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Recommended Citation

Wendy J. Gordon, Alain Marciano & Giovanni B. Ramello, *The Future of Law and Economics and the Legacy of Guido Calabresi*, in 48 *European Journal of Law and Economics* 1 (2019).

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Citations:

Bluebook 21st ed.

Wendy J. Gordon, Alain Marciano & Giovanni B. Ramello, The future of law and economics and the legacy of Guido Calabresi, 48 EUR. J.L. & ECON. 1 (2019).

ALWD 7th ed.

Wendy J. Gordon, Alain Marciano & Giovanni B. Ramello, The future of law and economics and the legacy of Guido Calabresi, 48 Eur. J.L. & Econ. 1 (2019).

APA 7th ed.

Gordon, W. J., Marciano, A., & Ramello, G. B. (2019). The future of law and economics and the legacy of guido calabresi. *European Journal of Law and Economics*, 48(1), 1-8.

Chicago 17th ed.

Wendy J. Gordon; Alain Marciano; Giovanni B. Ramello, "The future of law and economics and the legacy of Guido Calabresi," *European Journal of Law and Economics* 48, no. 1 (August 2019): 1-8

McGill Guide 9th ed.

Wendy J. Gordon, Alain Marciano & Giovanni B. Ramello, "The future of law and economics and the legacy of Guido Calabresi" (2019) 48:1 *Eur JL & Econ* 1.

AGLC 4th ed.

Wendy J. Gordon, Alain Marciano and Giovanni B. Ramello, 'The future of law and economics and the legacy of Guido Calabresi' (2019) 48(1) *European Journal of Law and Economics* 1

MLA 9th ed.

Gordon, Wendy J., et al. "The future of law and economics and the legacy of Guido Calabresi." *European Journal of Law and Economics*, vol. 48, no. 1, August 2019, pp. 1-8. HeinOnline.

OSCOLA 4th ed.

Wendy J. Gordon, Alain Marciano & Giovanni B. Ramello, 'The future of law and economics and the legacy of Guido Calabresi' (2019) 48 *Eur JL & Econ* 1

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The future of law and economics and the legacy of Guido Calabresi

Wendy J. Gordon¹ · Alain Marciano² · Giovanni B. Ramello³

Published online: 30 July 2019

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JEL Classification K00 · B31 · B40

In 1991, the American Law and Economics Association identified Guido Calabresi, Ronald Coase, Henry Manne and Richard Posner as the founders of the ‘law and economics’ movement. The *European Journal of Law and Economics* has already devoted a special issue to each of the last three.¹ It is now Calabresi’s turn. The order has no particular meaning and the current issue in Calabresi’s honor does not depend on a desire to complete the list. Rather, we waited for a very special occasion to celebrate Calabresi’s work—the publication of his latest book, *The Future of Law and Economics* (2016).

The appearance of this book provided a tempting opportunity to gather a number of well-known scholars to reflect on the current state of the discipline and identify its new future challenges—under Guido Calabresi’s guidance.² Now, here is the resultant special issue, devoted to the fourth founder of the law and economics movement. The fact that this special issue is published in the *European Journal of Law and Economics* is especially significant, in part because of the special connection between Guido Calabresi and Europe, but also because of the link between ‘law and economics’ and Europe.

¹ On Coase, 2011, 31 (1); on Posner, 2017, 43 (3); on Manne, 2018, 46 (2).

² The papers were presented at the conference, “Guido Calabresi and the Future of Law and Economics.” The conference, at which Calabresi also spoke and responded, was held at Boston University, June 1–2, 2017, and was generously funded by Boston University and its School of Law (<http://www.bu.edu/law/2017/02/27/guido-calabresi-and-the-future-of-law-and-economics/>).

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1 Law, economics and Europe

Although Calabresi's book and this special issue purport to discuss the future of 'law and economics', to understand the special relationship between that field and Europe it will be helpful to first say a few words about the discipline's past and present. In fact, examining the historical trajectory of the law and economics approach is fundamental for predicting its future developments.

Many valuable pages have been written about the origins and the development of law and economics in Chicago and elsewhere in the US. To supplement this extensive American-oriented literature, we start from the under-appreciated fact that two of the founding fathers, Ronald Coase and Guido Calabresi, have strong European connections. These connections, we believe, help explain the strong impact that law and economics has had worldwide, to the point of becoming, according to some scholars, the most important 'novelty' of modern legal scholarship (Marciano and Ramello 2016). We also believe that the European element of the law and economics origin story might be a key to figuring out what the future of the discipline will be.

