Law & Society Review (2024), 1–28
doi:10.1017/lsr.2024.46

ARTICLE

Calabresi's invite: bridging Law & Society and Law & Economics through "situated valuation"

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(Received 8 December 2022; revised 19 July 2024; accepted 7 August 2024)

Abstract

Law & Society scholars often dismiss Law & Economics (L&E) as insoluble with our core beliefs about distributive justice, culture, and social solidarity. This reaction has yielded missed opportunities for new theory emergent *between* the fields. One such opportunity came in 1978, when Guido Calabresi and Philip Bobbitt argued that societies make "tragic choices" about scarce resource allocations so as to reconcile such choices with core culture, ethics, and values. In Calabresi's later words, their book was a "more or less explicit appeal to anthropology for help."[1] Today, sociolegal studies remain well-poised to answer this appeal. Taking theory about moral costs from Calabresi in L&E and adding anthropological thought on the meaning of "value," this essay presents *situated valuation* – a contextualized notion of value that accounts for the moral costs of inequalities while supporting principled scrutiny of redistributive policies meant to reduce inequality but sometimes worsening it. This discussion highlights the importance of interpretive social science in the study of distributive inequality, while showcasing a neglected but generative link between mutually imbricated interdisciplinary communities.

Keywords: Law & Economics; value; markets; inequality; morals; anthropology; language; social context

Introduction

Law & Society (L&S) scholars care about economic inequality and have well-established ways of trying to understand and remedy it. Law & Economics (L&E), not traditionally known for the same, now increasingly also includes writers examining distributive justice and poverty with their own distinct theories and methods (see, e.g., Goldin and Kleiman 2022; Kaplow and Shavell 1994). While these two ways of seeing inequality tend not to converse, they would both be well-served by mutual engagement. This essay proposes one meaningful site at which to initiate that.

In 1978, Guido Calabresi and Philip Bobbitt argued that societies make "tragic choices" about scarce resource allocations in a way that seeks to reconcile such choices with core culture, ethics, and values. In Calabresi's later words, that book was a "more or less explicit appeal to anthropology for help."[2] In this essay, I refer to his appeal and its 2016 renewal as "Calabresi's Invite." Whereas L&E has been seen by sociolegal scholars as theoretically narrow and methodologically exclusive, with this moniker I

draw attention to the sometimes-overlooked intellectual curiosity and openness found among certain lawyer-economists. "Calabresi's Invite," simply put, is a substantive call for more interpretive observation in an academic world widely influenced by social science positivism.[3] In the interpretive tradition, it calls for a theory of valuation based on situated knowledge about human faculties for valuation, or "situated valuation," as I term it following Donna Haraway (1988).[4] Such theory moves from the terrain of "behavior" toward the interpretive terrain of tastes or values. This difference is what makes the "appeal to anthropology" potentially more profound than previous philosophical or behavioralist interventions on value.

This essay draws on secondary literatures in legal theory, L&E, sociolegal studies, and economic anthropology. Taking theory about moral costs raised by Calabresi in L&E and joining those with anthropological insights on the meaning of "value," the following pages point toward a contextualized notion of value missing from interdisciplinary studies of economy and society. Whereas others have proposed contextual definitions of value (Anderson 1993; Zelizer 1994), the unique contribution here is to identify clear space for a sociocultural concept of value at the heart of L&E theory, and to suggest that concept might be used to evaluate policies meant to address distributive inequality. Importantly, this essay focuses most on sociological and anthropological approaches for two key reasons related to demand and supply. The first reason, on the demand side, is already implicit: Calabresi specifically hailed anthropology due to its immanent interest in the complexities of culture, values, and ethics. Qualitative sociology, overlapping in attention to these both theoretically and methodologically, supplements anthropology with perhaps a greater interest in *structures* versus individual *agency*. Second, on the supply side, both anthropology and sociology are poised to challenge and enrich the relatively thin approaches to value – framed as a cultural concept by Calabresi at the outset. Though other disciplines clearly have more to add to this conversation, this essay is but a first step toward a wider reflection on economics in the L&S space.

There is also a transdisciplinary benefit. Using Calabresi's Invite as a starting point, this essay advances the concept of "situated valuation" as a case study in the type of theoretical advancement that can result from direct discussion between colleagues across the economy-and-society divide. As I explain further, situated valuation – a conception of economic value accounting for social and cultural dimensions of value – bolsters L&S's own approach to economic inequality. It does so by examining the need for sociocultural thinking within ostensibly narrow "economic analyses" of law, and revealing a complementarity between certain *sociolegal* and *lawyer-economist* approaches to inequality. By no means is the need for a relational theory of value observed *uniquely* by this piece. Writers in analytic philosophy (Anderson 1993) and economic sociology (Zelizer 1994) have long suggested that value should be looked at socially and pluralistically. This essay's contribution is to bring such calls – at the suggestion of Calabresi – to bear upon contemporary interdisciplinary "Law and" relations. Its goal is to demonstrate the critical relevance of sociolegal scholarship to L&E at the most basic level where "value" takes on meaning. It captures, in turn, the mutual imbrication of economy and society, and a need to recognize this overlap when speaking of either.

https://doi.org/10.1017/lsr.2024.46 Published online by Cambridge University Press

Putting aside its reception, Calabresi's outreach to anthropology was well placed. The discipline had long engaged in the study of local practices and behavioral innovations meant to restore moral coherence in the face of village or community upheaval. So what is at stake in picking up this loose thread today? First, in today's environment of interdisciplinary research incentivized by universities and grant-funding agencies, L&E and sociolegal studies *should* be in closer dialogue given their mutual interests and critical perspectives on one another. Second, by focusing attention on "value," this essay lends itself to growing discussions in L&S on distributive inequality. Historically, ignored by many mainstream lawyer-economists as a secondary or tertiary question after efficiency concerns (Calabresi 2016, 136; Duxbury 1995, 354; Mercuro and Medema 1997, 24; Leitzel 2015, 81; Liscow 2018, 1703), distributive inequality for sociolegal scholars has become a key problem in itself, as well as a site at which to assess the efficacy of legal institutions and systems (Bea and Taylor Poppe 2021, 266; Levitsky et al. 2018, 710-11; Seron 2016, 11). Derived substantially from the sociology of law, early L&S followed Marxian and Durkheimian concerns for economic inequality as a causal factor in social stratification (Levitsky et al. 2018). Contemporary L&S – attuned to social constructivism and contingency (Tejani 2019) – looks to formal law as a factor in failures of economic distribution. And yet, sociolegal arguments that lawyer-economists *should* consider distributional questions have largely fallen on deaf ears; L&E traditionally viewed these as extraneous, or beyond the scope of economic analysis.

Making a case for a response to Calabresi's Invite, the rest of this piece gives deeper context to the disciplinary and policy landscapes that give rise to its urgency. The first section below describes in brief the history, evolution, and key criticisms of L&E. The next section explains how Calabresi departed from Chicago economics to bring "tastes" and "merit goods" into mainstream L&E, and how those informed his invitation to sociocultural theory. It then delves into the nature of his "appeal for help" looking at key problem areas where L&E appeared to most need theoretical supplementation. The third section below then turns to the key concept of this essay, situated valuation, not only as a means for supplying an interpretive concept of value, but also as a means to serve L&S's own interest in understanding redistributive law and policy. The essay then concludes with four modest proposals for how sociolegal scholars might further engage L&E in ways that are theoretically and professionally generative around this issue moving forward.

L&E: history, evolution, and critical responses

The L&E movement can be subdivided into various "schools" surrounding three key universities. The Chicago and Virginia Schools; are associated with "price theory" and "public choice theory," respectively, whereas the New Haven School – centered at Yale Law – has been more amenable to considerations of distribution, inequality, moral relativism, and non-market forms of allocation. Nevertheless, the Chicago School, many would recognize, has been the most influential in academic law. Despite that fact, this essay advocates a blending of certain theory from the New Haven School and contemporary economic anthropology.

