinct from choice. The role of law is precisely to defend consent, and to intervene in an efficient way whenever this principle is violated.

Whereas Coase and Posner rely upon the aforementioned assumption that choice is equivalent to consent, Calabresi diverges significantly from this position to develop a type of heterodox—and thus not truly neoclassical—economic approach that also takes into account the conditions of choice and includes these conditions in the analysis of the intersection between law and economics. In other words, the conditions of choice are not treated as trivially exogenous features of the setting in which legal action—possibly guided by economic efficiency—is played out, but rather as a fully fledged part of the decision set, which the legal system must carefully consider. From this viewpoint it follows that the role of law and economics is to provide a method for examining these complex issues and arriving at solutions that consider not only social welfare (and, by implication, efficiency), but also other matters connected to individual rights and liberties.<sup>16</sup>

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2014 at 15, 36–37; Guido Calabresi, Lecture at the International University College of Turin: History and Meaning of Law and Economics (Jan. 24, 2012), *available at* [http://www.youtube.com/watch?v=UDz8R\\_PhscY](http://www.youtube.com/watch?v=UDz8R_PhscY).

15. Calabresi, *Some Thoughts*, *supra* note 8, at 505.

16. Such a conception of law and economics is very close to the conception that prompted Coase to write *The Problem of Social Cost* in order to confute blind Pigouvian support for state intervention, which he viewed as detrimental to individual liberties. For an extensive presentation of the genesis of Coase’s seminal article, see Francesco Parisi, *Coase Theorem and Transaction Cost Economics in the*

More specifically, under Calabresi's approach, law and economics complement each other as follows: Economics is concerned with choice under certain given conditions that, as we have noted, may not be satisfactory. What economics provides is only a framework, which needs to be normatively qualified by judges and the legal system. Therefore, if—as Laura Kalman stresses in her article in this issue of *Law and Contemporary Problems*—“[f]or Guido, law and economics proves the more challenging and worthwhile endeavor” than the economic analysis of law, it is because he envisages law and economics as a back-and-forth dialogue between the two disciplines.<sup>17</sup> This equal footing of law and economics is what the economic analysis of law tends to preclude, because it essentially downgrades economics to a mere problem-solving technology. To be sure, Calabresi sees economics as providing road signs—“road signs that are not too misleading to be worth spending time on”<sup>18</sup>—that judges and lawmakers can then use to serve a higher good than simply fostering efficiency.

We shall now illustrate how Calabresi expounded this view as early as 1961 and through all of his work during the 1960s. First, however, let us start with a discussion of the neoclassical assumption that choice takes place under given conditions.

## II

### CHOICE, CONSENT AND THE NEOCLASSICAL FRAMEWORK OF LAW AND ECONOMICS

Despite their different ways of looking at economics, law and economics and economic analysis of law share one major feature, rooted in their neoclassical foundations. To understand what this feature is we need to consider again what standard neoclassical economics is about. As is well-known, neoclassical economics is interested in explaining how to allocate resources in the most efficient manner and, at least sometimes, observing how individuals behave to arrive at such an optimal allocation, or how individual choices contribute to reaching an optimal allocation of resources. It is also a fairly well-known assumption—albeit one not always explicitly stated by neoclassical economists themselves—that the analysis takes place under *given* conditions, meaning that the preferences (in the form of a utility function) are given, as are the constraints individuals face and the content of the choice set.<sup>19</sup> This in its turn

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*Law*, in ELGAR COMPANION TO LAW AND ECONOMICS 7 (Jürgen G. Backhaus ed., 2d ed. 2005).

17. Kalman, *supra* note 14, at 35.

18. Guido Calabresi, *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 560 (1980) [hereinafter Calabresi, *An Exchange*].

19. This point was emphasized in particular by Friedrich Hayek, who insisted that neoclassical economics assumes that the economic problem to be solved is a matter of pure “logic”: “On certain familiar assumptions the answer is simple enough. If we possess all the relevant information, if we can start out from a given system of preferences and if we command complete knowledge of available means, the problem which remains is purely one of logic.” F.A. Hayek, *The Use of Knowledge in*

implies that, at the individual level, the purpose and goal of any individual is simply to mechanically select the most preferred element under the given conditions. At the global or collective level, this way of framing the analysis means that the optimal allocation of resources that needs to be attained for the economy to be efficient will likewise be given: It belongs to a *given*, preexisting set of feasible allocations or, in other words, is delineated by a preexisting Pareto frontier.

Yet because of this strict focus on choices within given constraints and under given conditions, neoclassical economists do not say anything about the nature, content, and boundaries of the choice set. Neoclassical economists neither investigate the conditions under which choices are made nor study whether individuals agree or consent to the conditions of the choices they make. Individuals are implicitly assumed to agree or consent to the conditions of choice. The very act of choosing is taken as a confirmation that individuals accept the conditions of the choice. If they disagreed, they would dissent with those conditions and not engage in interactions. This viewpoint is what Fabienne Peter terms a “choice-based view of consent,”<sup>20</sup> and it is a fundamental pillar of neoclassical economics that is more or less explicitly set forth in its analyses.<sup>21</sup>

Interestingly for our analysis, Peter refers to Posner as being one of the most explicit defenders, in law and economics, of the identity between choice and consent. She mentions a quotation from Posner in which he states that “[t]he version of consent used here is *ex ante* compensation. It is my contention that a person who buys a lottery ticket and then loses the lottery has ‘consented’ to the loss so long as there is no question of fraud or duress.”<sup>22</sup> This is certainly not surprising. Posner’s economic-analysis-of-law approach based on efficiency and legitimacy rests precisely on the idea that willingness to pay—that is, the maximum amount that a person consents to pay to buy a good or to avoid

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*Society*, 35 AM. ECON. REV. 519, 519 (1945) (emphasis omitted). James Buchanan also explained that, under this approach, choices are mechanical and the solution to the economic problem is given with the assumptions under which it is posed. James M. Buchanan, *What Should Economists Do?*, 30 S. ECON. J. 213 (1964).

