

IS EXCLUSIVITY OF EFFICIENCY-BASED GOALS IN ACCIDENT LAW DESIRABLE?¹

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Abstract: *Author concerns himself with the question whether it is desirable that law only promotes economic goals. Acceptance of Posner's wealth maximization principle implicitly leads also to acceptance of current distribution of wealth and income. Calabresi doubts that acceptance of the latter is desirable and suggests that it is necessary, by means of social agreement, to define what distribution of wealth and income we consider desirable (just). Author focuses on the field of accident law and depicts the disagreement between Posner and Calabresi on the example of accidents of cars and cyclists. Author concludes that Calabresi's argumentation is more persuasive.*

Keywords: *efficiency, wealth maximization, accident law, tort law*

To write this paper, I have been inspired by the symposium “Law and Economics as an Applied Science. The Legacy of Guido Calabresi” which was a part of Prague Conference on Political Economy held in October 2012 at CEVRO Institute, Prague. During this symposium Calabresi gave a talk “The Place of Torts in Law and Economics: The Significance of the Liability Rule” and several leading scholars in the field presented their papers on particular aspects of Guido Calabresi's work.

In this paper, I would like to address the question of desirability of normative economic arguments (efficiency-based goals) in accident tort law.² My starting point is Cserne's thesis that acceptance of consequence-based, i.e. also efficiency-based arguments, has to be argued for on three different levels of normative discourse.³ In this paper, I am focusing on the third level which Cserne describes as the “political or pragmatic” level and which addresses the question of desirability of consequence-based reasoning.

I deal with the question whether it is desirable that efficiency-based goals are the only ones to be sought by accident law when assigning entitlements, or whether also distributional goals ought to be taken into account.⁴ My hypothesis is that assigning entitlements only according to one single economic criterion is not socially desirable. However, I also believe that efficiency belongs among the most important goals of accident law. I am mainly building on the (often implicit) discussion between Richard A. Posner and Guido

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² This means I am not interested in such kinds of torts as nuisance or defamation. I am also not interested in other ways that law deals with accidents than tort law.

³ CSERNE, P. *Consequence-Based Arguments in Legal Reasoning: A Jurisprudential Preface to Law and Economics* (September 28, 2010). TILEC Discussion Paper No. 2010-036. Available at SSRN: <http://ssrn.com/abstract=1684043>, p. 9.

⁴ I understand the term “entitlement” as it is used by Calabresi and Melamed. See CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1090. “Whenever a state is presented with conflicting interests of two or more people, or two or more groups of people, it must decide which side to favour.” Law decides “which of the conflicting parties will be entitled to prevail”.

Calabresi, two founding fathers of the contemporary incarnation of Law and Economics, in which Posner is to be considered a proponent of exclusivity of economic goals,⁵ meanwhile Calabresi suggests that it is not only the overall welfare of a society that matters, but also the way it is distributed among members of the society.

To contextualize the problem, it is useful to look at two approaches to accident cases involving a cyclist and a car. The first approach flows from a case adjudicated by the Czech Supreme Court⁶ in which the court postulated that a cyclist not wearing a helmet who is injured in a traffic accident is contributory negligent and is, therefore, not entitled to full compensation for his injuries. It needs to be noted that the court reached this conclusion on the basis of section 415 of the Czech Civil Code (1964) which states that “[e]very person is obliged to act in such a manner so that no damage to health [...] occurs.”⁷ It is evident that the case fell under the scope of a widely open norm, i.e. it can be considered a hard case as the ruling could not have been given just by application of the text of the statute. Interestingly, the court does not provide any argument supporting the conclusion that a cyclist who is not wearing a helmet is not acting in such a manner that no damage to health occurs.⁸

The other approach can be found in Dutch law. Section 185 of the Dutch Statute on Road Traffic (2004) provides that if a car driven on a road causes damages to a non-motorized road user – hence also a cyclist, the owner of the car is obliged to compensate the victim for his damages. Even though, in general, a cyclist may also be found contributory negligent under Dutch law,⁹ not wearing helmet, which is widespread in the Netherlands, has to my knowledge never been considered a reason for such a finding.

The presented Czech case and Dutch statutory regulation deal with conflicting interests of car drivers and cyclists. They illustrate different assignment of entitlements to the two involved parties. According to Calabresi and Melamed,¹⁰ in injury cases, state can either grant the injurer (driver) an entitlement to be free of liability or it can shift the loss by entitling the victim (cyclist) to compensation. Below I use a simplified modification of the presented approaches to the bicycle helmet issue to illustrate the debate about desirability of economic goals and to suggest the assumptions that might have potentially influenced the considerations of the Czech court¹¹ and the Dutch legislator (and the judiciary). I also use the bicycle helmet story to explain some of the concepts which appear in the paper.

⁵ I am referring to Posner's earlier works. An interesting overview of the development of Posner's convictions can be found in MATHIS, K., SHANNON, D. *Efficiency Instead of Justice?* Springer, 2009, pp. 143–183. Currently, the most notable proponents of exclusivity of economic goals are Kaplow and Shavell. See KAPLOW, L., SHAVELL, S. *Fairness versus Welfare*. Harvard University Press, 2002.

⁶ Judgement of the Supreme Court of 22 January 2010, file number 25 Cdo 2258/2008.

⁷ It probably ought to be added that there is no general legal rule that cyclists have to wear helmets in the Czech Republic. Such a rule applies only to people younger than 15 years of age.

⁸ The court bluntly claims that it is “unquestionable that the use of a protective helmet by a cyclist in the road traffic is a desirable and fit means for avoiding or at least mitigating the consequences of injury in case of a traffic accident”.

⁹ E.g. IZA/Vrerink (HR 28 feb 1992 NJ 1993).

¹⁰ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1091.

¹¹ I regard this paper to be, incidentally, also a contribution to the debate about the role of cycling in the Czech Republic.