In many ways, a standard-bearer for the New Haven School, Calabresi defies some of the stereotypes L&S writers hold about L&E – most notably, the view that

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lawyer-economists ignore inequality. He is not the only one who complicates our narratives about what L&E stands for, but Calabresi provides a valuable starting point as part of the larger project – in which I have engaged for four years – to examine more closely the ethical and social tacit assumptions held by this field. While the institutional economists of the 1940s such as Thorstein Veblen showed deep concern for society and culture (Mercuro and Medema 1997, 103), and while other early lawyer-economists such as Ronald Coase claimed institutional economics to be their bedrock (Coase 1998), choosing Calabresi as the starting point for this discussion reflects the latter's enormous contemporary relevance to the study of law, and proximity to political ideologies held by many sociolegal scholars today.[5]

In *The Future of Law and Economics*, a book reflecting on nearly sixty years of personal and disciplinary intellectual development, Calabresi reminds us that law is about incentivizing and deterring *values* – not just behaviors – and says that lawyer-economists have spoken and written for years as though this function were negligible. "I believe," he says, "it is demonstrable that economists, in their work, take positions with respect to the relative merits of different tastes, *value*, and resulting costs, and do so all the time" (2016: 132 [my emphasis]). He says, in short, that there are unstated assumptions in how economists choose for some goods to be distributed and priced according to markets, and for other goods – referred to as "merit goods," a term explained at greater length below – to remain outside of market exchange and pricing. His purpose is not to question the motivations or validity of lawyer-economists; but he believes that L&E theory has suffered from its failure to account for the meta-values that inform such assumptions. Referring back to their earlier book, Calabresi writes that he and Phillip Bobbit issued an early invitation to the interpretive social sciences – namely anthropology – to help develop systematic thinking about how values are quietly assessed and applied (2016: 6). And yet, as he also says, that invitation was largely ignored.

One plausible reason for this neglect may have been the institutional displacement of qualitative social sciences during the interdisciplinary development of U.S. law schools in the late twentieth century. By the 2000s, quantitative social sciences, and economics in particular, enjoyed institutional ascendancy as "useful" disciplines to partner with legal scholarship. The number of economics PhDs on faculty at the top 34 law schools as of 2012 was 120 (McCrary et al. 2016: 556). By comparison, the next closest was political science at 89, whereas sociology sat at 16, and anthropology at 6 (2016: 556). Within law, the period was one of relative neo-formalism (Johnston 1990; see also Levitsky et al. 2018), renewing a theoretical approach to economics – *formalism* as opposed to *substantivism* (Polanyi 2001 [1944]) – that assumed features of human behavior and then sought to map or predict market outcomes as particular variables like prices or tax rates were tinkered with.

By this time, several key criticisms had emerged from Critical Legal Studies and then L&S. First, presumption – that society (and social protections) is embedded *within* the market rather than the opposite – characterized much scholarship in L&E and caused consternation among sociolegal scholars (see Edelman 2004). It assumed that if human beings are "social" it is because they are engaged in an infinite number and variety of market transactions with one another, reducing *Homo economicus* to a transactional being rather than a creature who engages in production and consumption as means to other meaningful ends. Social theorists have been rightly critical of this

https://doi.org/10.1017/lsr.2024.46 Published online by Cambridge University Press

reduction. Wendy Brown famously wrote that it poses an existential threat to democracy itself by substituting market participation for political participation (2015). Fred Block and Margaret Somers have complained that this reduction obviates the need for sociological or anthropological knowledge about humans and their world (2014: 225).

Second, sociolegal scholars had also long pointed to myriad faults with the rational choice theory classical *Homo economicus* was based on (Edelman 2004; McAdams 2004). As many said, people are not always "rational." But the advent and rise of behavioral economics (Jolls et al. 1998) somewhat weakened the rhetorical power of this key challenge. Whereas behavioralism was initially marginal among mainstream lawyer-economists, by the early 2000s, it was welcomed wholeheartedly among hardcore L&E scholars. The behavioralist approach was adopted by Cass Sunstein and others in academic writings, the Nobel Prize in Economics was awarded to the psychologist Daniel Kahneman in 2002, and Sunstein was invited to join the Obama administration in 2009 where he would implement ideas proposed in *Nudge* (Thaler and Sunstein 2008) – a coauthored book largely about failures in rational choice and their policy implications. Sunstein's collaborator Richard Thaler then won the 2017 economics Nobel, further legitimizing the behavioralist approach as an advancement on conventional economics.

But, as Tanina Rostain wrote, behavioral economics was not the teleological refinement for conventional L&E many assumed it was (2000). Stemming largely from psychology, behavioral economics foregrounded "bounded rationality" through empirical and experimental research. It answered decades-old criticisms from sociolegal scholars by attending to psychological contingency. And yet, as Rostain says, it was wrongly assimilated as a "new economics" with all the gravitas afforded that discipline and discourse because it utilized much of the same generalizing language (2000) sometimes in excess of empirical findings.

Behavioral economists helped to complicate the assumptions that had gone into early formalism, and they added nominal diversity to the ranks of law school scholarship and faculty recruitment. Their presence strengthened L&E against challenges from interpretive social scientists that, in practice, human beings rarely behaved in the predictable and atomistic ways that had been taken for granted when using economic reasoning to propose new legal rules and outcomes (Rostain 2000). With the behavioralists influencing debates, the use-value of interpretive social science – especially anthropology with its seemingly slow, long-term fieldwork methodology – seemed especially limited. Worse yet, as Jeffrey Kahn writes, anthropology remained seen among many legal academics as the purveyor of evidence on the "primitive," an argument echoing that of Michel-Rolph Trouillot's influential (2003) essay on anthropology and the so-called "Savage Slot" (Kahn 2022: 793).

But even after behavioralism, one remaining limitation in L&E was its elision of the social complexity that underpins most legal rule formation, practice, and institutionalization. That limitation was most pointedly raised by Sally Engle Merry in her work on quantification in the human rights sector (2016).[6] Already, as taught and learned in the Western legal profession, culture, and ethics are omitted as not quite fact or law, and therefore not relevant to legal analysis (Mertz 2007). This despite the certain grounding of law in relationships and symbolism (Mezey 2001). Coupling that tendency with the approach of mainstream economics, the L&E movement appeared to shift these considerations *even further* from the center of analysis and discussion.

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L&S scholars tended to view L&E in general as reductive and threatening to a socially grounded perspective on the meaning of law. Possibly for these reason as well, there has been no direct impulse to "answer" the call Calabresi and Bobbit issued in 1978, nor the renewed call Calabresi issued in 2016. Nevertheless, there have been a few efforts to account for economic behavior and values in the social sciences and humanities that resemble indirect responses. These scholarly positions can be sorted into ones about neoliberalism, capitalist legal architecture, and law and political economy.

The critical study of neoliberalism in the social sciences dates to the 1970s with Michel Foucault's famous (Foucault 2008 [1979]) *College de France* lectures on the topic seeking out emancipatory potential in the opportunities created by Chicago School economics. As sociologist Daniel Zamora has said, "His analysis is remarkable in that it represents one of the first attempts to closely study neoliberalism as a thought collective – the things that united it as well as the great differences that coexisted within it" (Zamora 2019). The topic was not widely reexamined until the 1990s (2019), and in the early 2000s, monograph-length intellectual histories from David Harvey (2007) and Aihwa Ong (2006) traced the line between Milton Friedman, the Washington Consensus, Reaganism/Thatcherism, and the structural adjustment programs of late-twentieth-century globalization. Running throughout that lineage was a progressively more intense disdain for social welfare programs made possible by a high-level rebranding of government social protectionism as "anti-freedom" (Harvey 2007). That rebranding framed "society" – taken for granted as the basis for widespread political cohesion since the New Deal – as a problem for individual liberty.