20. Fabienne Peter, *Choice, Consent, and the Legitimacy of Market Transactions*, 20 ECON. & PHIL. 1, 4 (2004).

21. More precisely, under the assumption of revealed preferences “the individual guinea-pig, by his market behaviour, reveals his preference pattern.” Paul A. Samuelson, *Consumption Theory in Terms of Revealed Preference*, 15 ECONOMICA 243, 243 (1948). Other social sciences, including more recently even economics, have questioned the stability of individual decisions and how they can be affected by social pressure or other psychological factors, thus highlighting the possible divergence between individual consent and choice when suggesting normative prescriptions. See, e.g., Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, in ADVANCES IN BEHAVIORAL ECONOMICS 3 (Colin F. Camerer, George Loewenstein & Matthew Rabin eds., 2003). For an example showing how the same individual’s choice may vary depending on the presence or absence of social pressures, see Matteo Migheli & Giovanni B. Ramello, *Open Access, Social Norms and Publication Choice*, 35 EUR. J.L. & ECON. 149 (2013).

22. Peter, *supra* note 20, at 5 (quoting RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 94 (1981)).

something undesired—indicates consent to the transaction. In other words, the very act of accepting to participate in the process of choosing means that the person agrees to the conditions of the choice. Under certain assumptions—specifically, if the person is not coerced to take part in the transaction—individuals are always free to opt out. Thus, we can even take the argument one step further, as Posner does, and extend this implicit derived-from-choice notion of consent to institutions. Under that view, individuals do not just consent to a specific transaction: They consent to the entire institutional system in which the transaction takes place. This is exactly the conclusion that Peter reaches about Posner: “[A] conception that derives consent from choice – whether actual or past – can be applied to legitimize not just individual market transactions, but the institutional constraints under which people choose and in which individual market transactions take place.”<sup>23</sup>

This choice-based view of consent transcends the categories of law and economics and economic analysis of law, and is used not only by Posner. We also find it in Coase, more specifically in his analysis of harmful effects (externalities) in *The Problem of Social Cost*,<sup>24</sup> and in Stigler’s *Coase Theorem*.<sup>25</sup> Indeed, Coase reasoned within a neoclassical framework. He was fundamentally interested in how to allocate scarce resources with harmful or third-party effects in a very traditional economic sense: The analysis takes place within a Pareto frontier—that is to say under given conditions—and the issue to tackle is how to arrive at the best outcome. In other words, the economist’s task is to explain how to reach an optimal situation that is presupposed to exist, that is, one that is known but cannot be attained due to technical obstacles. However, there is no discussion about the content of the choice set. This lack of discussion is confirmed by at least one requirement set forth by Coase. Coase requires that property rights should be well-defined, which clearly means that the conditions of choice are given and do not matter; they do not influence the outcome of the transaction.<sup>26</sup> Then, of course, there is the result that

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23. *Id.* at 6.

24. Coase, *The Problem of Social Cost*, *supra* note 9.

25. GEORGE STIGLER, *THE THEORY OF PRICE*, 113 (3rd ed. 1966).

26. According to Coase, a well-defined set of private-property rights is central for making the market a valuable technology of voluntary exchange. Coase, *The Problem of Social Cost*, *supra* note 9. However, the simplifying assumption that rights are “well-defined” is an elegant and somewhat tautological way of avoiding many problems, including consent, because, in accordance with Samuelson, it necessarily follows from such an assumption that economic agents are able to define their preferences *ex ante* for all conceivable occurrences and events, and that this represents their consent to *ex post* decisions. Samuelson, *supra* note 21. Although the assumption of well-defined rights utterly disregards the facts of bounded rationality and contractual incompleteness, it has fostered the notion of the market as a locus for expressing freedom, and that the law in many cases should serve society by simply promoting efficiency. See Ugo Mattei & Andrea Pradi, *Property Rights: A Comparative Law and Economics Perspective in the Global Era*, in *PROPERTY RIGHTS DYNAMICS: LAW AND ECONOMICS PERSPECTIVE* 40 (Donatella Porrini & Giovanni B. Ramello eds., 2007); Antonio Nicita, *On Incomplete Property: A Missing Perspective in Law and Economics*, in *PROPERTY RIGHTS DYNAMICS: LAW AND ECONOMICS PERSPECTIVE*, *supra*, at 78; Donatella Porrini & Giovanni B. Ramello, *Property Rights Dynamics: Current Issues in Law and Economics*, in *PROPERTY RIGHTS DYNAMICS: LAW AND*

corresponds to Coase's theorem, which is completely in accord with a neoclassical frame of analysis. In effect, the idea that individuals are able to bargain to reach an optimal allocation of resources and maximize personal utility, in a manner that internalizes all external effects, means that what matters is only what happens under the given, preexisting conditions that characterize the problem. What is crucial for the economist is that individuals are capable of bargaining with each other. In effect, through bargaining, if it works properly, individuals are always able to reach their most preferred outcome. Consent to the conditions of choice is left out of the analysis. The focus is placed only on how to enable individuals to obtain what they want and what they prefer.

Last but not least, the so-called "invariance" thesis is the idea that liability rules do not affect the allocation of resources. According to this thesis, therefore, the starting point—the legal conditions of the choice—does not impact the choice itself. As a result, there is no reason to pay attention to the actors' consent to the conditions of choice. Consent to the conditions of choice—to the initial situation—is assumed separately from the analysis.

As we have previously explained, both Coase's law-and-economics analysis and Posner's economic analysis of law take place within *given* constraints, and analyze only the choices made by individuals, without paying attention to the conditions of those choices. As a corollary, what matters to both these authors is understanding how to reach an optimal allocation of resources that belongs to a set of preexisting, given endowments. This view implies that there is not much need for dialog or interaction between the two disciplines. Because the only issue is how to select one's preferred outcome from a given set of alternatives, without saying anything about the alternatives themselves or how the set is selected, economics is without contention the best discipline for explaining such choices. It so follows that individual choices can be taken as the reference for legal decisions, and that judges and legal scholars should therefore follow the recommendations of economics.

