

2016

The Future of Law and Economics and the Calabresian External Moral Costs

Ariel Porat

Follow this and additional works at: http://chicagounbound.uchicago.edu/law_and_economics



Part of the [Law Commons](#)

Recommended Citation

Porat, Ariel, "The Future of Law and Economics and the Calabresian External Moral Costs" (2016). *Coase-Sandor Working Paper Series in Law and Economics*. 812.

http://chicagounbound.uchicago.edu/law_and_economics/812

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 787
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 604



**COASE-SANDOR INSTITUTE
FOR LAW AND ECONOMICS**
THE UNIVERSITY OF CHICAGO LAW SCHOOL

THE FUTURE OF LAW AND ECONOMICS AND THE CALABRESIAN EXTERNAL MORAL COSTS

Ariel Porat

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

December 2016

THE FUTURE OF LAW AND ECONOMICS AND THE CALABRESIAN EXTERNAL MORAL COSTS

(forthcoming in a symposium issue of the Jerusalem Review of Legal Studies (2017))

Ariel Porat*

Abstract

This short essay is a contribution to a symposium held at the Hebrew University of Jerusalem on Professor Calabresi's "The Future of Law and Economics." It focuses on Calabresi's arguments that tort law facilitates a modified market for merit goods, and that external moral costs should be seriously taken into account by the state and the law in making and implementing difficult social choices. The essay points out two categories of situations where tort law fails to facilitate modified markets for merit goods, and highlights the hurdles in considering external moral costs at least in some cases.

Introduction.....	1
I. Overview	2
II. The Limitations of Tort Law as a Modified Market	6
A. High Risk to Life.....	6
B. Different Values for Different Victims' Lives and Limbs	9
III. External Moral Costs in Tort Law	11
A. When the Argument Says Too Little	11
B. When the Argument Says Too Much.....	12
IV. Beyond Tort Law	14
Conclusion	17

Introduction

Much of what I know about tort law comes from Guido Calabresi. In the 1989-1990 academic year, I took his tort law class at Yale, and it changed my life. I was captured by the Calabresian economic analysis of tort law. I studied almost all of Calabresi's academic writings and became one of his many academic followers.

In Calabresi's writings, you can find almost everything. Some of his ideas from the sixties and seventies were further developed and reiterated by other scholars, and in

* Alain Poher Professor of Law, Tel Aviv University, Fischel-Neil Distinguished Visiting Professor of Law, the University of Chicago, and Visiting Professor of Law, Stanford University (Fall 2016).

some cases, the origins of some of these "new ideas" have been forgotten. As for me: almost everything I have written in torts takes me back twenty-six years to that once-in-a-lifetime class at Yale. It is a special pleasure and privilege for me to contribute to a symposium celebrating Calabresi's new book *The Future of Law and Economics*. There is so much richness in this book. It is extremely enjoyable reading, as well as thought-inspiring, as are all of Calabresi's writings.

This brief Essay starts with a short overview of the central themes covered in the book and then focuses on one of these themes: merit goods and external moral costs.

I. Overview

One of the main themes discussed in *The Future of Law and Economics* is merit goods. According to Calabresi, there are two categories of merit goods. The first refers to goods that many people do not want to be priced in any way, neither through the market (commodification) nor through collective commands (commandification¹)—in other words, goods that many people do not want to be translated into monetary terms. Second are goods that many people do not want to be allocated through the market or, more generally, that people resist their allocation to be determined by the prevailing wealth distribution in society.²

While many goods can be characterized as falling into both categories of merit goods, this is not always the case. Exemplifying this distinction is the dilemma of whether it should be legally permissible for people to sell their organs in a market transaction. Some people might be troubled by the commodification aspect: trading one's organs for money would commodify them, which, in itself, could degrade human beings.³ Others might be concerned also, or only, on the allocation front: if organs can be legally traded on the market, the poor will typically be the sellers and the rich the buyers. Calabresi suggests that people's aversion to commodification, commandification, and

¹ At 31.

² At 26-29.

³ The same concern might arise if legislatures were to ascribe monetary value to kidneys (commandification, in Calabresi's terms).

allocation are mental suffering, and he names them "external moral costs."⁴ These costs, he asserts, should not be ignored by legislatures, policymakers, and courts of law.

