



Guido Calabresi's economic analysis of law, Coase and the Coase theorem

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ABSTRACT

Calabresi and Coase, two of the founding fathers of the “law and economics” movement are frequently, and paradoxically, put on the same footing for having put forward the same results. The purpose of this paper is to investigate this proximity by analyzing Calabresi's works published in the 1960s. The argument we develop is that differences, and similarities, are deeper than what is usually assumed. First, methodologically, it can be said that Calabresi envisaged an economic analysis of liability rules while Coase adopted a law and economics perspective. Then, analytically, it can be shown that Calabresi proposed an “invariance” thesis. We compare it to Coase's results and to Stigler's Coase theorem and show that the “invariance” thesis can indeed be found in Coase's “The Problem of Social Cost” but was absent from Stigler's version of the Coase theorem—that was restricted to an “efficiency” thesis. We also show that Calabresi moved from the “invariance” to the “efficiency” thesis when he established a “Coase axiom”. However, Calabresi, just like Coase and Stigler, but for different reasons, believed that the axiom is theoretically valid but “*in fact* inaccurate”.

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1. Introduction

Almost 50 years ago, “the beginning of Law and Economics as an independent, specialized field of intellectual inquiry” (Hirsh & Osborne, 1992, p. 521) was marked by the publication of 2 crucial articles, “The Problem of Social Cost” (1960) and “Some Thoughts on Risk Distribution and the Law of Torts” (1961), respectively written by Ronald Coase and Guido Calabresi. Besides being the first two founding fathers of the “law and economics” movement, it appears that Coase and Calabresi also share similar views about the issues they discussed in their articles. At least, this is what the literature tells us. For instance, Harvard law professor Lawrence Tribe wrote that “[t]he currently popular analysis to the legal problem of how to assign “rights” and liabilities”—for example, between polluters and breathers . . . [is] . . . traceable to the works of Ronald Coase and Guido Calabresi” (1972, p. 86; emphases added). More specifically, Calabresi is cited or quoted for having “summarized” (Posner, 1970, p. 640) or, alternatively, “generalized” (Mumey, 1971, p. 718) or even “stated more clearly” (Regan, 1972, p. 428) an argument that was only “implicit in Coase's original article” (Regan, 1972, p. 428), naturally leading to the conclusion that Calabresi's works is

“generally” (Ayer, 1969, p. 696, footnote 11) the reference in the matters covered by the two articles.¹

These views are somehow troubling. Coase's and Calabresi's works seem to be built upon irreconcilable rather than compatible assumptions. For his part, Coase had very early—in the late 1950s and in the beginning of the 1960s—the reputation of being a right-wing and a pro-market economist. Thus, as he declared in an interview in the late 1990s, the administration of the University of Virginia, where he had his position, “thought the work we were doing was disreputable. They thought of us as right-wing extremists. My wife was at a cocktail party and heard me described as someone to the right of the John Birch Society” (Coase to Thomas Hazlett in Reason, 1997, p. 41). Also, in 1962, Lawrence Miller included Coase in the tradition of the Chicago School of Economics because, Miller explained, Chicagoan economists are pro-market and so was Coase as it could be guessed from the conclusions of his 1959 article on the Federal Communications Commission (see Coase, 1959). Now, significantly, at that time Coase was not at Chicago and “has never taught here” as Stigler (1962, p. 71) replied to Miller. And, last but not least, the theorem George Stigler

¹ The examples given are taken from the literature of the early 1970s only because this is the period this article studies. However, the “tradition” lasts. See for instance, to mention just two recent works, James Hackney (2007) and Roger van den Bergh (2008).

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invented in 1966 and that was based on Coase's work and is always viewed as a defense of the efficiency of market mechanisms.

By contrast, one of the "children" of the Warren Court,² Calabresi is a "legal liberal",³ a "reformist" and, although not a "judicial activist",⁴ favorable to the fact that Courts, including Supreme ones, may in certain circumstances have a political role to play. In addition, Calabresi studied law, in the second half of the 1950s, when legal liberalism was at its high and from one of the places where legal liberalism played an important role, the Law School of the Yale University. Just after having graduated, in 1958, Calabresi started to teach at Yale and started clerking in 1959 for Justice Hugo Black, who was close to Warren.⁵ And then, he has always been a defender of "strict liability", a rule that, "within law and economics... is often considered the left" (Zipursky, 2010, p. 3).

Put together, these elements suggest questions about the possibility to put on the same footing a liberal legal scholar and a pro-market economist. These are the questions we raise and discuss in this work. We focus specifically on Calabresi and on the articles he wrote and published in the 1960s—between 1961 and 1968, a period during which Calabresi's works were mostly ignored by economists and by legal scholars and after which he nonetheless came to be associated with Coase. We analyze these articles to see under which conditions it can be said that Calabresi reached the same conclusions as Coase's or Stigler's and found similar result as the one found by Coase in "The Problem of Social Cost" or put forward by Stigler in the Coase theorem. It then appears that, and this is what we would like to demonstrate, the similarities and differences are deeper and more complex than the ones usually emphasized as, for instance, by the above-mentioned literature that recognizes a connection between the works of Coase and for which Calabresi's work is more realistic than Coase's. More precisely, we identify two levels of comparison, that form the substance of our argumentation (and the structure of the paper).