Connecting Coase to Europe is easy: Coase was an Englishman, educated at the London School of Economics, who only moved to the US as an adult (see, for instance, Marciano 2013; Gordon and Coase 2008). His scholarship was originally European, and his academic thinking was formed there, thanks especially—as Coase himself recognized in his Nobel lecture³—to Arnold Plant. Plant was another iconic English scholar who dealt with the economic analysis of law; he had a special interest in copyright and patent (Ramello 2016), a field to which Coase sometimes turned his attention precisely because of the debt he felt to Plant.⁴

Connecting Guido Calabresi to Europe is trickier. Notwithstanding the Italianate melody of his name and his birth in Milano (Italy), Calabresi is a deeply American scholar. Sometimes it sounds as if he can blend his various heritages, and sometimes it sounds as if he can allocate between them. The latter appears in an exchange, recounted by Calabresi, where a young bi-national student had asked about his roots:

“‘Look,’ the student said, ‘I think I know what it means to be two things, but what are you really, are you Italian or are you American?’ And I said, ‘I am both, I really am both’. ‘OK’ he said, ‘but whom do you root for in the World Cup?’ ‘Of course, in the World Cup I root for Italy’ I answered ‘but if there were a World Cup in baseball I would root for the USA’.

In other words, in those things that I associate with Italy, I am very Italian and in the things I associate with the US I am very American.’⁵

³ <https://www.nobelprize.org/prizes/economic-sciences/1991/coase/lecture/>.

⁴ One of us (Gordon) first met Coase at a conference on intellectual property. It was not a field in which Coase wrote extensively. Rather, Coase made clear he attended because of his formative connection with Plant and the gratitude he felt to Plant as a teacher.

⁵ Alessandro Cassin, “We Were Outsiders. Conversation with Guido Calabresi”, <https://primolevicenter.org/we-were-outsiders-conversation-with-guido-calabresi/> (last accessed on June 18, 2019) (hereinafter, “Cassin 2019”).

As extensively described in Calabresi's current book, Yale Law School played a pivotal role in shaping his mind as a scholar (see also Marciano and Ramello 2014; Kalman 2014). That said, he has played a key role in making law and economics an American discipline that incorporates the balanced breath of the continental European tradition (Marciano and Ramello 2016). Overall, what we claim here is that the universality of his approach, and his contributions to the discipline, owe something to the unique feature of his being an American scholar fully embedded in European culture.

From its earliest beginnings—with Coase's "Nature of the firm" (1937) and "Problem of social cost" (1960), and with Calabresi's "Some thoughts" (1961) and *The Costs of Accidents* (1970)—law and economics had strong and solid roots in the two cultures. Indeed, Calabresi's innovative scholarship finds its distinctive trait in the constructive assimilation of multiple preexisting elements into novel syntheses. This trait may be ascribable to his being an American scholar who remains, at the same time, fully "embedded" in the European tradition. Thanks to this personal perspective, Guido Calabresi was (and is) in a position to provide contributions unconstrained by a single cultural paradigm, and thus widely applicable to many legal contexts.

Why do we feel comfortable making this claim? From other disciplines such as cultural anthropology, we know that individuals are inextricably embedded within the social systems where they live (Geertz 1973).⁶ Family, in particular, is crucial for building a human being. Now, Guido Calabresi was not only born in Milano, but he also spent his childhood there. He was raised in a highly educated Italian family and continued to speak Italian. As he mentioned recently,

"We spoke Italian at home, and we spoke English outside. Italian remained our language: to my brother's dying day, when I spoke to him I would speak in Italian. This has much to do with what all of us became."⁷

The father was a prominent cardiologist and the mother a literature scholar. According to the biographies, both were additionally very active in political debate, and took a strong position against the fascist political regime which at that time reigned in Italy.⁸ We infer that this family cultural milieu must have permeated Guido Calabresi's life, even in the US, making accessible to him a time-honored tradition of law, institutions and culture that fairly transcended national boundaries.⁹ It is then

⁶ Calabresi seems to have shared this opinion on many occasions, including in an interview cited by Benforado and Hanson (2005)

⁷ Calabresi in Cassin (2019).

⁸ See Cassin (2019).

⁹ National residence constitutes only one dimension of the sources on which Calabresi can draw. His background also includes for example, language facility in French and German as well as Italian; a family with professional backgrounds in law, medicine, and the rabbinate; and family commitment to activism against fascism (see Cassin 2019). Highly relevant, too, is Calabresi's personal experience as a transplant and refugee: "[T]he most important part of my legal education, of my formation as a lawyer, and as a Judge is that I am a refugee. That I am an outsider. ...I could not be the judge that I am if I had come up entirely in an American system. In a strange way I have Mussolini to thank for that; the difficulties he presented us with made us the people that we have become." (Cassin 2019).

important to note that the Italy where Calabresi's parents grew up was a time-specific outcome of an ongoing political laboratory in which many important issues concerning democratic societies were being debated. Prominent thinkers had tried to look at institutions in different ways, and this legacy must have been part of the cultural background of a highly educated individual raised in those decades.

