

Goldsmiths Research Online

*Goldsmiths Research Online (GRO)
is the institutional research repository for
Goldsmiths, University of London*

Citation

Desmarais-Tremblay, Maxime. 2019. Calabresi on Merit Goods. *Global Jurist*, 19(3), 20180053. ISSN 1934-2640 [Article]

Persistent URL

<https://research.gold.ac.uk/id/eprint/27341/>

Versions

The version presented here may differ from the published, performed or presented work. Please go to the persistent GRO record above for more information.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Goldsmiths, University of London via the following email address: gro@gold.ac.uk.

The item will be removed from the repository while any claim is being investigated. For more information, please contact the GRO team: gro@gold.ac.uk

Calabresi on Merit Goods

Maxime Desmarais-Tremblay¹

1 Introduction

In his *Theory of public finance* (1959), the American economist Richard A. Musgrave (1910-2007) proposed a typology of the budgetary functions of the government: allocation of public goods, redistribution of income, and stabilisation of the business cycle. Governments have the responsibility to provide some public goods because the market cannot allocate them to a satisfactory level. In the case of pure collective goods, failure of the market is caused by non-rivalry and non-exclusion, to use contemporary terms (on which see Desmarais-Tremblay, 2017b). In addition, Musgrave argued that governments were also subsidising other goods, not because the market could not technically provide them, but because they were satisfying needs of high social importance. Musgrave coined the expression of “merit wants” to designate such needs as basic education, nutrition for children, housing for the poor. The aim of the government policy in these cases is to increase the level of consumption compared to what individuals would have consumed in a purely market allocation. Through taxation and regulation, the state could also aim to decrease or ban the consumption of “demerit goods” such as drugs, tobacco, or prostitution. Musgrave did not provide a complete justification for why certain goods should be labelled as merit goods, but he hinted at different rationales (Desmarais-Tremblay, 2016).

Born in Germany, Musgrave immigrated to the United States in 1933 and received a PhD in economics from Harvard in 1937. After working at the Federal Reserve, he spent the 1950s at the University of Michigan where he wrote his magnum opus. Following a stint at Johns Hopkins and at Princeton, Musgrave went back to Harvard in 1965. Until his retirement in 1981, he held a joint appointment in the Economics department and in the Law Faculty. From 1967 onwards, he regularly taught a course on “Economics

¹M.Desmarais-Tremblay@gold.ac.uk. Institute of Management Studies, Goldsmiths, University of London. This paper was presented at a workshop on Guido Calabresi’s *The Future of Law & Economics* at the International University College of Turin on 8 May 2018 organized by Aleksandar Stojanović and Paolo Silvestri. I want to thank Péter Cserne, Marco Giraudo, Alain Marciano and an anonymous referee for their feedback.

for the Lawyers”. In the spring of 1970, he convened with Guido Calabresi a seminar titled “Problems in the Relation of Legal and Economic Reasoning”. The seminar outline in the Law School Register read:

A comparison of the assumptions and methods which the lawyer and the economist bring to bear on a range of policy issues. Topics will be chosen from areas such as tort liability; scope of property rights, tangible and intangible; criminal justice; economic aspects of the Federal system; institutional constraints upon optimal economic solutions; incidence of litigation costs.

Guido Calabresi had been visiting at Harvard in 1969-1970 and “it was as a result of that seminar that [he] wrote (together with a student in it, Doug Melamed), ‘Property, Rules, Liability Rules and Inalienability: One View of the Cathedral’” (1972).² The paper became one of the most cited papers in private law—although Calabresi (2014) insists on the public relevance of tort law, as part of the “legal–political–economic structure of a polity”. The paper was always a core reading in Musgrave’s seminar on the foundations of economics in the 1970s.³

Calabresi and Melamed (1972) develop an abstract framework to compare the efficiency and the distributional consequences of different legal rules. The authors argue that any given society has distributional concerns which can be expressed through the distribution of wealth or merit goods. These distribution preferences impact the choice of entitlements. When a society wants to commit that its members will have “at least a minimum endowment of certain goods—education, clothes, bodily integrity—the society is likely to begin by giving the individuals an entitlement to them” (p. 1100). It can even go as far as preventing the resale of such goods by making this entitlement inalienable. Looking back at the history of the concept of merit goods, Calabresi’s interaction with Musgrave during his Harvard visit was probably pivotal for the incorporation of this concept in his thinking since 1970. Anecdotal evidence, as well as systematic study suggest that personal

²Private correspondence with Guido Calabresi. 27 February 2018. See also Calabresi, 1997, p. 2202; Michelman, 2005, p. 137.