### III

#### CALABRESI'S DEPARTURE FROM THIS PERSPECTIVE

This is precisely where Calabresi parts ways with Coase as well as with Posner. We can detect this departure quite easily in Calabresi's more recent works, including *The Pointlessness of Pareto: Carrying Coase Further*<sup>27</sup> and *An Exchange: About Law and Economics: A Letter to Ronald Dworkin*.<sup>28</sup> In the former contribution, Calabresi opposes the views set forth in Coase's two major articles: *The Nature of the Firm*<sup>29</sup> and *The Problem of Social Cost*.<sup>30</sup> In these two

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ECONOMICS PERSPECTIVE, *supra*, at 1.

27. 100 YALE L.J. 1211 (1991).

28. Calabresi, *An Exchange*, *supra* note 18.

29. 4 ECONOMICA 386 (1937).

30. Coase, *The Problem of Social Cost*, *supra* note 9.



works, Coase makes a crucial transition away from socialism to adopt neoclassical reasoning, characterized by the analysis of what happens *within* an “existing” Pareto frontier or, to use our terms, under *given* conditions. Assuming that the starting point, the conditions of choice, is of no importance to the outcome of a bargaining process, as Coase does in *The Problem of Social Cost*,<sup>31</sup> clearly indicates that what mattered to Coase was how individuals behave within a set of given constraints. Calabresi, however, disagreed with this view, which limits economics to a science that studies the allocation of resources and individual choices under given conditions—that is, within an existing Pareto frontier. What Calabresi instead propounded was the adoption of a broader perspective that would also embrace law and ethics.<sup>32</sup> The economic analysis he was interested in performing needed to also include the *starting points* among its variables.

Calabresi set forth this view in a letter sent to Ronald Dworkin after the latter had criticized Posner’s criterion of wealth maximization.<sup>33</sup> In that letter, Calabresi likewise disagreed with wealth maximization, and framed the discussion in more general terms that compared different economic approaches. On one side, he placed economists or scholars such as Amartya Sen, I.M.D. Little, Abba Lerner, and Jules Coleman, whose works are of relevance for an economic analysis of law, and criticized Stigler and the Chicagoan economists whose views Posner endorsed.<sup>34</sup> He thus also disagreed with Posner’s economic analysis of law. A point of interest here is that Calabresi’s criticism centered precisely on the point that knowing how to reorganize the content of the choice set is just as important as knowing how to behave within it. This in turn means that choosing cannot be equated with consent. Choosing cannot indicate that individuals consent to the conditions of the choice and so, in Calabresi’s view, it is not enough to focus on wealth maximization or on allocative efficiency measured by any other criterion. A genuine law-and-economics approach needs to also pay attention to the nature, content, and boundaries of the choice set.<sup>35</sup>

31. *Id.*

32. The ethical dimension emerges from many points. For instance, in making comparisons with different positions of the nineteenth and twentieth centuries, Calabresi says that today “we quite properly find the idea of workers subsidizing industrial expansion intolerable.” Calabresi, *Some Thoughts*, *supra* note 8, at 517.

33. Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

34. Calabresi, *An Exchange*, *supra* note 18, at 560.

35. Indeed, in another, more recent work, Guido Calabresi insists that there are cases in which it is important to distinguish choosing within constraints from making decisions about constraints:

It is characteristic of tragic decisions, however, that first- and second-order determinations are made separately. This allows for the more complex mixtures of allocation approaches which are brought to bear on the tragic choice, and it permits a society to cleave to a different mixture of values at each order.

GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* 20 (1978). When tragic choices are involved, one should make a distinction between the two levels and the two dimensions of the process of choice. This latter view is more restrictive—restricted to tragic choices—but it also characterizes the rest of Calabresi’s work.

The above idea is not a recent development in Calabresi's work, and appeared in a number of his early publications, including, for example, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*.<sup>36</sup> Its initial seeds can be found as early as *Some Thoughts*, which thus marks the origins of a novel approach to matching economics with law.

#### IV

#### BACK TO THE BEGINNING: THE GENESIS AND THE NEOCLASSICAL FOUNDATIONS OF *SOME THOUGHTS ON RISK DISTRIBUTION AND THE LAW OF TORTS*

The genesis of *Some Thoughts* provides insights into Calabresi's approach to law and economics, that is to say, to Calabresi's economic analysis of law, to use the categorization proposed earlier. Calabresi produced the first draft in 1955, the same year that, after having obtained a B.S. *summa cum laude* at Yale University in analytical economics, he was taking torts.<sup>37</sup> He did not, however, write this article just as a matter of personal and abstract interest; instead, he was also spurred by the historical context that had brought tort law to the center of civil and academic debate, so much so that it was included on the agenda of policy makers. The surrounding environment was thus very important and provided fertile ground for the writing of *Some Thoughts*. In fact, the flourishing of manufacturing activities and transportation in the United States (and elsewhere) during the second half of the nineteenth century and the first decades of the twentieth century dramatically increased the number of accidents, thus attracting the attention of victims and legislators to liability.<sup>38</sup> As Lawrence Friedman nicely puts it, tort law is "a creation, to be more exact, of the railroad and the factory."<sup>39</sup> The rate of injuries caused by those activities increased to the point of becoming a social problem. Because a lot of blood was spilt—"the blood of factory workers, railroad passengers, and sometimes bystanders"<sup>40</sup>—lawsuits gained momentum and, especially in the United States, case-by-case adjudication boosted tort law.

During the industrial revolution, the courts' decisions were heavily biased in favor of firms and there were severe boundaries to the liability of enterprises,

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36. 78 HARV. L. REV. 713 (1965) [hereinafter Calabresi, *The Decision for Accidents*].