We start with a discussion of the approach Calabresi used in the 1960s that we compare Coase's. We show that the results found by Calabresi and Coase, whatever their degree of closeness, were reached by radically different methodological routes. Calabresi focused on a legal problem and envisaged economics as a means to analyze it. This corresponds to an economic analysis of law and legal rules—to which the name of Richard Posner is usually associated for having developed it in the early 1970s (see in particular, Posner, 1973). And, in addition, such approach differs from the law and economics perspective adopted by Coase in the 1960s. It

thus can be said that Calabresi anticipated Posner's economic analysis of law. This is the first part of our argument, that we develop in the second section of the paper through an analysis of Calabresi's justification of the use of economics to analyze a legal problem.

Actually, Calabresi used economics to answer a question about who should bear the costs of economics activities when, in particular, they create nuisance or, more broadly, to whom should be assigned liability in case of accidents, tortfeasors or victims? The answer Calabresi eventually (that is, after a long and careful analysis) gave was that tortfeasors should pay for the damages their activities generate. Economics allowed him to justify rigorously, scientifically, a conclusion that otherwise was debatable. Now, besides the general result reached by Calabresi, the intermediary steps of his demonstration and the conditions under which liability should be ascribed to one party or to the other also worth being investigated and compared to what Coase argued in "The Problem of Social Cost" and what Stigler presented as the Coase theorem.

For our purpose, a comparison between "Some Thoughts on Risk Distribution and the Law of Torts" and "The Problem of Social Cost" and Stigler's version of the Coase theorem is useful and necessary because of the differences that exist between the latter two formulations. In effect, and this will help us to clarify the terms of the comparison we make in this paper, let us emphasize that the theorem is made of one statement, known as the "efficiency" thesis, that Stigler presented as follows: "[t]he Coase theorem thus asserts that under perfect competition private and social costs will be equal" (1966, p. 113; emphasis added). As it has been demonstrated, what Stigler named the Coase theorem was a specific—reduced—version of what Coase had written in "The Problem of Social Cost". In the latter article, Coase did not only put forward a claim on efficiency but also added a statement that came to be known as the "invariance" thesis, according to which an efficient allocation of resources can be achieved whatever liability rules are. Stigler did not ignore this part of Coase's analysis. For instance, he wrote that "[t]he manner in which the law assigns liability will not affect the relative private marginal costs of cattle and grain" (1966, p. 113; emphasis added) and also that "the proposition that the composition of output will not be affected by the manner in which the law assigns liability for damage seems astonishing. But it should not be" (1966, p. 113; emphasis added). However, as we will stress later, this should rather be viewed as a corollary and was not included in the theorem.

As we show in the third section of the paper, Calabresi reached conclusions that have some similarities with Coase's and Stigler's even though he had read neither Coase's paper nor Stigler's book.⁶ It thus appears that Calabresi did not make any real distinction between invariance and efficiency since he insisted on invariance and also on efficiency *through* invariance. But he did not stop there. Like Coase and (to a lesser extent) Stigler, Calabresi analyzed the conditions under which they are verified and insisted that they do not hold in the real world. Therefore, Calabresi and Coase and (to some extent) Stigler agreed on the fact that there exists a difference between theoretical and real situations. However, they disagree as to why it is so.

Then, after having read Coase, the explanations Calabresi gave to his result evolved. This is what we demonstrate in the fourth

² Earl Warren was the chief justice of the US Supreme court in the 1950s. It was when, "for the first, and perhaps only, time in history the Supreme Court—under [his] leadership... —took on a liberal cast" (Friedman, 2002, p. 159). A majority of the justices of the so-called Warren Court were liberals, convinced that jurists and lawyers were reformers and have a central political role to play in the transformation of the society: the "Warren Court Children" (Geoghegan, 1986, p. 17) "thought lawyers were America's governing class. And the Warren Court was a Court of gods" (Geoghegan, 1986, p. 17). After Warren's death, a special issue of Yale Law Journal was significantly dedicated "[t]o this man, who made us all proud to be lawyers" (1975, p. 405).

³ The expression "legal liberalism" was relatively frequently used to describe the lawyers and jurists of the New Deal period. It is a doctrine which "trust[s] in the potential of courts, particularly the Supreme Court, to bring about 'those specific social reforms that affect large groups of people such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, policy change with national wide impact'" (Kalman, 1996, p. 2; Kalman quotes Rosenberg, 1991, p. 4).

⁴ Calabresi to author, interview, December 2009.

⁵ Black was a member of the Democratic party and elected at the senate as a representative of the State of Alabama from 1926 to 1937. Nominated at the Supreme Court by Roosevelt in 1937, he stayed until 1986. He is one of the two justices who spent the longest term in the Supreme Court—the other one being William O. Douglas. Black discussed with Warren attribution of opinions and it seems that, most of the time, he chose the cases he had to deal with (see Newman, 2001, p. 686). Calabresi not entirely agreed with Black, but the latter influenced his conception of the political role of the Supreme Court (see Calabresi, 1982, 1985).

⁶ Calabresi recounted that a first version of "Some Thoughts on Risk Distribution and the Law of Torts" was submitted to the Yale Law Journal in 1955, then withdrawn because of the "cold reaction [...] of the] outgoing board, which included people of unusual brilliance who today properly dominate the profession" (Calabresi, 1991a,b, p. 1482), to be submitted again in 1959 and eventually published in 1961, the very same year Coase's article was published. In effect, although the issue of the Journal of Law and Economics which contains Coase's article is dated of 1960, its publication was actually delayed and appeared in 1961 only.

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