³The seminar titled ‘Economy and Society’ was offered to PhD students in economics from the mid-1970s to the early 1980s. See the outlines in the Richard A. Musgrave Papers. Princeton University Library. Box 7, ‘Social Philosophy and 2080’. On the seminar and its potential influence on Musgrave’s later reformulation of the rationale for merit goods, see Desmarais-Tremblay, 2018.

connexions are crucial to the evolution of science (Colussi, 2018). Thus, it is not a coincidence if many important papers on merit goods were written by colleagues, friends, or former students of Musgrave.⁴

In this paper, I address the following questions: (1) What does Calabresi's conceptualisation of merit good share with the main lines of arguments in the literature for justifying state provision of merit goods? (2) What is Calabresi's contribution and how compatible is it with this literature? (3) What is missing in Calabresi's conceptualisation? (4) On what basis can we differentiate merit goods from mere externalities that do not require public attention?

Starting from a study of the tragic choices a society needs to make concerning the value of life, Calabresi provides an original conceptualisation of merit goods which is partly complementary to the classical definitions given by Musgrave (1959, 1987). However, Calabresi's conceptualisation is limited by its cost/benefit welfarist approach. Moreover, it leaves out important strands of justification for merit goods.

In the second section of this paper, I analyse Calabresi's first argument for merit goods exposed in *The Future of Law & Economics* (2016): some goods should not be allocated by a pure market mechanism because a "significant number of people do not want [them] to be priced". The third section of the paper analyses Calabresi's second type of merit goods: "goods whose allocation through the prevailing distribution of wealth is highly undesirable to a significant number of people". It also relates this argument to Calabresi's previous uses of the argument in the 1970s. In the fourth section, I suggest that a theory of merit goods would gain from moving away from the emotivist conceptualisation according to which people feel bad about certain goods being traded for money to a conceptualisation of the reasons for allocating specific goods to specific institutions.

2 Calabresi's First Argument for Merit Goods

Calabresi starts the part of his book dedicated to merit goods with the right questions which have been particularly difficult to answer, ever since Mus-

⁴On the genealogy of the concept and its reception, see Desmarais-Tremblay, 2017a. For a survey of the discussion around the concept in the last decades, see Desmarais-Tremblay, 2016, or Cserne and Desmarais-Tremblay, 2018.

grave coined the concept. First, what is specific about certain real goods or bads that make them different from other goods and bads (Calabresi, 2016, p. 25)? Indeed, the expression of merit goods was coined by Musgrave to capture state expenditures that did not fit the pure collective goods category. The latter could be well defined a priori by abstract principles (non-exclusion and non-rivalry), but this does not apply to merit goods, the provision of which reflect the specific evolution of institutional arrangements of a society (Desmarais-Tremblay, 2017a). Second, what does the recognition of such goods and bads entail for economic theory (Calabresi, 2016, p. 26)? The view has always been that merit goods were a “thorn in the side of the model” of the public economy (Musgrave, 1991). Ver Eecke (1998) argued that the introduction of the concept should lead to an “ethical revolution” in economics.

For Calabresi, merit goods are characterised by “the fact that decisions as to their purchase and uses did not adequately take into account their costs (or benefits) to others in society” (Calabresi, 2016, p. 24). Calabresi singles out two arguments for labelling certain goods and bads as merit goods, which give rise to two partially overlapping types of merit goods.

The first type of merit goods are goods “that a significant number of people do not want to be priced”. In Calabresi’s welfarist language, the fact that people do not want certain goods to be priced is conceptualised as “pricing, in and itself, causes a diminution in utility” for these people (Calabresi, 2016, p. 26). In other words, “the commodification is in itself costly”. The main example of such goods discussed by Calabresi (2016, Chapter 2) is life. His concern for the costs of accidents, the lives of soldiers, and public health policy likely stems from previous work. Calabresi and Bobbitt (1978) analysed the tragic choices faced by society when allocating scarce resources, like limbs that are ‘beyond price’. Yet, life was never mentioned as a type of merit good before the 2016 book. Calabresi’s argument is that although people do not want lives and body parts to be traded on pure markets, they do not want the government to decide directly how many lives will be saved, or how many people will die, or who should get a transplant, etc. To put it differently, “commandification” is also very costly (Calabresi, 2016, p. 31). People suffer psychologically when they have to make direct tradeoffs about lives.⁵ The

⁵And yet, analytical philosophers are very keen on toy examples about life and death to capture, allegedly, people’s moral intuitions. See, for instance, the Runaway trolley example in Sandel (2009, Chapter 1).

resulting social compromises are mixed institutional settings that combine elements of markets (e.g. matching schemes for organs), with decisions taken by political representatives who have indirect consequences on the number of people saved/left to die. These complex institutional arrangements embody fragile social compromises between different values and hide from direct public view the tragic choices that societies have to make. Calabresi seems to suggest that these institutions have been selected over time because they can achieve the lowest moral cost. What is striking with Calabresi's first category of merit goods is that they are not directly provided by the government, in contrast to what Musgrave envisaged when he coined the concept.

