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# On the (Methodological) Future of Law and Economics. The Uneasy Burden of Value Judgments and Normativity

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## Abstract:

Taking as its starting-point Guido Calabresi's latest book – *The Future of Law and Economics* – the present article aims to explore the often neglected issue of value judgments and normativity in Law and Economics. I will show the importance of enquiring Calabresi's methodological distinction between Law and Economics and Economic Analysis of Law and the related bilateralism thesis in order to understand the problematic relationship between methodological value judgments and ethical value judgments, the 'distance' between Calabresi and Posner and the problematic notion of reformism. Then I will try to introduce a different notion of normativity. I will also show the existence of an unresolved tension in Calabresi's methodological discourse between a positive approach, which seems to be privileged in this book, and his insistence on the inevitability of value judgments in economic analysis. Finally, I clarify the reasons for the 'ignorance' of values by the economist by distinguishing between economists' "lack of self-awareness", economists' idolatry and the economists' lenses.

**Keywords:** Law and Economics, Economics Analysis of Law, methodological value judgments, ethical value judgments, normativity, Guido Calabresi

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He teaches her to tell a shellbark from a shagbark hickory. No one else at her school can even tell a hickory from a hop hornbeam. The fact strikes her as bizarre. "Kids in my class think a black walnut looks just like a white ash. Are they blind?"

"Plant-blind. Adam's curse. We only see things that look like us. Sad story, ain't it, kiddo?"

— Richard Powers, *The Overstory* (W.W. Northon and Company, 2018)

## 1 Introduction: The burden of the past

There is no such a thing as "the future" of Law and Economics; not, at least, unless economists, lawyers, and lawyer-economists free themselves from the idolatry of past economic science. This past, in which most are still completely immersed, is shot through with the idea that economic science is value-neutral and that the economist *qua* economist has nothing to say about values.

I have to confess that I have always had the impression that there is a bit of confusion under the methodological sky of Law and Economics.<sup>1</sup> Usually, in Law and Economics scholarship 'positive' and 'normative' are explained in terms of analysis of the efficiency of alternative legal rules and their effects (positive analysis), and prescriptions for social change or legal reform in order to correct market failures (normative analysis). In a slightly different manner, and only to mention one of the latest summary of the past of Law and Economics, and, at the same time, a reflection on "The Future of Law and Economics" by Posner and Becker (2014, 235): "by the end of the 1960s [...] economics was understood to be relevant to the entire domain of the law, relevant both to understanding the law (positive analysis) and to reforming it (normative analysis)." But when it comes to explaining what exactly 'positive' and 'normative' mean, such explanations usually resort to different terms to explain their meanings: not only understanding/reforming, but also neutrality/non-neutrality, description/prescription, fact/value, is/ought, objective/subjective, methodological value judgments/ethical value judgments. In some cases, the positive/normative distinction is connected to the role of the economist in terms of 'economist *qua* economist'/'economist *qua* citizen'. At other times, further sub-distinction are sought

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for each of these terms, as in the case of explicit and implicit value judgments. In any case the list of the different meanings attributed to the positive/normative distinction is much longer than this (theory/practice, pure/applied, empirically founded/not empirically founded ...).

Often these dichotomies do not refer to the same order of problems or conceptual horizon, nor do they have the same historical origins.<sup>2</sup> And above all, like many other dichotomies, they do not exhaust reality.<sup>3</sup> Last, but not least, Law and Economics scholarship often do not take into account the long years of criticism that have eroded the positive/normative distinction's conceptual grounds.<sup>4</sup>

Though an attempt to clarify and disambiguate all these terms and their implications would require (at least) a monographic work, somewhere one will also have to start if one wants to free the methodological sky from these clouds.

In this regard, the book by Calabresi (2016), *The Future of Law and Economics: Essays in Reform and Recollection*, carries – right from the title – a great promise: the promise of a new beginning, a new future. It appears on the scene of the scientific community as a breath of fresh air. Perhaps not as an absolute novelty, as Calabresi himself recognizes (Calabresi 2016, 17). In fact, the scholars of Law and Economics, or the Economic Analysis of Law, have been questioning the future of their discipline for at least twenty years.<sup>5</sup> And yet, given that Calabresi is universally recognized as one of the founding fathers of Law and Economics, and given too that his book is “reform” oriented, we cannot deny a certain excitement of ‘great expectations’.

Calabresi's book deserves the greatest attention for what seems to be his attempt to “humanize economic analysis in general, and law and economics in particular” (Zamir 2017, 103), for his humanistic sensitivity and interdisciplinary openness to other ‘Law and ...’ approaches, and for his attempt to reopen the long-neglected (or repressed?) issue of values; in particular: individual and social values, the values incorporated into legal institutions, as well as social scientists' values, especially economists' values. Significant in this regard is the incipit of the book:

[...] of Bentham, Mill said that he approached all ideas as a stranger and if they did not fit his test (the test of utility), he dismissed them as vague generalities. Mill then went on to say that what Bentham didn't realize was that “these generalities contained the whole unanalyzed experience of the human race”. In my [Calabresi's] way of defining the terms, Bentham can be viewed as the paradigmatic Economic Analyst of Law, while Mill's approach is the precursor of that which characterizes Law and Economics. (Calabresi 2016, 1)

Undoubtedly, Calabresi's book is an attempt to recover in and reintroduce into Law and Economics, the *whole unanalyzed experience of the human race*. More precisely, the book seeks to recover in the economics that the lawyers or lawyer-economists of the approach of Law and Economics are familiar with, all those values, preferences and individual tastes that are usually excluded from the “one-way” and sometimes “aggressive” (Calabresi 2016, 2), if not positively imperialistic approach typical of the Economic Analysis of Law.

Calabresi develops his analysis of these values, and his arguments for the importance of their inclusion in the analysis and models of the economists, in the central chapters of the book (Chapters 2–6), devoted to the analysis of *merit* (and *demerit*) goods and mechanisms of resource allocation that are located between the two extremes of the market (“commodification”) and of the state (“commandification”). The treatment of goods and values such as healthcare, education, the role of altruism and the problem of economic and power inequalities seem to me to be particularly relevant. This is the part of the book that all legal scholars, economists, and lawyer-economists (to whom Calabresi primarily addresses his work) should hold in the highest consideration.<sup>6</sup>

However, given the space limitations of this article, and having to assume the role of devil's advocate, I will try to analyze and develop only those points that seem to me not entirely convincing or not so well developed.

I will analyze some methodological issues by pointing to work that still needs to be done, and therefore with the spirit of those who intend to keep faith with the “promise” contained in the “future” of the Law and Economics. Although Calabresi's book is not an explicitly methodological work, it nonetheless raises methodological questions that I consider important for that same future of the Law and Economics imagined by Calabresi.

My analysis will focus on the methodological issues – addressed in the introductory chapter – “Of Law and Economics and Economic Analysis of Law. The Role of the Lawyer” – and in the last two chapters – “Of Tastes and Values Ignored” and “Of Tastes and Values. What Economics Can Tell Us About Them”.<sup>7</sup> These themes are highlighted by Calabresi as among the

areas in which Law and Economics scholarship seems to be most promising and needed. [...] The suggested amplification of economic theory [should take into] account [...]: [1] The actual – and unavoidable – existence of value judgments underlying much economic analysis; [2] and the capacity of economic analysis, under quite traditional economic theory assumptions, to give guidance as to the desirability of a variety of tastes and values. (Calabresi 2016, 21–22)

Through a cross-reading of the methodological and conceptual apparatus of these three chapters I will show the importance of enquiring the methodological distinction between Law and Economics and Economic Analysis of Law (Section 2) – especially where it requires: to better specify the problematic relationship between methodological value judgments and ethical value judgments (Section 2.1), to understand the ‘distance’ between Law and Economics and Economic Analysis of Law (and, respectively, between Calabresi and Posner) with regard to Calabresi’s bilateralism and its relation with the issue of the empirical adequacy of models (Section 2.1.1) and the issue of reformism, which raises what I call *the black-box-psyche problem* (Section 2.1.2); then I will try to introduce a different notion of normativity (Section 2.1.3). I will also show the existence of an unresolved tension in Calabresi’s methodological discourse between a positive approach, which seems to be privileged in this book, and his insistence on the inevitability of value judgments in economic analysis (Section 3). To enquiry into such inevitability of value judgments I will try to overturn the economists’ creed that *De gustibus non est disputandum*, showing how one can and must first discuss economists’ *gustibus* and values (Section 3.1), and cast some doubts over the simplified view of neutrality based on means-ends reasoning (Section 3.2). Finally, I will try to clarify the reasons for the ‘ignorance’ of values by the economist, by distinguishing between economists’ “lack of self-awareness”, economists’ idolatry and the economists’ lenses (Section 3.3). I will conclude with brief considerations on the future of Law and Economics (Section 4).

