Clarifying the View of the Cathedral: the Four Dimensions of the Framework and the Calabresi Theorem

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ABSTRACT

It is well-known that policymakers have two basic levers to influence behavior, the carrot and the stick, or incentives and penalties. What is not common knowledge, even among policymakers, is that there are two broader levers than incentives and penalties that can influence behavior. Guido Calabresi and Douglas Melamed, in their seminal framework of law, defined two distinct but interlocking levers, entitlements and rules, powerful tools for meeting objectives. An entitlement, as defined by the framework is broader than that used typically with relation to the partisan “entitlement programs” – it refers to any allocation. The rule is the protection of the allocation. Allocations have impacts on behavior as do rules. And, the Calabresi-Melamed framework described herein in terms of four dimensions enlightens the view of how policymakers can achieve objectives with their use. For policymakers to fully understand the distinction between an entitlement and a rule, and how varying combinations of the two can be employed to achieve objectives, they must recognize the interrelationship between: one, the structure of rights (entitlements and rules); two, the attributes of rights (property, liability and inalienability); three, categorical objectives which are in tension; and four, criteria, which are essentially subsets of categorical objectives.

In describing the framework’s four dimensions, this article will bring into view important aspects of the framework, previously overlooked. To date scholars have focused predominately on how the framework enlightens the choice of a rule (again, the protection of an allocation). In part, they have done so, because the seminal article emphasized reasons a court may wish to choose one of four types of rules. In part, they did so because the predominant vehicle for changing an entitlement is legislation and it is often difficult for political reasons to advocate a tool for legislative policymaking – doing so will invariably favor one type of objective over another, for example, efficiency or distribution. This clarification of the framework is of one view of the
structure of law and does not advocate an ideology. Yet, in a time when ex ante policy solutions are essential, having clarity about a structural theory which can give policymakers a method to craft policies better suited to meet objectives would provide a powerful arrow in their quiver.
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I. INTRODUCTION

The Calabresi-Melamed framework\textsuperscript{1} of law, described in an article entitled One View of the Cathedral has come to be regarded as the seminal framework of law. The Cathedral is a reference to Professor Wellington’s point that there are many ways to look at the law much as is the case with “Monet’s paintings of the Cathedral at Rouen”\textsuperscript{2} Yet, despite its fame, this Article will argue the framework’s greater significance has been overlooked. Much of the scholarship about the article\textsuperscript{3} has focused on the use of one of two levers, which the framework calls a rule, a lever similar to a penalty or enforcement mechanism. The conceptual value of the other lever, which the framework terms an entitlement, or an allocation,\textsuperscript{4} different than the conventionally known entitlement program, has been largely overlooked.\textsuperscript{5} This article will clarify the role of both the entitlement and rule and other dimensions of the framework with a theorem, stated as: With the selection of criteria, related to categorical societal objectives, both first order entitlements\textsuperscript{6} and second order rules\textsuperscript{7} may be fit together to prevent might makes right.\textsuperscript{8} A more succinct and user friendly, though less precise, statement of the Calabresi theorem: incentives and penalties (subsets of entitlements and rules, respectively) can be calibrated to fit together to achieve a balance of objectives, by selecting criteria.\textsuperscript{9} This article’s clarifications will show that more important than the rule to meet objectives is the entitlement. Even more important is how the two are coupled together to meet objectives. Further clarification of the framework article shows that by utilizing criteria, entitlements and rules can be fit together to meet or balance varying, sometimes competing objectives.

Just how an entitlement and rule differ from each other and how they can be used more effectively together is the subject of this article. By, herein, describing the framework in four dimensions it will shed light on how a policymaker can structure or set different types of rights, or allocations and enforcements, to meet objectives, ex ante.

The greater significance of the framework has been overlooked because the distinction between entitlements and rules, (the allocations and their enforcement mechanism) as described in the

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\textsuperscript{1} Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972) [hereinafter Calabresi & Melamed]. A useful description opens the article:

Calabresi and … Melamed develop a framework for legal analysis which they believe serves to integrate various legal relationships which are traditionally analyzed in separate subject areas such as Property and Torts. By using their model to suggest solutions to the pollution problem … and by applying the model to the question of criminal sanctions, they demonstrate the utility of such an integrated approach.

\textit{Id.} at 1089.

\textsuperscript{2} Id at 1089 n.2.

\textsuperscript{3} See infra Part V.B (referring to the foci of the scholarship).

\textsuperscript{4} See \textit{infra} Part II.A.1 (explaining the meaning of entitlements).

\textsuperscript{5} See \textit{infra} Part V.A (explaining some confusion as to the distinction between entitlements and rules that led the importance of the entitlement to be overlooked).

\textsuperscript{6} Functioning as allocations. See \textit{infra} note 24 and accompanying text.

\textsuperscript{7} Functioning as protections for allocations. See \textit{infra} note 29 and accompanying text.

\textsuperscript{8} Regarding the order of these decisions, see Calabresi & Melamed, supra note 1, at 1092-93 (referring to rules as “second order decisions”), and \textit{id.} at 1090 (referring to entitlements as first order decisions).

\textsuperscript{9} Along with the material in CALABRESI, COSTS, supra note 17 (referred to by the framework, see, \textit{e.g.}, Calabresi & Melamed, supra note 1, at 1097 n.18), the framework comes close to stating the theorem. See CHRISTOPEHR M. DUNN, CRAFTING RIGHTS (2006) (unpublished manuscript, on file with the author) (providing a summary of the framework’s linkage of the dimensions).
scholarship reviewing the framework is often unclear and sometimes inaccurate. For simplicity sake, to distinguish between the two levers available to policymakers, begin by considering incentives (or rewards) as being akin to entitlements, and think of penalties as being akin to rules. In fact, incentives and penalties are subsets of entitlements and rules, respectively. This Article will explain the relationships in more detail. Admittedly, the framework article did not emphasize the terms incentives and penalties, nor did they leverage their familiarity, to heighten the distinction between the more confusing terms, entitlement and rules. If you were to turn to that four decades old article, you would see that the word incentive is used only three times and penalty only four. By contrast, the word entitlement is used more than one hundred and fifty times, and the word rules is used at least as many.

The problem with confusing an incentive (entitlement or allocation) with the penalty (rule, the enforcement of the allocation) is that the all important entitlement lever is underappreciated and ineffectively employed. Employing it properly can help policymakers achieve their objectives. Despite the framework article’s heavy emphasis on the importance of entitlements for selecting criteria and meeting objectives, it is what the article says about the choice of rule and penalties for selecting criteria and meeting objectives that garnered the most attention. In part, that is because the article emphasized the judicial use of four types of rules. By contrast, this Article will focus on the value of the framework for setting the entitlement and the broader implications of the four dimensions in both the legislative and judicial spheres.

To show which combinations of entitlement and rule are more effective for meeting efficiency and distribution, in which circumstances, is the point of much of the scholarship that has reviewed the framework, and one objective of this article. But the emphasis in this Article is on clarifying the methodology by which these four dimensions can be employed. Such is a necessary requisite to crafting applications, or policies to meet objectives. The main clarifications are (1) to address confusion over the distinction between entitlements and rules and (2) to highlight the relationship of entitlements and rules to the idea of rights; and (3) to highlight the importance of connecting objective categories and criteria to entitlements and rules. One area that will not receive as much attention is the difference between property, liability and inalienable rules, although a simplifying clarification will be provided.

An underlying reality highlights what this article is really all about: generally, pain or disincentives will discourage us from doing something we might otherwise do; that is, it will motivate cautionary behavior. (Of course, there are some “bad actors” who will not be deterred by even the steepest of threatened penalties from committing a harmful and illegal act). By contrast, incentives will motivate people to take productive risks they might otherwise not take. The key to reducing harmful acts and motivating beneficial ones is for policymakers to know when and how to use each lever. Stated in line with the theorem: knowing how to select criteria

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10 See Levmore, infra note 12 (referring to them in these terms). See discussion infra sections II.A, pp. 8-13, VI.A, pp. 72-80.

11 See also Singer, Entitlement, infra note 30, at 4 (regarding the property right presumption which must be overcome to justify entitlement change, and the role of government in that regard).

12 “The four-rule framework advances and manipulates the familiar idea that most sticks have corresponding carrots, so that both regulatory strategies and private bargains will usually come in pairs.” Saul Levmore, Unifying Remedies: Property Rules, Liability Rules, and Startling Rules, 106 Yale L.J. 2149 (1997).

13 See discussion infra section V.B.

14 See infra note 140 (citing articles which focus on these distinctions).

15 Desirable behavior refers to that which a society seeks to encourage, while allowing some room for competing subjective preferences. See discussion infra Part IV (regarding objectives).
(associated with objectives) and how to structure incentives (entitlements, or allocations)\textsuperscript{16} and penalties (rules, or enforcements) to meet those criteria is essential to meeting objectives. This Article will organize the concepts in such a way that one who has not read Calabresi’s works\textsuperscript{17} can begin with this Article, but also, so that one who has read the decades old work, will see aspects that they may not have realized before. Part II.A will clarify what is meant by a rights structure dimension. The rights structure dimension describes the structure of rights as being composed of entitlements and rules. Part II.B will clarify what is meant by a rights attribute dimension. The rights attribute dimension refers to the three characteristic traits or types of entitlements and rules: property, liability or inalienability. Part III will clarify what is meant by an objectives dimension. The objectives dimension refers to the two categorical objectives, efficiency and distribution that the framework discussed and suggested are affected by certain entitlement and rule combinations. Part IV will clarify what is meant by a criteria dimension. The criteria dimension refers to the rationales that policymakers draw upon to justify the setting of entitlements and rules. Criteria can be conceived of as falling in as subsets of the objectives dimension. That is, criteria are subobjectives. Part V reviews some pertinent history to highlight confusion that, perhaps, has led the greater significance to be overlooked. It clarifies, what can only be described as, mistakes by leading scholars. At the same time it develops the interrelations between the four dimensions.

