

Book reviews

Guido Calabresi's *The Future of Law & Economics*

Rafael A. Porrata-Doria, Jr.* and Mauro Grondona**

The Future of Law & Economics: Essays in Reform and Recollection

by Guido CALABRESI

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I. Introduction

Judge Guido Calabresi's new book, *The Future of Law & Economics: Essays in Reform and Recollection*,¹ is a passionate and convincing intellectual *tour-de-force*. It puts into context one of the most discussed (and controversial) issues in modern legal and economic thought: the appropriate relationship between law and economics. In eight clear and elegant essays, Judge Calabresi clarifies misconceptions involving the relationship between law and economics, convincingly concludes that economic analysis can be a useful tool in analyzing legal norms, enumerates the concepts that economic theorists must consider in order to effectively analyze the law, and shows how these concepts can be integrated into economic theory.

In the first part of this review, and in order to put law and economics into context, we will enumerate the various approaches that scholars have used to analyze law and legal system. As we move into the relationship into law and economics, we will note Judge Calabresi's distinction between the economic analysis of law and law and economics, a distinction that is often disregarded. We will then consider one of principal questions that Judge Calabresi asks in the book: what economics can do for law. Since many scholars have viewed the economic analysis of law as a common law phenomenon, we will then consider whether the answer to the previous question depends on the nature of the legal system involved. Lastly, we will

* Professor of Law, Temple University.

** Associate Professor of Private Law, University of Genova.

¹ G. Calabresi, *The Future of Law & Economics: Essays in Reform and Recollection* (New Haven and London: Yale University Press, 2016).

briefly describe the concepts that Judge Calabresi feels need to be incorporated into economic analysis in order to make it a truly useful tool to use in the consideration of legal norms.

II. The Four Theoretical Approaches to Law

In the United States, Judge Calabresi notes, four approaches to law have been prominent among legal scholars.² He describes these approaches as 'doctrinalism,' 'law and...,' 'the legal process school' and 'law and status', with each having strengths and weaknesses.

The first of these approaches, formalism, views law and autonomous and distinct from other fields of learning. Legal analysis can be carried out independently of, and without reference to, any other disciplines or sources for its value. Its purpose is to make the rules of law consistent and coherent with each other so that similar cases can be treated similarly. This approach, Judge Calabresi notes, seeks to rationalize 'a mishmash of common law precedents as well as statutory and constitutional norms, both at the state and federal level.'³ In Europe, on the other hand, it is meant solely to 'rationalize and render coherent the rules that derive from the great Codes of Law'.⁴ In the United States, an example of this approach can be found in the American Law Institute's famed Restatements of the Law.⁵ An important point to note is that the difference in how this approach is implemented by common and civil law legal scholars is in the materials that they analyze, rather than in their basic approach to their analysis.

The 'law and ...' approach aims to

'break out of a self-contained system of legal values which are either unchanging or change only mystically, revolutionarily, or at the hands of legislators unguided by legal scholars' critiques or suggestions'.⁶

This is so because legal scholars, by themselves, bring no special insight into the values that go into law making and law reform. How do legal scholars acquire this insight? By considering economics, philosophy, psychology or other fields in developing a scholarly critique of the legal system or particular parts thereof. For the 'law and ...' scholars, law is neither independent nor

² G. Calabresi, 'An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts' 55 *Stanford Law Review*, 2113 (2003).

³ *Ibid* 2115.

⁴ *Ibid* 2115.

⁵ See, eg, E.A. Farnsworth, *Restatement (Second) of Contracts* (Philadelphia: American Law Institute, 1981).

⁶ G. Calabresi, *An Introduction* n 2 above, 2119.

autonomous, but dependent on other fields.⁷

Judge Calabresi describes the legal process school as one whose scholars concentrate on a comparative analysis of institutions such as courts, legislatures, and administrative agencies and other institutions to understand what particular attributes of each of these institutions made them better suited to decide some issues rather than others. What these scholars would do is to objectively suggest, based on institutional capacity, which institutions should be the definers and determiners of the values that guide the legal system.

