

## Guido Calabresi's "Other Justice Reasons"

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The Honorable Guido Calabresi (or Guido, as he requests seemingly everyone he meets personally to call him) is among the most-respected and most-cited legal scholars of all time. The reason for this is obvious: his work has reshaped our fundamental understandings of how the law affects our lives. Chief among these contributions is his seminal article (cowritten with Professor A. Douglas Melamed), *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.<sup>1</sup> *One View of the Cathedral* has been cited thousands of times. Indeed, Westlaw calculates that it has been cited over 2,400 times in cases, articles, court documents, and the like.<sup>2</sup>

As anyone who has studied even the basics of law and economics knows, Melamed and then-Professor Calabresi separated the organization of society into property rules, liability rules, and inalienable rights.<sup>3</sup> A society then decides which of those types of rules to implement in which circumstances based on its desire to uphold various preferences, which are labeled either "distributional concerns" or "efficiency concerns."<sup>4</sup>

Except, this last description is not quite right. Judge Calabresi and Melamed do not speak solely of distributional concerns and efficiency concerns; they also identify a third category of "other justice reasons."<sup>5</sup> This idea, that there are "other justice reasons" not adequately captured by notions of efficiency or distribution, is rarely highlighted when discussing *One View of the*

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<sup>1</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

<sup>2</sup> WESTLAW, <http://www.westlaw.com> (search "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" to select the article and view the "Citing References" count).

<sup>3</sup> See *id.* at 1105.

<sup>4</sup> See *id.* at 1093–1101.

<sup>5</sup> See *id.* at 1102–05.

*Cathedral*. Indeed, of the more than 2,300 articles that cite *One View of the Cathedral*, fewer than 100 even mention these “other justice reasons.”<sup>6</sup>

To a scholar, this is understandable. What these justice considerations may be, beyond efficiency and distribution, is amorphous. Perhaps for that reason, Judge Calabresi and Melamed chose to define efficiency and distribution so broadly that those two categories essentially occupy the field.<sup>7</sup> For those scholars engaging with *One View of the Cathedral*, who are likely to view the law through this efficiency-distribution paradigm, focusing on the small, undefined category of “other” reasons for a society’s organization makes little sense.<sup>8</sup> But still, even under these broad definitions, *some* “other justice reasons” remain for the way a society might organize.<sup>9</sup>

I said that I understood this lack of focus as a scholar, but I admit that as someone who has had the pleasure to work with and get to know Judge Calabresi as a law clerk, I am perplexed. That is because, from up close, one cannot help but think there is some hard to define, but clearly present, sense of justice motivating almost everything that Judge Calabresi does. While there are undoubtedly examples of this sense of justice in his jurisprudence, that will not be my focus. Instead, I wish to discuss the “other justice reason” that happens when Judge Calabresi stops being Judge Calabresi and starts being Guido. That justice reason is community.

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<sup>6</sup> WESTLAW, <http://www.westlaw.com> (citing references *One View of the Cathedral*, search within secondary sources, “adv: ‘other justice reasons’ OR ‘other justice considerations’”); see also Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 25 (2002) (“Calabresi and Melamed’s call to consider distributive and other justice considerations in determining the allocation of entitlements has been all but ignored by subsequent law and economics scholars.”).

<sup>7</sup> Calabresi & Melamed, *supra* note 1, at 1104 (noting that they have “defined distribution as covering *all* the reasons, other than efficiency, on the basis of which we might prefer to” make one person wealthier than another (emphasis in original)).

<sup>8</sup> See, e.g., Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 848 n.61 (1993) (“The present article will use definitions of efficiency and distribution that are broad enough (particularly in the case of distribution) to encompass ‘other justice considerations.’” (emphasis in original)).

<sup>9</sup> Judge Calabresi and Melamed identify “religious or transcendental reasons” as possibly falling into this other category. That someone might believe that “God suffers if such a choice [of rule] is made,” as opposed to some human third party, is identified as “a true nonefficiency, nondistribution reason” because “[n]o amount of compensation will help [the human third party] in this situation since he suffers nothing which can be compensated, and compensating God for the wrong choice is not feasible.” Calabresi & Melamed, *supra* note 1, at 1102 n.30.