II. RIGHTS

The best place to begin to understand the theorem’s four dimensions is with the rights dimension. The framework article is not structured in terms of four dimensions. However, a quick summary of the article’s Parts, contrasted to the methodological approach taken here, will give you a sense of how the framework can be better understood by considering the interrelationship of four dimensions. This brief overview should reassure you that you can read this Article even without having read the framework article, though I would encourage you, if you do that, to then read the framework article which, though not methodological, covers as aspects that they may not have realized before. Part II.A will clarify what is meant by a rights attribute dimension. The rights attribute dimension refers to the three characteristic traits or types of entitlements and rules: property, liability or inalienability. Part III will clarify what is meant by an objectives dimension. The objectives dimension refers to the two categorical objectives, efficiency and distribution that the framework discussed and suggested are affected by certain entitlement and rule combinations. Part IV will clarify what is meant by a criteria dimension. The criteria dimension refers to the rationales that policymakers draw upon to justify the setting of entitlements and rules. Criteria can be conceived of as falling in as subsets of the objectives dimension. That is, criteria are subobjectives. Part V reviews some pertinent history to highlight confusion that, perhaps, has led the greater significance to be overlooked. It clarifies, what can only be described as, mistakes by leading scholars. At the same time it develops the interrelations between the four dimensions.

\textsuperscript{16} Note, articles often focus on how entitlement holders may behave based upon the penalty. \textit{See, e.g.}, Ian Ayres & Eric Talley, \textit{Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade}, 104 YALE L.J. 1027, at 1037-38 (1995) [hereinafter Ayres & Talley, \textit{Solomonic}] (noting, entitlement holder considerations related to the penalty). Such is a narrower analysis than how entitlement holders behave based upon other factors besides the penalty.

entitlements and objectives, together, it then explains rules. Problematic with that approach is
that entitlements and rules need further consideration together, before objectives can best be
understood. Of course, hindsight – some of the confusion that arose over the years (discussed
infra Part V) – makes the need for this reorganization into four dimensions clear.
To summarize, the following are the four dimensions: (1) Entitlements plus rules yield the right’s
structure (the specific entitlement and specific enforcement reflect the right’s content); (2) there
are three types, or characteristics, of rights: property, liability and inalienability; (3) objectives
(of rights) fall into one of three categories: efficiency, distribution and other justice reasons; and
(4) criteria are subsets of objectives (and are useful for setting entitlements and rules to balance
objectives).
This Article emphasizes that it is important to explain entitlements and rules together as one
dimension, first, since together, they define the structure of a right (Part II.A).18 And, it is
important to separate, at least, initially, that discussion about the structure of a right from what
might be considered the attribute (property, liability and inalienability) of a right (here, Part
II.B). The framework article does not take the approach of treating the attributes of a right as a
dimension worth developing separately, but rather discusses the attribute feature throughout.
After treating it separately here, Part II.C shows how the rights structure and rights attribute
combine. Part III, here, then focuses on defining the objective categories. Part IV extends
discussion of objectives by discussing the final dimension, criteria, which are essentially subsets
of objectives. Part IV of the framework article, The Framework and Pollution Control Rules and
Part V, The Framework and Criminal Sanctions, could be said to extend the framework into the
realm of practical application. To do something similar, Part IV of this Article emphasizes the
remaining dimension, that of the role of criteria, and provides a sample application, termed the
PROFIT Act, to illustrate how the theorem may be used to craft legislation that achieves a
balance of objectives. The framework article does not develop the functional role of the criteria
dimension, except insomuch as it does so by way of example, providing innumerable criteria
throughout the article to illustrate its relation to the other dimensions. This Article, by contrast,
explains the functional role of criteria, separately, to highlight its important functional role. Once
the four dimensions are made clear, the final Part of this Article highlights some of the confusion
that has kept key value of the framework from view.

A. Rights structure dimension – entitlements, gap, and rules

We can open a discussion of entitlements, rules and rights by juxtaposing the conventional
notion of rules, that is, that they are dictates, to the meaning that rules have here. Rules, here, are
protections or enforcements of allocations. For example, a liability penalty would be a liability
rule to enforce the allocation. By contrast, Friedrich Hayek’s look at what is necessary for
creating order asserts the more traditional notion and value of rules: “[t]he question of central
importance both for social theory and social policy is what rules individuals must follow for an
order to result.”19 Here, it is asked, to best create order, what circumstances dictate the setting of

18 The framework describes entitlements and rules as being distinct in function and treats rights as comprised of
both, see infra note 29 and accompanying text. See also discussion infra section VI.B, pp. 81-8 (discussing areas of
confusion).
19 Friedrich A. von Hayek, Kinds of Order in Society, [hereinafter Hayek, Order], reprinted in THE POLITICIZATION
OF SOCIETY 503, 513 (Kenneth S. Templeton, Jr., ed. 1979) [hereinafter TEMPLETON, THE POLITICIZATION]
(emphasis added).
the entitlement and how the entitlement should be protected (the appropriate rule). Thus, here, there are two questions, how to set the entitlement, or allocation, and how to set the protection of it. Yet, despite that difference, one important similarity is that, as Hayek asserts: “[i]n the social field, the kind of order achieved by arranging the relations between the parts according to a preconceived plan is called an organization.” Similarly, this Article emphasizes that achieving order requires dissecting the structures and parts of law. Identifying the dimensions of law is necessary, this Article asserts, to organizing them to meet objectives. We also must briefly note a distinction between conventional notions of rights and the one here which suggests that the structure of a right is comprised of the entitlement and the rule (and by a third aspect, which we’ll term the gap). Such is a less conventional approach than traditional consideration of inalienable rights, fundamental rights, or Constitutional rights. As we delve into the meaning of each, entitlements and rules, we’ll note works other than the framework that have regarded the combination of entitlements and rules as comprising a right. Such is not to undermine the traditional notion of a right. It is merely to offer another view, this one into its structure and function.

1. Entitlements

Entitlements, may be defined simplistically as allocations. Sometimes they are incentives. They can be motivational. They can drive productivity and efficiency. Or, they can achieve distributional objectives, grounded in criteria such as fairness, merit or need. When a policymaker sets an allocation, often he will do so to achieve either efficiency or distributional objectives, or some combination of both. The process for setting the entitlement that the framework speaks to involves: (1) recognizing what an entitlement is, and its strengths (2) recognizing the categorical objectives which the entitlement can help meet; and (3) recognizing the criteria that the entitlement can meet. In other words the setting of the entitlement involves identifying the circumstances, or criteria for an allocation, or a who-gets-what choice. In considering the meaning of the entitlement, a sports example helps. In football, for example, the allocations include assignments, such as four downs to gain ten yards, and crossing the goal line to score. These allocations or entitlement assignments provide a structural support function to the game, engendering competition between teams and cooperation between individuals. You will not find the support function, nor entitlements, so simply described in the framework. Of the definition of an entitlement, the framework says: “The first issue which must be faced by any legal system is one we call the problem of ‘entitlement.’ Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide

20 The framework states that it addresses two questions: “(1) what circumstances should we grant a particular entitlement? and (2) in what circumstances should we decide to protect that entitlement by using a property, liability, or inalienability rule?” Calabresi & Melamed, supra note 1, at 1093 (emphases added).
21 See infra text accompanying note 68 (referring to “allocations of entitlements”).
22 TEMPLETON, THE POLITICIZATION, supra note 19 at 506.
23 Note the use of the term gap by Lee Anne Fennell. Her article “exposes and suggests a way of filling a logical gap between property rules and liability rules. Both the gap itself and the potential associated with filling it emerge from my examination of unarticulated connections among the literatures on entitlement protection devices, commons problems, self-assessed valuation mechanisms, and real options.” Lee Anne Fennell, Revealing Options, 118 HARV. L. REV. 1399, 1410 (2005). See infra note 29 and accompanying text.
24 Calabresi emphasizes that “[t]he nature of the entitlement depends on the circumstances.” Calabresi, Simple Virtue, supra note 17, at 2205.
25 See SUNSTEIN, FREE MARKETS, infra note 31 and accompanying text (developing the terminology further).
which side to favor.” That framework statement is not as simple as entitlements are allocations, but it is still pretty straightforward: the state must decide the entitlement, who-gets-what. Who-gets-what phraseology is necessary locution for simplifying the definition of an entitlement. Again, entitlements are who-gets-what legal and extra-legal allocations. The definition of entitlements as allocations becomes important when we look at some of the confusion that conflates entitlements with rights (Part V) – entitlements are merely the allocation portion of a right, not the enforcement (or rule) part of the right.

When considering how the framework and theorem may be used to direct entitlement change, a few additional points of clarification are in order. First, any existing arrangement includes an existing or current entitlement. Sometimes reference is made to an initial, entitlement, which is in contrast to the grant of a new entitlement. Another clarification, when considering entitlement change, it is important to recognize that the entitlement term refers to allocations in all spheres, not, solely, in the legal sphere. That is, entitlement setting is done by businesses, parents, and even spouses. In the market sphere, for example, a typical contract involves a price term and a contract length. Both are examples of the entitlement terms which are specific to the contract. In the parenting sphere, parents set entitlements, such as how late a child can stay up, what television shows they can watch, and where they’ll go to school. So, too, spouses set entitlements, such as who will watch the children, when, whether they’ll go on a vacation, or make a repair to the home. Once we look at the objectives (infra Part III) and criteria (infra Part IV) we will gain a better sense for the value of entitlements. The entitlement allocation decision is different from the enforcement decision, which we’ll discuss next.

2. Rules

a. Defining rules

In the equation, entitlement plus rule equals a right, rules are the protections for the entitlement. Others, such as Cass Sunstein, have, similarly, reinforced that characterization of a right as being comprised of these two, entitlement and protection (rule). He connects the notion of an

26 Calabresi & Melamed, supra note 1, at 1090. See also infra text accompanying note 113.
27 For a general discussion of initial and current entitlements, and preference shaping, see CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 245-70 (1997) [hereinafter SUNSTEIN, FREE MARKETS]. Note, Coase’s notion of entitlement separate from a protective mechanism, described by Sunstein, is similar to the framework’s, though he does not describe his work in framework terms:

[T]he [Coase] theorem was originally developed in the context of an environmental problem arising in the law of tort. Coase’s conclusion was of course that in the absence of transaction costs, the initial assignment of a legal entitlement will be irrelevant to (a) the ultimate use of property or (b) the level of the relevant activities. The theorem suggests, for example, that where transaction costs are zero, it “does not matter” whether an entitlement is given to breathers or to polluters, to railroads or to farmers. The two will in any case bargain to a result that is both efficient and (more striking) the same.