37. For some biographical information on Calabresi, see William W. Fisher III, *Guido Calabresi and Douglas Melamed*, in THE CANON OF AMERICAN LEGAL THOUGHT 401 (David Kennedy & William W. Fisher eds., 2006). See also Guido Calabresi, Commentary, in Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449; Veronica Grembi, *Guido Calabresi e l'analisi economica del diritto*, 24 RIVISTA CRITICA DEL DIRITTO PRIVATO 449, 452 (2006) (It.); Kalman, *supra* note 14.

38. *Some Thoughts* has a nonnegligible "historical" dimension. Calabresi in fact refers to the use of liability in the nineteenth century and the twentieth century, explaining extensively why in the former the enterprise-liability argument did not arise. See Calabresi, *Some Thoughts*, *supra* note 8, at 515 n.43.

39. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 349 (2002).

40. *Id.*

possibly due to the enthusiasm for technological and economic progress.<sup>41</sup> The twentieth century opened the door to a substantial revolution in tort law, but this was a long tortuous process that began to gain pace especially after the Second World War, also thanks to works such as *Some Thoughts*.<sup>42</sup> There has always been a tension between the desire to not endanger individuals' basic rights (and their ancillary right to obtain damages) and the fear that too much protection would be tantamount to "killing the goose that lays golden eggs" by encouraging largely frivolous litigation.<sup>43</sup>

In this context, there began to emerge a need to rebalance the relationships between plaintiffs and defendants and to remedy the underprotection of victims, while at the same time avoiding making tort law a mere hunting ground for unscrupulous rent seekers. *Some Thoughts* and subsequent works up to and including *The Cost of Accidents* were, therefore, at least partly written with the aim of trying to solve this rebalancing conundrum in the light of social interest. Solutions to the rebalancing conundrum evidenced not only the social value of lawsuits but also their role in promoting efficiency. According to this innovative perspective, in addition to serving as a means to remedy private harms, tort-law litigation could be regarded as a legal device that serves society in a number of ways. To Calabresi, efficiency was one such way, and the efficiency criterion could become a guideline—although not a *goal*—for dealing with these kinds of issues.<sup>44</sup> Hence the rule of liability and the spreading of risk became functional tools for fostering the emergence of a proper outcome, and economics became useful for understanding how to determine liability.

Indeed, Calabresi's 1961 article starts with a detailed explanation of how useful and important economics—one might even say neoclassical economics—

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41. See Calabresi, *Some Thoughts*, *supra* note 8, at 515 n.43 (explaining that one of the reasons for the scant use of the resource-allocation rationale in the nineteenth century was an overreliance on rational choice and on the rational-actor assumption, to some extent spurred by the industrial revolution).

42. Again Friedman provides a rich description of the change:

In essence, nineteenth-century tort law was a law of limitation: a law that set boundaries to the liability of enterprise; a law that made it difficult (especially for workers) to collect for personal injury. In the twentieth century, the old tort system was completely dismantled; the courts and the legislatures limited or removed the obstacles that stood in the way of plaintiffs; and a new body of law developed, law which favored the plaintiffs—to the point where people spoke about a liability 'explosion.' Some of the changes were slow and incremental; some were dramatic. Some were inventions of judges; some were embodied in complicated statutes.

FRIEDMAN, *supra* note 39, at 349–50.

43. *Id.*

44. The idea of the social role of litigation, although not confined to tort law, has subsequently fostered a significant stream of literature in law and economics starting with Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982). This contribution in general focused on the direct outcome, whereas other, more recent contributions have focused on the indirect benefits such as law making. See Thomas Miceli, *Legal Change and the Social Value of Lawsuits*, 30 INT'L REV. L. & ECON. 203 (2010); Giovanni B. Ramello, *Aggregate Litigation and Regulatory Innovation: Another View of Judicial Efficiency*, 32 INT'L REV. L. & ECON. 63 (2012); Stacie I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?* 88 NOTRE DAME L. REV. 899 (2013).

is for analyzing legal problems, and an insistence on the importance of discussing these questions from the perspective of an efficient allocation of resources.<sup>45</sup> For instance, he opens by explaining that there are two criteria for determining how to spread economic losses caused by accidents—ethics (justice) and economics (allocation of resources)<sup>46</sup>—and that economics, though certainly not more important in absolute terms, should take priority over ethics. Questions about liability and the goals of accident law “are not meant to herald a metaphysical search for ultimate causes.”<sup>47</sup> Such “[g]reat moral issues” are instead a matter of “collective choice” and have to be “decide[d] in whatever political way our society chooses to decide moral questions.”<sup>48</sup> Thus, answers expressed in terms of justice and fairness would be too “vague,”<sup>49</sup> too general, and not practical enough. By contrast, questions about everyday-life situations, about “‘rotary mowers versus reel mowers,’ ‘one method of making steel as against another’ are questions difficult of collective decision,”<sup>50</sup> by which Calabresi meant that these questions are too “difficult” to be dealt with collectively. He then suggests that economics be used as a criterion to help judges make their decisions: “[T]he marketplace serves as the rough testing ground.”<sup>51</sup> In other words, those rules that are not determined at the political level, that is to say by citizens, have to be determined by judges using an economic criterion. Therefore, liability should be assigned based on what Calabresi also calls “the ‘allocation of resources’ justification.”<sup>52</sup> In other words, the assignment of liability should be made within a Pareto frontier, and hence under *given* economic conditions. In this respect, he therefore sticks to the mainstream economics tradition.

Next, and quite interestingly, Calabresi goes on to develop his own version of the Coase theorem.<sup>53</sup> Not only does he emphasize, in a non-Pigouvian way, the reciprocal dimension of accidents, but he also, rather than arguing that liability should be put on the tortfeasor, asks who should actually bear the costs of economic activities: Should it be the firms, “those classes of people ‘most able’ to pay?” or should those losses be spread “both interpersonally and intertemporally” as broadly as possible?<sup>54</sup> He also reaches the conclusion that, from an economic-analysis perspective—which he refers to as the “pure loss-distribution theory”<sup>55</sup>—the assignment of the cost burden, the distribution of losses, and the assignment of liability to one party or the other have no impact

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45. Calabresi, *Some Thoughts*, *supra* note 8, at 501–03.