A second theme central in the book is the need for modified markets and modified commands when merit goods are at stake. Calabresi contends that sometimes society should promote social welfare not directly through the market and commands but indirectly through modified markets and modified commands. The idea here is to prevent the external moral costs that direct or pure markets and commands might entail.⁵ For example, many people will be troubled by a straightforward equation between human life and limb and money, whether in markets or through commands, because of the pecuniary value such comparisons, or trade-offs, ascribe to human life and limb. Feeling troubled means that they bear external moral costs that might be avoided if those comparisons and trade-offs were implemented indirectly or in a softer way.⁶ For Calabresi, tort law facilitates indirect markets, thereby implicitly authorizing trading human life and safety for money. Indeed, tort law speaks in terms of compensating victims or returning them to the status quo prior to the injury⁷ but, at the same time, creates markets for human life and limb. Tort law also produces commands, or modified commands, which are the result of comparing risks to human life and limb with money. Illustrating this is the decentralized manner in which courts set the standard of care in negligence cases, allowing for savings in precautionary costs even if at the expense of more people being injured or killed. Calabresi maintains that this is in fact a major justification for retaining the quite expensive tort system: the facilitation of trade-offs between human life and safety and money, at relatively low external moral costs.⁸

Altruism, non-profit institutions, and beneficence are a third theme discussed in the book. Calabresi argues that altruism and beneficence are not merely a means for enhancing social welfare but an end in themselves.⁹ For example, if a particular goal can

⁴ At 27.

⁵ Sometimes a pure command might work when a pure market would not, and sometimes the reverse is true. At 34.

⁶ At 33-36.

⁷ At 35-36.

⁸ At 39-40. Calabresi elaborates more extensively on modified markets and commands in his discussion of the second category of merit goods, where allocation, rather than commodification and commandification, triggers external moral costs. At 41-89.

⁹ At 90-91.

be promoted equally through the market and by a non-profit institution, the latter might be preferable simply because altruism and beneficence are appealing to people or, in Calabresi's words, because "[altruism and beneficence] can be seen as things we have in our utility function."¹⁰ Therefore, just as in the case of merit goods, when a social decision must be made whether to advance social welfare through institutions that promote altruism and beneficence, external moral costs—and, I would add, external moral benefits—should count. In this context too, Calabresi suggests developing modified markets and modified commands to encourage greater altruism and beneficence. Pure markets or pure commands will obviously fail at this task, since they destroy (or crowd out) altruism and beneficence: how can we be altruistic or beneficent in pursuing a certain goal if we are commanded by the law or paid to pursue that goal?¹¹ Modified markets and commands function differently: while they do provide incentives to be altruistic and beneficent, they do so indirectly, often through cultural change. At a certain point, the altruistic and beneficent behavior detaches from the incentives that triggered it in the first place and takes on a life of its own.¹²

A fourth theme of the book is criticism of economists for disregarding external moral costs (and benefits) in their models. Standard economic models take people's tastes and values as is, with no normative judgment as to their contents. External moral costs, however, which are a manifestation of people's tastes and values *concerning other people's behaviors*, are disregarded in these models.¹³ Some economists would contend that these costs are the product of irrationality and, therefore, rightfully excluded from these models. Others would assert that it is too complicated to include them in already-complicated models. Yet, Calabresi argues, these reasons lose force in cases where the external moral costs are very high.¹⁴

Calabresi does not stop here with his criticism of economists. Rather, he further demands of economists that they increase their contribution to law and economics by advising the legal system on how to incorporate existing social tastes and values with the

¹⁰ At 91.

¹¹ At 105-16.

¹² Calabresi provides some examples of this: tax deductions for donations (at 106-07); a command to give a certain amount of money for beneficence (at 108-09); and paying generous salaries to CEOs of non-profit firms (at 110).

¹³ At 141-47.