Id. at 248.

28 It should be made clear that all relationships involve entitlement and rule setting. The theorem offers a methodology to set them most effectively, to create harmonious interactions.
29 The framework captures this by describing both entitlements and rules, largely, distinctly and by treating rights as comprised of both. See discussion infra section VI.A (discussing the distinctions and confusion over the composition of a right).
entitlement and of its protection to a right as follows: “if the particular choice foreclosed has some special characteristic entitled to protection from collective invasion, and especially if it is a prerequisite for deliberative democracy itself, it is appropriately considered a right.” He also states, consistent with the who-gets-what location: “[w]hat people ‘have’ is a product of what the law protects.” In our sports analogy, to use a simple example, the rules would be the penalties to be assessed for violations of the game’s intended allocations. In the contract example, again, the rules are, for example, penalties for early termination. Rules deter behavior much as entitlements motivate behavior. Again, that framework definition of rules runs counter to conventional connotations, such as that rules govern the way the game is to be played. Rules, according to the framework, are not specifications as to how the game should be played, but something much narrower. Rules are specifications, but only of protections. The term rights, then, as it is used here, reflecting a composite of entitlements and rules, is more reflective of what are conventionally thought of as rules. Note, this definition of a right is also much different than the general reference to inalienable rights or constitutional rights. One might recognize that those adjectives, preceding the word rights, qualify narrow subsets of a broader sphere, of all rights. It is that broader sphere to which we refer.

30 Sunstein, Free Markets, supra note 27, at 25 (emphases added). John Stuart Mill describes a similar conception of a right, as involving, described by Chinhengo, “the granting and the protection,” and in Mills words: “When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion.” Austin Chinhengo, Essential Jurisprudence 76 (2d ed. 2000). However, Mills idea of a right is more limited, according to his harm principle, than that of the framework, which in defining two all encompassing objectives, see infra notes 60, does not so limit the content of a right. Of course, Mill’s emphasis is on the content, not on the structure of a right. Note, such an approach is different than that of Joseph Singer, who emphasizes, not these two components, but rather the allocation and an associated obligation. Joseph William Singer, Entitlement (2000) [hereinafter Singer, Entitlement]. Though Singer broadens the discussion of the relation of obligations to property, and the understanding of property entitlements, obligations may be subsumed by a rule, and in that sense, Singer’s argument is consistent and useful with respect to both the entitlement and the rule. See discussion infra Part VI. (describing a rule in more detail).

31 Sunstein, Free Markets, supra note 27, at 248. One scholar reflects the concern that such an approach moves away from notions of “vested rights” to claims based on interests: “the reconceptualization of a legal right as an entitlement ‘to enforce against another a claim, or to resist the enforcement of a claim urged by another’ [made it difficult] to distinguish between legitimate and illegitimate exercises of legislative power.” Public Values in Constitutional Law 6 (Stephen E. Gottlieb, ed., 1993) (alteration in original) (quoting James L. Kainan, “Nineteenth Century Interpretations of the Contract Clause: The Transformation from Vested to Substantive Rights against the State,” Buffalo Law Review 31 (1982): 381, 461).

32 Joseph Singer provides a clear definition of the conventional meaning of rights:

Rights theory, broadly conceived, includes any normative arguments that justify property rules because they are right – because they describe the moral values that should govern the ways in which people behave toward each other in a free and democratic society. It therefore includes considerations of fairness and justice, dignity, autonomy and human flourishing, desert and distributive equity. In its broadest connotation, the language of rights can also encompass the values promoted by communitarians, who emphasize the importance of community life as well as individual rights and argue that individuals have obligations as well as rights.

Singer, Entitlement, supra note 30, at 105-06. He further contrasts such an approach to that which focuses on efficiency. Id. See also Sunstein, Free Markets, supra note 30 and accompanying text.
b. Avoiding confusion between rules and entitlements

One might also suggest that a rule, itself, can be described as an allocation.\(^{33}\) The rule does reflect an allocation of the enforcement aspect. And, that makes the definition of an entitlement as an allocation, confusing, with the contrasting definition of a rule as the protection of an allocation. It is plain to see, though, that there are really two allocations. But, what is less obvious is that they are of a different quality: the entitlement has an immediate benefit, whereas, the rule’s force is only contingent. Clearly, the rule includes the allocation of the protection of the entitlement allocation. In our sports analogy, the penalty is an allocation of the enforcement of the entitlement to be free from foul. But, in that sense, it is less an allocation, and more a protection of another allocation, which is why it is described as a rule or penalty attached to a particular entitlement. Notice that rules are fundamentally different, in that, what is being allocated is largely provisional or contingent, whereas with an entitlement, the allocation is substantive, or not provisional, at the time of the allocation. By contrast, most of the rule’s substantive impact only kicks in once a transfer is invoked. Take the contract example, the protective (pain) part of the agreement is the penalty for early termination, for example. Not all of the pain is provisional or contingent. There is some pain in simply knowing that one is stuck in a contract for a particular length of time. And it is pain heightened when competitive carriers offer lower rates while one is stuck in a higher price contract (that is called opportunity cost). But, the rule’s pain element is relatively limited — as compared to the pleasure of entitlements enjoyed immediately. That predominant quality, immediate gain versus provisional pain is a distinguishing feature between entitlements and rules.

3. Recognizing both entitlement and rule as part of the right

How the entitlement and rule pertain to a right can be seen clearly in Marbury v. Madison.\(^ {34}\) Justice Marshall uses the terms right and entitlement, interchangeably, as people are apt to do. But, in fact, it was decided very much on the distinction, just explained, between the entitlement and the rule. Justice Marshall, in noting that Marbury had an entitlement to have his commission delivered, and also noting that his protection was not through the courts, defined Marbury’s right in terms of both these components.\(^ {35}\) The two questions at the outset of the opinion imply the two aspects, though the first question phrases what we are calling an entitlement, as a right: “Has the applicant a right to the commission he demands?”\(^ {36}\) The question in the first part is really whether he had the entitlement. And the second question terms a remedy,\(^ {37}\) what we are calling the rule: “If he has a right (here, we’d say entitlement) … do the laws … afford him a

\(^{33}\) But see, Morris, Structure, infra note 115, at 842-43 (describing the allocation portion of a rule, but characterizing that as an entitlement).

\(^{34}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{35}\) Justice Marshall used the term entitlement and right, somewhat interchangeably: “The first object of inquiry is, 1st. Has the applicant a right to the commission he demands? His right originates in an act of congress…. In order to determine whether he is entitled to this commission…. “ Id. at 154-55. Later, the decision notes “It remains to be inquired whether he is entitled to the remedy for which he applies?” Id. at 168. Nonetheless, when we use the framework’s distinctions between these, we see that it has been decided on that noted between entitlement and rules.

\(^{36}\) Id at 154.

\(^{37}\) Notice a remedy refers more to the means for recovery, whereas, the rule refers more to the form of the transfer allowed. See infra text accompanying note 41 (explaining the rule). For a broader discussion about the relationship of rules to remedies, see Saul Levmore, Unifying Remedies: Property Rules, Liability Rules, and Startling Rules, 106 YALE L.J. 2149 (1997).
remedy?"  

Marshall quickly turns to the term entitlement, with respect to the first question: "[i]n order to determine whether he is entitled to this commission…." Of course, had Marbury been explained in such straightforward terms as entitlement and protection (rule) equal, or define, a right, it would have been much easier for the first year law student to understand the outcome at a glance: he had an entitlement to the commission, but it was not protected by the court.

a. The gap

The implication of recognizing two aspects to a right is that if we want to achieve a certain result, we can change either the entitlement or the rule. Before, we change either, however, we must recognize that there is a gap between the desired result and the result that attains with the existing entitlement and rule. In the case of Marbury, policymakers could seek a Constitutional amendment were they to deem the right as defined by the court to fall short of its desired right. When policymakers change an existing entitlement or rule, whether via Constitutional Amendment, legislation, or agency action, they do so based on criteria. We might view the criteria as playing a connecting role, in the way that the synapse in the body connects excitatory and inhibitory neurons. One could look at the entitlement as the excitatory neuron, and the penalty as the inhibitory neuron. The criteria dimension occupies plays the connecting role (infra Part IV). Now to the second dimension, the right’s attribute dimension.

B. Rights attribute - property, liability, inalienability

In addition to the distinction between entitilements and rules, it is important to look at the property, liability and inalienability attributes of entitlements and rules. The framework referred to three different types of entitlements and rules: property, liability and inalienability. A simple way to distinguish between them: two, one, zero. Two, one, zero reflects the number of parties that may transact in each of the three types, property, liability and inalienable rights, respectively. Two: “An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller….” One: “Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule….” Zero: “[a]n entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.” Property transfers, or property entitlements, require two people to agree; liability transfers, or liability entitlements, can be invoked by only one party; and inalienable transfers, can be invoked by neither. An inalienable transfer, for example, would be that one cannot sell oneself into slavery. Of course, it is only the willingness of people to comply with the norm and the enforcement mechanism that discourages inalienable transfers. Under the

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38 Id. at 154.
39 Id. at 155 (emphasis added).
40 See infra Part IV.
41 Calabresi & Melamed, supra note 1, at 1092 (emphasis added).
42 Id. (emphasis added).
43 Id. (emphasis added).
44 Id. at 1106.
45 Id. at 1112.
definitions, as we’ve explained, one, in fact, has the practical ability to entitle oneself to sell oneself into slavery, it is only the enforcement mechanism which will ex post prevent it.

C. **Putting the rights structure together with the rights attribute**

Both the attribute characteristic, property, liability, or inalienable, which, again, is the number of the parties that must – or are allowed to - “agree” to a specific exchange, and the nature, pleasure or pain, of the levers (entitlement versus rule) must be chosen. You can imagine the permutations: Pe, Pr, Le, Lr, Ie, Ir and the two together, PeLr, and so on.\(^{46}\) It is neither property/liability/inalienable characteristic nor entitlement/rule nature alone, but it is the two, characteristic and nature, together that need to be considered in terms of how well the combination will meet criteria and objectives. Should, in a given situation, two people be allowed to exchange their entitlements? Should, in a given situation, two people be allowed to bargain for the penalties (rules)? These are the assessments being made by policymakers along with the distinction between entitlement and rule. Ayres and Talley list some examples: “Restraining orders, specific performance clauses, and certain types of punitive sanctions represent “property” protections, while expectation damages, the Takings Clause of the Fifth Amendment, and compulsory licenses are examples of “liability” protections.”\(^{47}\) Note, Ayres and Talley characterize those as protections. It would be more accurate to describe them as reflecting both entitlements and rules, or rights. Section V.B will develop the rights attribute dimension, further, after putting it into perspective by highlighting the objectives dimension in Part III and the criteria dimension in Part IV.