In the wake of these larger historical observations, anthropologists and sociologists carried out field-based studies to examine the lived realities of *social* life in an era when society came to be seen as a "cost" rather than "benefit" in itself to public management. In *The Paradox of Relevance* (2011), Carol Greenhouse finely summarized work in anthropology during the 1980s that captured the effects of a dismantled social welfare state. Included there is Steven Gregory's *Black Corona* (1998), about activism in a black community in deindustrialized New York City, as well as Aihwa Ong's *Flexible Citizenship* (1999) about transnational elite migrants in San Francisco. Both works illustrate problems of citizenship arising between public and private action at a time when the state seemed to straddle both domains. Elsewhere, the philosopher Michael Sandel (2012) decried contemporary experience as subject to the "marketization of everything" – a conception that has come to capture in simplified form the general effect of "neoliberalism." Scheppele (2010) traced the roots of neoliberalism to the end of the Cold War ideological "competition" between the United States and Soviet Union, and Urciouli (2010) observed the effects of this shift in education, where students are now taught to approach learning as preparation for the workplace more than an exercise in critical thought or intellectual dexterity. The latter is consonant with the writings of Giroux (2014) and Newfield (2016) and has its starkest implications for Wendy Brown's (2015) thesis that preparation for democratic citizenship is now largely a preparation for "market-based" citizenship.

In the ensuing years, some wrote about the role of lawyers in the architecture of global capitalism. Riles (2011) argued that lawyers were uniquely responsible for establishing and collateralizing the transnational financial system that enables instantaneous, global transactions. Pistor (2019) showed cogently the way that legal experts

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were central in encoding tangible goods and services like land and labor with the labels necessary to bring them as tradable commodities into the global market. If there was a "marketization of everything," in other words, one could find lawyers present in the moments where objects are irreversibly converted into marketable material for capital.

Still, more direct confrontations are visible in the Law and Political Economy movement that emerged in the wake of the financial crisis of 2008. Based largely in U.S. law schools, that movement resurrected the work of Polanyi (2001 [1944]) as applied by contemporary writers like Fred Block and Margaret Somers (2014) and Nancy Fraser (2013) and focused on distributive inequality along class and race lines. It has taken direct issue with the separation of politics and economics in the widespread acceptance of L&E. Its events have included a symposium of Soviet legal history, and it has proposed a suite of training workshops and teaching materials to bring the critical Left economics perspective into mainstream legal academic work (LPE 2022). Leaders of the movement such as Kapczynski et al. write that, "we find ourselves in a moment of political crisis and accompanying intellectual upheaval: an old order of political economy and its legitimating concepts are crumbling, but a new order has yet to emerge. The outlines of the battle for a new order have come into focus" (2020: 1833).

Whereas this new LPE movement in North America is largely a law school phenomenon, it echoes the longstanding work of political economists in other disciplines. In the United States, "political economy" has been largely associated with either Marx and critiques of Capitalism or with Smith and Mill and the later Libertarian movement. Because U.S. professional law had embraced neither of these traditions at its core – and indeed has largely tried to serve as regulatory safeguard for capitalist modes of exchange – political economy remained somewhat neglected among U.S. law schools until the financial crisis, market crash, and Occupy movements made it impossible to ignore. Outside U.S. law schools, the topic has of course been prominent in political science. There, macro-level policy, development, and institutionalism have been key topics (e.g., Hall 1989; Lindblom 1977; Soskice 1994). In anthropology, several (e.g., Graeber 2011; Harris 1979; Steward 1972; Wolf 1982) have focused on culture's mediating role between politics and economics. And in sociology labor and embeddedness – the degree to which economic activity can be treated as a subset of social life – have been key interests for decades (Block and Sommers 2014; Burawoy 2007; Fligstein 2001). The LPE movement has built on these various approaches, citing several of the above authors, to identify law's role in supporting structural inequalities caused by extant political economy.

But, despite these rich, substantive responses to the problems neglected or exacerbated by L&E, none has directly contended with the challenge that Calabresi posed: to develop a theory of value that accounts for the moral costs of inequality – and the difficulty ameliorating inequality when "value" is reduced to "price." Critiques of neoliberalism in L&S have boosted the relevance of sociolegal scholarship in this regard. But the tendency to observe and study virtually everything as an object of marketization may miss the important point about the "costs of costing" Calabresi describes, and it can have a tendency to reify the all-pervasive character of "the market" when lived realities suggest not only considerable resistance but also in some cases all-out refusal. The fusion of early L&E with the "conservative legal movement"

https://doi.org/10.1017/lsr.2024.46 Published online by Cambridge University Press

(Teles 2008; Southworth 2008; Hollis-Brusky 2015) by itself suggests that, even on the Right, the application of market logics to legal reasoning may be unwelcome in areas where conservative values would dictate antimarket adherence to a cultural, religious, and moral status quo (see, e.g., Tappe 2021).

Similarly, the "collateral" (Riles 2011) and "code of capital" (Pistor 2019) architectural arguments advanced from within the legal academy are about the professional posture of law with respect to global economic transactional life. They tell us that the default or modal role for lawyers in this economically determined structure is that of a technocrat, a functionary, or a middleman; this lesson is important, but it may not advance theory at the intersection of law, society, and economics in the way I am aspiring to in this piece. And finally, the Law and Political Economy group has brought key Left perspectives to far-reaching economic imperatives, especially among legal academics. But its role has so far been a somewhat bibliographic one: attempting to introduce legal scholars to social theorists and economic thinkers that they otherwise might never encounter. Such readings, meanwhile, are commonplace in graduate seminars among the social sciences and humanities, and the great added-value of LPE to this conversation is thus far mostly limited to JD-only law faculty, particularly in the United States. If anything, it conjures the same observation Calabresi offers: that even among "command" economies there can be moral costs to dictating the distribution of merit goods. Thus, recognizing the intellectual history of "command" structures complicates the wisdom of all-encompassing markets, but it introduces the same set of problems related to *tastes* and *merit goods*. In other words, each of the above schools of thought have a valuable place in and around the L&S community, but none directly engages the call to understand the costs of costing at the center of Calabresi's Invite.

And yet, my own efforts to excavate lessons for sociolegal studies by comparing its approaches to L&E – here and in a parallel ethnographic project – are clearly not without precedent. In 2004, LSA President Lauren Edelman wrote that the two fields had much to offer one another given a certain willingness to self-reflect (Edelman 2004). And, as Richard McAdams (2004) pointed out, it was not as if each field operated ignorant of its own respective deficiencies. It was that LSA scholars remained unfamiliar with the ways contingency already figured into economic theories of law, and of the functional importance economic rationality has even in the face of that contingency. This essay takes up McAdams' call for attention to these nuances. As I am arguing in this piece, economic anthropology's accounting for "value" now offers an apt response to questions about tastes and merit goods in L&E raised by Calabresi.

Leaving Chicago: Calabresi, tastes, and merit goods

Calabresi's attention to issues surrounding moral costs was clearly a departure from Chicago L&E. Chicago's early use of economics to understand the effects of law on market activity arose during and after the New Deal era (Teles 2008). At that time, government intervention in the form of stronger regulation of currency and financial markets, as well as robust social welfare programs, were accepted as necessary remediation following the market crash of 1929, and the speculation that had caused it. But would these legal innovations – creating greater dependency on "command structures"[7] – help or hinder a return to "healthy" market economics?

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The urgency of that question was elevated by the Legal Realism movement of the period, which held that jurisprudence could be understood as a function of psychology and sociology, and that legal institutions sit in a feedback loop with social policies and inequalities (see Duxbury 1995; Fisher, Horwitz, and Reed 1993; Mertz 2016). To properly modernize law's presence in twentieth century, urban America, lawyers needed to take better stock of the ramifications of law *in* society (Duxbury 1995: 302). That meant on one hand fewer pretenses about law as a formal "science" or, worse, as a product of "nature." And it meant, on the other hand, a stronger marriage of law with academic disciplines such as psychology, sociology and economics – an impulse that was later reinvoked in efforts by impresarios like Aaron Director and Henry Manne to bring economists into law schools (Teles 2008: 102). Although it has been said that L&E in recent decades is a kind of neo-formalist school of legal thought, it is important to view the subfield as it stood at the time of its formation as "other" to law and therefore not supporting the latter's formal purity (Aber 2020).