¹⁴ At 152.

goals—so familiar to economists—of maximizing social welfare and promoting equality (what Calabresi calls "joint maximization"). Thus, Calabresi identifies a common social value of creativity: maximization and equality could be promoted in a way that is compatible with the social value of creativity. Accordingly, if there are two equally effective ways to promote social welfare and equality and only one of them reinforces people's value of creativity, this latter way should be preferred over the other.¹⁵

The fifth and last theme of the book is liability rules per Calabresi & Melamed. Calabresi claims that in contrast to the common understanding of liability rules, damages should not always be identified with the market value of the entitlement taken. In some cases, society might want a unilateral taking of an entitlement to be relatively costly and, therefore, damages higher than the market value of the entitlement or, alternatively, relatively less costly and damages lower than the market value.¹⁶ The desire to make the taking more costly could derive, for example, from the risk that awarding compensation at market value would not account for the "private value" people ascribe to their entitlements or, more generally, when society is striving for an inalienability rule regarding the particular entitlement at hand. In contrast, society might want a taking to be less costly than the market value of the entitlement when, for example, there is good reason not to compensate the entitlement holder for emotional harm or economic loss or, more generally, when society wants to encourage more transfers of entitlement than what the market would yield.¹⁷

From this short overview of *The Future of Law and Economics*, it should be apparent that external moral costs and their allegedly significant, yet almost ignored role in the theory of social choice are a central issue in this book. The idea promoted is that weight should be given to what people who are not directly affected by a social choice

¹⁵ Calabresi gives the example of promoting equality among men and women in the family and discusses the relatively new trend of receiving assistance for childcare so that both the husband and wife have an equal opportunity at advancing their careers. According to Calabresi, there is an alternative that would simultaneously promote equality and creativity and maximize social welfare, namely, developing creative options for childcare. Once the creativity of this activity is acknowledged, husband and wife would share in caring for their children—instead of receiving external assistance. *Id.*

¹⁶ At 119-21.

¹⁷ For possible reasons, see 120-21.

"feel" about that choice. If they have a strong aversion towards a certain choice, i.e., if they bear external moral costs because of the choice, this should be, according to Calabresi, a consideration against making that choice. For instance, trading human life and safety for money directly through market transactions might be impermissible because it entails high external moral costs. At the same time, Calabresi argues, tort law might serve as a modified market for trading human life and safety for money in a way that society could tolerate. In what follows, I want to reinforce Calabresi's argument but, at the same time, also expose some of its limitations.

II. The Limitations of Tort Law as a Modified Market

The Hand formula,¹⁸ which was adopted in the Restatement of Torts,¹⁹ instructs courts to determine negligence by comparing the burden of precautions (B) with expected harm (PL). Thus, many courts, applying the Hand formula, exonerate injurers from liability for bodily injury and death when the risks that could have been reduced by costly precautions were low. This approach supports Calabresi's argument: tort law facilitates trading human life for money. But courts do not apply the Hand formula when a high risk to life was at stake. Furthermore, they refrain from setting different values for different potential victims in the expected harm side of the formula, in contrast to what (many) economists would have likely done.

Below, I will elaborate on these two limitations of tort law as a modified market for human life and limb.

A. High Risk to Life

I could not find a single case, in the US or elsewhere, in which a court exonerated an injurer from liability for bodily injury or death when the risk was very high—say, a 50% risk of death—even when the injurer's costs of precautions were very high as well.²⁰ More precisely, it would appear that such cases are rarely litigated in

¹⁸ *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947).

¹⁹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2010).

²⁰ Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-To-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011). There have been some exceptional cases, where the risk to the patient was very high and the court was willing, in principle, to engage in a cost-benefit analysis. For example, in *Law Estate v. Simice* (1994), 21 C.C.L.T. 2d 228 (Can. B.C.), the supreme court of British Columbia found a physician negligent for denying a potentially life-saving CT scan to a patient for

court, if at all.²¹ For example, I found no case in which a doctor or a public medical provider claimed that they had reasonably decided to refrain from saving a patient from certain death because it was too costly.²² Yet needless to say, these kinds of decisions are made all the time. Public hospitals with limited budgets cannot avoid weighing monetary costs against severe risk to life and limb on a daily basis and sometimes deciding that saving the life of a certain patient or extending her life by a few months does not justify the high costs of care. Indeed, when budgets are limited, the costs of helping one patient are necessarily at the expense of care for other patients. Hence, being too generous to one patient might result in other patients' being undertreated and even dying.