### III. Objectives

Entitlement and rule choices, whether of the property, liability, or inalienable sort, can only be made by considering the objectives that they seek to meet. The framework article described, predominately, two categories of objectives: efficiency and distribution, which are useful in setting entitlements and rules. In this Part, we develop the role of objectives relative to rights. The framework explains its two comprehensive categories, which we’ll term buckets\(^{48}\) efficiency and distribution: “To the extent that one is concerned with contrasting the difference between efficiency and other reasons for certain entitlements, the bipolar efficiency-distribution locution is all that is needed.”\(^{49}\) However, the framework continues, explaining the reason one may separate out other objectives. They state:
euismod non, tristique sed, est. Curabitur lectus felis, pellentesque at, dapibus id, feugiat vitae, nisi.

\(^{46}\) For a further development that reflects components of an entitlement, and fourteen entitlement forms, see Morris, *Structure*, infra note 138.


\(^{49}\) Calabresi & Melamed, *supra* note 1, at 1105.
To the extent that one wishes to delve either into reasons which, though possibly originally linked to efficiency, have now a life of their own, or into reasons which, though distributional, cannot be described in terms of broad principles like equality, then a locution which allows for “other justice reasons” seems more useful.\(^{50}\)

They, thus, provide a third bucket, “other justice reasons.”

A word should be said about the idea of treating these as buckets of objectives, which seems to imply that these objectives are mutually exclusive. That is, if a reason for a policy is based on an efficiency ground, it is put in an efficiency bucket, exclusive of its distributional justifications. Such an approach is consistent with the framework’s treatment of efficiency and distribution as reflecting separate and distinct categories of reasons offered in support for particular choices of entitlements and rules.\(^{51}\) Treating those objectives as though they occupy buckets: (1) emphasizes that there are discrete differences worth noting; and (2) allows for the idea that a balance of each may be achieved. For the balance, we might visualize scales, with efficiency and distribution considerations being balanced against each other. Avery Wiener Katz notes, “[t]here is, after all, a trade-off between efficiency and fair distribution....”\(^{52}\) The purpose of linking these objective buckets to the entitlements and rules dimension and to the criteria dimension is to enable more adept balancing of efficiency and distribution objectives.\(^{53}\) In other words, entitlements and rules may be calibrated using criteria to manage the tension between competing objectives and to balance them. That is a restatement of the theorem.

A. Why efficiency and distribution?

There is good reason for efficiency and distribution to be the principal objective buckets of the framework, though the framework does not make an attempt to justify or debate the choice. It asks: “What are the reasons for deciding to entitle people to pollute or to entitle people to forbid pollution, to have children freely or to limit procreation, to own property or to share property?”\(^{54}\) It then, merely, makes an offering: “They can be grouped under three headings: economic efficiency, distributional preferences, and other justice considerations.”\(^{55}\) It seems almost self-evident that these are the categories that debates fall into,\(^{56}\) although, it might be helpful to briefly emphasize that the need to consider law in terms of efficiency is that so much of behavior, whether property, liability or inalienable, is driven by efficiency, particularly in a capitalist society (and, in one governed and limited by enumerated powers). One might also emphasize the need for distributional considerations, because so much of law is aimed at countering might makes right, whereby, often, might runs counter to distribution on the basis of

\(^{50}\) Id.

\(^{51}\) See supra text accompanying note 49 and infra text accompanying note 60.


\(^{53}\) See, e.g., id. at 2240 (discussing the “efficiency criterion” and “whether efficiency should be regarded as an exclusive goal, or simply as one of several to be balanced against each other.”).

\(^{54}\) Calabresi & Melamed, supra note 1, at 1093.

\(^{55}\) Id.

\(^{56}\) But see, Sunstein, Free Markets and Social Justice 44 (1997) [hereinafter Sunstein, Free Markets]. Sunstein, after pointing out that “law tries to redefine roles. . . . of employee, husband, father disabled person, and judge” notes that “[l]aw’s pervasive attention to roles shows the poverty of the familiar idea that ‘efficiency’ and ‘distribution’ exhaust the concerns of law and the state. Sometimes society and law revisit a currently conceived role for reasons that have nothing to do with either efficiency or distribution.”
equality, merit, desert or some other justice reason. The framework speaks of this “might makes right” challenge.\textsuperscript{57} Thus, this part of the theorem: “in accord with societal objectives … in order to prevent (counter) might makes right…”\textsuperscript{58} Given the considerable emphases placed on these categorical objectives, let’s take a closer look at their definitions.

\textbf{B. The meaning of efficiency and distribution}

1. \textit{Efficiency}

The framework defines efficiency according to Pareto:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before. This is often called Pareto optimality. To give two examples, economic efficiency asks for that combination of entitlements to engage in risky activities and to be free from harm from risky activities which will most likely lead to the lowest sum of accident costs and of costs of avoiding accidents. It asks for that form of property, private or communal, which leads to the highest product for the effort of producing.\textsuperscript{59}

Though the emphasis of that definition is on efficiency, we can also see that it touches on distributional objectives: “free from harm,” and free to “engage in risky activities.” To the framework’s definition of distribution we turn.

2. \textit{Distribution}

Though there is overlap, the framework defined distribution as mutually exclusive with efficiency, and as a catch-all:

Distributional grounds covered broadly accepted ideas like “equality” or, in some societies, “caste preference,” and highly specific ones like “favoring the silence lover.”\textsuperscript{60} We used this definition because there is a utility in lumping together all those reasons for preferring [one over another] which cannot be explained in terms of a desire to make everyone better off, and in contrasting them with efficiency reasons, whether Paretian or not, which can be so explained.\textsuperscript{60}

The framework sets up the distribution bucket as a catch-all for a decision grounded in some other reason than efficiency and the two buckets to capture all justifications for laws, policies, and cases. Note, there is a benefit to bucketing only distributive equality arguments in the distribution bucket and creating a separate distribution bucket for distributive necessity

\textsuperscript{57} See infra text accompanying note 113.
\textsuperscript{58} See supra text accompanying note 8.
\textsuperscript{59} Calabresi & Melamed, supra note 1, at 1093-94 (emphasis added) (footnotes omitted).
\textsuperscript{60} Id. at 1104.
arguments. But here, like the framework we place all distribution rationales in the distribution bucket. In the next Part, we’ll take a further look at these objectives.

IV. CRITERIA

A. Need for criteria

Thus far, this Article has explained the criteria dimension the least, and yet, the role of criteria is the most important. It is what allows legal solutions (and all transactions and extra-legal arrangements) to be made responsive and to balance objectives. Similarly, the framework article does not delve into the methodological role of criteria selection and setting, a common step of lawmaking, in as great length as it addressed the role of the other dimensions. Calabresi did, however, develop the role of criteria in more detail in Costs. And, the framework does provide useful examples of criteria. It’s unavoidable that it does because criteria are factors, standards, measurements, or yardsticks, any metric, qualitative or quantitative, for assessing how well something is performing, or for justifying an entitlement or rule choice. Criteria identification is integral to the discussion of rights.

But, here, we take care to explain and develop further, criteria’s methodological role for crafting optimal entitlements and rules to highlight that (a) criteria are really subsets of objectives (there are efficiency criteria and distribution criteria), and (b) criteria are what will steer toward the use of entitlement change or rule change. With respect to (a), the framework article highlights that many criteria relate to the efficiency objective and many relate to the distributive objective. For example, the framework article opens its Part II, “Setting the Entitlements” by noting that the Holmesian criterion of “letting the costs lie where they fall” is only one of many possible efficiency criteria. In fact, the framework suggests five different criteria that have the capacity to steer toward placing costs, not where they lie, but elsewhere, in order to achieve the

61 Christopher Dunn, Expanding the View of the Cathedral (unpublished manuscript, on file with the author) (providing three expansions: (1) adding two additional objectives buckets; (2) offering an alternative set of objective buckets to address Constitutional questions).

62 See infra text accompanying note 68.

63 The framework article specifically states that, with respect to criteria, it is only summarizing what it addresses in more detail in Costs, Calabresi & Melamed, supra note 1, at 1097 n.18.

64 Morris incorrectly terms criteria, Morris, Structure, infra note 138, at 848 n.61. (1993) [hereinafter Morris, Structure], what the framework clearly terms “distributional objectives” (Calabresi & Melamed, supra note 1, at 1110, “distributional goals” (Id. at 1098), and efficiency objectives (Id. at 1111) and efficiency goal(s) (Id. at 1098, 1104, 1114): “While efficiency and distributive preferences are the two criteria generally focused upon in the literature, a third criterion is mentioned on occasion. The third criterion is sometimes termed “other justice reasons,” as it was called by Calabresi and Melamed….” Morris, Structure, supra. Also “Distributive preferences, the second set of criteria…” Id. at 848-49. In the framework, there is a sole reference to “efficiency criteria.” Calabresi & Melamed, supra note 1, at 1113. The more frequent references are to objectives and goals. Along with the framework’s other characterization of criteria and its role, see supra text accompanying note 62, there is an important distinction being made. However, criteria may be thought of, in part, as reflecting subsets of objectives. See infra note 65 and accompanying text.

65 Often efficiency or other objectives will be described as a criterion. E.g., Katz, Positivism, supra note 52, at 2231 n.6 (noting “[f]or a classic defense of economic efficiency as a criterion for public policy, see Thomas C. Schelling, Economic Reasoning and the Ethics of Policy, Pub. Interest, Spring 1981, at 37.”).

66 Calabresi & Melamed, supra note 1, at 1093.
more efficient result. With respect to (b), of the role of criteria relating to entitlement selection, the framework notes:

Complex though this summary may suggest the entitlement choice to be, in practice the criteria it represents will frequently indicate which allocations of entitlements are most likely to lead to optimal market judgments between having an extra car or taking a train, getting an extra cabbage and spending less time working in the hot sun, and having more widgets and breathing the pollution that widget production implies.