At the outset I consider it proper to admit that my starting point is that it is desirable that substance-oriented arguments, including economic arguments, are admitted (to a certain extent, probably a bigger one than majority of continental legal scholars would agree with) to legal reasoning. On the other hand, I do not think of myself as a radical supporter of Law and Economics. With respect to normative use of economics in law this is even truer.

1. EFFICIENCY-BASED GOALS

Before analysing the desirability of economic goals in law, I consider it fit to outline what one understands under these economic goals.

1.1 Efficiency

Economists often suggest that law ought to be “efficient”. Efficiency is, however, a complex concept.¹² Kornhauser¹³ provides a concise overview of the topic. He shows that, according to economics, the desired state of affairs in an economy – which would naturally come into being if no market failures existed – is the allocative efficiency. Allocative efficiency consists in the most optimal mix and distribution of goods in the society.¹⁴

Allocative efficiency is sometimes identified with Pareto efficiency.¹⁵ Pareto efficiency is perceived when one individual cannot be made better-off without making anybody else worse-off. This criterion is rather noncontroversial as it obviously presumes that nobody is harmed (nobody’s welfare is lessened) on the route to Pareto efficiency since this definition of efficiency is confined to outcomes of voluntary transactions. The objection to this criterion of efficiency is that it has few applications to the real world because most transactions have effects on third parties.¹⁶

Another concept of efficiency is the Kaldor-Hicks efficiency which can be reached even by harming some if the benefits of the others exceed this harm. A transaction (or a measure) is Kaldor-Hicks efficient provided that the harm done by the transaction does not exceed the gain.¹⁷ Such a transaction would be a Pareto improvement only if the harmed parties were actually compensated for any harm suffered by them.¹⁸ For satisfying the

¹² COLEMAN, J. L. Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law. *California Law Review*. 1980, Vol. 68, No. 2, p. 222.

¹³ KORNHAUSER, L. A. A Guide to the Perplexed Claims of Efficiency in the Law. *Hofstra Law Review*. 1980, Vol. 8, No. 3, pp. 591–639.

¹⁴ Nevertheless, a necessary (not sufficient) condition of existence of allocative efficiency is productive efficiency consisting in producing as many goods as possible (i.e. producing goods at the lowest cost). See KORNHAUSER, L. A. A Guide to the Perplexed Claims of Efficiency in the Law. *Hofstra Law Review*. 1980, Vol. 8, No. 3, pp. 591–639.

¹⁵ COOTER, R., ULEN, T. *Law & Economics*. 6th edition. Pearson Education, 2012, p. 14.

¹⁶ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 13.

¹⁷ The gains and the harm of a transaction or a measure are often referred to as benefits and costs. They are to be understood in a very broad sense, e.g. a cost is any disutility perceived by a man. A person conducting cost-benefit analysis applicable to the question whether cyclists should wear a helmet, thus, needs to take into account various kinds of costs such as the purchasing costs of helmets or the discomfort perceived by cyclists because of wearing a helmet and also because of the fact that they might need to carry it around once they reached their destination. It is therefore mistaken to consider only the monetary costs and benefits because they provide only partial look at the given problem.

¹⁸ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 13.

Kaldor-Hicks criterion it is enough if the compensation is potentially possible. Since even the most trivial policy change is likely to harm at least one person, it is obvious that the Kaldor-Hicks criterion of efficiency enables more flexibility than the Pareto one.¹⁹ At the same time it brings controversy as it suggests that harming one person is acceptable if another one benefits from the harm.

1.2 Coase theorem

When talking about (Pareto) efficiency, it is useful to mention Coase theorem. It claims that in the world of no transaction costs people rationally maximizing their utility would enter negotiations about the use of resources that would lead to efficient outcomes no matter what the initial assignment of entitlements would be.²⁰ We can illustrate this on the bicycle helmet case. To simplify the issue, we may presume that, according to law, a cyclist who is not wearing a helmet is in the case of an accident resulting to an injury to him entitled either to (1) full compensation or (2) no compensation. We also presume that wearing a helmet completely forecloses occurrence of an injury.²¹ According to Coase theorem, if wearing helmets is more efficient than not wearing them, cyclists will end up wearing helmets regardless of the mode of entitlement. In the full-compensation case, car drivers will pay cyclists to wear helmets; in the no-compensation case, cyclists will prefer to wear helmets themselves without any transfer of money from drivers to them. The same logic applies also if not wearing helmets is more efficient than wearing them. In such a case, cyclists will end up not wearing them regardless of the legal rule.

This concept, particularly the idea of drivers paying the cyclists to wear helmets, is rather unintuitive. However, the reasoning is not complicated. When we say that we presume that wearing helmets is efficient, we mean that the benefits of wearing helmets consisting in the avoided costs of injuries that are eliminated by use of helmets exceed the costs which incur to cyclists as a result of wearing helmets, e.g. the perceived discomfort or the purchasing costs of helmets. If the full-compensation rule is adopted, drivers can choose either to pay compensation for injuries or to pay less money to the cyclists for their promise that they will adopt measures to avoid these injuries. Drivers will obviously choose the latter variant since it is cheaper. Similarly, when cyclists decide whether not to wear a helmet and be free of the discomfort and purchasing costs, or to get enough money from drivers for wearing a helmet, they will go for the latter. It should be evident that the amount of money that drivers will pay to cyclists will be negotiated between the costs of injuries avoided by helmets and the sum of costs borne by cyclists because of wearing helmets.

Let us assume that a cyclist and a driver every day use a road exclusively (no one else than the cyclist and the driver does use the road) going to work and back home. Let there be a 50% chance a year that a traffic accident happens between the cyclist and the driver in which the cyclist suffers and injury worth of €1000.²² This means that the expected value

¹⁹ VELJANOVSKI, C. G. *Economic Principles of Law*. Cambridge University Press, 2007, pp. 32–33.