46. *Id.*

47. Calabresi, *The Decision for Accidents*, *supra* note 36, at 725.

48. *Id.* at 717–18.

49. Calabresi, *Some Thoughts*, *supra* note 8, at 501.

50. Calabresi, *The Decision for Accidents*, *supra* note 36, at 717.

51. *Id.*

52. Calabresi, *Some Thoughts*, *supra* note 8, at 502.

53. For a more detailed analysis, see Marciano, *supra* note 10.

54. Calabresi, *Some Thoughts*, *supra* note 8, at 499.

55. *Id.* at 506.

on the allocation of resources, stating, “[I]t actually does not matter who bears the loss initially,” and “[t]here are, naturally, some situations where . . . it actually does not matter who bears the loss initially.”<sup>56</sup> Later, for example, in 1965 and 1968, Calabresi again repeats the same claims,<sup>57</sup> expressing even more clearly the role of bargaining. He explains that the “situations in which it will not matter which of two activities initially bears the cost of an accident . . . are all the situations in which the two or more possible accident-causing activities are related by bargaining.”<sup>58</sup> In effect, through bargaining, “the least expensive way to minimize the loss will be sought out and used [by] whichever of the two is initially liable.”<sup>59</sup>

Thus, Calabresi adopts arguments similar—or nearly identical—to those used by Coase in *The Problem of Social Cost*<sup>60</sup> and prefigures the invariance thesis about the law that economists would eventually come to accept only a decade later. One might even say that, as evinced by the quotations cited above, Calabresi adopts the same framework as neoclassical economists: Assigning liabilities is for him a matter of allocating resources to one party or another in a given Pareto set—within a given Pareto frontier—and of course, within such a framework, the starting points indeed do not matter. There is no need to distinguish consent from choice or to pay specific attention to the conditions of choice. The conditions of choice are not an issue because, whatever those conditions are, individuals always end up choosing what they value most, that is to say, what they prefer. In effect, just like Coase, Calabresi appears to argue that individuals always end up buying what they want to buy and paying what they want to pay, because when the market works perfectly, the pricing mechanism enables “the buyer to cast an informed vote in making his purchases.”<sup>61</sup> Calabresi even writes, “If people want television sets, society should produce television sets; if they want licorice drops, then licorice drops should be made.”<sup>62</sup> In this light, one could say that voluntary exchange is the

56. *Id.*

57. For instance, Calabresi says, “There are, happily, some situations in which it will not matter which of two activities initially bears the cost of an accident.” Calabresi, *The Decision for Accidents*, *supra* note 36, at 725. He is then more precise, explaining why “it ultimately makes no difference whether the dock owner or the shipowner in *Vincent v. Lake Erie Transp. Co.* is held liable for damage to the dock caused by an unexpected storm” and also why

[t]heoreticians will insist that in terms of ‘general’ deterrence of accident-prone activities it makes no difference either way” that “the cost of industrial accidents be put on workers or on their employers . . . [or] the cost of rotary as against reel lawn mowers be borne by the manufacturers or the users.

*Id.* at 726. In another article, Calabresi says, “[T]he same allocation of resources will come about regardless of which of two joint cost causers is initially charged with the cost, in other words regardless of liability rules.” Guido Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 67 (1968).

58. Calabresi, *The Decision for Accidents*, *supra* note 36, at 725–26.

59. *Id.* at 726.

60. Coase, *The Problem of Social Cost*, *supra* note 9.

61. Calabresi, *Some Thoughts*, *supra* note 8, at 502.

62. *Id.*

most efficient way to allocate resources. Under voluntary exchange, that is, if individuals can bargain with each other, we can completely rely upon and trust individual choices and take what individuals want as the benchmark for organizing production. Any distortive solution would impact not only what is produced but also individuals' choices to buy more of some goods and less of others.<sup>63</sup> It is no surprise, then, that the overall prescription provided in *Some Thoughts* seems to reflect a principle of minimal interference: “[I]t is equally clear that if people are to have any intelligent role in deciding what is to be produced, liability must finally be limited by some criterion connected with the scope of the activity charged.”<sup>64</sup>

This assertion, however, is only the tip of the iceberg of Calabresi's analysis. There is much more to consider, especially when the real world enters the scene. *Some Thoughts* also provides analyses that go far beyond these neoclassical foundations.

## V

### OVERCOMING NEOCLASSICAL ECONOMICS: CONSENT AND BEYOND

Although Calabresi does believe that economics is a powerful tool for helping legal scholars and judges “solve” legal problems, he also believes that it is not without its limitations and that the allocation-of-resources criterion is not without its weaknesses. This reasoning begins to be developed in his work as early as *Some Thoughts*. It first appears when he insists that the invariance thesis, under which liability rules have no impact on the allocation of resources, is valid only from the perspective of “traditional economic theory”<sup>65</sup> or “[i]n terms of ‘pure’ resource-allocation-loss-distribution theory.”<sup>66</sup> This means the invariance theory will, conversely, no longer valid when we shift away from the theory to real-world situations. Calabresi then writes the loss-distribution argument “is in fact inaccurate”<sup>67</sup> and, a few years later, states that “we cannot assume that it makes no difference, in terms of accident deterrence, who is saddled with the original liability.”<sup>68</sup> Thus, soon after insisting economists are right and that a thesis based on the premises of neoclassical economics could be accepted, he rejects it. That is to say, from the perspective we offer in this article, he rejects the idea that the constraints under which individuals make their choices do not matter. Or, to put it differently, he rejects the claim that studying the constraints is not part of the scope of economics. This can be taken as an admission that the traditional law-and-economics and economic-analysis-

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63. See Calabresi, *Some Thoughts*, *supra* note 8, at 503 (“In each, an economist would say, resources are misallocated in that goods are produced which the purchaser would not want if he really had to pay the full extent of their cost to society—their cost, whether in terms of the physical components of the item or of the expense of accidents associated with its production and use.”).