3 Calabresi's Second Argument for Merit Goods

Calabresi also argues that many goods are withheld from a pure market allocation because allocating them "through the prevailing distribution of wealth is highly undesirable to a significant number of people" (Calabresi, 2016, p. 26). To put it simply, for these merit goods, "it is the capacity of the rich to outbid the poor that renders their allocation through the ordinary market unacceptable, utility diminishing, and therefore, 'costly' to many people" (ibid.). Such goods and bads abound. In this category of merit goods Calabresi includes scarce resources like military drafts, body parts and (the hypothetical example of) procreation rights. But he also has in mind goods for which society wants to guarantee a basic level to everyone such as housing, food and education.

This argument for merit goods was already put forward in *Tragic Choices*:

In fact, one cannot make sense out of the concept of merit wants unless one believes that there are some goods or bads whose allocation on the basis of the existing wealth distribution engenders external costs which would not occur was the allocation based on a different distribution. (Calabresi and Bobbitt, 1978, p. 89)

In the case of organ transplants, the argument is quite straightforward: society would not allow any of its member to be so desperate for money to the point of selling one of his or her organs (Calabresi and Bobbitt, 1978, p. 33).

This argument for shielding some goods from the distributional consequences of market allocation can be interpreted either with or without a

paternalistic motive. One might support a universal entitlement to basic education and health services for every child irrespective of its family income out of a commitment to equality of opportunity (see Calabresi, 2016, pp. 43, 79-82). Another case in point is military draft. The Civil War practice of buying oneself out of the draft would create resentment and be perceived perhaps as unpatriotic by most modern Americans (Calabresi, 2016, p. 44). In both of these cases, no paternalistic motive is involved in the reason for adopting an alternative allocation mechanism. Yet, a “precautionary paternalistic reason” might lie behind the prohibition of selling one’s (‘nonrenewable’) body parts, or simply one’s life (Calabresi and Bobbitt, 1978, p. 90). The argument being that the poor person might regret his or her decision taken in desperate conditions, without having the possibility to nullify the transaction at a later point in time.

Calabresi’s second argument for merit goods has not been used by Musgrave either. In Musgrave’s *Theory* (1959), the separation of the distribution branch from the allocation branch of the public budget meant that public goods could be allocated under the assumption that the socially desired state of income and wealth distribution had been secured. Merit goods emerged as an exception to this policy framework (Musgrave, 1957). Not in Calabresi’s sense that they had to be regulated because of the existing distribution of income, but an exception in the sense that even if redistribution had taken place, it would not be sufficient to guarantee the socially desired allocation (consumption) of these goods. When writing on merit goods in the 1950s and 1960s, Musgrave always stressed the paternalistic dimension: merit goods were provided to ‘correct’ individual choices. The implicit reason was that even if we could give cash transfers to poor people, they wouldn’t make the right consumption choices, therefore the state had to provide social housing, elementary education, school lunches, and health services to secure a minimum consumption of these goods, irrespective of individual consumption decisions. In fact, this illiberal paternalistic motive certainly lurks behind the uneasiness of many economists with the concept of merit goods.

Perhaps Calabresi’s understanding of merit goods is closer to James Tobin’s plea for *specific egalitarianism*. In fact, both Calabresi (1978, p. 214 n13; 2016, p. 186 n1) and Musgrave (1987) referred to Tobin (1970) in support of merit goods provision.⁶ Tobin (1970) argued that “certain specific scarce

⁶This fact is all the more striking since Tobin (1970) never used the expression of merit goods! Calabresi mentioned during the workshop that James Tobin had been one of his

commodities should be distributed less unequally than the ability to pay for them” (p. 264). The types of ‘commodities’ subject to specific egalitarianism discussed by Tobin include rights and obligations like voting, military draft, as well as war time scarce commodities such as food, but also some easily reproducible services such as health, housing and education. Tobin acknowledged that the case for compulsory public education rested on a combination of egalitarianism and paternalism.