²⁰ COASE, R. H. The Problem of Social Cost. *Journal of Law and Economics*. 1960, Vol. 3, pp. 1–44.

²¹ In other words, in this example we care only about injuries that can be avoided by wearing a helmet and about compensations for such injuries.

²² This is the value of unhappiness caused by the accident to the cyclist. In other words, the cyclist is willing to pay up to €1000 to avoid the injury.

of the injury a year is €500. Let there be a possibility to avoid the consequences of the accident by the cyclist wearing a helmet. In scenario 1, the use of a helmet costs €400 a year. Hence, it is efficient to wear a helmet since the costs of wearing it are lower than the costs of the injury which it can foreclose. In scenario 2, the use of a helmet costs €600 a year. Hence, it is inefficient to wear a helmet since the costs of the injury are lower than cost of avoiding it. In scenario 1, if full compensation rule is adopted, the driver is legally obliged to pay €500 as compensation to the cyclist if an injury occurs. The driver will therefore be willing to pay a price up to €500 to avoid the occurrence of an injury. It is the cyclist who can avoid the injury for the price of €400. The cyclist will therefore request more than €400 for avoiding the injury by wearing a helmet. It then depends on the negotiation power of the parties where between €400 and €500 the agreed price will be positioned. If no-compensation rule is adopted, the cyclist can either suffer an injury worth of €500 or pay €400 to avoid it. It is obvious that the cyclist will choose to wear a helmet. In scenario 2, if full compensation is adopted, the driver can either pay €500 as a compensation for injury or (at least) €600 to avoid it. He will choose to pay the compensation. If no-compensation rule is adopted, the cyclist will rather suffer the injury which is worth €500 to him than pay €600 to avoid it.

1.3 Wealth maximization

Concept of wealth maximization was introduced by Posner in his paper *Utilitarianism, Economics, and Legal Theory*.²³ Wealth, according to Posner, is the sum of all tangible and intangible goods which are monetarily valued. The value depends on the maximum price that a person is willing to pay for a good or the minimum price which would have to be offered to the owner to induce him to sell the goods. A transaction (or a different means of change of ownership) is wealth increasing if a good is transferred from somebody who values it less to somebody who values it more.

Posner suggests that where transaction costs are prohibitive, i.e. where a voluntary bargaining solution cannot be reached because the costs associated with the exchange of goods are too high, the market should be stimulated by means of state compulsion. Should the private arrangements fail, the state ought to mimic the market and facilitate the exchange.

This applies also to “hypothetical” markets which come to play in relation to involuntary transactions, i.e. also accidents. Once an accident happens, the question is whether the harm suffered by one party, i.e. the wealth destroyed (e.g. the injury suffered by a cyclist), is bigger than the gain from the activity which accidentally gave rise to the accident. Hence, to satisfy the wealth maximization principle, a transaction must not be Pareto superior. It is enough if it satisfies the Kaldor-Hicks criterion. However, only wealth as defined by Posner is taken into account, not utility. This mainly means that the only desire for a good that matters (and hence be considered a “plus” in the Kaldor-Hicks comparison) is the one backed up by the ability to pay.²⁴ Transfers of goods to the hands of those who cannot afford to pay for them do not increase wealth of the society.

²³ POSNER, R. A. *Utilitarianism, Economics, and Legal Theory*. *Journal of Legal Studies*. 1979, Vol. 8, No. 1, pp. 103–140.

²⁴ POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 357.

As Kornhauser²⁵ shows, wealth maximization is neither implied by nor implying economic efficiency. It is conceivable that a wealth-maximizing state of affairs is neither allocatively nor productively efficient. “Only in a perfectly competitive economy will the wealth-maximizing state be productively efficient. If the economy is not perfectly competitive, the wealth maximization state is wasteful in the sense that more of some good could be produced without producing less of any other good.”²⁶ Nevertheless, wealth maximization stems from efficiency – often the word “efficiency” is even used when one is talking about wealth maximization – and, hence, we can count it among efficiency-based goals.

2. EFFICIENCY-BASED GOALS IN ACCIDENT LAW

From the economic perspective, liability rules which apply in (not only) accident law set an objective value for removing an entitlement from its holder.²⁷ Rules requiring drivers to pay compensation for injuries to cyclists in fact set a price which the driver has to pay to the cyclist for injuring him. The driver may then rationally decide whether he is willing to pay the price or not. If not, he will probably either adopt measures to avoid the accident (or lower its probability), such as driving more slowly, or stop driving a car at all. Similarly, rules making drivers free of liability lead to the result that the cost of the injury is perceived by the cyclist as a price of cycling.

The use of liability rules makes the simultaneous use of roads by drivers and cyclists possible. “If we were to give [cyclists] a property entitlement not to be accidentally injured we would have to require all [drivers] to negotiate with them before an accident, and to buy the right to knock off an arm or a leg. Such pre-accident negotiations would be extremely expensive, often prohibitively so. To require them would thus preclude many activities [(such as driving)] that might, in fact, be worth having.”²⁸

It is, however, a question whether this efficiency-seeking explanation for employment of liability rules in accident law is the only plausible, or whether there are other grounds. Moreover, there can be discussion about reasons that are taken into account when assigning entitlements through adoption of liability rules and when deciding about the adequate “price”. What social goals may lead to adoption of the full-compensation rule, the no-compensation rule or a different liability rule?

According to Posner, accident law is designed to promote efficiency. It requires people to perform an efficient amount of care. Efficient care is such when an extra unit of care (marginal care) costs the same as is the amount of costs which are avoided because of the extra unit of care.²⁹ Such a level of care brings the lowest total of (1) costs of avoidance of

²⁵ KORNHAUSER, L. A. A Guide to the Perplexed Claims of Efficiency in the Law. *Hofstra Law Review*. 1980, Vol. 8, No. 3, pp. 595–597.