Guido, his clerks quickly learn, prizes building a sense of community. This community extends from his clerks, to his family—among the many highlights of the clerkship are the after-dinner discussions at his home with his wife Anne—to the rest of the court on which he sits, and to, it seems to me, nearly everyone fortunate enough to cross his path. Between him and Anne, the amount of time, resources, and care that has been poured into this community—from celebrating clerks' birthdays to working to help unhoused people in New Haven<sup>10</sup>—is nearly incalculable.

But why do all this work? Perhaps distributional concerns are at its heart. Perhaps Guido believes that because the organization of society has given him, in the parlance of *One View of the Cathedral*, an overabundance of "wealth"—whether in the material or metaphysical sense—he should redistribute that wealth through his time and charity. But these distributional concerns do not explain why he continues to pour into his past law clerks, all of whom are now quite "wealthy" on their own.

This continued engagement, then, must be an efficiency concern. No human, not even Guido, has the ability to individually distribute their material and nonmaterial wealth in the precise way that would create Pareto optimality. By giving excess support to his clerks—people he has come to know well and whom he presumably trusts to do good works with what they are given—perhaps Guido believes that he can more efficiently distribute his wealth. To put it more crudely, he would be using his clerks as pass-throughs to efficiently reach Pareto optimality (or whatever his ideal distribution may be). Some of this may be his thinking: Among the many lessons Judge Calabresi imparts on his clerks is the idea that they should go forth and do good in the world. And if clerks act on this lesson, they are likely to distribute the excess wealth that Guido gives them in a way that would create the just-described pass-through mechanism.

But there are good reasons to believe that Judge Calabresi's actions are in pursuit of some "other justice reason" that goes beyond efficiency or distribution. First, he has highlighted these types of concerns in his later work.<sup>11</sup> Second, and perhaps more to

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<sup>10</sup> Anne Calabresi is one of the founders of the Sunrise Cafe, a place where unhoused and food-insecure people in New Haven can go each day for a nutritious, free breakfast, services, and a sense of community. It is a cause dear to both Anne's and Guido's hearts. See *Founders*, SUNRISE CAFE NEW HAVEN, <https://perma.cc/RDR3-K8DS>.

<sup>11</sup> See, e.g., Guido Calabresi, *Civil Recourse Theory's Reductionism*, 88 IND. L.J. 449, 465 (2013) (discussing value shaping as one of these "other justice reasons").

the point, when I discussed this topic with him, he immediately agreed that his desire to build this strong community transcended pure efficiency or distributional concerns.

Criminal law scholars have recently made claims tangential to this one, as they have focused on the possible democratization of parts of the criminal legal system. The idea of community-focused or community-controlled policing, judgment, and sentencing has gained many adherents both within the academy and in policy and activist circles.<sup>12</sup> But as other scholars more skeptical of community control have noticed, it is not clear what would change, or whether things might change for the better, under a more community-focused model.<sup>13</sup> While polling suggests that people in the United States are becoming less punitive,<sup>14</sup> the reasons for this decline are not clear.<sup>15</sup> So those reasons may not be sufficiently strong to create substantial change. It is also certainly not clear that the changes these communities would make would be those that the community-control scholars and activists envision.<sup>16</sup> If history is any indication, there is no guarantee that giving democratic control to the communities most affected by the criminal legal system—who are often also the communities that have been most victimized by harmful criminal actions—will create a system less punitive or less carceral than one controlled by experts or by society writ large.<sup>17</sup>

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<sup>12</sup> I admit to some conflation of potentially separate ideas here. Democratization and community control are different, albeit related, concepts. Both, however, overlap in that they each broadly refer to an increased participatory role for those communities most affected by the criminal legal system and a decreased role for judges, lawyers, and other experts who are not directly impacted by the system's effects. See John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 722–39 (2020) (describing theories of democratizing criminal justice and noting that "[t]he concept of 'community' is central to the democratization agenda").

<sup>13</sup> See generally *id.*

<sup>14</sup> See Jill Mizell, *Overview of Public Opinion*, in AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 7, 19–22, 24–26, 35–37 (Julie Fisher-Roe & Juhu Thukral eds., 2014), <https://perma.cc/5KJL-28B9>.