Irrespective of the origins of Calabresi’s second argument for merit goods, he makes a subtle point which is not clearly made by Musgrave.⁷ Calabresi notes that the American society is “highly ambivalent with respect to wealth inequalities” (Calabresi, 2016, p. 41).⁸ He argues that society’s distributional preferences do not only concern wealth and income, but also the distribution of certain goods. This cuts through the Wicksell-Musgrave idea of a separation of the distribution from the allocation functions of government.⁹ People might coherently wish to have an unequal distribution of income, but also wish that some goods were allocated more equally. We would not want certain goods to be for sale. Yet, “it does not make us want to change the wealth differences globally because, at another level, we believe we need the incentives that have led to those differences. As a result, we feel much better if some goods are made available to those who ‘need’ them, regardless of wealth and regardless of whether they would forego them in exchange for more wealth” (Calabresi, 2016, p. 47). In this perspective, merit goods have the paradoxical role of justifying a certain level of inequality:

In other words, the recognition of merit goods and their extraction from ordinary allocation system can result in the acceptance of a significantly more inegalitarian wealth distribution than would obtain if no merit goods were recognized. And, I dare say, this is precisely what our existing legal structures suggest is

tutors at Yale.

⁷Although, see Musgrave (1996, p. 90).

⁸Calabresi might not favor a complete equalization of wealth, but he argued in an exchange with Richard Posner and Ronald Dworkin, that the initial distribution of wealth has no intrinsic normative value. Individuals’ abilities are largely determined by the social environment in which they are born into, which is purely based on luck. Consequently, individuals’ aspirations for maximizing their wealth should not be taken as a normative starting point by the Economist-Lawyer or by the judge (Calabresi, 1980, p. 555).

⁹On Musgrave’s interpretation of Wicksell, see Musgrave (1989, pp. 3-5) and Johnson (2005).

the case (Calabresi, 2016, p. 78).

Calabresi's original argument for merit goods can be strengthened by appealing to communitarian philosophy. For instance, Sandel (2009) recently suggested that the more things there are for sale in a society, the more poor people suffer. When commodification increases, wealth distribution determines more and more people's life experiences and opportunities. In Walzer's (1983) perspective, when money becomes the allocation criteria in spheres of life that were previously governed by other distributing norms such as merit, equality or need, then it carries with it the consequences of an unequal distribution of wealth. By protecting certain goods from market distribution, we prevent wealth inequalities from completely determining people's lives.

4 Some Limits of Calabresi's Conceptualisation of Merit Goods

Calabresi wants economists to account for the diversity of human values, tastes, costs and externalities in their models. We can hardly disagree with that. Yet, Calabresi does not distinguish between tastes and values, and he takes values as the "other side of the same coin" as costs (p. 132).¹⁰ In this section, I argue that Calabresi's conceptualisation of merit goods in terms of costs and externalities rather than in terms of values and reasons for action faces some limits. Calabresi has demonstrated an elaborate grasp of moral philosophy which could be brought in the discussion on merit goods (see for instance Calabresi, 1991). In fact, Kalman (2014) recently argued that "[i]n Guido's hands, for example, law and economics is moral theory".

For Calabresi, merit goods generate external effects, either because their pricing causes "pain" to some people, or because of the "wealth dependence" of market allocation (Calabresi, 2016, p. 200 n10). In his own words: "The external costs that the goods *I* call merit goods cause are *mental suffering* that their allocation in the ordinary market imposes on other people." (emphasis in the original) (Calabresi, 2016, p. 27). This conceptualisation is perhaps a natural extension of the bilateral problems of tort law. It has the

¹⁰Calabresi (2017, p. 173) argued that he did not want to distinguish between tastes and values in order to make his book acceptable to economists who generally take preferences as given. For a rational theory of values which does not assimilate them to tastes, see Anderson (1993).

great advantage of highlighting the symmetry in human interactions: actions that bring benefits to some, might also generate costs to others. The category of costs also has a direct operational significance which can lead to a monetary assessment and the award of damages by a court of law. As Guttel (2017, p. 144) put it, tort law has an impact on the distribution of sensitive goods while avoiding to price them directly.