Further, it makes clear the role of criteria for influencing the entitlement choice, in the context of connecting the criteria, to objectives and the entitlement selection dimensions:

Economic efficiency is not, however, the sole reason which induces a society to select a set of entitlements. Wealth distribution preferences [according to subset criteria] are another, and thus it is to distributional grounds [or, criteria] for different entitlements to which we must now turn.

Its reference to “distributional grounds” is a reference to both the objective and the criteria: distribution is the objective; grounds reflect the criteria. The framework proceeds to note several distributional criteria. And, the framework does not stop at merely noting the relationship of criteria to objectives, it further explains how different entitlement and rule combinations pertain to both efficiency and distributive objectives.

The framework uses a pollution hypothetical, but “their reasoning could just as well apply to [other issues, such as] Saturday night specials, heroin, or cigarettes,” Margaret Radin notes. With the pollution hypothetical, the framework offers criteria in the context of the tension between efficiency and distribution:

Assume a factory which, by using cheap coal, pollutes a very wealthy section of town and employs many low income workers to produce a product purchased

67 The five criteria it noted:

(1) that economic efficiency standing alone would dictate that set of entitlements which favors knowledgeable choices between social benefits and the social costs of obtaining them, and between social costs and the social costs of avoiding them; … (2) … the party or activity best located to make such a cost-benefit analysis; (3) … which can most cheaply avoid them; (4) in the absence of certainty as to who that party or activity is [number 2 and 3], the costs should be put on the party or activity which can with the lowest transaction costs act in the market to correct an error in entitlements by inducing the party who can avoid social costs most cheaply to do so; and (5) a decision will often have to be made on whether market transactions or collective fiat is most likely to bring us closer to the Pareto optimal result the “perfect” market would reach.”

Calabresi & Melamed, supra note 1, at 1096-97 (footnote omitted).
68 Calabresi & Melamed, supra note 1, at 1097 (emphasis added).
69 Calabresi & Melamed, supra note 1, at 1097-98 (emphases added).
70 Calabresi & Melamed, supra note 1, at 1098-1101.
71 See Radin, infra note 140, at 1864.
primarily by the poor; assume also a distributional goal that favors equality of wealth.  

Criteria and subcriteria may be inferred with respect to each type of objective. For example, a “cheap” resource (the coal) is a subcriterion of broader cost minimization criteria that serves the efficiency objective. From the word “pollution,” one may infer some criteria and subcriteria related to the setting of the degree of acceptable pollution (e.g., criteria, the allotment of pollution credits; subcriteria, so many parts per billion). Each may be set differently to achieve varying distributive and efficiency preferences and balances.

The value of criteria ought to be clear: criteria (and subcriteria) can be thought out and selected to craft solutions that meet and balance both objectives (that, of course, is the process of lawmaking). The phrase, in the above hypothetical, “employs many low income workers” implicates criteria to meet both efficiency and distributive objectives: companies prefer to employ at low wages, thereby, achieving an efficiency objective, while providing jobs and meeting a distributive objective. To make that distributive implication clear, the framework also notes that the product is purchased by the poor, and they also note a preference for equality of wealth. The hypothetical serves to highlight tensions between efficiency and distribution (inter-bucket tension), but also the tension within the distributional bucket (intra-bucket tension) associated with entitlement and rule choices. The readily apparent tension is that there is a distributional benefit to the poor (of both jobs and more broadly, product use), an efficiency benefit (to the factory) from the use of a cheap energy source (coal) and cheap labor, and there is the distributional harm of the pollution to the neighboring wealthy. Thus, combining the dimensions with respect to the hypothetical: the entitlement and rule is set according to the criteria, such as the use of economically depressed areas for cheap labor, creating jobs, and distributing products that the poor need to thereby, achieve some degree of both efficiency and distribution objectives.

The framework could have illustrated the methodology with legislative policy, but instead uses a hypothetical to suggest judicial possibilities and their impacts on the achievement of objectives. The judicial possibilities it offers: rule one, the pollutee may enjoin the polluter’s nuisance; rule two, the polluter may pollute, but must compensate the pollutee; and rule three, polluter may pollute at will, because it is not held to be a nuisance. Rule four is that pollutee may stop the polluter, or compel the use of cleaner technologies, but must compensate polluter for doing so. Thus, pollutee must “buy-off” polluter. As for the impact on the balance of objectives, in the case of rule one, if the nuisance is enjoined, it is efficient where the harm from pollution to the wealthy town is greater (e.g., valued at two million dollars) than the savings (benefit to the company and consumers) by using the cheap coal (e.g., one million dollars), but it is distributionally harmful to the poor who would otherwise have jobs and benefit from the product (an inter-bucket tension) no longer being made. An alternate hypothetical, whereby the pollution harms a poor area, instead of a wealthy one, would illustrate that even distributional impacts may adversely affect one group of poor while helping another group of poor (an intra-
bucket tension). Not shutting down would maintain jobs and product for the poor, whereas shutting down would enable poor residents to be free from pollution though other poor would lose the benefits of the product.

We can see from the tension that, in order to choose which of the four entitlement and rule combinations are appropriate for achieving the objectives, some criteria will need to be rallied in support of one combination or another. Importantly, what the suggestion of this fourth combination of entitlement and rule highlights is that it may be the best way, of the four, to achieve an efficiency and distributive balance. It is the only one in which pollution may be lessened and, whereby, wealth distribution be made more equal. Rule four places a greater emphasis than the other three rules on the distributional impacts, while also maintaining efficiency, thereby, addressing: (1) the poor’s need for the product; (2) poor’s need for low income jobs; (3) the corporation’s need for profits; and (4) the residents need for clean air. Of course, having the community pay to require the polluter to use better standards (which is what rule four does) reflects a shift in costs from what is usually done when pollution is addressed.

Usually, regulation, if it is attained, requires the corporation to bear the brunt of costs of improvements. Those costs are then passed on to customers and to shareholders. Often, such regulation to raise pollution standards is not easily achieved. And, if it is achieved, it is often inadequate.

B. Relating the dimensions to each other, functionally

1. Criteria create the synaptic fit

In strictly legal terms, this Article has explained that the need for criteria to act as a synaptic connector, steering toward entitlement and rule combinations is based upon the need for society to balance competing tensions between objectives. The theorem addresses the tension between subjective preferences, both within and between objective buckets, by suggesting that criteria be selected that relate to each of the competing objectives and that entitlements and rules be set to balance the competing preferences. We may better understand the framework and Calabresi’s other relevant writings if we understand that they do not simply reveal the framework, a rigid structure, they also explains how criteria, rights, and objectives may be fit together by policymakers to create more responsive policies. From the above hypothetical and the

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77 See id. at 1121 n.61 (reflecting a similar alteration to the hypothetical and noting distributive and efficiency implications). See also, CALABRESI, COSTS, supra note 17, at 23, 28; Robert W. Hahn, United States Environmental Policy, Past, Present, and Future, 34 NAT. RESOURCES J. 305, 339-340 (1994) (cautioning that sometimes the choice of pollution prevention may be at the expense of other potentially more important environmental improvements.).

78 Id. at 1121.

79 Freeman notes with respect to the efficiency ideal: “Why losers should be happy with an explanation that they could have been compensated but were not is left open.” M.D.A. FREEMAN, LLOYD’S, INTRODUCTION TO JURISPRUDENCE 558 (7th ed. 2001) [hereinafter FREEMAN, LLOYDS].

80 That there are subjective preferences in tension is noted by Professor Robin Paul Malloy: “the study of who gets what and why is a very subjective and indeterminate undertaking.” Robin Paul Malloy, Adam Smith and the Modern Discourse of Law and Economics [hereinafter Malloy, Discourse], in MALLOY & EVENSKY, ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin P. Malloy & Jerry Evensky eds., 1994) [hereinafter MALLOY & EVENSKY] at 129.

81 Referring to those listed supra note 17.

82 Note, Calabresi also looks at the structure and responsiveness of government. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1999) (focusing on legislative and administrative inadequacies and addressing the
discussion about the role of criteria, one can see the functional interaction between the dimensions. A comparison that highlights and distinguishes the structural support and responsiveness roles better: entitlements and rules are like structural bones, or neurons in the body. As noted above, we might think of entitlements and rules as excitatory and inhibitory neurons, respectively. Objectives, by contrast, act as stimuli. Of course, in the body, there is a close relation between neurons and stimuli.\(^{83}\) So too, there is a close relation between entitlements, rules (or rights) and objectives. We can take a cue from John Dewey who describes objectives as directive stimuli.\(^{84}\) Such a notion is consistent with that, here, which suggests that objectives stimulate the setting of entitlement and rule. If “[n]eurons are ‘workers’ in an information-processing ‘factory’”\(^{85}\) so too entitlements and rules are ‘workers’ in an information-processing factory that mixes criteria to achieve objectives.

The idea that law is related to a nerve function is not new and not insignificant. If we can recognize the proper analogy, we will be able to better design our approach to policymaking. So thought greats such as Thomas Hobbes and Herbert Spencer. Hobbes related the law to the nerves, opening, no lesser than his work Leviathan with an intricate comparison of society to the human body, noting that “reward and punishment … are the nerves.”\(^{86}\) Such is consistent with our notion that entitlements (like rewards) and rules (like penalties) are the neurons. Herbert Spencer challenged the idea, noting, “if magistrates are the artificial joints of society [as Hobbes also suggests], how can reward and punishment be its nerves? Its nerves must surely be some class of persons. Reward and punishment must in societies, as in individuals, be conditions of the nerves, and not the nerves themselves.”\(^{87}\) In other words, Spencer argues that reward and punishment are the experience of the nerves, not the nerves; better to say that the neurons, rewards and penalties, respond to the stimuli of objectives. Such places the objective in the role of the indirect stimuli, and the neuronal entitlements and rules in the role of direct stimuli to stimulate the individual’s behavior. Generally the individual’s preference for pleasure and aversion to pain act as the immediate stimuli. No need to make, as Spencer asserts, the nerve a dimension.

\(^{83}\) See also Chapter VII., Structural Responses. Id. at 69-79 (developing the responsiveness function). Cf. PEOPLE VS. GOVERNMENT, THE RESPONSIVENESS OF AMERICAN INSTITUTIONS (Leroy N. Rieselbach ed., 1975) (examining the responsiveness of institutions in terms of various criteria rather than offering a tool for responsive policy setting).