Milan, in particular, was itself an important cultural melting pot of the Italian, French and German cultures. Calabresi had facility in all three languages (and not English) before coming to the United States (Cassin 2019). It is worth remembering that since the eighteenth century, Milan and two-thirds of Northern Italy had been part of the Habsburg Empire (with some interruptions connected to Napoleon's campaigns and other complementary local revolutions). All these dynamics, according to historians, made Milan the political and cultural center of Italy, thanks to a flourishing cultural environment that gave birth to a number of prominent scholars. In law and economics, for example, a well-known name is that of Cesare Beccaria, the leading Italian Enlightenment thinker from Milan who attracted the world's attention by questioning the role of punishment in the famous *An Essay On Crime and Punishment* (1778).¹⁰

Beccaria has been celebrated as an *ante-litteram* law and economics scholar, a forerunner of modern economic analyses of law, the initiator of a tradition that leads to the styles of analysis associated with Gary Becker or Richard Posner, in passing through Bentham. This was precisely the conclusion Becker, the first 20th century economists to have proposed an economic analysis of crime (1968), put forward his famous "Crime and Punishment":

"[I]est the reader be repelled by the apparent novelty of an "economic" framework for illegal behavior, let him recall that two important contributors to criminology during the eighteenth and nineteenth centuries, Beccaria and Bentham, explicitly applied an economic calculus." (209)

However, Beccaria's writings can be interpreted in a different way. We can also perceive an approach, a mode and a measure—a *Weltanschauung*, as philosophers might call it—that goes beyond economics. This breadth recurs in Calabresi's scholarship and through him in law and economics, and which largely goes beyond economics strictly speaking. Consider, for instance, Beccaria's attention to the role of punishment, as exemplified by the celebrated conclusion of his book. Here one sees how Beccaria's focus on incentives is enriched by a sensitivity to further considerations such as fairness to the individual: Beccaria reminds us that "In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law" (1778: PP).

This mix of rigorous economic analysis (in which there are hints in the direction of marginal deterrence and other economic mechanisms) with a wider concern with

¹⁰ See the special issue of this journal (2018, 46 (3)), dedicated to Beccaria. In particular, for an overview of Beccaria's contribution, see Bessler (2018) and Ramello and Marciano (2018).

both society and individuals, ascribes to law a special role in pursuing efficiency, but also broader goals that cannot be captured by a strict economic analysis. This opens the way to an “enlightened” perspective, which perfectly corresponds to the “amplified economic analysis of law” that Calabresi pleads for in his book. That approach, which is the hallmark of his scholarship, differs from the tradition that goes from Beccaria and Bentham to Becker and a narrow economic analysis of law.

Another thinker takes place in this tradition, John Stuart Mill. Calabresi mentions him in the first chapter of his book, contrasting Mill’s views to those of Jeremy Bentham, and in particular contrasting Bentham’s conceptions of consequentialism to those of Mill.¹¹ Thus, there exists an alternative tradition in “law and economics” that starts with Beccaria, passes through Mill instead of Bentham and leads to Calabresi himself—and that does not correspond to an ‘economic analysis of law’ in the narrower sense of the expression (Crimmins 2019). This alternative tradition has rarely been perceived or noted, remaining largely somehow unexpressed in law and economics—with the exception of Guido Calabresi. We believe it is now time to clearly take it as the guideline for future development, and ask Guido Calabresi again to show us the way, expecting to review the point with him as the future gradually arrives.

2 The contribution of “The Future of Law and Economics” and the symposium

One advantage of Calabresi’s book, “The Future of Law and Economics,” is precisely that it contributes to energizing such a tradition. Another reason why the book deserves particular attention is that the way in which Calabresi uses it to summarize his views about the field. It condenses his perspective on almost six decades of writings and research. In this respect, and despite of its title, the book is not only about the future of law and economics but also about its foundations. Moreover, its approach is not that of a static paradigm to be applied for the next generation. Rather, it reaches outward, giving multiple suggestions about where to look, in which directions to explore: “The book says, ‘Here are things that are worth investigating, now you should look further into them’”.¹²

This work of looking further has already begun with the two-day conference at Boston University School of Law¹³ and the spillover published in this special issue. Here the *Journal* presents a selection of papers—gifted with comments by Calabresi

¹¹ This allows him to show two ways of envisaging the field that is at the intersection between law and economics. This distinction is actually the one that was already put forward by Ronald Coase, for instance (in Epstein et al. 1997), and historically documented, i.e. between “law and economics” and an “economic analysis of law” (see Harnay and Marciano 2009; Marciano, 2019; see also Marciano and Ramello, and Hylton this issue). On the relationship between Bentham, Beccaria and other European thinkers see also Miceli (2018).

¹² Guido Calabresi quoted by Caroline Lambert (2017) available at <http://www.bu.edu/law/2017/06/29/hon-guido-calabresi-and-the-future-of-law-and-economics/>.