The earliest presence of economics in law schools started in the area of antitrust law well before legal educators in general were hospitable to the idea of economists on their faculty (Teles 2008: 95–97). Richard Posner, who rose to prominence as one of the most influential lawyer-economists, began his professional career in the Federal Trade Commission's antitrust division (2008). Antitrust law, with its New Deal roots and antimonopoly goals, was the strongest foothold for economics on law faculties by the time institutional entrepreneurs came along in the 1950s to build a movement (see, e.g., Calabresi 2016: 12).

At Chicago, Aaron Director on the law faculty was instrumental in creating what would come to be called the "Chicago School" (Ebenstein 2007; Teles 2008). He created a circle of sympathetic colleagues across the law school and economics department, a group of young lawyer-economist fellows, and a new showcase, the *Journal of Law and Economics*, whose first article was on monopolies in Britain (Jewkes 1958). Director is credited with attracting the likes of Frederik Hayek, Ronald Coase, and Richard Posner to Chicago, and with securing the publication of Hayek's seminal *The Road to Serfdom* (Stigler 2019). Although he published next to nothing himself, the key writers of the Chicago School would attribute much of their rhetoric to Director's teachings and leadership, while most of the law school converts to the economic approach to law – names like Henry Manne and Robert Bork[8] – credit Director's seminars as their inspiration. So, on one hand, the Legal Realist movement which shaped "command-oriented" New Deal law and policy also helped create the opening that allowed professional economics to enter legal academia and scholarship. And on the other hand, what came to be termed "Chicago School Economics" was the result of efforts waged first from the *law school* rather than the economics department (Teles 2008).

For these reasons, modern L&E can be considered more closely aligned with neoliberalism today than disciplinary economics. But this outcome was not inevitable. Before Director started at Chicago, the dominant ideology spearheaded there by Henry Simons was a conservative classical liberalism suspicious of all kinds of concentrations of economic power as anticompetitive (Van Horn 2011). Director, meanwhile, had met with Hayek and George Stigler in Switzerland at the Mount Pelerin Society with funding from the conservative Volker Fund (Stoller 2019). There, the group brainstormed the pro-market, corporatist form of liberalism that Director would later espouse and promote at Chicago. The early days of American L&E, grounded in the anticorporate

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antitrust policies of the New Deal era, gave way to a new business-friendly liberalism that viewed labor unions as monopolistic and threatening to freedom, but saw concentrations of corporate power as a healthy path to maximizing social utility (Wu 2016). Zooming out to the macro level, this set of core ideas would become a template for late-twentieth-century political battles more generally. As some have written, the vision of Aaron Director about the proper role of society *in* economy (rather than the opposite) has become the predominant, even default way of speaking about socioeconomic life today (Stoller 2019; Wu 2016).

Despite its fairly unitary origins, L&E soon experienced an important subdivision into Economic Analysis of Law (EAL) on one hand and L&E on the other (Hylton 2018). When outsiders, including myself, speak of L&E we are usually speaking about *both* of these hemispheres of the subfield. But, internally, the difference is meaningful: EAL, according to Calabresi (2016) is the application of economic theories to the application of law and policy. L&E, he writes, is the use of economic and legal methods to refine theories in both fields (2016). The former is analytical and didactic while the latter appears iterative and reflexive. Those practicing the former, such as its main figurehead Richard Posner – considered the most-cited legal scholar in history (Weiss 2021) – saw few limitations in applying economic analysis to *all* aspects of the professional and academic legal fields including among other things sex (R. Posner 1992), love (R. Posner 1996), literature (R. Posner 1988) and anthropology (R. Posner 1981). It is an imperious and fast-moving version of the subfield; as such, its writers have generated prodigious amounts of textual output and enjoyed the higher citation counts that follow from that. But some are less sanguine now, despite the early successes, about stretching the economics approach this broadly without empirical grounding (Calabresi 2016).

Most lawyer-economists are not empirical researchers, but empiricism has grown in popularity among them. Importantly, the earliest and still most-influential lawyer economists had little or no graduate training in economics (Calabresi 2016). They had generally not conducted original empirical research prior to or during their careers as legal scholars. Economic methods in general are able to make productive use of existing data sets, so this is not altogether limiting. But attention to how data is gathered or what information is left out did not enter mainstream L&E discussions until recent decades. Since, there has been a growth in Empirical Legal Studies (ELS) with prominent legal academics offering empirical research "boot camps" during the summers for non-disciplinary law professors with institutional support for professional development and research (Suchman and Mertz 2010, 558). The ELS movement has also tended to emphasize quantitative methods and, in particular economics and political science as disciplinary bedrocks (Suchman and Mertz 2010, 558).

Perhaps for these reasons, the ELS movement has, knowingly or not, largely missed Calabresi's Invite; whereas ELS embrace a positivist brand of social science research, Calabresi's appeal to anthropology was ostensibly a call for *interpretive* social research: what is "value," how does it take form, how might it vary contextually, what does it mean to individuals and groups, and how might "value" be difficult to translate into simple terms such as "price" or "willingness to pay"? Calabresi seemed to understand that the key for answering these queries could be held by the interpretive social sciences. Reflecting that understanding, a starting point for Calabresi was in the domain of "tastes."

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"Tastes"

Tastes refer to not only the kind of preferences that individuals exercise individually when permitted, but also the kind that intersect with social conditioning and expectation. One's taste for fashion or interior design for example – both admittedly privileged preferences to exercise – result from an interaction between what we think we "want" and what that desire means in the context we live in.

As Calabresi and Bobbit explained, our choices as a community whether or how to come to valuations of our most cherished goods are themselves exercises in taste. In *Tragic Choices*, Calabresi and Bobbit are concerned with the moral costs of, "scarcities which make particularly painful choices necessary" (1978: 17). Why must "societies"[9] resolve such scarcities through programs of resource allocation? The reason, they say, is that acute scarcities – for instance, a water shortage in an arid landscape – generate moral problems bringing together issues of need, desert, fairness, and equality (1978: 18). In such instances, "doing nothing" is still a choice, and societies that choose this are making a statement as well. "[S]scarcity, they write, "is not the result of any absolute lack of a resource but rather of the decision by society that it is not prepared to forgo other goods and benefits in a number sufficient to remove the scarcity" (1978: 22). Two things about this explanation are noteworthy. First, the authors say, objective indicators such as "efficiency" do not suffice in making allocation decisions under conditions of dire scarcity; rather, "society" demands other values such as "honesty" and "equality" be considered as well (1978: 23–24). Why? That leads to a second stark realization taken up in Calabresi's later (2016) book: decisions about how systematically to allocate scarce resources are *themselves* a matter of individual and collective taste.

The latter can be seen in the choice between market and non-market forms of allocation. In market forms, "society" must decide on *what* counts as a good or service and *which* goods and services should be subject to market exchange. In most places, watches and cars pose little confusion – they are likely marketable goods. But what about bread and milk – items families and individuals need for nutrition in many parts? Further still, what about love or individual military service? The choice to marketize these as goods or services may pose no problem to some, but it likely poses a significant problem to others who would say neither love nor sacrifice for country should be bought or sold. In this case, the choice to marketize has costs; Calabresi calls this derivative the "cost of costing" (1978: 32).

Furthermore, the choice of whether or not to marketize specific goods and services is relatable and concrete but no more important than the choice of *whether to use market or command structures* in the first place. *Market structures* in this case means any form of individualized free exchange system, whereas *command structures* are organizational units that centralize control over exchange at a certain level. At the highest level of analysis, an entire economy might utilize one such format making it a "market economy" or "command economy." So, a command structure might be the entire Soviet economy fixed by the Politburo, but it could also mean the Acme Corporation which dictates that employee work shifts shall not be traded freely between individuals – despite claims that workers "own" their own labor.

In *The Future of Law and Economics*, Calabresi follows Susan Rose-Ackerman's (1985) earlier advice that market and command structures should not be viewed in hermetic,

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Manichean perspective but rather in highly nuanced, interwoven, and complicated concert with one another – even in entire economic systems that avow capitalism or socialism (1985: 126). That was later echoed by economic sociologist Viviana Zelizer's "multiple markets" paradigm – the idea that different forms of exchange might coexist in one space (2010).