\(^{84}\) John Dewey, The Nature of Aims [hereinafter Dewey, Aims] excerpted and reprinted in ARISTOTELE’S ETHICS, ISSUES AND INTERPRETATIONS 47, at 50 (James J. Walsh & Henry L. Shapiro, eds. 1967) [hereinafter ARISTOTLE’S ETHICS] (describing objectives as “directive stimuli to present choice.” Id.). See Christopher M. Dunn, Altruism, One View of Society (Sept. 5, 2009) [hereinafter Dunn, Altruism] (unpublished manuscript, on file with the author) (describing the relationship of objectives to greater purposes, such as actualization, and the need for other functions beyond the structural support and responsiveness functions described in this article).

\(^{85}\) See also GEORGE B. JOHNSON, THE LIVING WORLD 82 (2d ed. 2000) A “wide range of synaptic types make synapses a very versatile chemical delivery system.” Id. at 161. Similarly, in the societal sphere there are a wide range of potential gap types that may make for very sophisticated and capable combinations of entitlements and rules. Those combinations may be used to make the system more healthy and capable of achieving objectives.

\(^{86}\) GEORGE B. JOHNSON, THE LIVING WORLD 82 (2d ed. 2000).

\(^{87}\) THOMAS HOBBES, LEVIATHAN, reprinted in LOUIS P. POJMAN, CLASSICS OF PHILOSOPHY, 508 (1998) [hereinafter, HOBBES, LEVIATHAN].

The efficiency objective corresponds with the enzyme: an enzyme is “any of numerous complex proteins that are produced by living cells and catalyze specific biochemical reactions . . .” 88 “Enzymes are necessary to produce chemical reactions within a cell.” 89 Comparing the efficiency objective to an enzyme reflects the view that the output to input ratio is related to the creation of a reaction or response. 90 Such is consistent with the fact that the efficiency reflects growth and productivity. We might, then, say that the distribution objective corresponds with the circulation to address the need by different parts of the body for nourishment – the nourishment is the distribution of products and services, not the money. Note, by contrast, Hobbes and Spencer regarded money as the blood. 91 To be clear: entitlements and rules need to be fit to objectives by using criteria, in order to respond to the existing situation and motivate the desired response or action. Though the framework has been regarded as reflecting the structure of rights, this Article has urged considering Calabresi’s writings, captured in the theorem, as describing more generally, the nervous system of law - a functional system that includes the synaptic role of criteria, the directive stimuli role of objectives (efficiency, akin to the catalyzing enzyme; distribution akin to the circulation – both critical), and the structural support role of entitlement and rule neurons.

The attempt to consider an analogy of these framework dimensions to functions in the human body is to offer an anchor for their importance. It was not hard for scholars to see the framework article as defining a structure. Nor, should it be difficult for scholars to see that the theorem defines a responsiveness tool, or a synapse, particularly in light of the comparisons made by Hobbes and Spencer. Describing objectives in such functional terms is consistent with the notion that objectives are “ends-in-view,” 92 as opposed to ends for their own sake 93 much as maintenance of each of those functional body components are ends in view, and not ends for their own sake. The greater end is not the balance of objectives but the actualization of the entity’s potential. Similarly, the greater end of creating policies is not to balance efficiency and distributional objectives but so that individuals are able to actualize their potential while committing minimal harm.

We can turn to another example of how these dimensions come together in the legal realm. A general point can be made regarding the Social Security program, for example, to show how each of the two objective categories apply to a program. First, clearly, the program involves the

89 Baylor College of Medicine, Dept. of Molecular Virology and Microbiology, Glossary, at http://www.bcm.edu/molvir/eidbt/eidbt-mvm-glos.htm (last visited Sept. 7, 2009).
90 But see, Spencer, The Social Organism, supra note 87, at 9.34 “Whence it is manifest that what in commercial affairs we call profit, answers to the excess of nutrition over waste in a living body.” Though different, efficiency and profit are closely related.
91 Spencer develops the analogy noting, “We refer, in the case of the individual organism, to the blood-discs; and in the case of the social organism, to money. . . . And blood corpuscles being like coin....” Spencer, The Social Organism, supra note 87, at 9.40. He also cites “Liebig, who in his Familiar Letters on Chemistry says: ‘Silver and Gold have to perform in the organism of the state, the same function as the blood-corpuscles in the human organism.’” Id. But see, HOBBES, LEVIATHAN, supra note 86, at xviii (noting “The Wealth and Riches of all the particular members, are the Strength”). Hobbes treatment of wealth as the strength accords with this author’s treatment of market exchange as reflecting the muscles. See Dunn, ALTRUISM, supra note 84 (unpublished manuscript, on file with the author) (describing the relation of exchange to muscles and to improving transactions and interactions). See also infra note 135 (noting a difference between Hobbes and this alignment of muscles).
92 Dewey, AIMS, in ARISTOTLE’S ETHICS, supra note 84, at 51.
93 See supra note 84 and accompanying text.
distribution of benefits. Second, the program has efficiency benefits to the extent that providing individuals threshold payments allows them to engage in productive endeavor. There are numerous other efficiency and distribution implications, description of which is not needed to make the point that these categories apply to legislation.

The analogy to the four dimensions to parts of the human body is to highlight the functional interactions between the dimensions and to highlight that each categorical objective serves a different function. The point is not to get hung up on the analogies, but rather to note that with respect to any program - in this case, the Social Security program - arguments can be made for varying balances to be struck as to each objective. For example, efforts by the Bush Administration to partially privatize Social Security were based on a stated interest in making the program more efficient.94 Counter-arguments focused on the potential that there would be some adverse distributional impacts.95 Thus, based on the analogy, the two sides could be described thus: the Administration’s goal to design a program to act as a better enzyme and to deliver blood was countered by the Democrats goal to maintain a program with healthy functioning circulation to meet the minimum needs of all.

The framework article did not make such analogies, nor did it offer a potential legislation to illustrate the implications in the legislative arena, thus the next section is useful to illustrate the application of the theorem to help craft legislation.96 Though the subsequent sections do not revisit the analogy, keep it in mind to reinforce your understanding of the distinctions being made about the four dimensions.

Before considering the application of the theorem in the legislative sphere, a final point should be made about considering the theorem in terms of other systems, such as the body, and of the value of categorizing. The visionary, Buckminster Fuller presciently speculated that “[t]here is an inherently minimum set of essential concepts and current information, cognizance of which could lead to our operating our planet Earth to the lasting satisfaction and health of all humanity.”97 If it is true that we can generalize the functions of the human body to the functions of our legal and broader social institutions, we might be able to realize solutions never dreamed possible.98 Certainly, the functional explanation of the theorem’s four dimensions is a step in the direction of affording policymakers a tool to create more responsive solutions to socio-economic challenges. Ironically, it is through the ability to generalize and aggregate (into dimensions and

95 See e.g., Harry Reid, Democratic Response to the State of the Union Address, (Feb. 2, 2005) (describing the proposals as “Social Security roulette” and “taking Social Security’s guarantee and gambling with it.” And rhetorically questioning whether “big corporations with powerful lobbyists should get special favors….”), http://www.washingtonpost.com/wp-dyn/articles/A58998-2005Feb2_3.html (last visited Sept. 3, 2009).
96 Of course, the application of the framework’s four dimensions are relatively clear with legislation. And, policy prescriptions often require detailed analysis. See, e.g., Henry Hansmann, Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 YALE L.J. 1879 (1991) (arguing the merits of extending liability to shareholders, but also noting the failings of such a proposal).
98 See Dunn, Altruism supra note 84 (broadening the systems understanding and analogy).
objective buckets), not simply to distinguish and divide, that we may be able to advance further. Again, a quote attributed to Fuller helps make the point: “The word generalization in literature usually means covering too much territory too thinly to be persuasive, let alone convincing. In science, however, a generalization means a principle that has been found to hold true in every special case. ... The principle of leverage is a scientific generalization.” In that vein, we continue, this time generalizing a set of criteria that justify an entitlement change in the legislative sphere.

2. Sample criteria: PROACTIVE criteria

To help clarify the important role of criteria in the framework, and for crafting more responsive laws, three general criteria, termed PROACTIVE criteria, are suggested that point to the need for an entitlement change. An entitlement change is desirable when:

1) ex ante prevention is essential (Prevention);
2) there is a potential for rogue actors (Rogue); and
3) there exists, other non-rogue actors that can control the rogue actor (Other Actor Control That Is Viable, Effective).

In fact, when those three general criteria are present, then an entitlement change is necessary to prevent harm and will be able to do so (although, not necessarily efficiently). The words in parentheses next to each criterion emphasize that these three criteria reflect a heightened need for proactive measures to be taken: Prevention, Rogue, Other Actor Control That Is Viable, Effective. These criteria steer toward an entitlement change as opposed to rule change. In that the criteria are being combined, it reflects the type of mixing that reflects the synaptic function. The reason that balances between the objectives can be accomplished is that criteria can be selected with respect to each objective bucket and combined to calibrate a balance of objectives. Notice how closely related the three PROACTIVE criteria are to the objective buckets. Criterion one, that ex ante deterrence is essential, reflects a distributional criterion. Criterion two, that there are rogue actors capable of inflicting harm to be addressed, also reflects a distributional criterion. Criterion three, tapping other actors reflects efficiency and distributional criteria, whereby, cost effectively, other actors may be employed to counter the action of bad actors. The fact that criteria may be looked upon as subsets of objectives stands to reason, since, for criteria to meet objectives, the two dimensions must be closely related. The next section describes a legislative application of those criteria and further illustrates their relevance to achieving objectives.

3. Tying the pieces together – the PROFIT Act

To illustrate those criteria and the four dimensions of the theorem, a sample application, termed the Productivity, Responsibility, Opportunity Fit (PROFIT) Act is offered. The Act couples entitlements and rules to achieve a balance of the efficiency and distribution objectives. Other Acts that couple carrots and sticks to meet broad objectives are, for example, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (1996) and The Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745 (2002). The former Act retains benefits for recipients, but offers incentives for individuals to find work while limiting the period which an individual may collect. The latter Act creates responsibilities for gatekeepers, thereby, eliminating a previous entitlement to gatekeepers to be free from such requirements. Each of those Acts could be analyzed in terms of the four dimensions and the four objective buckets, but no such analysis is necessary to see that they apply.