²⁶ *Ibid.*, p. 597.

²⁷ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1092. In case of property rules, to the contrary, the holder may be deprived of his entitlement only by means of a voluntary transaction for price agreed upon by the seller.

²⁸ *Ibid.*, pp. 1108–1109, fn omitted.

²⁹ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 168.

accidents and (2) costs of accidents that actually take place. As Coase theorem postulates, if there were no transaction costs, such a result would be reached naturally by *ex ante* contracting between injurers and victims, regardless of the initial assignment of entitlements. However, as Coase³⁰ himself claims, the assumption of no or at least sufficiently low transaction costs is often not met. In such a case, initial assignment of entitlements resulting from the design of accident law matters for efficiency. Accident law is then to be designed so that costs are put on the party which can most cheaply avoid the accidents.³¹ Since “many accidents can be prevented by victims at lower cost than by injurers”,³² this means that costs of an accident are often to be put on the victim of the accident.

So, when is it efficient to use the no-compensation rule and when is full-compensation more appropriate in the helmet example case? No-compensation rule promotes efficiency if (1) helmets are the cheapest measure to avoid the accident³³ (or rather its undesirable consequences), (2) wearing helmets brings lower costs than the avoided injuries, and (3) cyclists are the lowest-cost avoiders.³⁴ On the other hand, if any of these conditions is not met, the no-compensation rule does not promote efficiency and, thus, it is more efficient not to penalize cyclists for not wearing helmets. Full-compensation rule is appropriate then.³⁵

In the presented Czech case, however, neither of these two “all or nothing” rules was applied. The court ruled that the cyclist, by not wearing a helmet, contributed to the emergence of his injury by 10% and was therefore entitled to 90% compensation for his injury. Such a ruling may have been based on an economic rationale since “sometimes it is more efficient for each party to take some care than for one to take care and the other do nothing”.³⁶ Both the full-compensation and no-compensation rule lead to the latter. To the contrary, the contributory (comparative) negligence solution motivates both parties to take some level of care.³⁷ The ruling of the Czech court, if it was seeking efficiency, may have, hence, been based on the conviction that the lowest overall sum of costs of accidents involving cars and cyclists is reached by motivating drivers to take precautions and at the same time motivating cyclists (at least those who value 10% of injury compensation higher than the costs of wearing a helmet) to wear helmets.

It is remarkable that the Dutch legal system does not similarly sanction cyclists for not wearing helmets in case of an accident. If we presume that also the Dutch accident law provisions – both as laid down in the statutes and as interpreted by the courts – seek to

³⁰ COASE, R. H. The Problem of Social Cost. *Journal of Law and Economics*. 1960, Vol. 3, pp. 1–44.

³¹ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, pp. 1096–1097.

³² POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 172.

³³ In the example, we assume that the applied measure (wearing a helmet) completely eliminates accidents (their undesirable consequences). This is, however, rarely true in reality. Wearing helmets protects only from some injuries caused by traffic accidents.

³⁴ This condition is usually met since it seems obvious that cyclists can ensure that cyclists (i.e. they themselves) wear helmets with lower costs than drivers. This stems mainly from the enormously high level of transaction costs connected to negotiation between drivers and cyclists.

³⁵ This is of course related only to the issue of wearing a helmet. There may be other reasons why not to provide a cyclist with full compensation of his or her injuries.

³⁶ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 173.

³⁷ *Ibid.*, pp. 172–177.

promote only efficiency, there obviously needs to be some difference between the Czech and Dutch real-world situation resulting into the fact that in the Netherlands wearing bicycle helmets does not lead to lowering the overall costs of accidents. Purely hypothetically, this could be caused e.g. by purchase price of bicycle helmets being much higher in the Netherlands than in the Czech Republic. A more plausible explanation might consist in the fact that in the Czech Republic cycling is more often performed as a kind of sport activity rather than a means of transport from one point to another,³⁸ meanwhile in the Netherlands cycling is a widespread way of daily personal transport. Consequently, costs of wearing a helmet resulting from the discomfort of its user may be higher in the Netherlands since one must either carry the helmet around after he reaches his destination (or to find a safe place where to leave it). The discomfort of a sporting cyclist is presumably lower since he usually returns back to the same place from which he left and does not suffer from carrying the helmet with him.

3. EFFICIENCY-BASED VERSUS DISTRIBUTIONAL GOALS IN ACCIDENT LAW

Another explanation of the discrepancy between the Czech and Dutch regime may lie in the possibility that it is not only efficiency what the two legal systems promote through accident law.

3.1 Wealth effect and efficiency

As said above, if there are no transaction costs (and also other assumptions of Coase theorem are satisfied), the initial assignment of entitlements does not affect the way in which resources are used in society since they are always used efficiently. “The initial assignment of entitlements, however, does affect the relative wealth of the parties involved because the assignment determines which party has to do the purchasing.”³⁹ The assignment of entitlements determines who is the one spending his money. Full-compensation rule makes the cyclist wealthier and the driver poorer than no-compensation rule. If wearing a helmet is inefficient (costlier than the value of caused injury), the cyclist does not wear a helmet which is the only thing that matters from the efficiency point of view. Should an accident happen, it is nevertheless essential for the parties which one of them bears costs of the caused injury. Under the full-compensation rule, costs are borne by the driver; under the no-compensation rule, costs are borne by the cyclist. If wearing a helmet is efficient, adoption of the full-compensation rule leads to the driver paying to the cyclist so that the cyclist wears a helmet; meanwhile reception of the no-compensation rule makes the cyclist bear the costs of wearing a helmet.

In the bicycle helmet example we have, so far, neglected the fact that preferences of an individual change with change of his wealth.⁴⁰ What’s more, so far we have implicitly as-

³⁸ This was also the case of the cyclist injured and suing for compensation in the presented judicial decision.