One of the key places to see this mixing of market and command is in the example of charity. Commanding citizens to perform charity destroys the moral value it normally carries. As a result, in the area of charity, societies have developed complex "mixed" market and command structures designed to honor people's moral sensibilities about altruism and beneficence. For those interested in contributing time or money, the effort can be purely voluntary, and they can, in exchange for their voluntarism, feel good about sacrifices. For those who need to be compelled to support those in need, we also have public assistance programs into which all are required to contribute indirectly. Any lawyer-economist argument that one system or another is going to be *more efficient* at achieving reallocation of resources might be correct. But, as Calabresi suggests both in 1978 and 2016, that argument should state its assumption that the "cost" of moral discomfort created by eliminating one or the other option is either negligible or worth the benefit it creates. What we see instead, generally, is no mention of this cost associated with taste.[10]

The recognition that "taste" underpins meta-level legal-economic choices also suggests that relativism might play a role in understandings of economic valuation. Relativism, as I am using it, refers to the view that moral preferences are valid in their discrete social contexts, meaning that (1) they cannot be evaluated without recourse to the empirical realities of those contexts and (2) they cannot be invalidated outside of them. This perspective on social norms and culture saw its apogee in the work of the Boasian anthropologists, who used fieldwork anthropology to contextualize the values of both "primitive" native cultures and urban metropolitan minority communities (Stocking 1982). Their legacy became a fundamental feature of the antiracist movement in the United States following World War II by insisting on empirical observation of minority and native beliefs and practices, on proper contextualization of beliefs and practices that seemed "exotic" on first glance, and on opposition to the idea of racial difference as merely a biological fact (Stocking 1982).

The message implied in Calabresi's "tastes" is similar: value may be relative. It complicates the easy (and now anachronistic) economic perspective of humans as rational value-maximizers – essentially as biologically determined creatures in search of survival and comfort. It does not invalidate that view, but it follows Mill (2002 [1863]) rather than Bentham (1988) to say people's values relate to a far deeper set of preferences and choices in their world. Whether to give money to charity, and which one, is just one familiar example where value can be unrelated to survival of the Self. And it goes further to say that the preferred economic structure, *market, command, mixed*, or otherwise relates to the many variations in such preferences people harbor. But, with Haraway (1988), I would suggest these reflections go beyond an objectivist-relativist dichotomy in value theory. They rather suggest that forms of knowledge come to take on an objective quality *because of* situational fit – whether on a grand or small scale. Further still, the capacity for and participation in this situational fit regarding a person's or community's approach to valuation can become the basis for its membership in "legitimate" structures of knowledge and power. If scale should matter to theories of

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valuation, then those theories must now account for complications from globalization and pluralism.

Fieldwork in legal anthropology and transnational sociology of law have already challenged the notion that economic tastes could be assumed universal. This obvious conclusion has been slower to reach L&E. Repeatedly, its writers have asserted without qualification that "people tend to …" as they generalize from psychological experiments to real-world, global behavior.[11] But, as L&E has grown more global in scope, it has seemed to puzzle over large variations in legal behavior across borders, variation that would seem clearly correlated with variations in culture.

L&E, generally so interested in quantitative data and analysis, has largely been forced to "black box" (Tejani 2013) questions of culture if they are acknowledged at all. Beneath this tendency has been a tacit belief that social life is economically determined, with culture and relationships serving functionally as "glue" binding groups into markets (e.g., communities) and ensuring transactions will be repeatable (e.g., etiquette to encourage trust). But never has there been systematic treatment of culture as the *source* for moral norms that would lead to economic decisions that defy biological need, though this defying role is considered by some to be the hallmark of morality (Laidlaw 2013). What Calabresi (1978) appeared to call for, indeed, was this more systematic treatment from the discipline seemingly most poised to offer it. One way to approach this, he said, is to examine the way individual societies decide what should be subject to economic exchange – in other words, what communities do or do not consider "merit goods."

Merit goods

In 2016, Calabresi revisited his 1978 "appeal for help" with a lengthy discussion of *merit goods*; this phrase comes from prior economists, but Calabresi fleshes it out with a two-part definition:

> Some are goods that a significant number of people do not wish to have "priced". That is to put it in a more traditional way, they are goods whose pricing, in and of itself, causes a diminution in utility for a significant group of people … But other goods, to which the term "merit" is appropriately applied, are goods whose pricing is not intrinsically negative. They are goods whose bearing a market price is not *in itself* costly, but whose allocation through the prevailing distribution of wealth is highly undesirable … It is not their 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 (26).

In other words, the externalized costs of merit goods – costs from either designating or allocating them – are not transactional or environmental, they are moral (27). This assertion has implications for the relationship between L&E and sociolegal studies. First, it anticipates and attenuates the critique, common in the social sciences and humanities, about the "commodification of everything" (Immerwahr 2009). If, as Calabresi says, lawyer-economists need to grapple better with merit goods, then they must essentially recognize that there are wide moral costs to commodifying certain things that many would prefer to keep beyond the market.

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Second, this assertion creates a pathway away from behavioral economics' preoccupation with psychology. True, the moral costs referred to here have mental effects that can be called "suffering" (1978: 27). But this suffering is not the result of some inherent, natural aversion to marketization in specific sectors. It is rather the result of a discomfiture between the stated moral universe established by a culture and the practiced moral economy – the balance of morality and exchange – of the society in question. It can therefore be studied through social research, and a closer look at some examples is instructive.

One such common example is the "price of life." Since the industrial revolution, lawyers have been moved to try to assign a number to the value of life. The arrival of new modern machines (e.g., trains, planes, automobiles, printing press, woodchipper) brought ever new ways to have lives cut short or qualitatively diminished from injuries. Much of modern tort law consists of rules and theories dating from industrialization (Horwitz 1977). Yet today's prevalence of corporate life and litigation culture means that virtually any enterprise sending consumer goods and services into the stream of commerce can be subject to liability for resulting injury and death. Growth of liability insurance is one result, but so is the growth in corporate defense law and, with that, the arguments over what dollar amount to place on human life both *ex ante* and following an accident. The infamous Ford Pinto case *Grimshaw v. Ford Motors* (1981) is often cited as an example of all-too-obvious organizational efforts to rationalize known poor safety in an automobile on the basis that it would "cost" less based on the valuation of life to simply pay damages *ex post*.

In the regulatory universe, the "price of life" has become a common feature in the "cost–benefit revolution" Sunstein describes (2018). Sunstein favorably evaluates Reagan's 1981 Executive Order 12291 requiring all executive agencies to justify their policies based on cost–benefit analysis. He shows the historical embrace of this rule by subsequent presidents including Obama and Trump, and he describes his own efforts to include the valuation of life – said to stand at nine million USD – in these calculations. The use of "price of life" calculations in these instances can quickly sound sinister: one case involves a corporation determining whether you are "worth" safety precautions, and another the federal government determining whether the savings of X number of lives justifies the loss of Y number of jobs to an environmental regulation. But in more quotidian cases, like when an individual middle-aged father is killed by a Greyhound bus, the valuation of life can be an important tool in assessing damages needed to render his surviving spouse and children "whole" – an impossible task never fully achieved by law. With this limitation in mind, we should separate the *result* of applying this valuation from the *act* of coming to it in the first place. As Calabresi says, it is the act of arriving at such valuations that many find morally costly: "The pain I suffer from having an exact price put on 'life' *is* real. And so is the pain I suffer if I see the rich buying body parts that pretty much only the poor sell" (2016: 28).

A second example where L&E has largely neglected "merit" in this sense is in the case of education. In the social sciences and humanities, the subjection of education to market forces has become the target of numerous criticisms (Aronowitz 2001; Best and Best 2014; Giroux 2014; Newfield 2016; Tejani 2017). But the existence of private education by itself is not what causes moral objection for most people. Education is rather a merit good of the second variety Calabresi identifies (2016: 26). It is not the pricing of education that troubles us but the realization that the distribution of it

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likely follows the contours of existing wealth inequalities (79). This is an all-important observation because some have argued *more pervasive* pricing – that is marketization by privatization, technological access, intensive marketing, and flexible programming – was the key to reducing educational inequality (Sperling 2000). That, however, would only prove correct if the *quality* of educational opportunities remained equal. If it did not, as we know to be true, then those "consuming" education from new or nontraditional providers are merely paying more to remain in the lower education stratum. Recent research on the for-profit higher education sector reveals this contradiction to be exactly the case (Cottom 2017; Tejani 2017).