In many cases these are limits deriving from a lack of thematization or critical elaboration, which however has considerable implications. On the one hand, these limits are perfectly justifiable, since it was not Calabresi’s intention to investigate such methodological questions. On the other hand, however, these limits are the source of many ambiguities that risk undermining the methodological foundations of Calabresi’s Law and Economics approach.

## 2 On the methodological distinction between Law and Economics and Economic Analysis of Law

1. Let us start by recalling some of the methodological aspects discussed in the introduction and partly taken up in the last two chapters of the book. I will quote them here in full, given the importance attributed to them by Calabresi, and I will address their problematic implications more analytically in the following sections.

The methodological approach followed by Calabresi throughout his book is explained through the distinction between Economic Analysis of Law and Law and Economics. Calabresi endorses the Law and Economics approach, whose main and greatest representative is Ronald Coase, while the Economic Analysis of Law approach is emblematically represented by Richard Posner.

Economic analysis of law uses economic theory to analyse the legal world. It examines that world from the standpoint of economic theory and, as a result of that examination, confirms, casts doubt upon, and often seeks reform of legal reality. In effect, it acts as an Archimedean place to stand and upon which to place a lever, a lever that permits the scholar, when appropriate, to argue for change in that legal reality. In its most aggressive and reformist mode, having looked at the world from the standpoint of economic theory, if it finds that the legal world does not fit, it proclaims that world to be “irrational”. (Calabresi 2016, 2)

Law and Economics instead begins with an agnostic acceptance of the world as it is, as the lawyer describes it to be. It then looks as to whether economic theory can explain that world, that reality. And if it cannot, rather than automatically dismissing that world as irrational, it asks two questions. The first is, are the legal scholars who are describing the legal reality looking at the world as it really is? Or is there something in their way of seeing the world that has led them to mischaracterize that reality? [...] if however even a more comprehensive view of legal reality discloses rules and practices that economic theory cannot explain, Law and Economics asks the second question. Can economic theory be amplified, can it be made broader or more subtle (without thereby losing those characteristics that give it coherence and make it as powerful as it is) so that it can explain why the real world of law is as it is? (Calabresi 2016, 3–4)<sup>8</sup>

However, according to Calabresi this regulatory ideal of the amplification of economic theory and economic models through the incorporation of parts of the real world (human experience and institutional-legal arrangements) “as it is” may have to face two great limits.

The first limit is imposed by *methodological values*, such as “coherence” and “force” of economic models.

There will be times when even an expanded economic theory will not be able to explain legal reality. The lawyer-economists may then give way to some other “Law and ...” discipline and see if the legal world

can be justified or even only explained on the basis of theories or experiences that cannot be incorporated into economics without causing economics to lose its coherence and force. (Calabresi 2016, 5)

The second limit to the criterion that economic theory must represent reality “as it is” concerns *ethical values*.

There will be also times, moreover, when the lawyer-economist – recognizing, as Mill himself did – that legal reality does not by any means always represent worthy human experience but may instead reflect outdated or otherwise undesirable rules – will become as harsh a critic of the legal reality as Bentham was, and like Bentham, become the fierce proponent of *radical* reform. (Calabresi 2016, 6)

Hence, the other main difference between the approaches of Economic Analysis of Law and Law and Economics lies in the ways they treat the relationship between economics and law. While in the first approach “economics dominates and law is its subject of analysis and criticism”, in the second “the relationship is bilateral”<sup>9</sup>:

The world of human experience must – bilaterally – be both the subject of theoretically based analysis and criticism and the source of corrections and amplification in the analysing theory. (Calabresi 2016, 6)

To begin to understand the complex of problems intrinsic to this methodological approach, it is important, first of all, to note that Calabresi’s thesis on bilateralism is enunciated in *prescriptive* terms – “must be”. I would call such bilateralism thesis a methodological value judgment. Secondly, Calabresi’s bilateralism thesis can be broken down into three parts, at least in the sense that it seems to raise three different but correlated questions: how do I know *when* “the world of human experience must be”: (a) “the subject of theoretically based analysis”; (b) the subject of “criticism” or reform; (c) “the source of corrections and amplification in the analysing theory”?

The theses (a) and (b) would seem to refer to positive and normative analysis, respectively. The thesis (c) would seem to be a corollary of the thesis (a), and therefore refers to a ‘positive’ analysis as well, at least in so far as the process of model building, testing or correction belong to the positive analysis. Nevertheless, with reference to this last thesis we can already begin to glimpse a first order of problems, from which many implications and complications derive, since this alleged positive analysis (c) depends on the economist’s acceptance of or consensus on a series of values, such as ‘all human experience, variety and diversity of values are worthy of consideration and have to be counted equally’ (ethical value judgment),<sup>10</sup> or ‘the theory must be corrected/amplified by taking into account such variety and diversity’ (the methodological value of empirical adequacy of theory or model).

We can therefore note that if bilateralism thesis is a methodological value judgment, it in turn contains (at least) another methodological value judgment and an ethical value judgment. In what relation are all these judgments among them and/or with other methodological value judgments – like those already mentioned by Calabresi – and/or ethical value judgments – as when the scholar is faced with a reality or legal reality that “does not [...] represent worthy human experience” and needs to be reformed?

## 2.1 Methodological value judgments and ethical value judgments

1. In the methodology of social sciences it is usual to distinguish between methodological value judgments (henceforth MVJs) (also known as ‘constitutive values’ of science, epistemic values, or cognitive values), and ethical value judgments (henceforth EVJs) (also known as non-epistemic or non-cognitive values).<sup>11</sup> On the one hand, MVJs, are those judgments that enter into the picture every time a scholar/scientist tries to answer the question of how one ought to carry out one’s investigations. They are interpretations and/or choices of premises, theories, inferences, and data, that rely on our commitment to particular methodological values. Methodological values include simplicity, predictive power, external and internal consistency, empirical adequacy, accuracy, and so on. On the other hand, EVJs are judgments on what is morally right or wrong.

This distinction is usually based on the idea that MVJs are widely accepted by the scientific community, while EVJs are the source of endless discussions and, therefore, it would be better to keep them at bay and remain faithful to the ideal of neutrality. As Robbins put it, such discussions could be “a case of thy blood or mine, or live and let live” (Robbins 1932, 134). Or, as Friedman echoed, differences about values are “differences about which man can ultimately only fight” (Friedman 1953, 5).

Nevertheless, if such distinction is based on the degree of consensus on MVJs (greater consensus) and EVJs (less consensus), then it is based on shaky grounds. There are EVJs that are widely shared – such as “is it morally wrong to eat babies”<sup>12</sup> – as well as MVJs that are highly disputed and/or not easily reconcilable with each other. Also, they can sometimes even conflict with other EVJs. Sometimes it is necessary to choose between conflicting MVJs, or between MVJs and other EVJs. But this necessity of choice means, as we shall see, that the presumed distinction between MVJs and EVJs is much less ordered or clear cut than it may have seemed.