It is puzzling why such cases do not, in fact, end up in litigation. But a variant of this type of cases does reach the courts, namely, cases in which injurers expose large population groups to risks that, although small per each victim, are very high (even at the level of certainty) per the entire population.²³ The *Grimshaw* case against Ford Motor Company is illustrative of such a case.²⁴ In this case, a Ford Pinto car collided with another car; the Pinto caught on fire, and its interior was engulfed in flames. As a result, a

financial reasons. The court reasoned that “[t]he severity of the harm that may occur to the patient who is permitted to go undiagnosed is far greater than the financial harm that will occur to the medicare system if one more CT scan procedure only shows the patient is not suffering from a serious medical condition.” *Id.* ¶ 28. For a similar approach in the English context, see *Ball v. Wirral Health Authority*, (2003) 73 B.M.L.R. 31 (Eng.). In the latter, the court dismissed a negligence suit against a hospital for lacking the adequate facilities to care for premature babies, which allegedly resulted in brain damage to the plaintiff. The court held,

In the field of medicine where resources are limited and the demands on those resources are many, it may be necessary to make difficult decisions as to how resources are to be allocated... . The fact that an area of medicine may be under-funded...or that a particular hospital may not have the facilities that another hospital has, may give rise to a concern among the general public and experts in the field; but it does not necessarily provide the basis of a claim in negligence by a patient who may suffer from the effects of the under-funding or the lack of facilities.

Id. ¶ 32.

²¹ With very high risk to property, courts tend to impose liability on the injurer regardless of whether his behavior was reasonable or not. *See, e.g., Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 221-22 (Minn. 1910) (imposing liability on a ship-owner for failing to untie his ship from the dock during a storm in order to save the ship and thereby inflicting harm on the dock); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 168-69 (1973) (demonstrating the prevalence of strict liability in those tort cases characterized as *A hit B*).

²² This is not a quandary for corrective justice theorists, who argue that negligence should be determined by the risks rather than by the precautions that, if taken, would have mitigated them. *See Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 116-17, 130-31 (2001).

²³ *See generally* Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293 (2003) (discussing various theories for assessing risks to life and statistical life).

²⁴ 174 Cal. Rptr. 348 (Ct. App. 1981).

child passenger in the Pinto was severely injured, and his mother, who was driving the car, killed. In the suit brought against Ford by the child and his mother's heirs, the claim was made that the Pinto design was defective because an alternative design would have saved not only the plaintiffs but also the lives of 180 other people per year. Ford argued in its defense that the alternative design would not have been cost-justified because it would have meant an investment of additional \$11 per car. The court upheld a large punitive damages award in favor of the plaintiff because "[u]nlike malicious conduct directed toward a single specific individual, Ford's tortious conduct endangered the lives of thousands of Pinto purchasers."²⁵

Another case, along similar lines, is *Helling v. Carey*.²⁶ In this case, the plaintiff sued her ophthalmologist for failing to administer a pressure test as part of a routine eye examination, which would have prevented her loss of vision from glaucoma. The defendant ophthalmologist claimed that he was only following professional standards in not administering the test, according to which, the risk of glaucoma—1:25,000—at the patient's age is too low to justify the high costs of the test. The court rejected this argument and held the ophthalmologist liable for the plaintiff's injury. Although the court stressed the low costs of the test and the very severe harm resulting from glaucoma if not detected in time, the decision can also be interpreted as manifesting the court's reluctance to allow a loss of vision to many people every year due to a failure to take what appears to be low cost precaution per patient.

What we can see so far, then, is that although tort law does allow tradeoffs between human life and limb for money, this is not exactly so when there is a high risk to a specific victim at stake or when it is certain that a particular number of statistical lives will be lost in a defined period of time if precautions are not taken. What would Calabresi's response be to this observation? I expect that he would probably concede that courts should avoid balancing human life and limb against money in those circumstances *because* this entails high external moral costs. Before considering this anticipated response, I turn, in the next section, to another area in which courts adjudicating tort cases do not weigh human life and limb in in line with market criteria.

²⁵ *Id.* at 388. See also Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1020 (1991).

²⁶ 83 Wn.2d 514, 519 P.2d 981(1974).