Vexation over merit goods – what I have termed Calabresi's Invite – highlights the glaring need for more methodical understanding of the multiple meanings latent in the term (and idea) of "value." As I propose, the anthropologically infused notion of "situated valuation" expands the standard L&E account. In turn, it helps to show why certain decisions that seem "irrational" or "inefficient" to the remote empirical observer are in fact understandable from within the context of the situated economic actor. This approach is not rationality "bounded" by limited context, it is taste complexified by social entanglements not typically viewed or understood in standard L&E accounts. Situated valuation accounts for moral costs, and this accounting has important ramifications for the study of distributive inequality in L&S.

Discussion: situated valuation and distributive inequality

As this section emphasizes, a *situated* approach to economic value, at least among others, may be useful for sociolegal scholars in explaining why some policy efforts to address distributive inequality may fail. Starting from an assumption of individual rationality, high-level policy reforms to effectuate redistribution – for example, through the tax system (see, e.g., Goldin and Kleiman 2022) – apply conceptions of value considered "objective" yet highly abstracted from approaches to value found most among people who would benefit from redistribution. Situated valuation helps by moving away from presumed individual or bounded rationality as the central organizing concept of economic behavior, and instead views value as a loop between individual desire and collective meanings and deliberation.

This concept substantially builds on the work of economic anthropologist David Graeber in *Toward an Anthropological Theory of Value* (2001). There, Graeber surveys the anthropological literature for development and uses of "value" to find that (1) the concept has been a staple of such writings since nearly the advent of the discipline and (2) there has been no consensus about its accepted meaning. He explains this as a result of the multivalence of the term, and then disaggregates it to find three parallel uses – sometimes joined in pairs, but rarely acknowledged as layered. These can be paraphrased as follows: *willingness-to-pay*[12] valuation based on demand – what most lawyer-economists (and lawyers actually) are thinking of when utilizing the term; value as *meaning* in the linguistic sense; and value as *desirability* or measure of social goodness in the sociological or ethical sense (Graeber 2001). Interestingly, after initially separating these layers, Graeber then sees them as parts of a whole: "Value … can best be seen in this light as the way in which actions become meaningful to the actor by being incorporated in some larger, social totality – even if in many cases the totality

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in question exists primarily in the actor's imagination" (2001: xii). In other words, precisely *because* of its multivalence, value allows us to see the deeply integrative function of desire. It captures the relationship between *wanting* or *needing* something and *being part of* something.

The study of merit goods and the myriad questions they raise about society and culture remain an underexamined area for sociolegal research, and one that I am advocating in light of growing inequality. Situated valuation accounts for moral costs by considering how inequalities can cost the responsible community morally, and can therefore impact the value added by particular goods. As described above, situated valuation strengthens L&S's approach to inequality by pinpointing exactly what it adds to extant economistic approaches and models.

But even as Calabresi rightly identifies the paucity of nuanced value theory in L&E (2016), "value" has enjoyed substantial attention in philosophy, sociology, and some economic theory. Lawyer-economists have appeared more open to theoretical advances from these fields than, for example, anthropology. These observations suggest at least some possibility of a "soft landing" for the claims raised in this piece. For instance, lawyer-economists may be most familiar with Becker's (1996) book on tastes, where one entire chapter is dedicated to the "economic way of looking at life" (139). There, lamenting a narrow adherence to rational choice, Becker recognizes the relational (socially and temporally) nature of value:

> Actions are constrained by income, time, imperfect memory and calculating capacities, and other limited resources, and also by the opportunities available in the economy and elsewhere. These opportunities are largely *determined by the private and collective actions of other individuals and organizations.* (1996, 139 [emphasis added])

Most interesting about this observation from a Nobel-Prize winning economist is not that "other individuals and organizations" *influence* economic choice, it is that they may *determine* those.

Similarly, Elizabeth Anderson's seminal *Value in Ethics and Economics* (1993) challenged the singular meanings assigned to "value" given what she called the inherently "pluralistic" character of value and evaluative faculties. Others have extended this nuanced perspective on value to suggest markets – where singular, generalized valuations can be enforced by the powerful – are limited in their moral capacity to meet the needs of many (Sandel 2012). And a related strand of thought has examined the sociality of money – the lingua franca of valuation across spaces and times (Zelizer 1994).

The literature on value theory reflects a recognition of the need for nuance in fields adjacent to economics. Whereas lawyers have been slow to embrace anthropology, they have drawn from philosophy and sociology in attacking select problems about language and structure. I am suggesting that richer value theory from anthropology – hailed by Calabresi in the titular invite – has an important place among these extant contributions, and that, together, they can support a better understanding of distributive inequality and law.

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Distributive inequality

With roots in Marxist-influenced Critical Legal Studies, sociolegal studies has long examined issues related to inequality as such. "Law and inequality," or "law and poverty" have comprised research agendas in their own right for decades (Seron and Munger 1996). There, writers examined the unequal application or effects of law on poor, rural, inner city, and ethnoracial minority communities. But interest in *distributive inequality* as allowed or exacerbated by law is a more recent development. Whereas it might seem central to the priorities of sociolegal studies today, the study of distributive inequalities in L&S appears to have resurfaced as a central topic primarily in the past decade or so. Levitsky et al. (2018) assert that this marginality was the result of a somewhat formalist approach to the definition of law and related problems in sociolegal studies. "Rarely have sociolegal scholars considered how legal ideologies, symbols, and categories shape the absence of laws on the books. As a result, when social welfare laws began disappearing, sociolegal scholarship drifted away from studying law's role in creating, sustaining, and reinforcing economic inequality" (2018, 710). This observation echoes one made even more substantively by Carol Greenhouse in 2011, which points to the retraction of social welfare policies as a leading cause for the seeming retreat of "relevance" ascribed to ethnographic research in the United States and globally (34).

Beneath "the absence of laws," one of the precipitating reasons for the return of distributive inequality has been recent failures in the global financial system. Such failures include massive corporate accounting scandals in the early 2000s (Tejani 2022), the collapse of credit markets around 2008 caused by state-sanctioned predatory lending practices (Tejani 2017), and most recently, rampant inflation spurred by the COVID-19 pandemic and policies to manage that (Ball, Leigh and Mishra 2023). Petit and Lyons (2009) examined incarceration timing in individual prisoners' lifetimes for its effect on long-term employment and income opportunities. And, in 2014, in her review commentary for Michael McCann's (2014) "The Unbearable Lightness of Rights," Sally Merry praises the author's mastery of the rights framework in reducing legal and extralegal discrimination, but laments that a key limitation of that framework has been its failure to ameliorate economic inequality (2014). Both Richard Lempert (2010) and Carroll Seron (2016) made economic inequality central to their LSA presidential address remarks on racial discrimination and engaged scholarship, respectively. And Bea and Poppe (2021) recently described the effect of racial and socioeconomic classifications on intestacy and its outcomes noting substantial inequalities as a result of marginal status based on their data.

These discussions signify a welcome return of interest in distributional inequality in L&S. And yet, missing still is a thorough treatment of value rooted in interpretive social science that would enrich evaluations of distributive justice policies. Of the six examples listed above of scholarship on economic inequality in *Law & Society Review* from the past seventeen years, four make use of the term "value" in varying ways. But none defines that concept, let alone disambiguates which of the three meanings referred to above they might be using. Much like the anthropological literature that Graeber surveyed, the L&S literature seems to make a similar, sweeping omission. Yet given its general distaste for "simple economics," one would want to see more complexity in sociolegal studies' treatment of that transcendent and integral concept. Building from

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Graeber's three-part approach to *value* (*supra*), I have offered situated valuation as a step toward such a theory – one that is both inspired by Calabresi's 1978 call, and one that draws sociolegal studies and L&E into more direct dialogue than they have generally found themselves. So, what do we really gain from a situated approach to value at the site of distributive inequality?