Also, it is worth anticipating that Calabresi's treatment of economists' value judgments is put forward without providing a specific definition of value judgments. Such treatment is mainly concerned with a peculiar type of *implicit* value judgments taken by the economist, namely "taking of a position – *sub silentio* – on [individual] tastes and values. [...] To the extent that any taste or value is held by people, setting it aside involves a choice. And excluding it effectuates a ranking of values." (Calabresi 2016, 151). Note that this idea of value judgments as taking a position or choice, which inevitably implies a ranking of values, is even stronger and more pervasive than Myrdal's characterization of economists' implicit value judgments (Myrdal 1953, 1958) in terms of choice of problems and theoretical analysis led by their ideology, political stance, etc., since we may rightly *assume that every step of the whole scientific research process is led by a choice and, therefore, by a ranking of values*.<sup>13</sup> Whether such choices have been made and the corresponding values are methodological or ethical is difficult to know precisely because such choices are taken *sub silentio*. As we will see, this inevitably raises the issue of *unknowability* of scholar's psyche, unless s/he *explicitly* declares them (and, at the same time, we believe that s/he is telling the truth).

Though Calabresi does not appear to be interested in discussing MVJs explicitly, nor their relation with EVJs, indeed the introductory chapter as well as the penultimate chapter dwell on both issues. These are the already mentioned cases of the bilateralism thesis and the methodological precept of the empirical adequacy of economic models with the reality of human and social values and with legal institutions that incorporate these values. Remember that these are the *founding* and fundamental methodological values of Law and Economics. Moreover, Calabresi adopts, implicitly or explicitly, other types of MVJs, such as the coherence of the model, its usefulness, etc. Again, he explicitly aims to "explain some potentially sound reasons for what economic theory is in fact doing when it accepts some tastes, values, and costs, and rejects others" (Calabresi 2016, 131). And last, but not least, he dwells on the inevitability of value judgments, on implicit value judgments as well as on how they should be made explicit.

In this regard, I will try to clarify what role MVJs play in the approach of Law and Economics supported by Calabresi, and what the relationship between MVJs as well as between MVJs and EVJs is.

### 2.1.1 Calabresi Vs Posner (I): Bilateralism and empirical adequacy

1. First of all, if Calabresi had more explicitly discussed his MVJs, we would have better understood the distance that separates Law and Economics from Economic Analysis of Law, as well as that which separates Calabresi from Richard Posner. In this regard, two issues might be worth exploring with more in-depth reflection<sup>14</sup>: (1) Posner's (imaginary) reply to the methodological value of bilateralism as well as to the MVJ of empirical adequacy. (2) Calabresi and Posner's notions of reformism and its relation with the distinction between positive and normative analysis.

In this connection, it may be important to note, on the one hand, that Calabresi later argued that "at its broadest [his] book is about the relation of theory to empirical data" (Calabresi 2017, 167), on the other, that, in his attempt to restore the balance between law and economics, Calabresi envisages a more proactive "role of jurists" as they are "necessarily empirical" (Calabresi 2016, 19).

2. If MVJs are accepted or considered more legitimate than EVJs in that they are based on a greater consensus, if bilateralism is prescriptive, and, at the same time, is to be considered a MVJ, one might wonder if Posner would *consent* to it. In a recent essay on "Norms and Values in the Economic Approach to Law", Posner notes that MVJs are of a purely "procedural" nature and belong to the positive analysis. Although he adds that the positive/normative distinction is a bit "confusing":

The economic approach to law [L&E, EAL] embodies norms of two types: procedural or epistemological norms, the norms of scientific enquiry; and moral and political norms; which come into play when the economic approach is used as a basis for making proposals for legal reform. The two types of norms correspond to the conventional distinction between 'positive' and 'normative' analysis, but the conventional distinction is confusing because norms enter into positive analysis, merely norms of a different type" (Posner 2015, 11).

If MVJs are merely "procedural", one would think that Posner should easily consent to Calabresi's prescription of bilateralism. I suspect, however, that things are a bit more complicated, if only because Calabresi accuses the Economic Analysis of Law approach of not following that kind of methodological value, which, in turn, *includes* the MVJ of the empirical adequacy (also not followed by the Economic Analysis of Law). Therefore, we may think that even the consent or adherence to a mere 'procedure' is not so obvious.

3. This problem is further complicated by the potential conflict between MVJs as well as between MVJs and EVJs.

A clear case of conflict between two MVJs emerges if we bear in mind Calabresi's distinction between Law and Economics and Economic Analysis of Law. The first approach would be 'superior' or 'better' than the second, not because 'more' empirically founded, but simply because Calabresi assumes that the methodological value of the empirical adequacy of the theory is superior to the value of rationality (however understood), necessarily assumed by the Economic Analysis of Law to judge/criticize/dismiss reality as non-rational or "irrational": it is only starting from some normative standard of rationality that one can judge/criticize/dismiss something as "irrational". Whether, this normative standard is a MVJ or an EVJ might be an open issue,<sup>15</sup> but, in any case, it will be necessary to explain and justify when and why the first value should be superior to the second.

Also, if the assumption of rationality is understood as an EVJ instead of a MVJ, then it would have been opportune to distinguish between MVJs and EVJs and to clarify and strive to better understand the relationship between them.

4. Calabresi seems to hint at the problem of the relation between MVJs not only in the already mentioned introduction but also when he addresses the question: "when it is appropriate to ignore costs and values in making an economic model, and when it is not?" (Calabresi 2016, 150). While maintaining the general precept that all individual tastes and values must be taken into account, Calabresi introduces some exceptions to *justify* "when it is appropriate to ignore costs and values in making an economic model":

if an attempt to include in an economic model some values or tastes makes the modelling impossible, significantly less *coherent*, or just too *difficult*, and thereby renders the model less *useful* to the task for which the model was created, then exclusion of those tastes and values makes the best of sense. So in appropriate circumstances, economists may be quite correct in refusing to take into account utility interdependencies. But this is not because such interdependencies don't exist: it is because including them in the model is too hard, and excluding them does not diminish the *validity of the model's results* significantly. (Calabresi 2016, 151, italics mine)

As we can see, this passage contains several MVJs – the model's usefulness, the model's coherency, the validity of the model's results – along with other judgments of a more subjective nature (or at least pertinent to scholarly evaluation) which seems to lie on the threshold between MVJs and EVJs, such as judgment on the "difficulty" of including individual preferences for altruism or taking "into account utility interdependencies" in the model.

All these MVJs, however, create further ambiguities and problems: what are the most important MVJs and in what order should we choose them in case of conflict among them or between them and other EVJs?

5. To illustrate the difficulty of these questions, let us try to apply them to the distinction between Law and Economics and Economic Analysis of Law. Calabresi charges the 'heirs' of Bentham, or the proponents of the Economic Analysis of Law approach, not to include in their economic models some merit goods or to discard them as irrational or "out of the model". They could easily reply that it was too "difficult" to include them in the model and/or that it was not worth sacrificing the "coherence" and/or "force" of the model on the altar of merit goods. Therefore, these MVJs could easily be adopted by the Economic Analysis of Law approach criticized by Calabresi. In this case, the conflict between different MVJs is quite evident and casts doubt on the possibility of clearly distinguishing between Law and Economics and Economic Analysis of Law.

And even if we wish to abandon the general methodological criterion of empirical adequacy, between coherence and utility of the model, what methodological value should we choose? And if we are in favour of coherence, should we prefer internal or external coherence, or both? And so forth.

6. In Calabresi's approach, the relationship between the methodological value of the empirical adequacy of the model and the other MVJs seems to be framed in terms of *rule and exception*. In other words, the general methodological rule is the inclusion of the reality of individuals' values and tastes in the model, while the exception comes into play if and to the extent that such inclusion risks compromising the coherence, utility, etc. of the model. But even if that were the case, this does not solve the problem of the relationship between MVJs: how do we know that we are facing an exception? And why and when should empirical adequacy be given priority over other MVJs?

Calabresi seems to face the problem with a case by case approach: how costly is the exclusion of some values and tastes from the model "depends on the question that is being asked; the issue that is being analyzed. Accordingly, such exclusions may or may not make sense" (Calabresi 2016, 152).

But, rather than a solution, this reintroduces the problem of value judgments, since, the selection of research questions depends largely on the economist's vocation and values or on what s/he deems worthy of being studied (Section 3.1). Also, in this case we will have to face another problem: what is the relation between the economist's values, as implied in the selection of the research question, and the MVJs?