B. Different Values for Different Victims' Lives and Limbs

In an article I wrote a few years ago,²⁷ I offered the following example:

Poor and rich neighborhoods. John drives his car at a speed of 30 mph in a rich neighborhood. Unfortunately, he hits a pedestrian as she is crossing the street. Had John driven a bit more slowly, he would have succeeded in stopping his car in time and preventing the accident. A day later, John drives his car again at the same speed, but this time in a poor neighborhood. Once again, he hits a pedestrian. All driving conditions are exactly the same as they were in the rich neighborhood the day before. Therefore, in this case as well, the accident would have been avoided had John driven his car a bit more slowly. Is it possible that under a rule of negligence, the same court would find John liable for the first accident but not for the second?

It seems that the answer to this question could be yes. Why? Because under current tort law, a major component in any award of damages for bodily injury is lost income. This means that the average amount of damages in the rich neighborhood will be higher than in the poor neighborhood because the rich have a higher average income than the poor.²⁸ Therefore, when a court sets the standard of care, all else being equal, it should assume that the risk (PL) in the rich neighborhood is higher than the risk in the poor neighborhood. Under this assumption, it is plausible, then, that a certain level of precautions would be sufficient, from an efficiency perspective, for the poor neighborhood (since PL is low) but insufficient for the rich neighborhood (since PL is high).

As far as I can tell, no court in the world would explicitly²⁹ apply different standards of care for the two neighborhoods. Similarly, no court would explicitly set different standards of care for doctors in accordance with the well-known income-level of the specific patient being treated or for occupiers of land according to the average income of their invitees. Rather, courts set the same standard of care in all like cases, regardless of the potential victim's income.³⁰

²⁷ Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82 (2011).

²⁸ Hereinafter I refer to high-income earners as the "rich" and to low-income earners as the "poor." In reality, rich people might have a low income, for example, when their wealth inherited.

²⁹ Another question is whether in determining negligence, jurors (and judges) tend to be more demanding of injurers who placed the rich rather than the poor at risk, but *without saying so*. I am not aware of any evidence supporting this possibility.

³⁰ Porat, *supra* note 27, at 86-87.

Yet courts do award diverging amounts of damages for the same bodily injury to the rich and to the poor. They would reason that is an unavoidable outcome of the need to restore the victims to their differing prior positions: the rich suffer higher losses than the poor do, since their lost income is greater. But what is significant here is that because of this difference in the amounts of damages awarded in cases of injury, despite the uniform standard of care, injurers will take more care toward the rich than the poor.³¹ In sum, rich people's lives and limbs are better protected than poor people's lives and limbs.³² This is problematic not only from a distributive justice perspective but also, as I have argued elsewhere, from an efficiency perspective.³³

What underlies this inconsistency between the standard of care and damages? Why are all victims considered to have the same potential harm *regardless* of their income when courts set the standard of care but different concrete harm in accordance with their income when damages are awarded? One possible explanation is that what we see here is a compromise within tort law between efficiency and distributive justice considerations. If efficiency were the only goal of tort law, both the standard of care and damages awards would diverge in relation to the rich and the poor.³⁴ If, instead, distributive justice were at the core of tort law, both the standard of care and damages would be uniform with regard to all victims regardless of income. However, applying the same standard of care toward the rich and the poor but awarding differing amounts of damages protects the rich more than the poor, as efficiency *arguably* requires, but the divergence in the *level* of protection is smaller than were both the standard of care and damages be determined by income.³⁵

³¹ Here is the reason: Although the standard of care is uniform, with poor victims, it might be more worthwhile for injurers not to comply with the standard and pay damages instead. Conversely, with rich victims, they would comply with the uniform standard and, in certain circumstances, even over-comply. *Id.* at 98-99.

³² Note that although poor people who are injured because the injurer did not comply with the standard of care will be compensated (*supra* note 31), compensation for severe bodily injury is typically under-compensatory, whereas in cases of death, the victim is obviously not compensated at all (but rather his or her dependents and heirs are).

³³ Porat, *supra* note 27, at 100-07.

³⁴ Although my view is different. Porat, *supra* note 27, at 100-05.