However, for policy purposes, the way economic and social problems are formulated has a direct impact on the type of solutions that will be proposed. Externalities is an elastic concept. Labelling merit goods as externalities dilutes the signalling effect of labelling it as something socially important that deserves public attention. Externalities are endless and most of them do not require public attention. For instance, if transaction costs are low, the Coase theorem suggests that externalities can be efficiently settled between the parties without the need for the government to step in (see Medema, 1999). Would that imply we should care about externalities only when and because they have high transaction costs? Moreover, if externalities between individuals are conceived in subjectivist terms, as James Buchanan argued, there would be “no prima facie case for intervention” (Buchanan and Stubblebine, 1962, p. 381). In that perspective, Pareto-relevant externalities might be identified ex-post when the parties exchange to resolve the problem. Otherwise, it means that the benefits of a activity to one party are larger to her than the damages imposed by the activity on the other party. In any case, according to Buchanan’s subjectivist perspective, the state is not responsible for internalizing the externality (Marciano, 2011).

Even if we adopt an objectivist perspective, in a world where externalities are ubiquitous, what criterion can be invoked to identify the externalities that deserve specific attention? Many people suffer from the action of others, but how can we decide if this suffering justifies public intervention?¹¹ Can we conceptualise merit goods in a way that they can be objectively identified by social scientists, philosophers, or the general population without the recourse to courts? I will not answer these difficult questions directly in this paper, but

¹¹Without adopting a normative perspective, Elster (1992, p. 10) nonetheless raised related criticisms at Calabresi and Bobbitt (1978). He contended that the “excessive emphasis on symbolic or process costs” was detrimental to their analysis. Besides, their approach leaves open the question as to what “society wants” and how these wants are converted into concrete action. During the workshop, to the question of which moral costs should be accounted for in the welfare analysis, Calabresi answered that it was ultimately a “political decision”.

I suggest that one promising avenue is to reframe merit goods justification in terms of reasons that can be rationally appealed to and debated in the public space.

By formulating reasons why individuals oppose the commodification of some goods, I aim to go beyond the mere observation of the presence of costs/external effects and suggest why it matters. As Harel (2017, p. 126) recently put it in his criticism of Calabresi's book: "Mere mental anguish not grounded in reason ought not to give rise to regulation of a market. If a person simply suffers as a result of a transaction without having principled objections, she should be urged to be tolerant".¹²

I share Calabresi's motivation for a realistic economic theory when he says: "Traditional economic theorists have too often ignored, or treated as non-existent, irrational, or not worth considering, costs and values that people in the world deem very real indeed" (Calabresi, 2016, p. 88).¹³ Still, we can push this further and ask that the categories with which we describe people's moral experiences would make sense to them if they were presented to them. As Anderson (1993) argued, individuals relate to goods in different ways. By reducing these complex human-goods interactions to a single dimension of gains/costs, Calabresi cannot account for the plurality of ways in which people justify their value judgements to each other and debate in the public sphere in the hope of reaching common understandings on important social issues. In other words, just as the price system is not the right mode of valuation for all goods, the welfarist framework is too reductive to apprehend the many ways in which people care about things.¹⁴

Taking a legal perspective, Calabresi formulates many of his examples of merit goods in terms of fundamental rights: the right to have children, the right to obtain various body parts, the right to some level of education, the right to medical care, and the right to environmental protection (Calabresi, 2016, p. 43). The language of fundamental rights is one that has wide appeal in the public sphere and evokes something more important than mere costs and externalities. But one can go beyond the formulation of rights to enquire

¹²In his reply to Harel, Calabresi (2017, p. 171) acknowledged that "not all external moral costs ought to be given weight in a good legal system". He suggested that future Lawyer-economists could work on identifying "which external moral costs are worth attention, which are not, and which should be given negative weight".

¹³Marciano and Ramello (Forthcoming) situate Calabresi's call for realism with respect to other Law and Economics scholars.

¹⁴On the limitations of a welfarist perspective in Law and Economics, see Zamir (2017).

why some of these goods are considered fundamental rights.

The example of basic education is normatively overdetermined. In a liberal perspective, universal education is often justified in the name of equality of opportunity. It also provides individuals with an ability to exercise their role of citizen and debate rationally about public matters, including the provision of other merit goods. One could as well make a perfectionist case: human beings should develop their talents to their full potential. Public education is also supported by a republican argument. It provides an environment to transmit the values of the community through a mandatory curriculum. It can promote a national language and an understanding of the national history.

A republican rationale also substantiates Calabresi's proposal for a mandatory youth (military or civil) service. The idea that one should not be able to buy oneself out of the military draft rests on the equal value of the lives of members of a community. The burden of the ultimate sacrifice for the community must be equally shared irrespective of the material benefits any member can gain for the society. The idea of universal civil service also rests on similar grounds of an equal contribution to the public goods provided by the community. It is supposed to develop a sense of civic duty and reinforce the sense of belonging to the community.