‘Law and status’, on the other hand, instructs legal scholars to examine how laws and the legal system affect specific categories of people and questions and criticizes all law on the basis of its treatment of certain preselected groups, chiefly those who have been exploited, disadvantaged or dominated.⁸

As one reads Judge Calabresi’s analysis of these approaches, it becomes clear that all of these approaches can be applied into both common and civil law systems. He believes that each of these approaches has much to be said for it. Indeed, he feels that a mixture of these approaches, and the insights that they can bring, is essential and that legal scholars, regardless of their preference for any of these approaches, should be ‘well advised to be open to those whose preferences are far different’.⁹ The history of law, he concludes, suggests that crucial insights can come from each and every one of these approaches.¹⁰ Each of these approaches can be applied.

This conclusion is important, since it forms the basis of Judge Calabresi’s thesis in *The Future of Law and Economics*: that economics and economic analysis have a valid role to play in legal analysis and policymaking.

III. Economic Analysis of Law vs Law and Economics

In the beginning of his examination of the relationship between law and economics, Judge Calabresi makes a very important distinction between two different approaches: that between the economic analysis of law and law and economics.¹¹ The economic analysis of law, following Bentham’s notion of utilitarianism, uses economic theory to examine the legal world through the prism of economic theory and, as a result of that examination, confirms, denies or seeks reform of legal reality. If a legal norm does not conform to

⁷ Ibid 2119-2120.

⁸ Ibid 2127.

⁹ Ibid 2151.

¹⁰ Ibid 2151.

¹¹ As Judge Calabresi notes, others scholars do not recognize this distinction, or make the distinction in a very different fashion. See *The Future* n 1 above, 177 n 2.

existing economic theory, then that legal norm is irrational and should be reformed or eliminated.¹² Judge Calabresi concludes that, in this analysis, economics and economic theory dominate, and the law is the subject of it analysis and criticism.¹³ This is a problem because there are relevant issues in legal reality that are not adequately explained in current economic theory.¹⁴

What Judge Calabresi calls law and economics is a different approach. He describes it as beginning with an acceptance of legal reality and sees if economic theory can explain that reality. If economic theory cannot do so, then the scholar must ask two questions. The first is whether the scholars who are describing legal reality are looking at the world as it really is, or if something is causing them to mischaracterize reality. The second question is whether economic theory can be made broader or subtler so that it can explain why the real world of law is as it is. If the answer to this question is affirmative, then law and economics suggests that changes shall be made to economic theory to enable it to explain a specific legal reality.¹⁵ As opposed to the economic analysis of law, law and economics creates a bilateral relationship between both disciplines. This, Judge Calabresi notes, is akin to John Stuart Mills' analysis and criticism.¹⁶ He is careful to point out, however, there will be situations where economic theory (even an expanded one) will not be able to explain a particular legal reality.¹⁷ In other words, law and economics may not satisfactorily explain all of legal reality.

IV. What Can Economics Do for Law?

At this point, we are facing the topic of prescriptive (or deontological)/descriptive (or ontological) dualism. This dualism is relevant not only from a strictly legal or legal point of view, but also from the economic point of view. The always critical questions of *quid ius?* (what is law?), *quid iuris?* (which is the legal solution in this case?) in the long run of history have obtained two major answers. The first says that law is what a formal legal source dictates and prescribes. If so, for solving a case we have to turn to the sources of law. The second says that law (as a set of rules) is, to a certain extent, the mirror of society, and this connection between law and society is precisely what legitimates the law as a set of rules provided imposing a legal order upon society. The problem lies in the definition of the concept of 'legal rules'.

¹² Ibid 2-3.

¹³ Ibid 6.

¹⁴ See *infra* nn 21-22 and accompanying text.

¹⁵ G. Calabresi, *The Future* n 1 above, 3-4.

¹⁶ Ibid 1, 6.

¹⁷ Ibid 4.

Legal rules can be analyzed from either a ‘top-down’ vs a ‘bottom-up’ approach.

The first focus, mainly, on legal sources of law, and to their prescriptive function of imposing something on someone, when adjudicating a conflict. Here the approach is formal and dogmatic, because the law is something coming from above, and social reality only has to receive, from outside, the law, ie the norm. The second mainly focuses on the variety of social (in the sense of human) experience (an Italian legal philosopher of the past, and not always – still today – well received by his colleagues, used to refer to the ‘legal experience’, as a field much larger than law is, and most profitable to understand which legal rule better fits to the concrete factual situation).¹⁸ Here the approach is substantial and factualist, in the sense that the content of law could and should be influenced (to an extent which must be scrutinized by legal scholarship, applying the various methodologies and technologies existing within the social sciences) by the content of social reality.