³⁹ COLEMAN, J. L. Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law. *California Law Review*. 1980, Vol. 68, No. 2, p. 225.

⁴⁰ Unless “desires are totally inelastic”. See CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1095.

sumed that the desire of drivers and cyclists to use the road – and pay for the use either by suffering an injury or compensating the other party for an injury – is equal no matter what compensation rule is adopted. In reality, however, we would observe that as a result of adoption of the full compensation rule, and hence making the driver poorer, the driver would probably be willing to pay less⁴¹ for the use of the road, and hence also pay less to the cyclist in order to make him wear a helmet. In certain settings, this could result into not wearing helmet being the more efficient option.

The example illustrates that what is Pareto optimal, or economically efficient, alters with the starting distribution of wealth. “If the wealth in society were distributed differently (redistributed), then there would be a different Pareto (and Kaldor–Hicks) efficient allocation of resources. Each different distribution of wealth generates a different pattern of demand, a different set of prices and different production decisions.”⁴² What’s more, these different states of the world are not Pareto-comparable (neither is Pareto superior to the other one) and hence we cannot designate one of the assignments of entitlements to be superior to the other one from efficiency point of view.

This means that in a society in which wealth is unevenly distributed it will be efficient to produce more luxurious goods than in one in which wealth is more evenly spread. In an egalitarian society, on the other hand, it will be efficient to produce more everyday necessities.⁴³ If we care only about efficiency (wealth maximization), we cannot say that one of these is better. We can only assess whether resources are used efficiently given the distribution of wealth.

3.2 Distributional goals

To multiple authors, including Calabresi, the existence of wealth effect implies that non-economic motives should determine the initial allocation of entitlements.⁴⁴ Calabresi in his letter to Ronald Dworkin⁴⁵ endorses Dworkin’s point⁴⁶ that without starting points (whether termed rights, entitlements or differently) one can hardly give any meaning to the term “an increase in wealth”.⁴⁷ This is because “each individual’s desires are dependent on, indeed are a function of, his or her initial “wealth””.⁴⁸ Calabresi considers seeking efficiency, “defined narrowly to mean wealth maximization,” a “meaningless concept” unless it is grounded on normatively appropriate “starting points or distributional values”.⁴⁹ Veljanovski⁵⁰ points out that Posner’s wealth maximization principle is not income distribution neutral. Since only desire backed up by money matters, the

⁴¹ “Willingness to pay” is a function of utility and wealth of the individual.

⁴² VELJANOVSKI, C. G. *Economic Principles of Law*. Cambridge University Press, 2007, pp. 34–35.

⁴³ MATHIS, K., SHANNON, D. *Efficiency Instead of Justice?* Springer, 2009, p. 169.

⁴⁴ KRAUSS, M. I. Property Rules vs. Liability Rules. In: BOUCKAERT, B., DE GEEST, G. (eds.). *Encyclopedia of Law and Economics*. Edgar Elgar Publishing: Gent, 2000, p. 787.

⁴⁵ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, pp. 553–562; DWORKIN, R. Is Wealth a Value? *Journal of Legal Studies*. 1980, Vol. 9, pp. 191–226.

⁴⁶ Calabresi claims that he himself had made this point before the Dworkin’s article was published, though not as systematically.

⁴⁷ Term used by Posner. See POSNER, R. Utilitarianism, Economics, and Legal Theory. *Journal of Legal Studies*. 1979, Vol. 8, No. 1, pp. 103–140.

⁴⁸ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 555.

principle gives greater priority with income and market power. “[T]he wealth maximization principle [...] gives greater weight to those who are already favoured by the distribution of rights in society and will therefore tend systematically to favour those individuals that already have wealth.”⁵¹ Calabresi does not only criticize application of the Kaldor-Hicks criterion – underlying Posner’s wealth maximization – but also of the Pareto criterion: “[A]ny given society is always or will immediately arrive at a Pareto optimal point *given* transaction costs”⁵² and therefore “the Pareto criterion is of no general use as a normative guide”.⁵³

First, let us assume a society in which car drivers are very rich and cyclists are very poor. Second, let us assume that desires of both the groups are wealth elastic (dependent on wealth). Third, let us assume that the simultaneous use of roads by the both groups necessarily leads to all cyclists being severely injured (injuries cannot be avoided by any measures). Fourth, let us assume that cyclists can switch to walking on sidewalks which is completely safe but less favourable for the cyclists (e.g. because it is slower). If assumptions of Coase theorem are satisfied, drivers and cyclists will negotiate and the negotiation will result in drivers driving their cars on the roads and cyclists switching to walking. This result will be reached no matter whether drivers are or are not liable to compensate cyclists for their injuries. If they are liable, they will pay cyclists to switch to walking. If they are not liable, cyclists will themselves switch to walking since they will not want to bear the costs of injuries. In reality, however, transaction costs of negotiation between the two groups are prohibitively high. According to Posner’s wealth maximization principle, if transaction costs are prohibitively high, the role of law is to mimic the market, i.e. to promote the state of the world where drivers use roads and cyclists switch to walking. To maximize wealth, hence, law ought to make drivers free of liability.

If we look at the example, we can see that the very essential reason why drivers should not compensate injured cyclists is that drivers are rich and therefore would be willing to pay more for using roads. One may ask whether such reasoning is in accord with our perception of fairness. That is why Calabresi proposes that it is necessary to set appropriate starting points which will be reflected in the specification of initial assignment of entitlements. These starting points are then in Calabresi’s view mainly distributional values. “[A]bsent such a notion of starting points, we cannot say anything about distribution or equality either. We cannot meaningfully say that we have treated Marshall and Taney equally, or justly favored Marshall over Taney, without a concept of what it is to treat them equally.”⁵⁴ “The just distribution depends on the initial specification of legal entitlements, which in turn depends on the principle of equality that guides (and constrains) the legal system.”⁵⁵

⁴⁹ CALABRESI, G. First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them? *Iowa Law Review*. 1984, Vol. 69, p. 834.