Current legal regimes to address uneven economic distribution in the West, particularly in the United States, are typically developed and adopted by elites at the highest levels of knowledge production and policymaking (see Liscow and Markovitz 2022). These applied ideas tend to come from research academics at R1 universities or national think tanks, and they are proposed to lawmakers in regional or federal centers of government with the support of statistical or survey data. More rarely, are they supported by long-term or in-depth fieldwork. One prominent example of the latter data can be found in Matthew Desmond's now-seminal *Evicted* – an ethnographic study of housing precarity in Milwaukee during and after the real estate and banking crash of 2007–2008 (2016). In that study, Desmond spent over a year with low-income and unemployed residents in an era when property values were plummeting, interest rates were rising, rents increased, tenants were pushed further to precarity, and landlords sought evictions en masse (2016). Unlike flyover statistical data about atomized costs, willingness (and unwillingness) to pay, and consequences in the credit markets, Desmond's granular data showed readers the "value" – in this case, the meaning and ethics in Graeber's rendition – of housing to people squarely at the margins. As he argued, the high-level policies that permitted mass evictions – generally ignorant or indifferent to bottom-up conceptions of value – increased poverty in this and similar contexts (2016).

Eviction laws – about the rights of landlords to exclude underpaid tenants – are indirectly "redistributive"; but, as implied earlier, tax and social welfare programs are often directly aimed at distributive inequalities. These are macro-level policy choices that tend to adopt "objective" notions of value presumed universal by highly educated researchers (see, e.g., Backhouse 2009), abstract quantitative models laypeople would find mystifying (see, e.g., Seshadri and Yuki 2004), and cost–benefit analysis – required under regulatory law – that has worsened inequality by emphasizing efficiency according to Liscow and Sunstein (2023). While it may be understandable that macro-level problems like distributive inequality beget solutions premised on significant abstraction from daily life, this does not guarantee those solutions will be, on final analysis, helpful to the publics they were aimed at. On the contrary, in both the Desmond (2016) study of eviction and the Liscow and Sunstein (2023) study of cost–benefit in social welfare, those policies were shown to exacerbate distributive inequality.

This essay has generally dwelt in the theoretical demand for – and potential contours of – a concept like situated valuation. But the foregoing observations suggest potential policy significance in a way that might interest sociolegal scholars who care about distributive inequality. As Calabresi – prompted by "taste" and "merit goods" – and as Graeber – inspired by a triangular notion of "value" as *willingness to pay, meaning*, and *desirability* – both suggest, a situated conception of value is essential to evaluating the causes and consequences of ineffective redistributive law and policy, particularly when aimed at the most marginal among us. Out-of-touch top-down paternalism has been a concern in among certain observers of behavioral economics and its normative

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results (Kapeliushnikov 2015); for sociolegal scholars expert in the tools of qualitative interpretive social science, situated valuation represents a principled way we might address that. As Louie (2016, 9) summarizes, "Despite the scope of the challenge, research that thoughtfully considers the types of 'how' and 'why' questions that qualitative methods are well-suited to answering can form a body of knowledge that leads to change, helps reduce inequality, and improves opportunities and outcomes for young people across the country."

Conclusion

I have suggested that sociolegal studies and L&E have something important to gain from engaging in debate over problems of common interest. I further suggested that "Calabresi's Invite" is a particularly useful starting point. In light of that claim, this final section offers four suggestions to move this project beyond a single example and toward broader and more inclusive mutual engagement.

First, taking Calabresi's call seriously to study the problem of *merit goods* – and taste and moral costs surrounding distributions of them – means understanding better what merit goods actually are. Calabresi defines them as the types of goods that societies are uncomfortable relegating to market or command structure distributions. These include tangible and intangible items such as charitable donations, military service, domestic labor, reproduction, organ donation, and so on. These tend to be items or actions that are imputed to reflect moral values and rest therefore beyond the socially determined realm of tradeable or fungible goods. And yet, there are clearly a variety of "goods" that sit adjacent to these that we in the Western world *do* trade by commodification and market exchange. Corporate retailer calls for charitable donations when we're asked to "round up" or "donate your change" are one example (Hessekiel 2019). Feminists in some quarters have suggested charging for domestic labor as an act of economic fairness to women (Meagher 2002). And surrogate childbearing is the subject of contractual negotiations – including for sums of money – while disputes about them are adjudicated like other service contracts (Harris 1992).

Sociolegal scholars have been aware of these marginal or interstitial economic practices and their negotiations in and around law. For example, Columb (2017) describes structural factors – especially economic vulnerabilities – enabling the transnational organ trade in East and North Africa. And Hendley (2004) argues that debt collection among Russian firms tended to reflect a "disinclination" to use courts to avoid state scrutiny. These examples reflect key structural lessons that emerge from rigorous sociolegal studies of marginal economic practices. And yet, neither frames its object of study – organ access or credit – in the language of "merit goods." Doing so could help bridge a discursive gap between economy and society and bring L&S into critical dialogue with L&E.

Thus far, generally, our studies tend to focus primarily on lessons about law and legality: how lay actors negotiate spaces where law is ill-developed, or how "the law" comes to be resignified in use by people making meaningful decisions with it. These approaches are important, but for the purpose of advancing the sociolegal study of economic behavior *I propose, first, that greater attention be dedicated to the comparative study of merit goods themselves.* How do different communities delineate what falls into this category or any local version of it? How do the different goods and services that fall

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into or out of the category compare? And how might acceptance and contestation of these assumptions delineate insiders and outsiders in the way that sociolegal scholars have long observed about litigation (Greenhouse, Yngvesson, and Engel 1994).

Second, how do communities choose to allocate these with and without intervention from the state? Once we better examine the various approaches to defining merit goods, what are the various techniques social groups have devised for allocating these among themselves? As already suggested, *both* market and command structures can be considered *dis*tasteful in many contexts. And yet, one of the strengths of social and cultural studies is the finding that human beings have devised myriad subtle ways to distribute merit goods that combine these or reject them entirely. These ingenious devices for spreading merit goods may in fact be one of the key features of human cultural adaptation.

Existing sociolegal research that chooses to focus on legality in economic "systems" plays a valuable role in holding the "type of system" constant while attending to other variables. So far, a review of the L&S literature around distributive justice reflects a general preoccupation with policing (Sunshine and Tyler 2003), criminal or civil procedure (Broscheid 2011; Rose 2005; Sutton 2013), and access to legal expertise and profession (Cornwell, Poppe & Bea 2017; Dinovitzer 2006; Liu 2008; Young and Billings 2023). These studies are important for illuminating the distribution of legal protections and mechanisms for inequality therein. But for understanding local innovations in the distribution of *merit* goods, the emphasis on law and procedural justice as goods in themselves may limit the potential for wider observations about the relationship between law, society, and economics at this important site.

What is needed are more studies examining other forms of economic distribution from a sociolegal perspective. Levitsky et al. (2018) make a similar call in their 2018 piece arguing for a reclamation of distribution for L&S. Levitsky's own (2008) work on health care entitlements remains one of the better examples of scholarship pursuing that goal successfully. Pushing this observation still further, *I propose foregrounding various ways of blending and rejecting economic system approaches when they are both "native" and "nonnative" to a society*. Here, *native* refers to the idea that an economic system such as capitalism is endemic to large communities such as the United States or Great Britain, and to the idea that a market-based allocation of merit goods within those might be *expected* based on this ambient quality, yet *rejected* precisely because it is the dominant one. To embrace the distinctive quality of merit goods, in other words, perhaps moral communities might reject the dominant distributive system *because* of its dominance, and perhaps this assertion of moral independence is more definitive than any "just" allocation of merit goods that results from it.[13] There may be an expressive quality in the local choice of allocative system. These are but some of the theoretical questions illuminated by a focus on merit good allocation.