7. Finally, the problem of the relationship between MVJs and EVJs raises the further question of how to proceed in the event of a conflict between them.

Let us consider the relationship between the MVJ of the empirical adequacy of the model and the EVJ according to which all individual values are worthy of consideration and have the same weight and must be included in the model. The problem is: in the event of a conflict between the two values (methodological and ethical), which one has a priority over the other?

In Calabresi's approach these two values would seem so connected as to be confused. In other words, it is not clear if Calabresi claims: (a) the inclusion of all individuals' values in the name of the (superior) methodological value of the empirical adequacy of the model; or (b) the methodological value of the empirical adequacy of the model, in the name of the (superior) value of the inclusion of all individuals' values. Whatever position – (a) or (b) – adopted by Calabresi, it would require both to explain when and why one value should prevail over the other, as well as to identify a normative criterion able to resolve the possible general conflict between MVJs and EVJs.

For example, if Calabresi adopted the position (b), namely the superiority of the EVJ of the inclusion of all individuals' values into the model over the MVJ of the empirical adequacy of the model, then we should also specify when and why the first EVJ can constitute another *exception to the exception* introduced by Calabresi in the relationship between the general MVJ of the empirical adequacy and the other MVJs. In other words, by adopting position (b) we would be facing the problem of how to resolve the possible conflict between the EVJ of the inclusion of all individuals' values in the model with the MVJ of the coherence or utility of the model.

### 2.1.2 Calabresi Vs Posner (II): Bilateralism, reformism and the black-box-psyche problem

1. The second issue is: what do Calabresi and Posner mean by “Benthamite” and/or “reformist”?

Sometimes Law and Economics scholars were used to classify the Chicago School approach as positive while that of the Yale School as normative,<sup>16</sup> or “reformist” (Rose-Ackerman 1989). But this is no more than a sociological or “institution-based” distinction, and, as such, it is “no longer salient” (Parisi and Klick 2015, 116),<sup>17</sup> and above all, I would say, not at all helpful for a methodological clarification. It does not help us to understand the meaning of ‘positive’ and, above all, in what sense the normative is synonymous with reformism.

About forty years ago, Posner did not believe that the positive/normative distinction is “confusing” (as highlighted in the previous section), and explained the distinction in terms of *is/ought*, and pointed to his work as an example of a “positive” approach and that of Calabresi as “mainly normative”, especially with reference to Calabresi's (1970) *The Cost of Accidents*, adding that Calabresi is “a reformer in the Bentham tradition” (Posner 1979, 285). Calabresi today seems to turn the ‘accusation’ back (if he ever perceived it as an accusation). Also, in this book he seems to make a considerable effort to remain within the positive analysis, which however is never defined, except in terms of empirical analysis, or with some reference to neutrality or means-ends rationality.

In my opinion, the problem of being “Benthamite-reformist”, on which Calabresi focuses (through Mill's reading of Bentham), is the “aggressive” attitude of the Economic Analysis of Law. Calabresi's characterization of this approach as “aggressive” seems to evoke the so called ‘imperialism of economics’. It is not only the adjective ‘aggressive’ in which Stigler's words seem to resonate: “so economics is an imperial science: it has been aggressive in addressing central problems in a considerable number of neighbouring social disciplines, and without any invitations” (Stigler 1984, 311). It is, above all, Calabresi's characterization of Posner's approach and his turn from Law and Economics to Economic Analysis of Law that points to the problem of economics imperialism.<sup>18</sup>

And even if economics imperialism were not the problem highlighted by Calabresi, I believe that the characterization of the Economic Analysis of Law approach as “aggressive” points to a problem that is not only methodological, but also psychological: where does this “aggressive” attitude come from? In my view such problem has to do with the *relationship* of *scholars* with their own *lenses*, that is the categories, models, theories, etc., they use to observe reality: how much scholars are *aware of, attached to or ready to dismiss* their own lenses? The fact that Bentham “approached all ideas as a *stranger*, and if they did not fit his test (the test of utility), he dismissed them as vague generalities”, or the fact that scholars of Economic Analysis of Law “dismiss” reality as “irrational”, should lead us to ask ourselves: if it were so simple to recognize reality “as it is”, why do they not dismiss their own lenses instead of dismissing reality? How can it be that these lenses lead to a form of blindness of reality?

In other words, one could get the impression that Calabresi tries to address a psychological problem with the tools of a discourse on method (the reference to the empirical adequacy of the models seems, in this regard, like a reference to a Freudian ‘principle of reality’). Once again: where does this “aggressive” attitude come from? I will try to argue that this might be due to a form of idolatry of the model or lenses (Section 3.3).

2. It is known that Posner has often changed his mind, and I would say also with reference to the notion of positive and normative (no longer understood in terms of ‘is’ and ‘ought’), since he recently argued that, apart from MVJs, all economic science is “*heavily normative*”:



people aren't as *curious* about the economic system or the legal system as they are about the stars [...] their *interest* in the economic and legal systems is *practical*; it is an interest in *making these systems work better* (Posner 2015, 4, emphasis added).

Let us forget about the problem of whether Posner is also speaking for himself (is his analysis "heavily normative"?), or the problem that even the *choice* of some basic MVJs might be guided by an "interest in making these systems work better", and think about the core of the question.

To the extent that in these kind of arguments one makes an appeal to some aspect of scholar's *psyche* – "curiosity", detachment from reality, ("aggressive") attitudes or inclinations, "interests", intentions, taking a position *sub silentio*, reformist (attitude), etc. – as an explicative criterion of what is positive or normative analysis, we will always be faced with a thorny problem, which I would call the *black-box-psyche* problem.

To explain the problem, let us take one of the common ways of understanding the distinction between positive and normative analysis as "theoretical analysis" of reality and "criticism" or "reform" of reality (to resort to Calabresi's words); or to put the distinction as if it were an analytical/chronological process: *first* I need to 'understand'<sup>19</sup> (or 'represent', 'study', 'analyze', etc.) reality, *then* I can reform/change it. This way of posing the problem is an hard-to-die residual of intellectualism in virtue of which scholars are used to frame the problem in terms of priority of knowledge (or theory) over practice. In this regard, Posner and Calabresi share the same residual of intellectualism and the same notion of 'reformism'.

But this way of posing the problem does not hold if we ask ourselves: how do I know if the positive analysis is driven by the scholar's *intention* to criticize or reform reality? Which comes first: the positive or normative approach? In this case, the problem of the axiological or even the ideological assumptions of scholars can come into play, starting from their choice of problems to analyze, from the choice of research questions, etc., and this type of *sub silentio* choices may reappear in the whole research process (see Section 3.1).

If we do not want to judge scholars' intentions (and, I guess, nobody does), the black-box-psyche problem is a difficult one. Most of the times it is a professional ethics problem (Section 3.1) rather than a methodological one. The only solution to the black-box-psyche problem is either to ask scholars to make their values explicit – and, in this case, we should believe they are telling the truth – or, more simply, to put their theories under the scrutiny of the scientific community. Through the public debate and critical analysis and/or the possibility of reproducing/controlling/falsifying the experiment (if the research is an empirical one) the scientific community will always work (in so far as it works) as control mechanism.

3. To come back to the issue of bilateralism and the relation between theoretical analysis and reformism: what should scholars do if they find themselves in a situation, such as that indicated by Calabresi, in which "the whole unanalyzed experience of the human race [...] might represent centuries of exploitation, mixed ideas, or approaches that new technologies rendered obsolete"? (Calabresi 2016, 6). Should they follow the MVJ of empirical adquacy, and then represent reality "as it is", however brutal it may be, or take a stand and then "criticize" or attempt to reform that reality? It should be noted that the idea of *taking a position* against a given reality can be a little misleading if it is intended in opposition to the idea that following the approach of positive analysis would mean remaining *supra-partes*, impartial or, so to say, remaining in the ivory tower, as if the opposition was between taking position *versus* remaining *supra-partes*. In fact, even choosing to be *supra-partes* entails taking a position. Above all, choosing to follow the positive analysis instead of the normative analysis entails taking a position. Therefore, the real conflict is between different normative claims: on the one hand the methodological value of representing reality as it is, on the other the precept of taking a position against a reality deemed unjust.