⁵⁰ VELJANOVSKI, C. G. Wealth maximization, law and ethics—On the limits of economic efficiency. *International Review of Law and Economics*. 1981, Vol. 1, No. 1, p. 12.

⁵¹ *Ibid.*, p. 21.

⁵² CALABRESI, G. The Pointlessness of Pareto: Carrying Coase Further. *Yale Law Journal*. 1991, Vol. 100, p. 1212. Italics by Calabresi.

⁵³ *Ibid.*, p. 1216.

⁵⁴ CALABRESI, G. First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them? *Iowa Law Review*. 1984, Vol. 69, p. 850.

⁵⁵ GEISTFELD, M. A. *Risk Distribution in the Law of Torts: Carrying Calabresi Further*. Conference paper presented at the Prague Conference on Political Economy 2012 held on 26th–27th October in Prague. Not published, p. 2.

However, to talk about specific distribution preferences of individual societies seems to be harder than to talk about efficiency goals.⁵⁶ Calabresi and Melamed are sceptical about the possibility to discuss distributional preferences in a single conceptual framework.⁵⁷ Nevertheless, Calabresi believes that “economists and lawyer-economists can have a great deal to say, as scholars, about what is distributionally desirable.”⁵⁸ He claims that it is possible to develop scholarly definitions of just distributions: both theoretical or empirical – based on studies of particular societies.⁵⁹ However, Calabresi never published any subsequent articles on this topic.⁶⁰

Even though distribution preferences are hard to analyze, for Calabresi they play essential role in deciding about the assignment of entitlements.⁶¹ Calabresi is known for his “insistence that wealth distribution is and must be a central goal of legal system.”⁶² It needs to be noted that Calabresi, in some of his papers, accepts a very broad definition of wealth distribution. In such cases, he defines “distribution as covering all the reasons, other than efficiency, on the basis of which we might prefer to make Taney *wealthier* than Marshall.”⁶³ Calabresi himself recognizes this and acknowledges that the term “distribution” is often limited to relatively few broad reasons, like equality.⁶⁴ Further, he explains that the way he uses the term in the broad sense is acceptable when “one is concerned with contrasting the difference between efficiency and other reasons for certain entitlements.”⁶⁵ Thus, when Calabresi talks about distributive considerations taking place when entitlements are being assigned, he sometimes refers to any reasons distinct from efficiency (wealth maximization). For instance, preferring cyclists to car drivers could, in such a case, be considered a distributional reason.⁶⁶

⁵⁶ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1092.

⁵⁷ *Ibid.*

⁵⁸ CALABRESI, G. The Pointlessness of Pareto: Carrying Coase Further. *Yale Law Journal*. 1991, Vol. 100, p. 1228, fn omitted.

⁵⁹ *Ibid.*

⁶⁰ GEISTFELD, M. A. *Risk Distribution in the Law of Torts: Carrying Calabresi Further*. Conference paper presented at the Prague Conference on Political Economy 2012 held on 26th–27th October in Prague. Not published, p. 3.

⁶¹ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1098.

⁶² PRIEST, G. L. The rise of law and economics: a memoir of the early years. In PARISI, F., ROWLEY, C. K. (eds.). *The Origins of Law and Economics: Essays by the Founding Fathers*. Edward Elgar Publishing, 2005, p. 359. “According to Calabresi, the only thing that ultimately matters within tort law is whether risk is distributed in the manner required by the governing distributive norms or values.” See GEISTFELD, M. A. *Risk Distribution in the Law of Torts: Carrying Calabresi Further*. Conference paper presented at the Prague Conference on Political Economy 2012 held on 26th–27th October in Prague. Not published, p. 2.

⁶³ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1104. Italics by Calabresi and Melamed.

⁶⁴ *Ibid.*, p. 1105.

⁶⁵ *Ibid.*

⁶⁶ However, preferring cyclists to drivers because of the better impact of cycling on the environment could be driven by an efficiency-based consideration. Pollution of the environment is considered a bad thing since it negatively influences other people. Under the conditions of Coase theorem also these people would negotiate with car drivers and an efficient amount of car driving (pollution caused by car driving) would be reached. Taking the desires of the people influenced by pollution into account would therefore only mean that we extend the scope of inputs for the cost-benefit analysis.

Distributional considerations (both in the broad and the narrow sense) are supposed to play major role when designing law. They belong among the arguments that need to be taken into account when it is to be decided whether to protect an entitlement through a liability rule or a property rule.⁶⁷ “More often, once a liability rule is decided upon, perhaps for efficiency reasons, it is then employed to favour distributive goals as well.”⁶⁸ If we return to the bicycle helmet case, we may wonder whether distributional considerations were involved when the respective legal rules were adopted and interpreted; whether the Czech court accented drivers’ interest more than Dutch authorities for distributional reasons; whether the legal system in the Netherlands seeks to redistribute wealth among drivers and cyclists more in favour of cyclists than the Czech one does. According to Calabresi, this would not be surprising, since in the area of accidents “the compensation given has clearly varied with society’s distributive goals, and cannot be readily explained in terms of giving the victim, as nearly as possible, an objectively determined equivalent of the price at which he would have sold what was taken from him”⁶⁹ (his health).