99 Fuller, supra note 97.
100 See also supra text accompanying note 47 (summarizing differences).
101 Other Acts that couple carrots and sticks to meet broad objectives are, for example, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. No. 104-193, 110 Stat. 2105 (1996) and The Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745 (2002). The former Act retains benefits for recipients, but offers incentives for individuals to find work while limiting the period which an individual may collect. The latter Act creates responsibilities for gatekeepers, thereby, eliminating a previous entitlement to gatekeepers to be free from such requirements. Each of those Acts could be analyzed in terms of the four dimensions and the four objective buckets, but no such analysis is necessary to see that they apply.
Imagine a legislative act that would create a long-term retirement benefit to accrue to all employees in every firm or organization. It would be funded from a small percentage of profits (or, in the case of not-for-profits, as a percentage of an alternate bottom line). The fund, though offering an additional retirement benefit, beyond those customarily available today, would also serve as an augmenting tort judgment fund. That is, to the extent that companies were held liable for tort judgments, the fund would provide an additional source of funds. Judgments would reduce the new retirement benefit created by the Act. Those funds could be allocated to plaintiffs in the particular case, or to other important societal initiatives. Such a retirement benefit coupled with responsibility for tort judgments would, it seems logical to conclude, put all employees in the same boat as management to help foster responsible profits. Because the fund accrues according to a percentage of profits, applicable to all organizations, and would get charged deductions as the corporation settles or judgments are awarded for tortuous behavior, it creates a nexus between responsible behavior and the profit motive. Only as the company prospers responsibly does the fund grow.

The Act, as we are describing it, simplistically, can be seen to meet each of the two types of objectives. First, with respect to efficiency, because the fund inspires reductions to primary costs, it has benefits on secondary and tertiary costs. Calabresi describes each of these types of costs: primary, the direct cost to the injured in health care costs; secondary, the cost of lost productivity due to the injury; and tertiary, the cost of the administration of benefits and health care. Thus, to the extent that the Act would reduce accidents, without jeopardizing growth it reflects, not an increase in costs of a corporation, but instead, a shift from accident, insurance and litigation costs to employee benefits. And, it rewards employees for additional diligence. Thus, the fund has both efficiency and also distributive benefits. It distributes a percentage of corporate profits, even if only a very small percentage, to all employees according to their ability to reduce torts.

The fund may be calibrated to fund at an amount equal to the reduction in the “tort tax” which is estimated to be “an economic cost of more than $865 billion every year, or more than $9,800 per family.” The Act also has the additional efficiency and distributional benefits of putting all employees in the same boat to prevent harmful torts by allowing employees and management the freedom to exercise their discretion in how to engender more responsible profits.

Each of the three PROACTIVE criteria is present. We can consider those criteria in the context of recent financial harms. For example, one might argue that the damage that has been inflicted, over the last several decades, by rogue actors from those involved in the Savings and Loan scandal of the 1980s to the recent lending practices that brought down Bear Stearns and other banking institutions in the opening years of the twenty-first century, is such that would warrant the assertion of criteria one, that ex ante prevention of new and problematic risk-taking is essential. Each time, the party left holding the bag is the taxpayer. While that may be the best place to allocate the risk – compared to fault or ex ante social insurance – damage ought be prevented to the extent that the damage may be foreseeable and preventable, and the measures would not undesirably thwart responsible risk-taking and economic growth. The second

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102 Calabresi, Costs, supra note 17, at 28-9 (describing these costs).
103 Id.
104 Concerns that the plan would lead to overcaution and reduce responsible risk-taking is countered by the plan’s linkage to profits. Only as profits grow will employees be rewarded financially.
106 See Calabresi, Costs, supra note 17, at 312 (discussing the benefits of mixed systems).
criterion, that there remains the continuing potential for rogue actors, might be assumed from past history. Third, the criterion that there are other non-rogue actors that can control the rogue actor is the basis for the decision to entitle all employees to a percentage of profits - the thought being that they can and will be motivated by a new provisional benefit, to provide extra eyes, ears, and minds to engender responsible profits.

An example helps to illustrate the benefits to be expected from the PROFIT Act. Imagine a janitor sweeps mercury off a shop table onto the floor, sloped to run into a drain which feeds a local lake. The typical legal analysis examines whether you can hold a corporate officer responsible, if, for example, he walked the shop floor and passed the table each day around the time that the janitor performed the tortuous act. The PROFIT Act, in an effort to inspire heightened ex ante prevention puts all employees into the same boat by creating a retirement fund to motivate other employees to prevent harmful behavior that they witness. It is understandable that few employees will voice concerns over health hazards and exercise their passion for the good of others when protected only by Whistleblowing Acts. Many employees may not want to risk losing their jobs and going through the legal system to enforce their rights. With the PROFIT Act, the one individual inclined to speak up, even at personal risk, will have a broader audience: all the employees’ PROFIT Act retirement account going down the drain will make more employees predisposed to support the efforts to stop harmful behavior. It gives each employee an additional incentive to find an alternate way to handle the situation, and, perhaps, make a difference. Though the idea for such an Act would require much further analysis, it is presented here, as a sample application of the theorem in order to demonstrate the theorem’s four dimensions and how they can enable a balancing of objectives.

V. CONFUSION ABOUT RIGHTS AND TRANSACTIONS

Having made the case for a theorem that reflects the greater significance of Calabresi’s work (what it says about crafting entitlement change), it is important to consider why such significance has been missed. This Article noted above that the framework did not organize itself into four dimensions and that it focused on the judicial sphere. This Article reorganized the subject so as to enable the structural aspects of the framework to be distinguished from the responsive aspects of the theorem. That, thereby, helps to surface the greater significance. But, there are two important other issues that play into the reasons that scholars may have missed its greater significance. One, scholars misunderstood the distinction being made in the framework article between entitlements and rules. Two, scholars focused heavily on one criterion, transaction costs. Part A addresses the first issue. Part B explains the broader implication of the theorem on transactions.

A. Discerning rights from entitlements

Some scholars have mistakenly confused rights, entitlements and rules, which are clearly defined in the framework. For example, Yale law professor Jules Coleman mistakenly asserts, and

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107 Example taken from Pace University School of Law, Professor Jeffery Miller, based on a Mock Trial competition case.
108 Id.
109 For a clear example, noting their distinction, see Lee Anne Fennell, The Unbounded Home: Property Values Beyond Property Lines, 18 (2009) (noting the “framework broke the court’s choice into two parts: which party holds the entitlement at issue … and how that entitlement is protected.” See also Fennell, supra note 23, at 980.
develops an argument around his misconception, that the framework states that rules protect rights! Rules protect rights? No. Rules protect entitlements.\textsuperscript{110} The framework could not have been any clearer in that regard. For example, while explaining the two types, property and liability, it states:

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.…. Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule…..\textsuperscript{111}

The framework is distinguishing between two of the components of a right.\textsuperscript{112} And, the framework’s definition of entitlement emphasizes that it is distinct from the protection component:

The first issue which must be faced by any legal system is one we call the problem of “entitlement.” Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of “might makes right” - whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.\textsuperscript{113}

And, yet, Coleman questions the framework structure and how rules can be said to protect rights, not, more accurately, entitlements: “It is surely odd to claim that an individual’s right is protected when another individual is permitted to force a transfer at a price set by third parties.”\textsuperscript{114}

\textsuperscript{110} See Calabresi & Melamed, supra note 1, at 1090-92. See also infra section III.A.2.

\textsuperscript{111} Calabresi & Melamed, supra note 1, at 1092 (emphases added) (footnote omitted). Note also, this reference: “By articulating a concept of ‘entitlements’ which are protected by property, liability, or inalienability rules, we present one framework ….” Calabresi & Melamed, supra note 1, at 1089 (emphasis added).

\textsuperscript{112} See discussion supra section III.A.

\textsuperscript{113} Calabresi & Melamed, supra note 1, at 1090 (footnote omitted).

\textsuperscript{114} See Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335, 1338-39 (1986) (emphases added) [hereinafter Coleman and Kraus, Rethinking]. See also Jules Coleman, RISKS AND WRONGS 335-40 (1992) [hereinafter COLEMAN, RISKS] (noting “[i]n classical liberal theory, to have a right is to have a protected sphere of autonomy or control. To say that I have a right to something is to say that I, not you or anybody else, have control over its use. I make those decisions, not you. There is an obvious conflict between the classical liberal conception of rights and the Calabresi-Melamed framework.”). Id. at 336. It is hard to explain Coleman’s treatment of the Calabresian distinction between entitlements and rights: it is not that he does not recognize the distinction, as he notes it correctly, on at least one occasion: “An individual whose entitlements are secured by liability rules only is not empowered to exclude others, but in the event others act to reduce the value of her entitlement, she is entitled to recover damages ex post. In the case of property rules we speak of free exchange; in the case of liability rules we speak of forced transfers.” Id at 183. Note, it is not an isolated error. Coleman asks, “How can a liability rule in the Calabresi-Melamed sense protect my right when it gives you and others certain important discretions with respect to the uses to which my right can be put…?” Id at 336.
We cannot excuse such sloppiness from a law or economics scholar, much less from a legal philosopher.\(^{115}\) Such a mistake is critical because unless we recognize that the entitlement and rule are distinct in the ways that the framework suggests, we cannot make as effective use of the two levers. Somehow the confusion seems to have pervaded the ranks of law schools.\(^{116}\) But, Coleman’s error yields some important gains. One, is that his emphasis on the inadequacy of liability protections – that is, that liabilities ex post are often inadequate (money doesn’t bring a leg back) - highlights that the structure of a right or law includes a gap. We might associate that with the “loophole.” That is where the methodological understanding of the role of criteria and objectives can help connect and direct the choice of entitlement and rule to form a proper synapse, as explained above. Two, Coleman’s broader point that liability rules do not satisfactorily prevent harms surfaces the need for two additional important objective categories, beyond efficiency and distribution: liberty, or more broadly, normative objectives and the necessity objective categories.\(^{117}\) His argument also points to the need for ex ante prevention, and the PROACTIVE criteria.