With reference to these problems, Calabresi's position does not seem very clear. If in his introduction he praises Mill's reformism (Calabresi 2016, 6),<sup>20</sup> in many other cases he seems to be closer to a positive approach, or to the idea of a mere 'description' of reality "as it is". This latter is in fact his position with reference to the dominant values in a certain society. Altruism, equality, commandification, commodification, etc., should be counted and included in the individual preferences and economic models, not because right or good, but simply because "some people *like* markets, while others *like* command", and because "this preference is in their utility functions" (Calabresi 2016, 127). The same applies to the legal prohibition of voluntary slavery or the sale of parts of one's body: "if enough people are offended for this reason, no other explanation for the prohibition is needed" (Calabresi 2016, 46). But what should economists do if "enough people" or the majority of people like slavery? Should they continue to 'describe' this reality and include it in the model, or take a position against it?<sup>21</sup> If the answer is: "this is an issue of scholar's attitude",<sup>22</sup> then we are back to the black-box-psyche problem, and we will never know whether the scholar is doing positive or normative analysis or both.

### 2.1.3 Empirical adequacy Vs normativity

Here, in an attempt to push Calabresi's "promise" of a new future a little further, I would like to show how some element of normativity always insinuates itself even in the so-called positive analysis. In this regard, I will try to introduce a notion of normativity, postponing its exploration in a future Law and Economics.

This normativity has nothing to do with the idea of giving prescriptions – in so far as a prescription takes on the form of an imperative, must- or ought-statement<sup>23</sup> –, but with the idea of providing reasons for action. And in many cases it is the models or theories that provide reasons for action, without stating any prescription.<sup>24</sup> Here, however, the problem is no longer their empirical adequacy. On closer inspection, no model or theory has ever had as its main purpose to *mimic reality*. The ideal of empirical adequacy, taken to the extreme, would only mean a map that represents the territory on a 1:1 scale. That is a map that does not orientate at all, a useless map. Instead, the ability of the map to orient is in the *gap* that it establishes with reality. To be sure, there can be no reformism without such a gap.

To explain the point, let us take the paradigmatic case of the Coase theorem, and ask ourselves if it is positive or normative. It can be understood as a positive analysis, at least as a "conclusion derived from a set of initial premises" (Medema 2015, 78). But here 'positive' is simply meant as logical coherence. As to the empirical adequacy of Coase's theorem, there are many doubts. The "validity of the theorem depiction of individual behaviour, [namely] to what extent this behavioural model accurately describes behaviour within legal arena" is quite open (*ibidem*). And the experimental and empirical literature has generated contrasting results.<sup>25</sup>

But the true force of Coase's theorem lies in its latent or potential normativity, thus in its capacity to provide reasons for actions. It is not by chance that its basic formulation – "absent transaction costs, externalities will be efficiently resolved through bargaining" – can be understood as a "legal fiction" or "an exercise in pure fiction", or a "useful fiction". For Coase "the supposed optimality of markets and government as means of coordinating economic activity are equally fictional. We do not know what the optimum is nor do we know *how to get there*" (Medema 1999, 212, emphasis added). And if we take seriously a statement made by Coase – "these stories of what Heaven is like are not without interest, but they are bound to have most interest for *people who are sure of getting there*" (R. Coase 1970, 60, cited in Medema 2009, 101) – we can understand why, by depicting a possible world, his theorem provides reasons for action.

The principle "mimic the market" works exactly this way. The market that is to be 'imitated' is not the 'real' market (full of failures) but the '*ideal*' market, i. e. the perfect competition model, if we want to achieve, for example, a better allocation of resources.

And this is also true for the so called 'normative' Law and Economics, usually understood in terms of 'prescriptions' for social change or legal reform in order to correct market failures: if we cannot but see the 'failures' through the lenses of, say, the 'perfect' competition model, then we are deriving a prescription from an alleged positive (descriptive?) model.

Last but not least, this is true for the so called 'positive' Law and Economics too, and tells us why importing economics into law or using economic lenses to observe law is not a purely neutral operation.<sup>26</sup>

## 3 On "the actual and unavoidable existence of value judgments underlying much economic analysis"

1. In my opinion, the problems, the open questions and the ambiguities that we have begun to glimpse, also reappear in the last two chapters of the book, where Calabresi (2016, 131) addresses the "two distinct parts to my views on how economics treats, and should treat, tastes and values". Let us focus now on the penultimate chapter. We will turn to the last one in another section (Section 3.2). The first part:

concerns those tastes, values and costs that many economists seem to ignore or treat as irrational or not worth paying attention to. They do this while at the same time taking the position that, as to the validity of tastes and values, economics has nothing to say. (*ibidem*)

In this connection, Calabresi intends to perform three acts: (a) "examine the nature of this paradoxical – inconsistent even – attitude"; (b) "explain some potentially sound reasons for what economic theory is in fact doing when it accepts some tastes, values, and costs, and rejects others"; (c) "conclude with a plea for more openness and clarity in the treatment of such tastes, values and costs" (*ibidem*). Indeed, in many cases Calabresi seems to remain faithful to the precept of a value-free economic science, albeit with some exceptions, which, however, generate further ambiguities.

2. To understand the nature of these ambiguities, suffice it to compare Calabresi's statement "*De gustibus non est disputandum* is almost a creed in economics" (Calabresi 2016, 132), which seems to be a prelude to a critique

of this *creed*, with his general claim that if “economists *qua* economists” have “nothing to say” (Calabresi 2016, 131), or “purport to be agnostic” (Calabresi 2016, 136) as to values and tastes, then they should take into account *all* individuals’ tastes and values and *not exclude* some values in favour of others.

The two theses are only apparently connected. Indeed, one response is to *question* the economists’ *creed*, for example, clarifying its content and scope, the themes of economists’ investigation invested by this *creed*, and, ultimately, to question the *creed* as such, for example, by questioning economists’ values and *gustibus* (see Section 3.1), their methodological value judgments, or investigate why they are so reluctant to admit the “actual and unavoidable existence of value judgments underlying much economic analysis”: is it because they fear losing their scientific or professional status? Or their legitimacy? etc.

Another response is to ask economists to remain faithful to (and be consistent with) their *creed* in a value-free science and, therefore, not to exclude some values and tastes in favour of others. In this second case, the *creed* is not questioned, rather it is taken for granted.

For example, Calabresi declares, as we have seen, that he wants to analyze how “economics treats, and should treat, tastes and values”, noting that economists “*tak[e] the position* that, as to the validity of tastes and values, economics has nothing to say”, and explaining that he wants to “examine the nature of this paradoxical – inconsistent even – attitude” (Calabresi 2016, 131, italics mine).

In this regard Calabresi rightly notes:

“ignoring” or treating as “outside the model”, let alone terming “irrational” or “unreal” any costs or tastes and values that people in fact have or bear, violates the assertion that economics has nothing to say about tastes or values. To ignore or treat as non-existent some tastes and values – some things that are in individuals’ utility functions, and the costs that result from their being there – constitutes a taking of a position – *sub silentio* – on tastes and values. [...] To the extent that any taste or value is held by people, setting it aside involves a choice. And excluding it effectuates a ranking of values. (Calabresi 2016, 151)

But note that here the inconsistency or the paradox intrinsic in economists’ attitudes concerns the fact that they are not faithful to the precept of a value-free science, and not the fact, equally inconsistent and paradoxical, that the choice to follow a value-free approach constitutes, in any case, a *taking of a position*.

Therefore, Calabresi’s attempt to amplify economic theory by taking seriously the “actual – and unavoidable – existence of value judgments underlying much economic analysis” is to be understood, first of all, as a critique of “economics for not truly living up to its asserted taste/value neutrality” (Calabresi 2016, 155) and, therefore, of economists’ unawareness and/or ignorance of the way in which their value judgments enter their analysis at the expense of others. Hence, in fact, the meaning of the title of the penultimate chapter – “Of tastes and values ignored [by economists]”.