³⁵ With different standards of care, injurers would take high care toward the rich and low care toward the poor and bear no liability. With a uniform standard of care but different amounts of damages awards, injurers take an average level of care toward the rich (and not the high care they would take under different standards of care) and low care toward the poor and bear liability toward the latter when non-compliance with the uniform standard caused their injuries. *See supra* notes 31-32.

How would Calabresi explain the inconsistency between standard of care and damages? I think he would likely say that external moral costs make it impossible to allow courts to set—at least explicitly—different standards of care toward the rich and the poor. Part III below delves a bit deeper into the external moral costs argument and considers how it may impact our analysis so far.

III. External Moral Costs in Tort Law

For Calabresi, when merit goods are at stake, society should take external moral costs seriously: in our context, then, if people have a strong aversion to trading human life and safety for money, those negative feelings are external moral costs that must be taken into account. Calabresi suggests two types of merit goods: first, goods that many people do not want to have priced; second, goods that many people resist their allocation to be determined by the prevailing wealth distribution in society.³⁶ It is possible, of course, that some merit goods would fall into both categories. This would be goods that people are averse to their pricing as well as to their allocation according to the distribution of wealth in society.

I want to suggest that sometimes the argument accounting for external moral costs says too little and, sometimes, it says too much.

A. When the Argument Says Too Little

Here is what Calabresi says about slavery and the minimum of fundamental rights:

We may not permit people to sell themselves into slavery, or to forgo a minimum of education or health, simply because *we* believe that it is immoral for people so to live, whatever they may think. This minimum, fundamental rights explanation seems obvious to many who are philosophically inclined. It may seem problematic to those economists who find fundamental rights hard to explain. But if enough people are offended for this reason, no other explanation for the prohibition is needed.³⁷

Calabresi thus suggests that slavery should not be allowed because many people would have borne moral costs if it were allowed. Calabresi is aware, of course, that for

³⁶ See *supra* text accompanying notes 2-4.

³⁷ At 47.

many people ("philosophically inclined," in his words), this justification for the prohibition of slavery is unnecessary at best and probably even offensive. What do most of us believe society should do if many people favor slavery or, say, torture? Prohibit these practices, of course. The external moral costs argument says too little here, perhaps even trivializes the strong opposition to slavery and infringement of basic human rights. After all, there is much more at stake with the prohibition of slavery (or torture) than the fact that many people feel badly about it.

Let's consider now the different values attributed to different victims' lives and limbs, as illustrated by the poor and rich neighborhoods example. How would Calabresi explain courts' unwillingness to set different standards of care toward the rich and the poor? Recall that for Calabresi, tort law is a modified market (or facilitates a market) for trading human life and limb for money. But in establishing this modified market, the law should be sensitive to external moral costs, and such costs, in turn, might emerge because of either one of the two qualities of merit goods, or both. Thus, people may be averse to pricing the safety of the poor and rich differently; furthermore, they may disapprove of allocating safety according to the wealth distribution in society. Therefore, they may find repugnant a legal regime that sets different standards of care toward the rich and the poor. This could explain why courts set a uniform standard toward all victims regardless of income.

But is this the full story? What if people do not really pay attention to the law's stance on this matter or simply do not care much about it? Should this lead us to think that protecting the rich more than the poor is a good idea? I don't think so, although I understand that some efficiency-oriented scholars might respond differently.³⁸

B. When the Argument Says Too Much

The argument that I want to develop here is that we should be very cautious in factoring-in external moral costs in our welfare calculus. In particular, external moral costs could often be reduced or even eliminated if people bearing those costs better understood the price society pays in making inefficient choices. Furthermore, some

³⁸ However, in my view, efficiency considerations also do not require different standards of care toward the rich and the poor. Porat, *supra* note 27, at 100-05.

inefficient choices might entail their own external moral costs that we tend to ignore, and those costs might offset the costs of the efficient choice.