Next, I would ask, what are the *costs of costing*, and what new economies might arise out of these? Recall the observation that it burdens communities when they are asked to trade, by market or command, items that they would prefer not to. I have already referenced sectors such as military service and education. Military service, of greater interest to political scientists and political sociologists, does not make significant appearance in the L&S literature. Education, on the other hand, does, and it most recently emerges as an illustration of contemporary neoliberalism (Kim and Boyle

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2011) or in discussions of modern legal education itself (Wilson and Hollis-Brusky 2018; Obiora 1996; Rubin 2014).

Health care is another apt example. Some in the United States feel that private markets for health care goods and services – when so many are too poor to adequately seek care through these mechanisms – implicates the moral standing of the wider society (Dees 2018; Fisk 1996). Already, medical anthropologists study the phenomenology of pain and suffering (see, e.g., Jackson 2011), as well as economies of care (see, e.g., Cook and Trundle 2020). L&S scholars are no strangers to the economics and moral stakes of health care inequalities. Heimer (2023) writes on preventable error in health care showing that regulators have imported "rational choice" assumptions long since questioned by behavioralists. Rao (2011) has described the administration of health care entitlement in the early American republic. And Kirkland et al. (2021) have described the social construction of "medical necessity" in the experiences of trans people. Such research sheds valuable light on the economic burdens and moral tradeoffs of current health care provisions. But *I propose those burdens and tradeoffs can and should be brought to bear as examples of the "cost of costing."* Thus far, in *Law & Society Review* (*LSR*), no single article or commentary uses this phrase, nor does any reference the notion of "moral cost." Several, albeit few, do make explicit reference to "moral economy" (see, e.g., Canfield 2018; Greenhouse 2012; Valverde 2011). In *Law and Social Inquiry* (*LSI*), only Herrington (2006) has used "moral cost" in describing the experience of death row attorney volunteers. "Moral economy" has appeared in fourteen articles, though none since 2017 (see, e.g., Swanson 2017). And no single article or commentary in *LSR* or *LSI* has ever used the "cost of costing." By taking up this phrase and responding to Calabresi directly, sociolegal studies of military service, education, and health care, among other things, can join broader debates about resource allocation and morality in law and policy.

And finally, engaging with L&E in this way might make sociolegal scholars uncomfortable because it collapses the significant opposition between "them" and "us" – a dichotomy whose origins and causes are both material and deeply symbolic. L&E, has served as an important counter-community, and counter-position to the ones long embraced in sociolegal studies. Few claim membership in both fields (cf. McAdams 2004), and research agendas have taken shape on both sides around trying to disabuse the other group of its assumptions (Cooter 1997; Posner 2021; Fineman 2005).

Following Durkheim (2014 [1893]), anthropologists have long argued that communities often "need" rival communities to establish or maintain definitions of themselves, particularly through periods of rapid change or scarcities in human resources (Borneman 1992; Evans-Pritchard 1940). And, as Reinhardt Koselleck reminds us, social histories are often marked by "assymetric counterconcepts" that allow communities to understand themselves by way of pat, albeit constructed, binaries (2004). While I would not propose that the sociolegal critique of L&E stands primarily on this ground, I do suggest that L&S scholars might feel they have something to "lose" by cooperating and collaborating with their main interdisciplinary associational rival.

But in the spirit of intellectual paradigm shaking (Kuhn 2012 [1962]), this possibility makes the search for common ground *more* rather than less attractive. Cross-disciplinary intercourse of this kind has been already broached by several key scholars. Some (Kennedy 2002; Hackney 2007; Fineman 2005) issued direct challenges to L&E at

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the level of first principles – challenges that did not significantly provoke responses among lawyer-economists. Others have sought more mutually constitutive forms of *rapprochement*. Lauren Edelman's LSA presidential keynote (2004) is among the best examples, as are McAdams' (2004) and Halliday's (2004) responses, refinements, and extensions of that. In recognition of the potential behind those examples, *I propose that Law and Society scholars make greater efforts to actively engage – through panels, workshops, symposia, etc. – counterparts in the L&E "movement"* working on related or adjacent problems such as welfarism, inequality, regulation, and even new reflections on ethical groundworks.

Synthesizing these proposals in a more general fashion, we might ask what the broader academic and societal gains would be from increased collaboration across the two subfields. In the first respect, this essay has sought to demonstrate that academic understandings of value have been limited by a two-fold problem: positivist social scientists such as economists may suffer from a reductive understanding of value that tends to exclude moral costs, while interpretivists have better captured "complexity" at the expense of pragmatic lessons for policymaking. The relationship suggested by this essay and its ultimate proposals aim to conjoin these complementary strengths for mutual gain – that is to say a nuanced *and* pragmatic approach to value better capturing the way our world works, or can be made to work. Lastly, the societal benefit is a similar but wider reaching one. Our current age is marked by extreme polarization in ideology and policy proposals the world over. Better dialogue between competing visions of the world – actual and prospective – has been a proposed solution to conflict in the age of "information bubbles" and media "echo chambers." The transdisciplinary intercourse spelled out in this piece models the trans-ideological work some have advocated, and it does so among expert communities with undeniable potential to shape, through evidence-driven policies, the world we share.

Acknowledgement. I thank Guido Calabresi, Eric Posner, Eric Talley, Lauren Edelman, and Deborah Hensler for very rich conversations about this project. I also thank Shubha Ghosh, Leo Coleman, Matthew Erie, and Joe Vavrus for comments on an earlier version of this argument. Audiences and participants at the University of Nebraska College of Law, the "Law & Society Meets Law & Economics" LSA 2022 roundtable, and the American Bar Foundation's 2022 Fall Speaker Series also gave valuable feedback on the ideas presented here.

Notes

1. Calabresi (2016). The Future of Law and Economics, p. 6.
2. *Id.*
3. *Interpretivism* in social science examines the ways humans experience and understand their surroundings, whether or not those precede human perception; *positivism* presumes a certain objective reality preceding human experience with it.
4. Haraway (1988) argues that "facts" become objective only once accepted in meaningful social relational contexts, and that group membership and belonging often depends upon this acceptance.
5. Similar might be said about the work of Christine Jolls (2006), Ian Ayres and John Donohue (2003), or more recently Zach Liscow (2021), and Goldin and Kleiman (2022) among others. But these authors are more reflective of the "empirical turn" in the subfield, and none yet approaches the theoretical and professional influence so far exerted by Calabresi inside and outside legal academic circles.
6. Dan-Cohen (2017) asserts that "complexity" is more of an "epistemological artefact" than an empirically observable fact for ethnographic discovery and description. I agree. But in this context, the term is

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used to signify depth of motivation in legal and economic action rather than technical nuance in comparing social structures. It presumes its opposite, "simple," to mean rational, value-maximizing, etc. rather than "primitive."

7. This essay uses the terms "markets" and "command" to signify, respectively, free trade among people and organizations on one hand, and centralized directed distribution on the other.

8. Bork said, "A lot of us who took the antitrust course, or the economics course, underwent what can only be called a religious conversion" (quoted in Stoller 2019).

9. Here I use the term "society" without nuance in the way Calabresi and Bobbit do. Whereas any anthropologist or sociolegal writer would explain and complicate this term, the authors use it in relatively flat, monolithic sense.

10. Mercuro and Medema (1997: 118) point out that efficiency is *contingent* upon presumed structures of rights, rather than vice versa.

11. See, e.g., Rachlinski (2011: 1692), Jolls, Sunstein, and Thaler (1998: 1477), and Sunstein (1997: 9, 10, & 14).

12. It is doubtful Graeber would agree with this paraphrasing; however, he may never have envisaged translating his own phrasing into legal academic terms for the transdisciplinary dialogic purposes I am using it here.

13. Laidlaw (2013) has suggested rejection of economic imperatives may be a defining feature of moral thought and action. This is where anthropological insight into moral economy may shed light on economic rationality where psychology and economics alone cannot.

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Cite this article: Tejani, Riaz. 2024. "Calabresi's invite: bridging Law & Society and Law & Economics through "situated valuation"." *Law & Society Review* 1–28. https://doi.org/10.1017/lsr.2024.46