But even in this regard it seems to me that Calabresi’s position presents an ambiguity or contradiction, since, if value judgments are really “unavoidable”, it is not clear why economic science should be asked to live “up to its asserted taste/value neutrality”, and how economists can avoid such “unavoidability”.

This ambiguity may be dissolved if the ‘much’ contained in the statement “the actual – and unavoidable – existence of value judgments underlying much economic analysis” is understood in the sense that the inevitability of value judgments does not affect the *whole* economic analysis. But even if this is the case, it would still be necessary to clarify which *parts* of the economic analysis would be immune from values.

Perhaps the best way to untangle all these ambiguities and problems is, firstly, to start questioning the “*creed*” of economists *qua* economists, and, secondly, to better understand whether and to what extent economists’ analysis based on means-ends rationality can be value-free.

### 3.1 *De economist qua economist’s gustibus est disputandum*

1. The recurrent expression “economists *qua* economists have nothing to say about values” is a highly problematic statement. To understand this, it is sufficient to ask two simple questions: (1) what does it mean that economists “*have nothing to say* about values”? (2) Who is “the economist *qua* economist”?

If economists really *have nothing to say* about values, in the sense that they are driven by the logic of *necessity*, as if they were automata or machines, then they cannot do otherwise than be neutral. But if this were so, why do economists feel the need to constantly reaffirm that they have nothing to say about values? Evidently, because they contemplate the logic of *possibility* (and freedom): the possibility that they may have something to say about values. So, the expression “economists *qua* economists have nothing to say about values” can only mean, either that they *must be* value-neutral, or that they *do not have* to make value judgments.

Here, then, is the problem: the prohibition on pronouncing value judgments is formulated as an ought-statement and refers to some value. Whatever this value may be – the duty to tell the truth, to be objective, etc. – it still remains a value expressed as a precept.<sup>27</sup> Whether this value or duty of neutrality is a methodological

value, which should be distinguished from ethical value judgments, or is a duty pertinent to professional ethics, and whether professional ethics belongs to the domain of methodological values or is independent from it are open issues.<sup>28</sup> In any case, whatever the meaning attributed to the duty of neutrality, even establishing a criterion of demarcation between these areas – ethical, methodological or professional ethics – inevitably leads to establish a normative criterion of a higher order.

It is perhaps from the professional ethics standpoint that we can find an answer to the second question: who is the “economist *qua* economist”? The expression is a pure tautology, but perhaps it can acquire meaning through the distinction between “economist *qua* economist” and “economist *qua* citizen” or “economist *qua* policy advisor”. These last two expressions are sometimes used to indicate that economists, as citizens or advisors, can make value judgments. Let us leave aside for the moment the (not very convincing) objection that the advisor, by taking values as facts, ‘ends’ or objectives, is only a technician, as if she were an engineer or a pure technocrat, and that, as such, she does not make value judgments (see Section 3.2). What remains is the distinction between economist *qua* economist and the economist *qua* citizen.

From this perspective, the economist seems to be condemned to live a kind of schizophrenic existence, or at least to have a double identity: as an economist *qua* economist and as an economist *qua* citizen. But how do I know if, how and when such economist – while doing her job or research *qua* economist – manages to keep her two identities separate and to set aside her being also a citizen and keep at bay her value judgments? Can the economist be sure that she has a total awareness of or control over every step or choice of her research? Once again, we are back to the black-box-psyche problem.<sup>29</sup>

On other occasions, the expression “economist *qua* economist” indicates “the economist *qua* scientist”, and, to the extent that this expression is joined to the prohibition of making value judgments, it may be connected to what Fritz Machlup (1978) once termed the ‘inferiority complex of the social sciences’, and/or to the economists’ need for legitimacy and/or to their need to preserve their own identity, so as not to be confused with charlatans.<sup>30</sup>

Finally, economists *qua* economists, for the simple reason of their having chosen the study of economics as a profession or vocation, must have made some axiological assumptions, as Weber long ago noted (1919). For example, they will have assumed that the laws of economics are worthy of being discovered or studied, that their particular field of study deserves to be deepened, developed, reformed; that the research questions to which they intend to give an answer are worthy of all their efforts and dedication, etc. etc.

### 3.2 Means-Ends rationality

1. In his last chapter – “Of Tastes and Values. What Economics can Tell us about Them” – Calabresi takes up the problem of value judgments from a more constructive perspective, at least as regards the role of economists and economic theory as a “powerful tool” to implement reforms in legal realm.

Economists are very well suited – perhaps are optimally suited – to examine the consequences of some tastes and values [...]. With a minimum of assumptions of a sort that are standard in economic theory, economists can give lawmakers guidance in favouring laws that further the creation of some values and deter others. With very few changes, of a sort that are consonant with the structure of economics, economic theory can become a powerful tool in the reform, criticism, and confirmation of what, *in fact*, is one of the law’s most important function, the furtherance of some values and the deterrence of others. (Calabresi 2016, 131–132)

Economists, “while remaining true to all the restrictions they have appropriately wanted to put on their field, can tell lawmakers a great deal about what value changes can properly be viewed as desirable” (Calabresi 2016, 160). In other words, while admitting that there are values that “economics regularly takes as a given”, such as “more is better than less”, economists, assuming values as facts or as “given”, can calculate the means to reach them and/or the “desirability of subsidiary tastes and values that would be of great use to lawmakers” (Calabresi 2016, 161). In this case, according to Calabresi, and in a manner not dissimilar to the conclusions of his previous chapter, the inevitable presence of *implicit* value judgments would not be such a great problem for the ideal of value-neutrality if and to the extent that economists would make them *explicit* (Calabresi 2016, 169–170).

2. Calabresi’s discourse on “what economics can tell us about” values seems to me, if I have not misunderstood it, to resume the Weberian ideal of means-ends reasoning, with which the conception of the economists as mere technocrats or engineers is often associated. From this perspective, politicians or lawmakers set the goal or ends to be realized – for example, greater redistribution of wealth, or the promotion of some merit good – and economists simply calculate the means to achieve them, the conformity of the means to the end, and all the consequences deriving from these ends.

In this regard, I will simply limit myself to referring to the various criticisms that have long been advanced against this view of means-end rationality and of economists as engineers: it is a very simplified vision of reality, both as regards the role of the economist and the policy-making or law-making process.<sup>31</sup> It is also a simplified vision of economists' analytical process, since values can present themselves not only at the beginning or the end of the process as a (given) policy aim, but also in the same chain of economists' means-ends reasoning, in the form of fact-value entanglement (Putnam 2002).<sup>32</sup> Whether these values can *always* be made *explicit* by the scholar is an issue that I will address in the last section.

### 3.3 Economists' 'lack of self-awareness', idolatry or the economists' lenses?

1. The conclusion of Calabresi's penultimate chapter is "a plea for more openness and clarity in the treatment of such tastes, values and costs" (Calabresi 2016, 131). After clarifying the cases in which exclusion of individual values and tastes from the economic model would be justified, Calabresi argues that exclusion is "too often" the "result of a lack of self-awareness" (Calabresi 2016, 152–153). Now, he believes this kind of problem can be easily solved with

more self-awareness resulting in openness and, dare I say it, greater honesty of treatment. When economic theory chooses, for its own good reasons, to ignore some values and costs, it must – *it must* – be aware that it is doing so, and make that decision abundantly clear. [...] The task of the law and economics scholar is to see to it that such openness and honesty occur. It is also to ask for, and help develop, the more nuanced, cost/value-inclusive economic theory. (Calabresi 2016, 154)

Nevertheless, I have the impression that the theme of "implicit value judgments" – also evoked by Calabresi when he refers to the "implicit valuation and rejection of some tastes" (Calabresi 2016, 135), or when he claims that "to ignore or treat as nonexistent some tastes and values [...] constitutes a taking of a position – *sub silentio* – on tastes and values" (Calabresi 2016, 151) – requires some further clarification.