Let us start with the issue of high risk to life. As I have explained, cases of very high risk to life and limb for a specific individual somehow do not reach the courtroom. Moreover, when certain deaths or severe bodily injuries in a defined period of time are at stake, courts tend to ignore the cost-benefit calculus and impose liability on injurers who could have prevented those deaths or injuries, even if the prevention was not economically justified. The *Grimshaw* Ford Pinto case and *Helling* glaucoma case exemplify this. A possible efficiency justification for this tendency is, in Calabresi's terms, that a cost-benefit calculus in such instances has external moral costs because it prices human life and limb too directly. If courts had to decide such cases using a cost-benefit test, such as the Hand formula, they would not be able to avoid stating explicitly the social value they ascribe to life and limb and how much money should be spent to preserve them. Indeed, in awarding damages in wrongful death and severe bodily injury cases, courts do ascribe value to human life and limb, and the amounts of damages awarded could be considered by some people to be too low, at times even offensively so. But ascribing value to life and limb for the purpose of awarding damages is *inevitable*, since otherwise no damages could be awarded. However, ascribing value to life and limb to set the standard of care is quite different, for this implies a determination of the monetary costs society should spend to preserve them.

Yet sometimes applying the cost-benefit calculus could be *inevitable* too, even if it entails external moral costs. No one should complain when a public hospital administrator, with a limited budget, decides not to extend a patient's life because it would cost too much. We all understand the difficult reality that allocating abundant resources to one patient necessarily comes at the expense of the treatment of other patients, and someone must make these hard choices.

Is this argument applicable in the context of court decisions? Let us return to the *Grimshaw* and *Helling* cases. In *Helling*, the question at hand was whether administering a relatively low-cost eye pressure test is justified given a 1:25,000 risk of glaucoma, which could result in loss of vision. Let us assume that the healthcare provider was a public hospital with a limited budget (in the actual case, the defendant was a doctor with

his own private clinic) and that were the eye pressure test administered in such cases, other patients would bear costs in terms of higher risk to their lives and limbs. In these circumstances, refusing to administer the test might, therefore, be reasonable. If the determination of reasonableness in such a case were presented by the court as balancing risks against risks, rather than risks against money, even the external moral costs that some people might bear in the latter balancing process would disappear. Moreover, if the court were to rule that administering the eye pressure test is mandatory in all circumstances and people were to understand that other patients are deprived of essential medical treatment because less essential treatment has become mandatory, this might yield external moral costs for them. These latter moral costs would not necessarily be lower than the moral costs borne by people who would have been offended were the eye pressure tests not made mandatory.

Things are more complicated with *Grimshaw*. In the circumstances of this case, converting the balancing test from risks versus money to risks versus risks is impossible or artificial at best. Still, most people should rationally understand that there is a limit to the amount of money we should require manufacturers to invest in safety, and setting such limit is inevitable. After all, consumers want to buy a car, not a tank, at a reasonable and affordable price. Perhaps it is the rhetoric that shaped the outcome in this case—an extra investment of \$11 per car to save lives sounds terribly cheap to a layperson; or perhaps the jury (and court) felt that there is greater value to people's lives than what Ford's claims implied. Still, I agree that external moral costs might play a role in the court's determination in this case, and those costs are not symmetrical, as in *Helling*: even if many consumers would have preferred the less expensive (by \$11!) version of the car to the more expensive one, they (and others) would bear no external moral costs due to the car being slightly more expensive.

IV. Beyond Tort Law

About ten years ago, the Hamas captured an Israeli soldier, Gilead Shalit, and offered to release him in exchange for the release of hundreds of Palestinians held in Israeli prisons, some of whom were terrorists convicted for murder. A public debate emerged around this dilemma: Should Israel save Shalit's life at the expense of risking

the lives of other Israelis, who might be murdered in the future by the released Palestinian prisoners, not to mention the affect making this deal could have on deterrence? Israel eventually agreed to the exchange, and Shalit was released. But let's consider how society should deal with such cases.³⁹

Returning to when the Shalit deal was still on the table, assume that accepting it would result in an average risk of death of 1:1 million for each individual residing in Israel. Since at the time, the Israeli population stood at approximately 8 million people, accepting Hamas' offer would mean that about eight Israelis would die as a result. Should Israel agree, assuming (unrealistically) that there are no other considerations at stake?

The Shalit case is an archetypical identified victim case: we know that society is willing to pay much more money to save the life of an identified victim than a statistical life.⁴⁰ External moral costs are the main justification for this. Many people feel badly, even terribly, if they see one identified person, with a name, face, and family sitting among us, left to face such a destiny.