¹³ See note __ *supra*.

as well as passed through a peer-review process as customary for this journal—that provide a first glimpse of the future.

The papers gathered in this special issue provide examples of this diversity. Kathryn Zeiler's paper takes up Guido's exhortation to properly consider reality by adopting and interrogating the behavioral approach to economics. For this, she stresses the distinction between "non-standard preferences" and "psychological mistakes"; confusing these two forms of departures from rationality can be problematic and lead to policy recommendations that are "ill suited". She provides examples of models in each category, and examples of mistaken applications of models that assume non-standard preferences rather than psychological mistakes. She also suggests ways to avoid errors when applying behavioral economics theories in law.

Peter Leeson provides an example of how Calabresi's work, besides giving perspective, fosters divergent viewpoints sometimes in disagreement with his own view. Leeson's claim is that we do not need behavioral economics to explain law and legal structures—in particular those that do not maximize wealth. He argues that traditional economic theory can do the job. In fact, reasoning in terms of "rent-seeking" makes it possible to explain the legal structures that Calabresi tries to explain using behavioral economics, altruism and a preference for merit goods. Leeson even goes further, claiming that "rent-seeking suggests that popular preferences for merit goods and altruism are unlikely to account for these structures."

The contribution from Henry Smith further stresses the need for a strong connection to the real world, recognizing that law as a complex system sometimes requires rethinking the assumptions that underpin the method of law and economics. Smith refers here in particular to the property paradigm and to Guido Calabresi's work on this topic.

Two more papers tackle the distinction between 'law and economics' and 'economic analysis of law' from different angles. Alain Marciano and Giovanni B. Ramello stick to the two categories—'law and economics' and 'economic analysis of law'—to identify the main characteristic features of Calabresi's scholarship, which Calabresi defines in his latest book as "amplified" law and economics. They analyze three claims made by Calabresi in the book, namely that economic analysis should be amplified by, first, adopting a more realistic approach, à la Coase; second, taking merit goods into account; third, including individuals' propensity to be altruistic. They show that this leads to a certain ambiguity in terms of the distinction between 'law and economics' and 'economic analysis of law'. It appears, from their demonstration, that Calabresi's amplified approach still remains a form of the 'economic analysis of law' which Calabresi so criticizes in his book. To a certain extent, Calabresi's economic analysis of law should be viewed as *heterodox*.

For his part, Keith Hylton argues that the categories of 'law and economics' and 'economic analysis of law' are too "broad" to capture the diversity of Calabresi's work. He introduces a pair of additional distinctions. One is between positive (descriptive) analysis and normative (evaluative) analysis, as accepted in economics. The second distinction originates in the philosophy of law, and draws a line between legal positivism (roughly, "the law is only what's been duly enacted or enacted by governmental authority") and non-positivism (roughly, "the law is also constituted by non-governmental sources such as morals and custom"). For a legal positivist,

as Hylton explains, “the only source of law ... is the state, which announces the law through statute books, case reports, and administrative agencies”. These distinctions then give birth to four categories—(a) economic positive analysis and legal positivism, (b) economic normative analysis and legal positivism, (c) economic positive analysis and legal nonpositivism, and (d) economic normative analysis and legal nonpositivism—that allow Hylton to argue that Calabresi’s *The Costs of Accidents* (1970) is an example of economic normative analysis combined with legal positivism while “Property Rules” (Calabresi and Melamed 1972) is rather an instance of economic positive analysis and legal positivism. Then, Hylton also points at the implications for the future of law and economics.

We turn next to an empirical study by Alex Kozinski and Conor Clarke entitled, “Does Law & Economics Help Decide Cases?” Their research suggests that judges use academic writing from our field significantly less than they use more traditional legal scholarship. For example, judges cite famous law and economics articles like Coase’s “Social Cost” less often than purely doctrinal pieces. Kozinski and Clarke claim that judges do employ economics, at least “sometimes,” but that some central concepts in law and economics—such as efficiency or incentives—seem to be “unappealing to judges” or, at least, that evidence about their use is “mixed”. Kozinski and Clarke use a particular case to illustrate the way judges “often” use economics: “A prediction informed by theory ([in the illustrative case], that the market can self-regulate) is carried into a[n] open-ended test to produce or justify a result ([in the illustrative case], that the policy wasn’t narrowly tailored).”

Brian Bix supplies a review essay on *The Future of Law and Economics*. He starts from the arguments raised in the book and supplements them with ideas from other legal theories, including Arthur Leff’s critique of economic analysis. Bix aims to show how certain puzzles arising in law and economics—for example, outcomes that seem “irrational” or “inefficient”—can be solved thanks to a broader and different approach embracing a wider viewpoint. This possibly is one way of characterizing what Calabresi defines as the “amplified” economic analysis of law.

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