2. To understand the reasons for the exclusion of the values and tastes of individuals from the analysis of economists we must better understand the *sources* of the "ignorance" of the economist. The word *ignore* means both 'not know' and 'neglect' or 'overlook'. But from the epistemological and psychological point of view, these are two very different phenomena. Moreover, between absolute ignorance and perfect knowledge there are different degrees of knowledge, as well as of self-awareness; and this, of course, has a certain relevance as regards the discourse "on tastes and values *ignored*" by economists.

If economists were completely ignorant of their implicit valuations, of their taking a position *sub silentio*, and/or of the values embodied in Economics, we could blame their 'ignorance', the educational system in which they studied, the absence of a humanistic, philosophical, ethical, etc. training in their curriculum; but it would not make sense to ask them to be more "open" and "honest", as this request implies that they should have a minimum of awareness-knowledge of the values at stake.

If, on the other hand, economists were always aware of the values at stake, then the question of their "openness" and "honesty" is 'only' (so to speak) a question of professional ethics or moral conscience of the scholar (remember, however, that even professional ethics refers to a normative apparatus: the duty to tell the truth, to be objective, etc.). But this is, once again, the black-box-psyche problem. To verify whether "such openness and honesty occur" can only be a task entrusted to the scientific community, through the examination and critical debate of the theories proposed by scholars.

The problem, however, is that scholars are not always and wholly aware of their implicit valuations or of their taking a position *sub silentio* and/or of the values (already) incorporated into Economics. And this might be the case for many different reasons. I will try to explain some of them but without any pretence of being exhaustive.

In the first place, because the *learning* of a discipline consists, for the most part, in the *uncritical* interiorization of its assumptions and methodological and/or ethical values. And often it takes time to achieve that mastery of the discipline necessary to exercise a critical and conscious detachment from such interiorized assumptions and values.

In other cases, we tend to *forget* that the observation of reality is, in the words of Karl Popper, "theory-impregnated". If the theories are like the lenses with which we observe the world, it is as if we were asking "where did I put my glasses", without realizing that they are on our nose.<sup>33</sup>

Other times, unawareness (which could be a special case of the aforementioned forgetfulness) may be due to a sort of over-confidence or *idolatry* of the model, approach or knowledge itself. Such idolatry may also take the form of scientism or dogmatism.<sup>34</sup> This type of unawareness can lead scholars to exchange fiction with reality and/or not to see or to refuse reality or to bend it to the model and/or to 'get lost' in the model (part of this problem has also to do with the famous Alfred Korzybski's remark "the map is not the territory"). This is

the paradigmatic case of Bentham, as depicted by Mill (and Calabresi), who bends the reality to the model, or refuses or criticizes reality as it does not fit the model, without realizing that it may be time to change lenses.

I would not hesitate to say that much of what Calabresi calls the “aggressive and reformist mode” of Economic Analysis of Law is at least partly due to such idolatry problem. And if it is so, part of Calabresi’s methodological critique of Economic Analysis of Law has a psychological dimension. As said earlier (Section 2.1.2), it is the problem of the *relationship of scholars* with their own *lenses* and not only (or not so much) the problem of the “relation of theory to empirical data” (Calabresi 2017, 167). That is why Calabresi’s fundamental MVJ of empirical adequacy and his continuous exhortation to look at the world “as it is” sounds like an exhortation to come to terms with a ‘principle of reality’.

In most cases, time, learning, acquiring a certain epistemological humility through confrontation and critical discussion among scholars, disciplines, perspectives and methods, help to achieve the self-awareness invoked by Calabresi. And his book certainly contributes to the increase in the awareness of economists. His exhortation to make explicit the implicit values of economists is certainly a relevant point for the future of Law and Economics, if and to the extent that we believe and share in the *value* of public, open and critical discussion of the values incorporated into economic models as well as of the values of economists, lawyers and lawyers-economists. However, in cases of idolatry, including the faith in the neutrality of positive economics, discussion is not possible because discussions on values as well as the value of the discussion are denied at the outset. And then all that remains is to *hope* that the criticisms put forward by the scientific community will sooner or later convince the dogmatists to change their perspective or their lenses on the world.

It seems to me that Calabresi’s book is animated by this value (and by its sharing) and by such hope. And, of course, this article too shares that value as well as that hope.

## 4 On the Future of Law and Economics

So far, I have simply tried to bring Calabresi’s affirmation about the “inevitability of value judgments” and the “taking of a position *sub silentio*” to extreme consequences, noting an unresolved tension with his approach that in many cases seems to be positive. If we take such ‘inevitability’ seriously, as I have tried to do, we end up questioning some methodological assumptions of the future Law and Economics envisaged by Calabresi: starting from his attempt to establish a clear separation between Economics Analysis of Law and Law and Economics, passing through a problematic relationship between methodological value judgments and ethical value judgments, and ending up in the problem of economists’ ‘ignorance’ of their own value judgments.

A future Law and Economics that wants to deal with values will have to put in the first points of its agenda the need to clarify the meaning of such ‘inevitability’ of value judgments and in what sense we can still use dichotomies, as positive/normative, theoretical analysis/reformism, is /ought, fact/value etc., that are too often taken for granted or understood as analogous or, even worse, used as an ideological weapon, or, more often, used to legitimize the status or identity of the scholars or of their own discipline through the label of ‘science’.

And this is all the more necessary if the future Law and Economics claims not only to ‘explain’ but also to reform human, social and institutional reality, because such a reformist pretence immediately raises the issue of the *legitimacy* of scholars or experts who are supposed to provide recommendations in view of such reforms.<sup>35</sup>

Also, if Calabresi’s Law and Economics is also an attempt to claim (if not a privileged position, at least) a specific task or “role” of legal scholars, why should the “role of jurists” have to do with their being “necessarily empirical” and not with their being more used to deal with discourses on values? Are not jurists, and more in general, scholars in the fields of humanities more equipped to understand the “whole unanalyzed experience of the human race”?

Paraphrasing Calabresi’s introduction, “there will be times when lawyer-economists may give way to some other ‘Law and ...’ discipline” ... perhaps the present “times” are ripe. We could add, with another paraphrase, that Law and Economics is only “one view of the Cathedral”.<sup>36</sup> Moreover, Calabresi himself has long urged us to consider the plurality and (the value) of different approaches.<sup>37</sup>

But perhaps a new “Law and ...” is not even necessary. It may suffice to reflect critically on the foundations of our disciplines, on their value assumptions and normative consequences, on if and how we adhere to them, and on our own work of analysis and development of theories, especially if such work seeks to regulate, steer or *reform* human, social and institutional reality.

Or perhaps, and more simply, this is the task that philosophers have always taken on. Whether this work of critical reflection and discussion will give rise to a new “Law and ...”, or rather, to a Philosophy of Law and Economics, or to a Law, Economics and Humanities, we will know only in the future.