4. POSNER’S DEFENCE

According to Calabresi,⁷⁰ Posner almost seems to say that since it is impossible to say anything scientific or scholarly about starting points or distributional values, we must ignore them and analyze law only on the basis of economic efficiency. “The practical effect of Posner’s refusal to provide a theory of distributive justice is implicitly to claim that the existing distribution of rights and income in society is ‘just’. If this is not Posner’s claim then his whole di[s]cussion has side-stepped the crucial normative question: on what ethical criteria are rights to be assigned so that ideal hypothetical market outcomes (wealth maximization) can be judged as ethically attractive?”⁷¹

However, Posner – at least in his later works – does partially recognize the importance of the debate about initial assignment. “[I]f wealth maximization is indifferent to the initial distribution of rights, it is a truncated concept of justice.”⁷² Posner, then, occasionally “attempts to make use of the wealth maximization principle to find grounds for disapproving of a very inequitable initial endowment”.⁷³ For instance, he believes that a society with a more egalitarian initial endowment of resources is in the long term wealthier because it incurs fewer transaction costs.⁷⁴ Further, he gives an example of two societies: in the first

⁶⁷ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1110.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ CALABRESI, G. First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them? *Iowa Law Review*. 1984, Vol. 69, p. 834.

⁷¹ VELJANOVSKI, C. G. Wealth maximization, law and ethics—On the limits of economic efficiency. *International Review of Law and Economics*. 1981, Vol. 1, No. 1, p. 20.

⁷² POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 375.

⁷³ MATHIS, K., SHANNON, D. *Efficiency Instead of Justice?* Springer, 2009, p. 169.

⁷⁴ POSNER, R. A. The Justice of Economics. In *Economia delle scelte pubbliche*, Vol. 1 (1987), p. 24. According to MATHIS, K., SHANNON, D. *Efficiency Instead of Justice?* Springer, 2009, p. 169.

society one person owns all the others as his slaves, in the second society slavery is forbidden and each person “owns” himself.⁷⁵ According to Posner, our experience shows that slavery is an inefficient method of organizing society and therefore the second society would prosper better. Finally, he contends that “parcelling out rights in small units to many different people”⁷⁶ helps to prevent creation of monopolies which are undesirable from the wealth maximization point of view. Nevertheless, Posner⁷⁷ admits that the criticism of wealth maximization stemming from the fact that it has nothing – or rather not much, as it was illustrated – to say about the distribution of rights is one of these that cannot (fully) be answered.

Posner also claims that, if there is to be some redistribution of wealth through law, it ought not to be performed by the means of private law – hence also tort law – but rather through income tax and transfer system.⁷⁸ However, if we “not assume that the income tax and transfer system would always be used to redistribute wealth beneficially, in which case the choice of [private] legal rules might be decided in part on the basis of their redistributive effects.”⁷⁹ Taxation might be also less politically feasible than the use of a private law rule.⁸⁰

5. CALABRESI’S PLURALISM

Calabresi believes that Posner is, regarding his conviction about the proper goal of law, a member of a very small minority⁸¹ since most people (apparently including Calabresi himself) would say “Your goals, Richard [Posner], are fine for you, but without a lot more in the way of equality [...] they are totally unacceptable to me.” Therefore, one may conclude, Posner and Calabresi seem to disagree about the distributional “starting points” and that is why they disagree also about the goals that law ought to promote. Calabresi advocates a more egalitarian approach than Posner.

As it was mentioned above, Calabresi considers distribution to be the core goal of the legal system. Calabresi, however, never held the view that tort law should focus solely on this goal. On the other hand, Calabresi has looked at accident law as at a product of reconciliation of various goals. He endorses this position by stating that “no system of accident law should be designed with one goal in mind.”⁸² Calabresi⁸³ contends that it is possible to conceive trade-offs between efficiency (wealth maximization) and wealth distribution. “[I]t might be worth having less overall utility to have a much more egalitarian distribution.”⁸⁴ To find and apply an appropriate combination of these two, then, accord-

⁷⁵ POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 375.

⁷⁶ POSNER, R. A. Utilitarianism, Economics, and Legal Theory. *Journal of Legal Studies*. 1979, Vol. 8, No. 1, p. 126.

⁷⁷ POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 375.

⁷⁸ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 507, p. 511.

⁷⁹ SHAVELL, S. *Foundations of Economic Analysis of Law*. Harvard University Press, 2004, p. 3.

⁸⁰ CALABRESI, G. *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970, p. 79.

⁸¹ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 557.

⁸² CALABRESI, G. *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970, p. 37.

⁸³ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 558.

⁸⁴ DWORKIN, R. Why Efficiency? A Response to Professors Calabresi and Posner. *Hofstra Law Review*. 1980, Vol. 8, p. 565. Interpreting Calabresi’s position. Dworkin in general agrees with Calabresi’s value pluralism.

ing to Calabresi, means to promote just society.⁸⁵ Dworkin interprets Calabresi's position as one which tries to find a compromise between utilitarianism and egalitarianism, between distribution and wealth (conceived either as values themselves or surrogates for target values).⁸⁶ According to Calabresi, there is, however, no general always applicable compromise since "the importance of each goal may vary in the different areas in which accidents occur".⁸⁷

For Calabresi, the desirable compromise cannot be found with the use of economic tools. "[E]conomic theory cannot decide for us [...] how far we want to go and save lives and reduce accident costs."⁸⁸ From the terminology that Calabresi uses ("an agreed upon efficiency-distribution mix", "assumptions that are neither intuitively obvious nor so widely accepted",⁸⁹ "we collectively, and not the economics, are the boss"⁹⁰) it is obvious that he leaves the decision about the appropriate combination of efficiency and wealth distribution in the hands of the community. He says that Law and Economics is concerned rather with the road signs pointing towards a desirable goal than with defining these goals.⁹¹

According to Calabresi, hence, the society may, for example, favour cycling over car driving. Economics may, then, help with designing rules (including accident tort law rules) that will lead to this result. Obviously, making cycling less expensive by putting the costs of cyclists' injuries on drivers – and thereby also making driving costlier – will lead to some people switching from cars to bicycles. Such favouring of cycling may be motivated by the fact that cycling is mostly performed by the poor and that the society wants to subsidize them.⁹² However, it may be also for other non-efficiency reasons.