Obviously, there is not a lack of deontology in the bottom-up approach for the very basic reason that law is a way to express and apply deontology to social facts, but law may vary (and in fact it does) the features of this deontology related to that peculiar social fact which is under legal scrutiny in the perspective of adjudication. If we look at society and at social facts as a historical and an empirical proof of the pluralism of actions and values, we should conclude that the best way to face adjudication questions is the one that is the broadest, and not the narrowest. According to this assumption, the jurist should consider this broader approach to achieve ‘a more accurate, more comprehensive view of legal reality’.¹⁹

So, when confronting with the social reality (what is happened and what is happening), we have, as jurists in a broad sense (legislators, legal scholars, judges, lawyers), some technical tools to use: legal and economic, from the past and from the present. Theories are the ordinary means to achieve what should be outlined as the social role of the jurist: the enforcing of legal rules, which move herself, to a certain extent, along the path of social life – considered from a historical point of view.

Within this framework, ontology and deontology, the realms of is and of ought, are not opposite each other; on the contrary, what is a social fact could (and should) influence the content of the law as a prescriptive rule. But if this is the general perspective of the law, we do need to know which are these social facts, how much are they socially rooted, and to what extent can they influence the law.²⁰

¹⁸ G. Capograssi, *Studi sull'esperienza giuridica* (Roma: Maglione, 1932).

¹⁹ G. Calabresi, *The Future* n 1 above, 3.

²⁰ This point emerges with linearity from this passage: ‘The (...) capacity to employ any of many economic theories applies also to Law and Economics. The theory that is amplified to make it explain and respond to the actual legal world can be Marxist economics, pure

The relation between law and economics enriches both: they are communicating vessels. Both law and economics are parts of social science; but neither law nor economics are the unique ways of approaching and clarifying the variety of reality. Both are empirical, sociological, historical and anthropological weapons of understanding what society is, and what society looks for. And to properly do its job, law and economics analysis tries to maximize the substantial and material meaning of social facts, recurring to the theories 'on the roster' – legal and economic, but also in the field of other social sciences²¹ in terms of scientific paradigms. These paradigms are sometime recessive, sometime dominant: but it would be a misleading assumption to think that there are theories definitely dead, or evergreen: this attitude would be negatively dogmatic in the sense that theoretical statements must always prevail on empirical analysis of the concrete circumstances, and on concrete, specific needs.

This opens, also, the perilous field of rational and irrational human action,²² along with the 'Idealtypus' of the homo oeconomicus, the rational human being whose action is nothing but maximization. This is, in fact, a 'perilous field' because if we draw the line between what is, by definition, considered rational, and what not, then we will use a criterion (legal and economic, but not only) to put aside real factors that, as they exist, affect individual and social life. Repeatedly, the economic analysis of law approach appears to be too much a dogmatic one (in the sense of too much rigid and too much closed to what effectively happens).

Judge Calabresi makes it clear in his book that law and economics,

utilitarianism, Vienna transplanted to the Windy City, or Keynes redux in New Haven. It is not the *theory* used that distinguishes the approaches. The theory can vary. It is, rather, the relationship between the theory and the world it examines that separate them': Ibid 7.

²¹ This 'much more' could be problematic, and there is no doubt that this scientific abundance may produce a sort of involuntary rigidity descending from the theoretical field and oppressing the reality of facts: on this crucial point, see the most interesting 'Appendix' of the book: the 'Farewell Letter of Arthur Corbin to the Yale Law School Faculty.' Here we read: 'Admitting, as our latest discovery, that there are no principles, that there is no law, we turn to fields with other names – to economics, ethics, political science. Surely here we can find our absolutes, our eternal principles of right and of justice. (...) The less we know of economics and ethics and politics, the more likely we are to enjoy the illusion that in them we find certainty, or at least the illusion that certainty is just around the corner. But just as in the field called Law, that corner is never turned. The fact is that these are merely different names for a single field – the field of human experience. I believe that there is greater hope, of human welfare and happiness, if we are conscious of our limitations, if we abandon the quest for absolutes, if we confess that justice is wholly relative and human, and if we erect our temple of peace upon a foundation, made as stable as we can by a neat balancing of interests, determined by as careful and complete a study of human experience as is possible. Rules and principles, where we call them political, economic, ethical or legal, are the result of this balancing of interests. They are the tentative working rules of life – not to be scorned because they are not absolute': Ibid 174-175.