## Notes

- 1 There are, of course, exceptions in the horizon of Law and Economics scholarship, thus scholars who have tried to criticize or make explicit the methodological and normative assumptions of the Economic Analysis of Law. See for example Malloy (1989) or Cooter (1989) and, for an overview of the critiques of Law and Economics, Driesen and Malloy (2017), who has shown that even ‘simply’ importing economics into law is never a neutral operation. See also Kornhauser (2011), Mathis (2009), and Zamir and Medina (2010), and the collection of essays in Hatzis and Mercurio (2015).
- 2 See at least Colander and Su (2015) and Weston (2009).
- 3 Among the positions that oscillate between the two extremes of non-neutrality and neutrality, respectively and emblematically represented by Myrdal and Robbins, different intermediate positions are given. For example, Mongin (2006) has shown the possibility of a more convincing “weak non-neutrality” position. Also, it would be better to distinguish between descriptive, evaluative and prescriptive judgments, and understand their “interdependencies” (Baujard 2013), or to rethink the idea, put forward by Jon Neville Keynes (1984 [1917]), of Economic Science as “Art”, as a third category beyond positive and normative economics.
- 4 Among the most recent contributions see at least: Putnam (2002), Dasgupta (2005), Davis (2014), Mongin (2006), and Reiss (2017).
- 5 See, for example, the Symposium on “The Future of Law and Economics: Looking Forward”; in particular, the roundtable discussion held by Epstein et al. (1997), Epstein (1997); but also, among others, Ellickson (1989), Posner (1989b), Mattei (2005), and Posner and Becker (2014).
- 6 In this connection, see also the essays by Cserne (2019) and Desmarais-Tremblay (2019) in this special issue. A critical analysis of Calabresi’s merit goods and their existence and acceptance in legal systems and institutions is in Sunstein (2017).
- 7 The last two chapters are a re-elaboration of the lecture delivered by Judge Calabresi upon receiving the Ronald H. Coase Medal at the Annual Meeting of the American Law and Economic Association at Stanford Law School on May 18, 2012, later published in Calabresi (2014).
- 8 As an example of this empirical approach, Calabresi here refers to behavioural economics. For the purpose of this article, it is worth noting that the developments of behavioural economics into so-called Behavioural Law and Economics are not free from value judgments. See Steffen (2016).
- 9 On Calabresi’s claim of the bilateral relationship between Law and Economics see Tuzet’s (2019) interpretation of this relationship in terms of reflexive equilibrium and Esposito (2019) in this issue.
- 10 Since Calabresi explicitly conflates individual preferences and values (see, above all, Ch. 7 of his book), and since one of the main EVJs of welfare economics is that all individual preferences have the same weight and have to be counted equally (on this see Davis 2014) here I am assuming that Calabresi takes seriously such EVJ precisely because he criticizes scholars who take a position in favour of some individual value and exclude other values.
- 11 Here the reference point is Kuhn (1977). For a critical analysis of the distinction between cognitive and non-cognitive values in science see Longino (1996). For a discussion of this distinction in economics see Blaug (1980 [1992]: 114–116).
- 12 On this point see, for example Blaug (1980 [1992]: 112 ff).
- 13 On this see Reiss (2017).
- 14 Another important issue worth exploring is the distance between Calabresi and Posner’s positions on Ronald Coase’s methodology, since, where Calabresi (2016, 11ff) refers to Coase as a methodological reference model for Law and Economics, Posner (1993) criticizes Coase precisely for methodological reasons. See also Coase’s (1993) reply. On this debate see Mäki (1998).
- 15 On the normative assumptions of the standard of rationality in economics see Hausman, McPherson, and Satz (2017, 70–88).
- 16 See i. e. Parisi (2004).
- 17 Such “institution-based distinction is no longer salient as Yale has many positivist law and economics scholars on its faculty, just as Chicago has scholars who can be categorized in the normative school” (Parisi and Klick 2015, 116).
- 18 On Posner and his “values” of economics imperialism see also: Harnay and Marciano (2009) and Medema (2015). The issue of economics imperialism in Law and Economics was well explained by Cooter (1981) many years ago. For a general discussion of the meanings and implications of ‘economics imperialism’ see Mäki (2009).
- 19 Indeed, even the notion of “understanding” may be vague or ambiguous: “Economic analysis is frequently offered as the best way to understand particular legal rules and doctrinal areas of law. However, notion of “understanding” here may be ambiguous between description, prescription, or some combination of the two” (Bix 2017).
- 20 On Calabresi and Mill see Tuzet (2019) in this issue.
- 21 As has been noted, Calabresi does not distinguish between an individual’s tastes and an individual’s values and, therefore, also between preferences and normative judgments; see Zamir (2017, 116), but also Cserne (2019) and Desmarais-Tremblay (2019) in this issue.
- 22 I wish to thank one of the referees for suggesting this reply.
- 23 On this see Baujard (2013, 8–9).
- 24 As already noted years ago by Hahn Hollis with reference to the notion of rationality and the potential normativity of the ideal type of *homo oeconomicus*: “the rational man of pure theory is an ideal type in the sense not only of being an idealization where the theory holds without qualification, but also of being a model to copy, a guide to action. In pointing out the way to satisfy a given set of ordered preferences, the theorist gives reasons for action” (Hahn and Hollis 1979).
- 25 See the analysis of this literature in Medema and Zerby (2000).
- 26 “Importing economics into law [...] is a value-based undertaking and not an amoral or ‘objectively value-free’ process in the sense that some legal economist might suggest. In practice, therefore, economics provides grammatical and rhetorical devices for framing legal inquiry and for advancing certain value-based approaches to the allocation and distribution of scarce resources [...]. For example, assuming that resources should move to the highest bidder discounts the preferences of those with little or nothing to use for bidding. This simple and fundamental assumption in economics expresses a socio-economic value. While one may or may not agree that this is a good value to import into law, the resolution of the matter is one grounded in persuasion and opinion and not in an objective calculus of economic analysis” (Driesen and Malloy 2017).
- 27 Note that this problem may turn into a contradiction, which is quite evident for the strong-neutrality positions (see Mongin 2006), according to which making value judgments is ‘illegitimate’ in the sense of being ‘non-scientific’. If doing science implies the injunction not to make value judgments, then this ‘science’ is always founded, contradictorily, on a value-judgment.
- 28 Professional ethics is another long-suppressed issue in economics. See the essays collected in DeMartino and McCloskey (2014).
- 29 One may object, as noted by a reviewer, “that the most natural reading of the ‘economist *qua* economist’ claim is the methodological value of being neutral about other values. Which means, to study economic phenomena as they are (not as we wish they are). This is the very foundation of science. Why strive to put it into doubt? Do we want economists to mix up beliefs and desires?”. Of course, I am not putting into doubt the *duty* of neutrality. Whether this is the very foundation of science, or, as I believe, a mere professional ethics duty (including the duty to respect the norms of the scientific enquiry) it is an issue that should be treated separately. I am simply saying that

(unless scholars make their value judgments explicit, and provided that we believe they are telling the truth): (1) scholars may not have a total self-awareness of or control over their entire research path, and accordingly knowing if, how and when some sort of value judgment has entered into that path somehow; (2) this is not necessarily a problem, since the scientific community, through the public debate/critique and/or the possibility of reproducing/controlling/falsifying the experiment (if the research is an empirical one) will always work (in so far as it works!) as control mechanism; (3) I do not see (and I do not have) any trouble with scholars' 'beliefs' and 'desires' (or sentiments, passions, emotions, biases ... and the list may be longer); because: (a) the scientific community, as said, works as a control mechanism; (b) if a scholar declares – for example, as confessed by the Nobel prize for economics Amartya Sen – he was moved to study poverty and hunger because in his childhood in India he saw people dying of hunger and this made him suffer, I do not see how this compassion can 'negatively affect' his research; even if this were the case, I repeat, there is always the scientific community that will judge his works.

30 It is an issue that not surprisingly (re)surfaces every time the 'scientificity' of economics is questioned. In this case 'value judgments' take on the meaning of 'non-science' and become part of a broader discussion over the demarcation criteria between science and non-science. See Silvestri (2016).

31 See Machlup (1969), Klappholz (1984), Blaug (1980 [1992], 128–131); Hausman, McPherson, and Satz (2017, 338–340). For a more precise and compelling characterization of economists' role as experts, as well as of the interdependency of their descriptive, evaluative and prescriptive judgments see Baujard (2013).

32 Here I am referring to the critique of the means-ends reasoning put forward by Luigi Einaudi many years ago, which I have elsewhere interpreted (Silvestri 2018a, 2017a, and 2017b) with the lenses of the fact-value entanglement theory developed by Putnam (2002).

33 The problem of the scholar's lenses seems to me to be emblematically exemplified in the debate between Richard Titmuss and Kenneth Arrow, often cited by Calabresi (2016, 192, 204, 216). Both Titmuss and Arrow reasoned with the lenses of a false dichotomy (self-interest / altruism; exchange / gift; market / welfare-state) through which they looked at the reality of altruism, with specific reference to the system of the gift of blood. In other words, the inclusion / exclusion of altruism ended with the dependence on the positive or negative value that they gave to one of the two terms of the dichotomy. See Silvestri (2018b).

34 I have discussed how a discipline or knowledge field is a form of *dogmatics*, which may also turn into a form of *dogmatism*, in Silvestri (2016).

35 See, again, Baujard (2013).

36 Calabresi and Melamed (1972).

37 See, for example, Calabresi (2003).

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