This, in itself, however, is not necessarily sufficient reason to save the identified victim in cases like Shalit's. The reason is that in such situations, which, unfortunately, are not very rare in Israel, it is relatively easy to connect the deal, which led to the release of the Israeli prisoner, to the subsequent murders of other Israelis. It has happened on more than one occasion that Palestinian prisoners released in such an exchange participated in terrorist attacks that ended in a loss of Israeli life. When this happens, many people bear external moral costs: they are disturbed by the fact that Israel saved one Israeli life but "sacrificed" the lives of other Israelis, who also have names, faces, and families. In sum, these cases are different from identified victim cases in which it is not possible to tie an investment in rescuing an identified victim to the death of other identified persons. Thus, if Israel had paid a huge sum of money to save Shalit's life, the fact that that money could have *theoretically* been spent elsewhere and saved many statistical lives (say, the lives of road accident victims) would not raise the same opposition as the actual Shalit deal did. With statistical lives, typically (cases like Shalit

³⁹ For the details of the story, see https://en.wikipedia.org/wiki/Gilad_Shalit.

⁴⁰ See Guido Calabresi, *The Decision For Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 716 (1965) (comparing society's willingness to spend much more than what a person's life is conceivably worth to save an identified individual from certain death with its refusal to bear the same costs where death is almost statistically certain but the individual in question unknown).

being the exception), one cannot draw a clear line between saving one person's life and the deaths of others.

The Shalit case gives rise to an interesting argument, however, which could justify the deal even if we ignore completely external moral costs. Suppose it were possible for Shalit to offer a contract to the 8 million people living in Israel, where he would pay them in exchange for the latter's consent to a 1:1 million risk of death (resulting from the deal with Hamas) to save his life. Would they accept his offer? The answer would probably be yes, assuming Shalit had enough money to pay out. Indeed, he would probably be willing to pay all that he has (save for what is necessary for the minimal conditions of living), and this would convince most people to expose themselves to the small risk of 1:1 million in return. This is not irrationality on either side: people are willing to pay disproportionately higher amounts of money for eliminating high risks, as opposed to low risks, not only because they are risk averse, but also because they discount the money they have by the probability of their death. Thus, if Shalit had enough money to pay all people living in Israel for their consent to the risk they bear from the exchange, he would certainly do so knowing that otherwise he would die and not be able to benefit from that money. As Avraham Tabbach and I have shown, this "discounting costs" effect misaligns people's incentives with social welfare.⁴¹

But since Shalit did not have these kinds of funds,⁴² it is more illuminating to ask the same question from an ex-ante perspective. The question then is: Would people be willing to agree in advance to saving one person (who could be any one of them) from certain death and thereby expose themselves to a 1:1 million risk of death? Regardless of external moral costs and given people's risk-aversion, the answer would probably be yes.⁴³

Assuming this answer is right, we are faced with the puzzling outcome of a hypothetical (ex-ante) contract to which all parties involved, with full rationality and full information, would consent but that seems to be socially bad. After all, such a contract would lead to more people being killed. Still, if we take people's preferences as a given,

⁴¹ See Ariel Porat & Avraham Tabbach, *Willingness to Pay, Death, Wealth, and Damages*, 13 AM. L. ECON. REV. 45 (2011).

⁴² In fact, for the hypothetical contract metaphor to be meaningful from a social welfare perspective, wealth disparities should be eliminated. *Id.*

⁴³ If there were too many such cases, the answer, at a certain point, would be no.

as economists used to do, the hypothetical contract is instructive and the outcome it yields should be upheld. Or should it not?

Conclusion

External moral costs are a central theme in *The Future of Law and Economics*, woven into all the other themes discussed in the book. I agree that such costs should not be ignored, especially when merit goods are at stake. I also agree that tort law is a good place to deal with merit goods, and it has an advantage over other mechanisms in preventing external moral costs. Tort law, however, has its own limits. Moreover, in torts, as in other contexts, taking into account external moral costs should be done with prudence. Sometimes these costs could be eliminated even if we make the efficient choice, and sometimes avoiding those choices will produce other external moral costs. With this in mind, we should not be too hasty in avoiding efficient choices *just because* they are expected to yield external moral costs.