²² See G. Calabresi, 'Of Tasted and Values Ignored', in Id, *The Future* n 1 above, 131.

notwithstanding being two different social sciences fields, are strongly interconnected – and should be even more so. This interconnection does mean that either the law is the main criterion to understand economics, or that economics is the main criterion to understand law. Neither the former nor the latter are self-sufficient as ways to a serious comprehension of the *mare magnum* called society – a comprehension, indeed, which is also, to a certain extent, a prescription in terms of legal rules: to comprehend in order to prescribe.

Therefore, Judge Calabresi describes (and gives various arguments and examples for) a sort of methodological parallelism by virtue of which law and economics are complementary tools to investigate social reality, or, in other words – that may sound better –, the social dimension of human beings, the social interconnection of the individual actions: the interconnection of lives. Judge Calabresi's distinction between the economic analysis of law and law and economics (which we discussed above) is critical because each gives rise to different and opposing outputs.

If we think of law as a criterion by which better ordering human social life (social, because it is a function of the innumerable individual actions), and if we think of economics as a criterion for a better assessment of what it is usually expressed in terms of 'complexity of social reality', we are, methodologically, applying law and economics approach. The sole combination of law and economics could and should address to the individuation of a rule – relevant both from a legal and an economic point of view – which is not the mere reproduction of legal and economic theories, to which adequate the social complexity, but is (and properly should be) the result of the scientific cooperation between the lawyer and the economist, to better answer towards the needs of the present.²³ On the contrary, if we consider economics as the best way to put in order the societal dimension, and in doing so we assume that the deontological standards are, and must be, a logical consequence of some economic theories, we are, methodologically, applying the economic analysis of law approach, because we are convinced that social reality must be governed by those legal rules that are the product of just some economic theories – the true ones, or, most probably, the true one. In this perspective,

²³ This anti-dogmatic and I would say, to a certain extent, relativistic methodological attitude (which is necessary within a pluralistic context) of Judge Calabresi well emerges from this passage: 'To summarize: The lawyer, the legal scholar, has a special, and especially crucial, role in the bilateral relationship that Law and Economics scholarship involves. This is because it is *law* and legal institutions that are the subject of that scholarship. It is also because the legal scholars' part in that bilateral relationship is played by legal scholars of every sort of ideological persuasion. But, let me be careful. I am not for a moment suggesting that this is the sole or even the most important role that legal scholars should play. Law is an immensely rich and complex field. What are and what should be legal rules must, I believe, be looked at in any number of different ways by any number of differently guided legal scholars': G. Calabresi, *The Future* n 1 above, 21.

the factual dimension is and must remain totally silent.

V. Does the Answer to this Question Depend on the Legal System?

Law and economics and the question of what economics can do for law has been the subject of extensive commentary and discussion in the United States.²⁴ The question that arises is whether law and economics is relevant only to a common law system like that of the United States, or whether it has validity and utility in a civil law system like Italy's. If law and economics is a method, and not but simply theories which are affected by the historical and political framework of the society along its evolvment, it should be quite appropriate that the 'role of the lawyer' changes.

Considering this topic from an Italian perspective, many questions are on the table. The first one, and today most notable, is connected with the actual (but to a certain point, always actual) debate on legal methodology and legal teaching. To what extent law and society must be interconnected? How do we learn law in law schools? What does it mean to be a lawyer today? What do we have to do to form good lawyers in university and post lauream courses?

This debate is, or, better, these interconnected debates, are mostly tributary to the new global framework of the sources of law, and in particularly to the well-known phenomenon of the dialogue among courts and jurisdictions, which so many new perspectives and problems has pushed to an emersion – perspectives and problems deeply affecting legal scholars' self-consciousness and their social role, also confronting with the social role of other social sciences scholars, as the economists.