Even though Calabresi does not exactly specify what combination of wealth creation and wealth distribution is desirable, he recognizes that some distribution is desirable. To me, this seems to be much more in accord with the general conviction of members of our society about what the goals of the society are. We realize that some people are born disadvantaged and believe that those who were luckier ought to share some of their wealth. On the other hand, Calabresi does not undervalue the importance of economic efficiency and agrees with Posner that it ought to be promoted.

6. POSNER'S ACCEPTANCE OF OTHER GOALS

In his later works, Posner abandons the idea of exclusivity of wealth maximization, even though he still treats it as a very important goal. Posner recognizes that clashes between

⁸⁵ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 558. According to Dworkin, however, the fact that justice has veto power over efficiency goals necessarily means that there must be a different reason than justice why social wealth is worth pursuing. See DWORKIN, R. Why Efficiency? A Response to Professors Calabresi and Posner. *Hofstra Law Review*. 1980, Vol. 8, p. 563.

⁸⁶ DWORKIN, R. Why Efficiency? A Response to Professors Calabresi and Posner. *Hofstra Law Review*. 1980, Vol. 8, p. 571.

⁸⁷ CALABRESI, G. *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970, p. 15.

⁸⁸ *Ibid.*, p.18.

⁸⁹ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 559.

⁹⁰ CALABRESI, G. *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970, p. 17.

⁹¹ CALABRESI, G. About Law and Economics: A Letter to Ronald Dworkin. *Hofstra Law Review*. 1980, Vol. 8, p. 560.

⁹² CALABRESI, G. *The Costs of Accidents: A Legal and Economic Analysis*. Yale University Press, 1970, p. 78.

economic goals and our “moral intuitions” can be observed and that criticism stemming from such clashes often cannot be answered with the use of economic arguments.⁹³ He gives the example of individual autonomy of human beings. Posner recognizes that our society regards individual freedom as something more than just a tool contributing to prosperity of society.⁹⁴

The same can be said about the desire of society for redistribution. Although Posner says that he is “less sure of the extent of egalitarian sentiment in our society than that of individualistic sentiment”⁹⁵ he accepts that in fact we do desire some redistribution which brings him to the conclusion that even some involuntary redistribution (i.e. redistribution facilitated by law against the will of those whose wealth is to be distributed to other people) may be justifiable.⁹⁶

Even though Posner accepts the role of other values (goals) when he says that “obviously there is more to justice than economics”,⁹⁷ he still accents the essential role of economic goals. He contends that wealth maximization “may be the right default principle, placing on the proponents of departures from wealth maximization the burden of demonstrating their desirability”.⁹⁸

7. CONCLUSION

To be able to design law according to its goals and to be able to evaluate whether law promotes the goals effectively, it is necessary to identify the goals. “If the social goal were simply to minimize the number of automobile accidents, the best rule might well involve severe punishment for causing an accident, whereas if the social goal were also to include the benefits people obtain from driving, the best rule would be unlikely to involve very rigorous punishment for causing an accident.”⁹⁹ If the social goal is also to redistribute wealth among members of the society, the best rule would most likely not be efficient (wealth maximizing) as there is a trade-off between efficiency and distribution.

It appears that, by contrast with Posner, Calabresi does claim neither that efficiency (wealth maximization) could be used as the only goal of law, nor that it should be the default principle from which we may deviate only if we may argue for desirability of such a deviation. For Calabresi, the allocation of resources is an important element to take into account but it is to be completed by other elements. For Calabresi, efficiency is but “one view of the Cathedral”.¹⁰⁰

My convictions correspond with those of Calabresi. The obstinate commitment of some proponents of Law and Economics to a single principle does not lead to provision of a per-

⁹³ POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 375, p. 377.

⁹⁴ *Ibid*, p. 377, p. 379.

⁹⁵ *Ibid*, p. 380.

⁹⁶ *Ibid*, p. 381.

⁹⁷ POSNER, R. A. *Economic Analysis of Law*. 7th edition. Aspen Publishers, 2007, p. 27.

⁹⁸ POSNER, R. A. *The problems of jurisprudence*. Harvard University Press, 1990, p. 387.

⁹⁹ SHAVELL, S. *Foundations of Economic Analysis of Law*. Harvard University Press, 2004, p. 2.

¹⁰⁰ CALABRESI, G., MELAMED, A. D. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review*. 1972, Vol. 85, No. 6, p. 1128.

suasive normative theory.¹⁰¹ We live in a plural world¹⁰² and even though that the concept of *homo oeconomicus* may depict the nature of a man relatively well, it does not depict it entirely. There are also other values that are precious to us. Calabresi stresses mainly distributional goals of law. Should we design legal system to promote only efficiency, it would mean that we (1) consider the current distribution of wealth desirable (just) and that we (2) do not consider desirable (just) to redistribute income in the future. However, majority of the society does not perceive justice in this way.

In this paper I have focused mainly on distribution of wealth in its narrower sense, i.e. on the principle of equality. Calabresi uses the term distribution also in a wider sense when he refers to any goals of law different from efficiency. These other goals are in my opinion abundant. Although it is only a speculation, I believe that both in the Czech and Dutch case there were other goals taken into account in frame of judges' deliberation and also legislation. That, however, goes beyond the scope of this paper.

¹⁰¹ TUNICK, M. Efficiency, practices, and the Moral Point of View. In: WHITE M. D. (ed.). *Theoretical Foundations of Law and Economics*. Cambridge University Press, 2009, p. 78.

¹⁰² EPSTEIN, R. Foreword. In WHITE M. D. (ed.). *Theoretical Foundations of Law and Economics*. Cambridge University Press, 2009, p. xi.