Calabresi does not claim to have a comprehensive theory of merit goods.¹⁵ By focusing on emotional reactions to interpersonal interactions, Calabresi's conceptualisation of merit goods cannot account for cultural merit goods, for instance. Take the public support of national museums or monuments. Technically national monuments are not collective goods. Most of them are easily congested, and exclusion mechanisms allow the charging of entry fees. In other words, they could be privately owned and managed like cinemas. Yet, many citizens would be appalled by the idea of privatising the Pantheon. Important landmarks of the national heritage are owned by the state and managed by public institutions to guarantee their access to every citizen and their preservation for future generations. As a member of a community, I have a duty to support the institutions that maintain the culture of the community irrespective of how I feel. Likewise, I can rationally derive an obligation to contribute to the support of poor people, in my community

¹⁵Levmore (2017) recognized that Calabresi's definition of merit goods is different from the Musgravian understanding. In spite of that, I think Levmore conceptualization of merit goods is too narrow.

and perhaps globally, because everyone deserves a worthy existence, as long as my contribution would not bring me in a position as bad as the worst off. No emotional connexion is needed to derive such reasons for withdrawing these goods from market allocation.

Many reasons can be invoked against the commodification of life and body parts. If society prevents people from selling their organs for cash, or selling themselves into slavery, it might be because these trades would threaten directly the dignity of the person. Dignity is probably a widely shared value, even if it leads to a wide spectrum of interpretations in terms of what its protection entails.¹⁶ In fact, Calabresi acknowledges that there would still be reasons to forbid some forms of trading on human parts and lives, even if the distribution of income would be radically equalised: “Even under conditions of almost absolute egalitarianism or wealth neutrality, we may well feel that one must still be given a certain education and a certain sphere of bodily integrity, however minimal, and that these should be inalienable, that one should not be able to forgo them, for example, by selling oneself into slavery.” (Calabresi, 2016, p. 194 n18)

The most popular rationale for merit goods which is not directly taken up by Calabresi involves paternalistic reasons (see Desmarais-Tremblay, 2016). Even if they had the money, some people would not make the best decisions for themselves. Take the example of the recent introduction of a tax on soft drinks by the United Kingdom government.¹⁷ The explicit aim of the tax is to fight child obesity. The implicit reasoning is that individuals (children or their parents) are misinformed about the long-term effect of consuming too much sugar, they are subject to advertising, suffer from inter-temporal myopia, and perhaps weakness of the will. The aggregate consequence of unhealthy individual choices is an obesity pandemic which calls for public action. Thus, soft drink has become a *demerit* good, similarly to tobacco and alcohol. Some might perhaps justify this fiscal intervention in terms of external effects obese people with diabetes impose on the public health-care system (funded through general taxation). Others might argue they suffer from seeing so many overweight children around. But in terms of making sense of the government’s intervention, these reasons are not fully convincing.

¹⁶For instance, it can conflict with individual freedom.

¹⁷“The rates companies [Soft drinks manufacturers] will need to pay are as follows: 24p per litre of drink if it contains 8 grams of sugar per 100 millilitres. 18p per litre of drink if it contains between 5 and 8 grams of sugar per 100 millilitres.” (<https://www.gov.uk/government/news/soft-drinks-industry-levy-comes-into-effect>)

Rather, there seem to be a genuine paternalistic motive in the population, or at least among the governing elite, for intervening in individual choices.¹⁸

The categorisation of reasons for regulation or budgetary policies is a difficult exercise, notably because of the potential normative over-determination. This fact was mentioned by Calabresi and Melamed (1972, p. 1114 n50) in an insightful footnote: “As a practical matter, it is often impossible to tell whether an entitlement has been made partially inalienable for any of the several efficiency grounds mentioned or for distributional grounds. Do we bar people from selling their bodies for paternalistic, self paternalistic, or moralistic cost reason?” To put it differently, the same regulation, or the same policy can admit different justifications. This begs the question of which justification should politicians appeal to in the public debate. Political liberals would favour justifications that are neutral with respect to substantial conceptions of the good life. But if the aim of the regulation or the policy is overtly paternalistic and promotes a specific conception of the good, for instance, a healthy lifestyle without soft drinks, then perhaps there is no point in trying to provide neutral justifications.¹⁹ One avenue would be to require the neutrality (of aims and justifications) of the state on constitutional matters, but to allow the adoption of non-neutral perfectionist policies by a representative majority, provided that the basic structure of society relies on neutral grounds.²⁰

5 Conclusion

Over the years, Calabresi has written extensively on the distributional consequences of different rules assignments and resource allocations. This is the proper theoretical context in which the concept of merit goods coined by Musgrave takes its meaning. Both European-born, Calabresi and Musgrave reflected on economic theory from the vantage point of the American mixed

¹⁸The sugar tax is not a case of liberal paternalism (or soft paternalism), but it can be interpreted as a case of self-paternalism to the extent that the policy was part of a budget voted by a representative parliament.