When things change, methods and concepts to understand those new things (or the same old things, but in a new epiphany) must change. The law and economics approach could have a new chance – thanks to Judge Calabresi's book – to become an operating tool for the average Italian lawyer, who in the past was, and still is, quite skeptic when not incredulous about the interrelationship between law and economics.²⁵ In brief, and along with the Italian perspective, the first concrete utility of the law and economics approach as presented and depicted by Judge Calabresi has a true didactic

²⁴ See, eg, R. Cooter and T. Ulen, *Law and Economics* (Boston: Addison-Wesley, 6th ed, 2016); A. Marciano and G.B. Ramello (special eds), 'Law and Economics: The Legacy of Guido Calabresi' 77 *Law and Contemporary Problems*, (2014); G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972).

²⁵ See R. Pardolesi and G. Bellantuono, 'The History and Methodology of Law and Economics', in B. Bouckaert and G. De Geest eds, *Encyclopedia Of Law and Economics* (Cheltenham: Edward Elgar, 2000), 244, 246-250, expressing some reasons for why Italian lawyers and economists usually 'do not listen' to law 'and' economics.

nature: to show to the law students and to the legal scholars how many ‘things’ exist beyond the law intended in the formal and traditional way – and these many things are, in sum, our lives. The lesson from law and economics approach is that the range and the boundaries of legal reasoning are and must be much more extended than usual, at least in Italy; to do so, we do need to consider the field of economics as a real intellectual aid and support.

Indeed, Judge Calabresi himself makes it clear that he believes that the law and economics approach has value and utility in the analysis of the Italian legal system.²⁶

VI. What Economics Need to Consider in Analyzing Law?

Judge Calabresi identifies two key issues that economic theory needs to better consider in order to analyze existing legal reality: merit goods and altruism and values.

1. Merit Goods

Merit goods are those that correspond to merit wants and whose purchase and use do not take into account their costs²⁷ or benefits to others in society.²⁸ There are two types of merit goods: goods that a significant number of people in society do not wish to have priced; they are ‘pearls beyond price’ whose commodification is indeed costly. Others are goods whose pricing is not costly in itself, but whose allocation through the prevailing system of wealth inequality is highly undesirable to a significant number of people.²⁹

How does one then deal with merit goods? One can, through

²⁶ As Judge Calabresi noted in a recent interview: ‘Well, I’m also European. (...) This book says law, and your notion that law has had something to tell us for a long time and still does, is true. It discusses this in a systematic way by talking about law and economics, rather than economic analysis of law, and says the two things work together. This traditional European notion that law had things to say about the unanalyzed experience of the human race, and economic theory, this Benthamite, powerful, out-of-law engine of reform were now coming together. And the two sides of me, Italian and American, were now coming together in my scholarship’: ‘Law and Guido Calabresi’ 63 *Yale Law Reporter*, 118, 128 (2016).

²⁷ Judge Calabresi notes that, for merit goods, external costs are the ‘mental sufferings that their allocation in the ordinary market imposes on other people. The external costs attributable to these goods, when they are priced or allocated through the ordinary market, are the pain other people feel because they do not like that kind of pricing allocation. They are similar to moral costs, but that does not make them less real or less needful of attention’: G. Calabresi, *The Future* n 1 above, 27.

²⁸ *Ibid* 24-25.

²⁹ As Judge Calabresi notes: ‘It is not the pricing that is objected to by many; 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* 26.

commodification, put a market price on them, but pricing these goods through market mechanisms is painful to many members of society. The alternative is what Professor Calabresi calls commandification, which substitutes market pricing by the collective allocation.³⁰ Most often, societies deal with this category of merit good through a combination of markets and commands.³¹ As Professor Calabresi shows, the incorporation of these concepts into economic theory, and their application to the world of law, is complicated.³²

Consideration of the second type of merit goods³³ brings Judge Calabresi to deal with the issue of inequality. Since distributing these goods through regular market mechanisms is not feasible, two alternatives surface: the use of collecting allocation schemes (either public or private) that take into account preferences and involve a more equal distribution; or the modification of markets (through rationing, taxes or subsidies or markets where the medium of exchange is not money) so that the distribution of these goods does not depend on the regular market. Professor Calabresi notes that, although the use of these mechanisms alone creates issues that need to be resolved, it is possible, through a combination of these methods, to deal with the effect of income inequality on different merit goods.³⁴ He ends this discussion by asking what his examination of merit goods tells us about the demands that the lawyer-economist must make on economic theory. His first response is to focus on the importance of the availability and usefulness of modified markets and modified command structures. Secondly, he underscores that the use of these command and market mechanisms to achieve the goals of a given society are far more complex and intertwined than is usually considered in economic models. Lastly, he notes that traditional economic theorists have ignored or treated as non-existent or irrational, cost and values that people in the real world deem real.³⁵

2. Altruism and Values

Two other issues that Judge Calabresi believes need to be considered further in economic theory are altruism and values.