64. *Id.* at 515.

65. *Id.* at 505.

66. *Id.* (emphasis added).

67. *Id.* at 506.

68. Calabresi, *The Decision for Accidents*, *supra* note 36, at 731.

of-law approaches are not well equipped for tackling the question, and a further step is needed to provide a solution. Indeed, the explanations Calabresi puts forward to justify his opposition to the conclusions of neoclassical economics clearly prove he is aware of the limitations of a choice-based view of consent.<sup>69</sup>

First, Calabresi insists that, in the real world, the allocation of resources does not always take place through competitive markets, but is instead determined by the choices and decisions of monopolists. In terms of individuals' choices and their consent to the conditions of their choices, this proves to be crucial. In effect, in such a case, the crucial point is that the choice set from which individuals select their most-preferred outcome is constrained—chosen by the monopolist. Obviously, this means that individuals do not make their own choices but choose what they are obliged to choose by the monopolists. Even if an individual chooses an option that maximizes her utility, it cannot be said that she consents to the conditions of choice.<sup>70</sup> Even if an individual chooses her most-preferred element out of a set of available alternatives, she cannot be said to “own” her choice. Even if an exchange is “voluntary,” it cannot be said that individuals consent to the exchange. Calabresi is clear on this point: “If, then, we count on people to choose what they want on the basis of an item’s total cost to society, we fool ourselves whenever differing degrees of monopoly power exist.”<sup>71</sup> In that case, consent to the conditions of choice is impaired despite the fact that the exchange itself is voluntary.

Calabresi further argues that the allocation-of-resources theory is not valid in the real world because, in his view—and in contradiction with what standard neoclassical economists assume—individuals are *not* rational. Discussing the possible reasons for why resource allocation was not extensively used in the nineteenth century, he specifically criticizes the simplistic position of a blind belief in the rationality paradigm and in a world populated by all-knowing economic men. Although he recognizes the power of the economic paradigm, he keeps his feet well-grounded in reality and warns the reader about the limitations of this paradigm in many instances. Thus, he notes that although the resource-allocation paradigm would be true for the “‘rational’ worker in a

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69. Calabresi’s awareness of the consent problem and its ethical dimension is evinced by another of his writings published in 1969 in which he does focus on consent, although the attention thereof is tailored to patient choices in medical experimentation. Guido Calabresi, *Reflection on Medical Experimentation in Humans*, 98 DAEDALUS 387 (1969) [hereinafter Calabresi, *Reflection on Medical Experimentation in Humans*]. In the patient context, the choice set is constrained “between the life, well-being, or comfort of a given patient and the lives or well-being of unknown future patients.” *Id.* at 387. Although at first sight the usual cost-benefit analysis could be performed, Calabresi advises the reader that this view “is far too superficial. Even in the accident field, there are many occasions when we do treat life as a pearl beyond price.” *Id.* at 387–88. Calabresi further advises that one key issue is the absence or the inconsistency of consent. *Id.* at 390.

70. The point is certainly not new and does not represent a huge difference with neoclassical economists. However, Calabresi goes one step further than that. He puts forward a second set of explanations to justify that one cannot simply rely on the findings of economic analysis.

71. Calabresi, *Some Thoughts*, *supra* note 8, at 504–05. Moreover, Calabresi provides a similar limitation for competitive industries. *Id.* at 505 n.21. Later he underlines that among other effects, monopolistic power can determine a “shift in choices.” *Id.* at 507.

purely competitive world”<sup>72</sup>—that is, it would be true for consumers if they were in a position to properly and completely evaluate the choices they make, such as purchasing some meat with a risk of trichinosis—“[i]n the *real world*, of course, it is *most unlikely* that workers and consumers would evaluate this risk of injury or of trichinosis as accurately as the producer who is made to pay damages.”<sup>73</sup> Thus, mainstream economics would make no distinction between placing the loss on one party or the other—the pedestrian or the car driver, or the bank or the depositor, to use Calabresi’s examples—because individuals are supposed to be rational so that no differences exist among them, at least in terms of rationality. Calabresi instead argues that this mainstream view misses the key question of the asymmetries that exist between individuals, which mean their ability to evaluate the loss will differ.<sup>74</sup> Indeed, while the resource-allocation principle provides a criterion for the liability rule, it also shows that this rule has very much to do with an asymmetric position of one party deciding an issue without being properly equipped to do so.

Indeed—and in contrast with the standard assumption of economics—it is important to consider that the ability to gather and process information varies across individuals, as does their ability to correctly evaluate the situations they face. In *Some Thoughts*, Calabresi discusses this point in terms of attitude toward risks. He insists that we must take into account the fact that individual workers do not “evaluate the risk of injury to be as great as it actually [is].”<sup>75</sup> They only make “guesses” that cannot possibly reflect what the risk really is. Individuals may make mistakes in how they evaluate risks of accidents. Therefore, a sum of money paid to an individual—either *ex ante* in the form of a higher salary as a reward for the risks inherent in the job, or *ex post* as an indemnity to compensate losses due to an accident—might even correspond to the worker’s personal evaluation, but will in all likelihood differ from the actual risk faced or the actual loss suffered. The probability that an individual’s guesses will be correct is certainly very low. Even if individuals freely—that is, without being *formally* coerced—accept compensation, they cannot be said to truly consent to it, nor to the conditions of the choice. They accept those conditions because their evaluation is misleading.

This is exactly the kind of mechanism operating in advertisements. The impact of an advertisement on individual choices—which reveals how

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72. *Id.* at 515 n.43.

73. *Id.* at 515 n.43 (emphasis added). The tension between the desirability of the perfect-competition paradigm and its unattainability in the real world is a leitmotif throughout *Some Thoughts*. See, e.g., *id.* at 519.