¹⁹Still, Roberto Merrill (2014, p. 6) argues that perfectionist aims are compatible with neutral justifications, but this seems to me to rely on a form of deceit incompatible with the condition of publicity.

²⁰See Merrill (2014, p.16). This view is attributed to Rawls (1993). For a suggestion of how to integrate merit goods within the Rawlsian framework, see Ege and Igersheim (2010).

economy. Like Tobin, Calabresi and Musgrave were inspired in their reflections on the limits of markets by the experience of WWII planning which provided a large-scale social experimentation in allocation of resources. More importantly, Calabresi, like Musgrave, uses the category of *society* in the context of merit goods. Methodologically speaking, if we do not allow for the existence of such an entity, then the concept of merit goods loses its fruitful meaning. Without the idea of social values, merit goods reduce to unacceptable instances of paternalism: one individual imposing his will on another one. Still, this theoretical use of the concept of society is not incompatible with the liberal commitment to endow individuals with the ultimate source of value, however difficult it is to bridge the gap between the two.

Calabresi's original argument for merit goods is that some goods should not be allocated according to the prevailing market distribution of income, even if there is already a socially desired state of redistribution implemented through the government budget. In other words, to preserve some incentives to work, society might not wish to bring about an equal distribution of income, but it might still want to allocate some goods in an egalitarian way, or according to another criterion than income or wealth. This argument is compatible with other strands of arguments for justifying merit goods. Nevertheless, it is important to stress that in Musgrave's view—and for most commentators ever since—merit goods are goods provided by the state, whereas Calabresi's merit goods are not bounded by this constraint. For instance, his examples of body parts and procreation rights would not be allocated by a central government. They are cases of what Elster (1992) called local justice.

Calabresi's conceptualisation of merit goods is limited by its sensualist assessment of human interactions: goods acquire the status of merit goods because their commodification (or their "commandification") would hurt some individuals. I have argued in favour of formulating reasons why some cases of external moral or psychological costs matter more than others. The first advantage of such an approach is to bring the theory more in line with a realistic conception of morality. The second advantage is that it allows us to relate Calabresi's merit goods with other arguments for merit goods, and to identify other cases of merit goods that are not discussed by Calabresi. In that respect, I mentioned cultural merit goods, and merit goods provided for purely paternalistic reasons. This being said, Calabresi never pretended to provide an exhaustive list of arguments for merit goods. The formulation of rational justifications for merit goods does not contradict Calabresi's

approach. It is rather intended as a friendly criticism.

References

- Anderson, E. (1993): *Value in Ethics and Economics*, Cambridge, MA: Harvard University Press.
- Buchanan, J. M. and W. C. Stubblebine (1962): “Externality,” *Economica*, 29, 371–384.
- Calabresi, G. (1980): “An Exchange: About Law and Economics: A Letter to Ronald Dworkin,” *Hofstra Law Review*, 8, 553–562.
- Calabresi, G. (1991): “Do We Own Our Bodies,” *Health Matrix*, 1, 5–18.
- Calabresi, G. (1997): “Remarks: The Simple Virtues of the Cathedral,” *Yale Law Journal*, 106, 2201–2206.
- Calabresi, G. (2014): “A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension,” *Law and Contemporary Problems*, 77, 1–13.
- Calabresi, G. (2016): *The Future of Law and Economics. Essays in Reform and Recollection*, New Haven: Yale University Press.
- Calabresi, G. (2017): “The Future of Law and Economics: Comments and Reflections,” *Jerusalem Review of Legal Studies*, 16, 167–178.
- Calabresi, G. and P. Bobbitt (1978): *Tragic Choices. The conflicts society confronts in the allocation of tragically scarce resources*, New York: W.W. Norton & Co.
- Calabresi, G. and A. D. Melamed (1972): “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review*, 85, 1089–1128.
- Colussi, T. (2018): “Social Ties in Academia: A Friend is a Treasure,” *The Review of Economics and Statistics*, 100, 45–50.