<sup>15</sup> See John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 953–68 (2016) (discussing the argument that the need for economic savings led to decarceration before concluding that economic savings merely gave political cover for those with other decarceratory motives).

<sup>16</sup> See, e.g., Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), <https://perma.cc/ZM7A-3C2J> (noting that 81% of Black respondents said that they wanted police to spend the same or more time in their neighborhoods as they currently spent).

<sup>17</sup> See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 128–34, 139–43 (2017) (telling the story of Washington, D.C., city councilmember John Ray's successful quest to make the District's drug crimes more punitive).

This problem exists, in part, because both sides of the community-control debate often assume (and the law at times requires) a definition of community that changes demographics but does not change relationships. Even those who ground their proposals in theories of retail leniency assume that the laypeople doing the judging will be strangers to the person who has committed a criminal harm.<sup>18</sup> Ultimately, this conflates "community" with the related, but distinct, concepts of geographical proximity and demography.

But, to paraphrase a popular saying, "community is an action word."<sup>19</sup> This is the lesson that Guido's relationship to his clerks, court, and town teaches us. Guido creates community not merely by being in proximity to these other people but through reciprocal investments of time, energy, and resources. Without these investments, these people would more accurately be described as Guido's employees, coworkers, and neighbors than as his community.

Guido, of course, is not the only person to realize the necessity of investment to create, and to harness the power of, community. It is also a key insight from transformative-justice literature and practice.

Viewed through *One View of the Cathedral's* efficiency-distribution paradigm, the democratization debate might be thought of as deciding how best to meet certain distributional goals (such as ensuring involvement for some individuals or imposing less state-sanctioned harm on others) and efficiency goals (such as reducing costly excessive punishment, thereby coming closer to Pareto optimality). For both Guido and transformative justice, however, while the pursuit of community may further these sorts of goals, that pursuit also transcends these goals. In other words, in both Guido's life and in transformative-justice processes, a societally organizing rule's ability to build community is a reason for choosing that rule, even if it subverts the efficiency-distribution ideal. Community is thus an "other justice reason."

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<sup>18</sup> See, e.g., Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2000 (2010).

<sup>19</sup> The phrase "[blank] is an action word," seems to have gained popularity with the gospel group Witness's album titled *Love Is an Action Word* and spread like wildfire from there. See WITNESS, *Love Is an Action Word*, on LOVE IS AN ACTION WORD (CGI Records 1998).

Transformative justice takes the sort of community building that Guido does with his clerks and extends it to those who have caused, or been the victim of, harm. It has been described as

a community process developed by anti-violence activists of color, in particular, who wanted to create responses to violence that do what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.<sup>20</sup>

While having significant overlap with restorative justice, transformative justice “emerged through the organizational work of advocates who are often more critical of forgiveness, victim-perpetrator power dynamics, and focused on communal accountability for enacted social change, with less of an emphasis on reconciliation.”<sup>21</sup> Despite this difference from restorative justice, transformative-justice practitioners continue to actively reject intervention by the modern carceral state.<sup>22</sup>

Harnessing the power of an actively built community, or building that community when it is lacking, is key to transformative-justice processes. For people who have been harmed, community serves as a source of healing.<sup>23</sup> And healing is defined broadly. It means both internal, psychological healing through care and connection as well as tangible healing through the provision of resources necessary to ensure the harmed person’s safety.<sup>24</sup> Likewise, for the person who has caused harm, transformative justice focuses on using community to get that person to a place where

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<sup>20</sup> Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why.*, THE APPEAL (Feb. 5, 2018), <https://perma.cc/2ZZH-2JFY>. See generally Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019) (giving historical background for prison abolition and analyzing transformative justice through vignettes); Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG (2018), <https://perma.cc/HF63-G4KZ>.

<sup>21</sup> Beth Ribet, *Emotion, Power Relations, and Restorative Justice: A Review of Compulsory Compassion by Annalise Acorn*, 15 UCLA WOMEN’S L.J. 115, 120–21 (2006).

<sup>22</sup> SARA KERSHAR, STACI HAINES, GILLIAN HARKINS, ALAN GREIG, CINDY WIESNER, MICH LEVY, PALAK SHAH, MIMI KIM & JESSE CARR, GENERATIONFIVE.ORG, TOWARD TRANSFORMATIVE JUSTICE, 9–12 (June 2007), <https://perma.cc/7B29-CF43> (explaining transformative justice’s reasoning for rejecting state interventions).