74. It is worth remembering that, in an article published in the same decade, Calabresi discusses the very same issue using an example dealing with pedestrians, in which he directly mentions consent. Calabresi, *Reflection on Medical Experimentation in Humans*, *supra* note 69, at 390.

75. Calabresi, *Some Thoughts*, *supra* note 8, at 506. Later, Calabresi will repeat this claim, insisting that this is precisely what makes his approach different from Posner’s. To Calabresi, the assumption upon which wealth maximization rests, and according to which “\$1 is as likely to be worth as much to the rich person as to the poor person” is “peculiar, not to say absurd” and “a lousier one than most.” Calabresi, *An Exchange*, *supra* note 18, at 556.



individuals are vulnerable to external influences—complements Calabresi's viewpoint on the lack of rationality that, to him, characterizes human beings and strengthens our argument about choice without consent. Advertising, he argues, may lead people to “buy cars or T.V. sets which they do not ‘really’ want.”<sup>76</sup> Here, the problem is not whether consumers are afterwards satisfied by the choices they have made in response to advertising. It might be that their preferences have changed as a result of advertising, and that they are satisfying their “new” preferences. The problem is that they eventually choose and buy goods they did not need or want in the first place—“such phenomena as advertising are most likely to cast doubt on how people know what they ‘really’ want.”<sup>77</sup> What they have chosen is not really *their* choice, even if they have chosen their most preferred outcome out of a set of given available alternatives. Utility maximization might be important under the assumption of rationality and unchanging preferences. It becomes secondary and almost irrelevant if we assume that rationality is imperfect and preferences are unstable. The fact that preferences can be affected by external factors limits the value of individual choices: It introduces a wedge between choice and consent. Therefore, because individuals do not choose what they *really* want to choose, most of the time they “do not understand how much they should spend, ‘for their own good,’ on housing and . . . against such goods as television sets.”<sup>78</sup> As a consequence, Calabresi concludes, if individuals “are unhappy with the things they have bought once they have them, then, perhaps, the postulate that people know better than anyone else what is best for themselves ought to be abandoned.”<sup>79</sup>

This position is certainly not trivial and is very distant from a strict Chicagoan approach in which, once more, blind support for the market programmatically prevails over any other critical perspective.<sup>80</sup> Indeed, it is unsurprising but significant that in a similar, subsequent discussion in the law-and-economics literature, Posner specifically opposes any critique based on “the power of brand advertising to bamboozle the public and thereby promote monopoly.”<sup>81</sup> Calabresi, by contrast, seems to be aligned with Pigou's view that

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76. Calabresi, *Some Thoughts*, *supra* note 8, at 531.

77. *Id.* at 532.

78. *Id.* at 531.

79. *Id.* at 531–32.

80. An extensive discussion of the different approaches to the economics of advertising is presented in Kyle Bagwell, *The Economic Analysis of Advertising*, in HANDBOOK OF INDUSTRIAL ORGANIZATION 1701 (Mark Armstrong & Robert H. Porter eds., 2007). Presenting the different theories, Bagwell concludes that “no single view of advertising is valid in all settings” and that the various views “are all, at some level, plausible. But they have dramatically different positive and normative implications.” *Id.* at 1706.

81. Landes & Posner, *supra* note 5, at 274. This stylization, very convenient to avoid challenging many theoretical tools, simply disregards the role of persuasion—and hence of social and psychological stances—in the market, taking for granted that advertising has a purely informational role. This is tantamount to transforming human beings into “talking animals” that individually maximize given preferences. For a critical perspective on this, see Deirdre McCloskey & Arjo Klamer, *One Quarter of GDP is Persuasion*, 85 AM. ECON. REV. 191 (1995) and Francesco Silva & Giovanni B. Ramello, *Appropriating Signs and Meaning: The Elusive Economics of Trademark*, 15 INDUS. & CORP. CHANGE

“[u]nder simple competition, there is no purpose in this advertisement, because, *ex hypothesi*, the market will take, at the market price, as much as any one small seller wants to sell.”<sup>82</sup> Yet framing the discussion only in terms of monopoly merely brings us back to the previous line of reasoning, without really adding anything new.<sup>83</sup> Calabresi’s reasoning, however, goes far beyond the monopoly issue. In similar vein to Braithwaite,<sup>84</sup> who stresses that advertising alters consumers’ preferences with distorting consequences on resource allocation, Calabresi focuses on consumers’ consistency of choice and consent, which ultimately relates to the individual liberties that should be fostered by the voluntary exchange.

Later on, in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral (One View of the Cathedral)*, while focusing on property, Calabresi asserts the limitations of human beings: “If the society deems such an endowment to be essential regardless of individual desires, it will, of course, make the entitlement inalienable.”<sup>85</sup> It is worth noting that Calabresi sets the desires of society against those of individuals; that is to say, he draws a distinction between the result of a private and a social calculus. Sometimes, in certain situations, individual desires do not contribute to the maximization of social welfare. Society, that is to say, a social planner, must make the decision instead. The argument in *One View of the Cathedral* refers essentially to the cost of selling or buying entitlements, and so can be traced back to the market paradigm. However, it implies that there are systemic imperfections within the market itself that cannot be remedied without a “greater degree of societal intervention.”<sup>86</sup> In this case, the final reasoning can be boiled down to the efficiency paradigm, if we consider that limiting individuals to “engage in transactions”<sup>87</sup> is the best way of pursuing efficiency in all those cases in which individual choice would create, rather than internalize, externalities.<sup>88</sup> This reasoning, however, is tantamount to asserting that there are situations in which voluntary choice is taken without real consent. The role of law is thus to

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937 (2006).

82. PIGOU, *supra* note 1, at 196 n.2.

83. Indeed, this argument was pioneered by Edward Chamberlin and Joan Robinson, both early examiners of advertising. See Bagwell, *supra* note 80, at 1708.