- Cserne, P. and M. Desmarais-Tremblay (2018): “Merit Goods,” *TILEC Discussion Paper*, written for *The Encyclopedia of the Philosophy of Law and Social Philosophy*, Springer, 2019.
- Desmarais-Tremblay, M. (2016): “The normative problem of merit goods in perspective,” *Forum for Social Economics*, forthcoming, <http://dx.doi.org/10.1080/07360932.2016.1196593>.
- Desmarais-Tremblay, M. (2017a): “A genealogy of the concept of merit wants,” *The European journal of the history of economic thought*, 24, 409–440.
- Desmarais-Tremblay, M. (2017b): “Musgrave, Samuelson, and the Crystallization of the Standard Rationale for Public Goods,” *History of Political Economy*, 49, 59–92.
- Desmarais-Tremblay, M. (2018): “Musgrave and the Idea of Community,” *mimeo*.
- Ege, R. and H. Igersheim (2010): “Rawls’s justice theory and its relations to the concept of merit goods,” *The European Journal of the History of Economic Thought*, 17, 1001–1030.
- Elster, J. (1992): *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, Cambridge: Cambridge University Press.
- Guttel, E. (2017): “The Law and Economics of Merit Goods: Discussion of The Future of Law and Economics,” *Jerusalem Review of Legal Studies*, 16, 142–152.
- Harel, A. (2017): “Comments on: The Future of Law and Economics,” *Jerusalem Review of Legal Studies*, 16, 124–128.
- Johnson, M. (2005): “Wicksell’s Unanimity Rule. Buchanan’s Dominance Considered,” *American Journal of Economics and Sociology*, 64, 1049–1071.
- Kalman, L. (2014): “Some Thoughts on Yale and Guido,” *Law and Contemporary Problems*, 77, 15–43.

- Levmore, S. (2017): “Merit Goods, Calabresi-Goods, and Rent-Seeking: In Honor of Guido Calabresi’s *The Future of Law and Economics*,” *Jerusalem Review of Legal Studies*, 16, 129–141.
- Marciano, A. (2011): “Buchanan on externalities: An exercise in applied subjectivism,” *Journal of Economic Behavior & Organization*, 80, 280–289.
- Marciano, A. and G. Ramello (Forthcoming): “Law, Economics, and Calabresi on The Future of Law and Economics,” *European Journal of Law and Economics*.
- Medema, S. G. (1999): “Legal Fiction: The Place of the Coase Theorem in Law and Economics,” *Economics and Philosophy*, 15, 209–233.
- Merrill, R. (2014): “Introduction,” in R. Merrill and D. M. Weinstock, eds., *Political Neutrality. A Re-evaluation*, Palgrave, 1–21.
- Michelman, F. I. (2005): ““There Have to Be Four”,” *Maryland Law Review*, 64, 136–158.
- Musgrave, R. A. (1957): “A multiple theory of budget determination,” *Finanzarchiv*, 17, 333–343.
- Musgrave, R. A. (1959): *The Theory of Public Finance: A Study in Public Economy*, New York: McGraw Hill.
- Musgrave, R. A. (1987): “merit goods,” in J. Eatwell, M. Milgate, and P. Newman, eds., *The New Palgrave Dictionary of Economics*, Palgrave, first edition, 1958–1960.
- Musgrave, R. A. (1989): “The Three Branches Revisited,” *Atlantic Economic Journal*, 17, 1–7.
- Musgrave, R. A. (1991): “Tableau Fiscale,” in *Public Finance in a Democratic Society. Volume III*, Cheltenham: Edward Elgar, 116–125, 2000 edition.
- Musgrave, R. A. (1996): “Combining and Separating Fiscal Choices: Wicksell’s Model at its Centennial,” in *Public Finance in a Democratic Society. Volume III*, Cheltenham: Edward Elgar, 2000 edition, 81–103.

- Rawls, J. (1993): *Political Liberalism*, New York: Columbia University Press.
- Sandel, M. J. (2009): *Justice. What's the Right Thing to Do?*, New York: Farrar, Straus and Giroux.
- Tobin, J. (1970): "On limiting the domain of inequality," *Journal of Law and Economics*, 13, 263–277.
- Ver Eecke, W. (1998): "The Concept of a "Merit Good" The Ethical Dimension in Economic Theory and the History of Economic Thought or the Transformation of Economics into Socio-Economics," *Journal of Socio-Economics*, 27, 133–153.
- Walzer, M. (1983): *Spheres of Justice. A Defense of Pluralism and Equality*, Basic Books.
- Zamir, E. (2017): "Tastes, Values, and The Future of Law and Economics," *Jerusalem Review of Legal Studies*, 16, 101–123.