Altruism is a collection of goods that are not only a means to an end, but

³⁰ Ibid 31.

³¹ Ibid 36.

³² See, eg, *ibid* 35-40.

³³ Judge Calabresi uses military service, the right to have children, the right to some level of education and the right to body parts as examples of this category of merit goods. These goods all elicit the feeling in a large number of people that they are goods which the rich should not be able to get, or the poor have to forego, simply because of their status. There is also a feeling that is wrong to price these goods: *Ibid* 43-44.

³⁴ See, eg, *ibid* 59-73.

³⁵ *Ibid* 88.

also ends in themselves. When economists ask themselves whether altruistic behavior is an efficient or cost effective way to deliver a good or service they usually say no. If self-interested behavior is more effective at producing goods and services that we want why, Judge Calabresi asks, is there so much altruism? His answer is that altruism is not only a means to an end, but an end in itself because we like it and are willing to pay for it.³⁶ With regard to altruism, the job for the lawyer economist is to suggest that economic theory need to be amplified to explain what is the legal world. Specifically, economic theory needs to consider three issues, Judge Calabresi believes. The first issue is whether altruism is one good in itself or several goods that we desire. The second is what means have actually been used to optimize these different goods and why these means have been chosen. Lastly, Judge Calabresi asks what indications there are as to the 'price' that people are willing to pay for altruistic goods and as to what demand exists for these goods.³⁷ After an outstanding examination and analysis, Judge Calabresi answers these questions in a clear and convincing manner.³⁸

The relationship between law and values is critical. Although the law and legal structures of a society depend on the values of that society, its laws and legal structures also profoundly affect society's values. Moreover, a change in law can both accelerate the change in the values that brought about the change and give rise to a powerful reaction thereto.³⁹ Judge Calabresi believes that economists can tell lawmakers a great deal about what value changes can be viewed as desirable or undesirable.⁴⁰

VII. Conclusion

The Future of Law and Economics convincingly argues that there is an appropriate relationship between law and economics. In this relationship, economic analysis, in the form of the law and economics analytical methodology articulated and explained in the book can be very useful in analyzing legal reality. As Judge Calabresi expresses it, there are questions as to which legal rulemaking needs help and the skills that economists have

³⁶ Ibid 90.

³⁷ Ibid 98.

³⁸ Ibid 100-115. Judge Calabresi concludes that: 1) there are goods and bads whose optimization through pure market and command mechanisms is counterproductive, but whose existence must be recognized and dealt with; 2) the examination and incorporation of modified markets and command systems into economic theory would be very useful, and 3) goods must be recognized as being both means and ends: ibid 115.

³⁹ Ibid 157.

⁴⁰ Ibid 160. Judge Calabresi notes that it would not violate the rigor of economic analysis to conclude that a society has a number of fundamental values and, starting from there, economists could develop interesting joint maximization models based on the relationship between fundamental values and subsidiary values promoted by legislation: Ibid 168.

make them particularly capable of giving lawmakers this help. The problem, he notes, is that applying economic skills in the areas in which this help is most needed requires economists to do certain things that they have traditionally been reluctant to do.⁴¹ Judge Calabresi clearly and elegantly shows how legal and economic scholars can do this.

Judge Calabresi makes it clear that law and economics, as a legal methodology, is of equal assistance and utility in a civil law system such as that of Italy as in a common law system. As he so eloquently put it, this book puts together both his Italian and American sides.⁴²

The Future of Law and Economics is an essential book for legal scholars, judges, lawmakers, lawyers and students of the law, both in Italy and the United States.

⁴¹ Ibid 171.

⁴² See n 27 above and accompanying text.