<sup>23</sup> Mingus, *supra* note 20.

<sup>24</sup> See *id.*

they can take accountability for the harm they have caused, understand the impact of their harm, and work to change their behavior so that they do not repeat their past harmful actions.<sup>25</sup>

But more fundamentally, transformative justice uses moments of harm to build community by interrogating the successes and failures of the community itself. A transformative-justice process might ask whether the community has created the infrastructure for those who need to escape violence or whether members of the community have the necessary skills to interrupt live violence and communicate with each other in productive ways.<sup>26</sup> When these things are lacking, transformative-justice practitioners seek to create them.<sup>27</sup> They do this because each transformative-justice process is about both the individual and the collective.<sup>28</sup> The goal of a transformative-justice process is "not only [to] address the current incident of violence, but also [to] help to transform the conditions that allowed for it to happen."<sup>29</sup>

This interrogation of the community itself is necessary because community, while powerful, is not a universal good. Communities can perpetuate the economic and social conditions that give rise to harm.<sup>30</sup> Worse, "community responses to violence can be . . . more emotionally devastating [than state responses] due to the breaking and loss of relationship, family and community."<sup>31</sup>

As Nyako Pippen, a man sentenced to death by incarceration at age twenty, explained, "So much of my life had taught me that to expose my vulnerabilities meant admitting I was weak—something I spent practically my entire short life trying to prove I wasn't."<sup>32</sup> As a result, he believed that he had to avoid "ever expos[ing]" the remorse that he felt for the harm he caused because "if I ever truly held myself accountable, I would expose my vulnerabilities."<sup>33</sup> It was not until another imprisoned man, David "Dawud" Lee, intervened through an ongoing transformative-

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<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1630–31 (2019) ("[T]ransformative justice processes aspire to work toward broader social, political, and economic change.").

<sup>29</sup> Mingus, *supra* note 20 (emphasis omitted).

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> David "Dawud" Lee & Nyako Pippen, *Transformative Justice Behind the Wall*, MEDIUM (July 16, 2020), <https://perma.cc/4HAQ-G25C>.

<sup>33</sup> *Id.*

justice process that Pippen was able to recognize and escape the toxic parts of his past communities.<sup>34</sup>

The point of all this is not to say that Judge Calabresi is a master of transformative-justice practice. Indeed, transformative justice and Judge Calabresi would seem to be strange bedfellows. As a federal judge, he is a part of the carceral system that transformative-justice practitioners and theorists decry, and the law and economics movement which he helped to begin has, despite his own work to the contrary, become synonymous with a focus on efficiency that is anathema to transformative-justice processes.<sup>35</sup> And yet, in both his written theory and lived experience, the connection through community remains.

Instead, the point is simply that community has a power that seems both universal and transcendent. That as we come to a moment where we are increasingly undertaking a radical reimagining of what our society should be, it may be worth rethinking long-discussed ideas to pour more effort into developing a rigorous understanding of what, exactly, the power of community is. That despite differing societal roles, backgrounds, and ideologies, both Judge Calabresi and transformative-justice theorists and practitioners have recognized that there is value in pursuing community—actively built community—that cannot be explained solely by reference to efficiency or distribution. That pursuing this sort of community, as it was put in *One View of the Cathedral*, may be an “other justice reason” around which our society can, and perhaps should, be based.

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<sup>34</sup> See *id.* Pippen is now a facilitator with Dare 2 Care, a mentoring program for imprisoned people, at his prison. *Id.*; Francis Scarcella, *Prison Outreach Program Holds Banquet, Preps to Aid Special Olympics*, DAILY ITEM (July 10, 2019), <https://perma.cc/LYX8-Z7FB> (“Dare 2 Care is an inmate mentoring program run by Lifeline members. Older inmates meet with new arrivals just coming into the prison system.”).

<sup>35</sup> See Bell & Parchomovsky, *supra* note 6, at 25 (noting that law and economics since *One View of the Cathedral* has focused on efficiency to the detriment of distributive and justice concerns).