84. Dorothea Braithwaite, *The Economic Effects of Advertisement*, 38 ECON. J. 16, 24–26 (1928).

85. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1100 (1972). As previously discussed, Calabresi likewise envisages those limitations when discussing consent and medical experimentation. Calabresi, *Reflection on Medical Experimentation in Humans*, *supra* note 69, at 390.

86. Calabresi & Melamed, *supra* note 85, at 1111. Once more, Calabresi stresses that “we should admit that explaining entitlements solely in terms of efficiency and distribution, in even their broadest terms, does not seem wholly satisfactory.” *Id.* at 1104.

87. *Id.* at 1111.

88. The argument, among other things, refers to the inability to produce an objective measure. Now, because commensurability is a fundamental part of market exchanges, it implies that there are situations in which individuals are technologically not able to make the proper choice, and letting them do so would not lead to efficiency. In other words, the choice can be made but consent cannot spring from the usual rationality assumptions.

mediate these situations and provide a solution approximating efficiency, which the market mechanism cannot provide.

A final illuminating example in which consent cannot be inferred by default is when rights are not exercised. Individuals may choose to act or not to act, but simple observation of behaviors can sometimes prove misleading when the setting in which choices are made is imperfect. *Some Thoughts* provides an example in discussing nuisance. If the damage is widely spread, pure allocation cannot work simply because not all the victims are likely to pursue their claim, or because the cost of “bringing so many scattered suits might easily be great enough to negate”<sup>89</sup> any value in promoting efficiency. That is, “if an enterprise caused a great many minor injuries the aggregate misallocation might be substantial even though no one claim for damages was worth bothering about.”<sup>90</sup> That is to say, there are lawsuits that are not filed—or, put another way, there are choices to not litigate—even though litigation would be individually and even socially desirable (and the cost of the injury is not incorporated into the price system); this implies that the victims are choosing to not sue tortfeasors, but they are (once more) making these choices without consent, because they are essentially forced into them. Thus, even when it comes to more directly legal matters, consent can be an issue; and so even here a solution to rebalance the situation is needed.<sup>91</sup>

## VI

### CONCLUSION

*Some Thoughts* is not only a key scholarly contribution that, together with Coase's seminal article, made law and economics “an independent, specialized field of intellectual inquiry.”<sup>92</sup> It is also the article that set forth Guido Calabresi's research agenda and elevated the intersection between law and economics to the mature status of discipline, with relevance extending beyond the academic community to meet the practical needs of practitioners and policy makers. In this respect, even though Calabresi's work shares many features with both Coase's and Posner's approaches, it also significantly diverges from both by introducing a significant element of novelty in that it makes law and economics an applied science, and thus a tool for solving real-world problems.

A major element of the originality of Calabresi's contribution is precisely that it considers the discrepancy between choice and consent, which arises in many practical situations involving legal intervention. Whereas the other

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89. Calabresi, *Some Thoughts*, *supra* note 8, at 535.

90. *Id.* at 537.

91. Calabresi very recently discussed this issue, focusing on collective redress and especially class actions. In such a case, the efficiency criterion meets ethical principles. See Guido Calabresi & Kevin S. Schwartz, *The Costs of Class Actions: Allocation and Collective Redress in the US Experience*, 32 EUR. J.L. & ECON. 169 (2011).

92. Werner Z. Hirsch & Evan Osborne, *Law and Economics—Valuable but Controversial*, 17 LAW & SOC. INQUIRY 521, 521 (1992).

founding fathers of law and economics comfortably rely upon the assumption that choice reveals consent, from *Some Thoughts* onward Calabresi diverges from this stylization and, despite fully exploiting the machinery of economics, endorses a broader sensitivity, opening the way to a more nuanced combination of law and economics. Thus, Calabresi raised the problem of the potential lack of consent—arising from monopoly, individuals' lack of rationality and their vulnerability to external pressures, or systemic imperfections—with the implication that individuals do not always make choices that correspond to their preferences. This in its turn enabled law-and-economics scholars to contribute by providing a wider framework for decision making that uses the efficiency criterion, but also explicitly combines it with other principles, such as societal welfare and individual liberties. The implication is that the questions social scientists have to tackle cannot always be reduced to optimal allocation of resources, and instead frequently require enquiring about the “starting points,” conditions of choice, and consent to those conditions.

This wider framework is exactly the route taken by Calabresi's economic analysis of law, and is also the reason why his approach cannot be classified as an orthodox neoclassical form thereof. In an article published a few years after *Some Thoughts*, Calabresi discussed the issue of consent and patient choices in medical testing and also more broadly addressed tort, warning readers that

[i]n many situations, the victim can be said to have, to some extent at least, consented to the risk. Consent is often actually very dubious. Are we, in fact, free to avoid driving cars? Is a tunnel-digger free to engage in a safer occupation? And is there any consent at all when a pedestrian is run down by a car?<sup>93</sup>

These questions begin to emerge as early as Calabresi's 1961 seminal work, in which he first attempts to balance the complex set of factors involved, which go far beyond the easy-to-grasp but narrow boundaries of economic efficiency. It is precisely this feature that makes *Some Thoughts* a milestone for a new approach to law-and-economics scholarship. Although Calabresi there declares himself to be “still remarkably wedded to the price system and to individual choice as the proper basis for determining what should be produced,”<sup>94</sup> he at the same time provides a straightforward example of how a market can sometimes be limited and in opposition to individual consent. Now, “[t]he more we deviate from such a system—the more we believe that people do *not* know what is best for them—the more we undermine the foundation of enterprise liability, the resource-allocation theory.”<sup>95</sup> There is some space left for moving away from a society fully governed by “a system of choices based on free prices.”<sup>96</sup> Subsidies and what we would today call other regulatory interventions are necessary. In that case, obviously, efficiency is no longer sufficient for guiding legal action and some external principle has to be invoked.

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93. Calabresi, *Reflection on Medical Experimentation in Humans*, *supra* note 69, at 390.

94. Calabresi, *Some Thoughts*, *supra* note 8, at 532.

95. *Id.* at 531.

96. *Id.*