\(^{115}\) Coleman is not the only one guilty of confusing these terms. For example, Kaplow and Shavell misstate the role of an entitlement, the “choice of who” designation, as part of the role of the rule when they state: “The characterization of a property rule as a choice of who should enjoy an entitlement, coupled with its absolute protection, is emphasized [by] Calabresi and Melamed…In the analysis here, we take an entitlement to be complete.” (emphasis added). The property rule of course is the protection, separate and distinct from the choice of who-gets-what allocation to then be protected. The property entitlement is the choice of who. Kaplow & Steven Shavell, Property Rules versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713, 723 n.27 (1996). The Kaplow & Shavell treatment stems in part from their characterization that “a property rule involves two elements” the entitlement and the protection. Id. at 723. Yet, nowhere does the framework suggest that a rule includes the entitlement and the rule. As another example, Morris’ description of Calabresi and Melamed’s “form” of entitlement as a rule is incorrect. Morris, Structure, infra note 138, at 824 (stating that Calabresi and Melamed “identified three forms of entitlement: property, liability and inalienability rules”) (emphasis added). The entitlement is not a form of the rule. It is separate from the rule. That is not to take away from the usefulness of the two articles, but merely to note that the exact distinctions that Calabresi and Melamed made are sometimes diverged from. This is an important point because so much of the literature has focused on the choice between property rules and liability rules that one may wonder where all the entitlements have gone. At least in those two cases, they have been incorrectly blended to some degree into the rule. In the case of Morris, in part their reason for their locution is to make a different case, but in describing, as they do, the framework locution as “a flaw in Calabresi’s and Melamed’s analysis” they undermine the value of the distinction between their approach and the framework’s. Id. at 843. See also infra note 33.

Also, often arguments for entitlement change do not mistake, but, rather, do blur the distinction between the entitlement and the rule. See, e.g., Lucian Arye Bebchuk, Property Rights and Liability Rules: The Ex Ante View of the Cathedral, 100 Mich. L. Rev. 601, 606 (2001) (using the term “property-right rule”). Use of this term, likely, means property rule, but makes it difficult, at times, for the reader to maintain the distinction between property right which might refer to the entitlement, and right which includes both the entitlement and the rule. See also Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade, 104 Yale L.J. 1027, 1102 (1995) (jumping from entitlements, to property rights, and property rules, without clear and consistent definitional delineation at times). But see, e.g., F. Scott Kieff, Property Rights and Property Rules for Commercializing Inventions, 85 Minn. L. Rev. 697, 703 (2001) (providing an example where property rights are distinguished from property rules in the manner consistent with the Calabresi-Melamed distinction); George C. Keating, The Idea of Fairness in the Law of Enterprise Liability, 95 Mich. L. Rev. 1266, 1303 (1997) (utilizing the terms entitlement, rules and rights consistently with the framework, in the context of reviewing efficiency and normative objectives of liability systems). See also discussion supra section III.A (discussing the correct formula, entitlements plus rule plus gap, or synapse, equals a right).

\(^{116}\) Additional correspondence with legal scholars on file with author.

\(^{117}\) See supra note 61 Christopher Dunn, Expanding the View of the Cathedral (unpublished manuscript, on file with the author) (providing three expansions: (1) adding two additional objectives buckets; (2) offering an alternative set of objective buckets to address Constitutional questions).
With respect to the first gain, though Coleman’s writings do not point out the value of a conceptual gap,\(^{118}\) he makes a noteworthy - albeit, incorrect - point when he questions how it can be said that a rule protects a right.\(^{119}\) Remember, an entitlement is the allocation and the rule seeks to protect the specific allocation, and together, they comprise a right. The rule may fail to protect the entitlement, but that is the theoretical role it plays; the rule does not profess to succeed in protecting the right.\(^{120}\) The issue, in assessing whether the right is adequate, is identifying whether there is a gap between the desired right and the right which is actually crafted.\(^{121}\) For example, take the right to be free from terrorism, as defined by an entitlement and rule set. The ideal is that there would be no terrorist incidents. With the optimal entitlements and optimal rules, no terrorism would occur. Were terrorism to occur, the actual right crafted will be revealed and it will reflect a shortfall to the ideal. That shortfall reflects a gap between the ideal and the actual, which this Article has regarded as a gap in the resultant right, or law. The narrower the gap, the more effective the law. Thus, the need for criteria to steer toward a better synapse or connection.

We can contrast the theorem to the ideal of the invisible hand\(^{122}\) to highlight the theorem’s role with respect to gaps, and markets, further. The invisible hand, according to Smith works in a perfect market.\(^{123}\) By contrast, the visible hand, captured by the theorem works in the real

\(^{118}\) Note, the gap is implied in the framework because it explains that the entitlement is what is being protected, and does not assert that the whole body of a person’s right is being protected. By very definition the scope of the right is limited by the extent to which the entitlement and rule together can be said to prevent harm and promote objectives. And, the scope of the right is limited by the type of rule, property, liability or inalienable. It should hardly need to be reinforced in the framework article that rules do not successfully protect rights and do not right wrongs, but that they merely protect specific entitlements.

\(^{119}\) See Morris, supra note 115, at 842-43 (recognizing that rules do not fully protect entitlements and referring to Coleman in that regard, though without noting that Coleman’s characterization of rules as protecting entitlements. Id. at 842 n.51).

\(^{120}\) Desired right (Dr) = Entitlement (optimal) + Rule (optimal). Actual right (Ar) = Entitlement (actual) + Rule (actual). Dr – Ar = Gap. Entitlement (actual) + Gap + Rule (actual) = Dr.

\(^{121}\) Smith writes:

> As every individual, therefore, endeavours … to employ his capital … he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. … By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.


\(^{122}\) Smith writes:

> The ‘invisible hand’ metaphor … assumes that resources are allocated in markets where everyone has full information and an equal opportunity to bid and where no one acts strategically in an attempt to influence the outcome. If these conditions are not satisfied, there is no guarantee of efficiency; instead, the result is what economists call market failure.

KATZ, FOUNDATIONS, supra note 17, at 41-2. Making the same point, see also Evensky, Smith’s Philosophy, supra note 122, in MALLOY & EVENSKY, ADAM SMITH, supra note 80, at 18: “His ideal representation of the economy assumes that the political and social dimensions are perfectly aligned with the Deity’s design. In this case perfectly ethical beings pursue their own self-interest within the context of natural jurisprudence.” In Smith’s own words,
world. We might visualize the three components as being the entitlement, or who-gets-what, fingers with the protective fit of a rule glove and the gap, reflecting the fit, either well or poorly, to varying degrees. That is an important point, not simply because it helps to reinforce the assertion that we may craft better laws by changing both the rule and the entitlement to eliminate the gap, but also, because, more broadly, the idea of a gap often arises in the relationship between law and markets, termed market failure. With calibrated methodology, one need not only change entitlements and rules in cases of serious market failure, as some suggest; any gap, through which the bad actor can drive, can be addressed by a better fit of entitlement and rule. And, as noted above, adjustments to the entitlement and rule need not be solely made by

“This at least would be the case in a society where things were left to follow their natural course, where there was perfect liberty, and where every man was perfectly free to choose what occupation he thought proper, and to change it as often as he thought proper.” Id at 19.

With respect to market action, Jules Coleman describes: “If market failure is measured against the criterion of perfect competition, all markets fail, always.” COLEMAN, RISKS, supra note 114, at 91. The extent to which the who gets what entitlement choice is considered in the scholarship is noteworthy. See e.g., supra text accompanying note 31 (reflecting the concept) and Malloy, Discourse, infra note 80 (using the phrase). The terminology is also used by sociologists, see, e.g., GERHARD EMANUEL LENSKI, POWER AND PRIVILEGE 1-23 (1984) (discussing, in a chapter, The Problem: Who Gets What and Why?), http://books.google.com/books?id=UySGOjdd-XK&pg=PA65&lpg=PA65&dq=power+and+privilege+lenski&source=web&ots=ap7Kx8pHTD&sig=2f7HHJ51VkDckxoD1cszC_UYOk0&hl=en&sa=X&ei=gnAaT72HAJrM5gP3k-3A0w&ved=0CDkJTjOQ

The notion of a fit is consistent with the notion of a right. See e.g., WILL DURANT, THE STORY OF PHILOSOPHY 61 (1961) (describing Aristotle’s notion: “Right,” then in ethics or conduct, is not different from ‘right’ in mathematics or engineering; it means correct, fit, what works best to the best result.”). Id.

Cohen describes a broad view of market failure:

In sum, markets are not only incomplete indicators of what people want, but there is also reason to be skeptical of what markets tell us about the fraction of human interests that they can purport to describe. Also, the term “market failure” is inescapably contingent. Its meaning depends on the indicia of social welfare that a market is supposed to optimize, and these goals are not predetermined and may change over time. Market failure, properly understood, encompasses not only cases in which the parties fail to transact, or find it too expensive, but also cases in which consensual, relatively costless transactions nonetheless fail to produce particular outcomes that have been defined to be socially valuable. When market institutions fail, use of the public process of lawmaking to reshape them is entirely appropriate. Market institutions are in and of human society, not a fixed axis around which human society revolves. Their structure, like the structure of nonmarket institutions, is necessarily a matter for collective choice.


Coleman notes that “[s]trangely, economists have provided very little help in clarifying the notion of market failure, lending credence to the suspicion that economists are really interested in the concept of inefficiency, not the concept of market failure.” COLEMAN, RISKS, supra note 114, at 91. Others assert the inadequacy of the efficiency objective. See e.g., A. Brooke Overby, The Community Reinvestment Act Reconsidered, 143 U PENN. L. REV. 1431, 1499 n.314 (1995) (quoting Edward J. McCaffery, Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change, 103 YALE L.J. 595, 634 (1993)) (noting “[w]here individuals are blocked by market failures from pursuing their life plans, efficiency talk loses much of its normative appeal.”). Id.


Taken to an extreme, a perfect world - a world without market failure - would be reflected by the proper fit of rules and entitlements. That is a corollary of the Calabresi theorem. But see, COLEMAN, RISKS, supra note 124 (Coleman noting there is no such thing as perfect markets).
government: entitlements and rules are, and may be set, in all spheres of interaction; criteria may be identified to both set the entitlement and its protection to bridge the gaps and market failures; identifying criteria is necessary for creating an effective synaptic connection. As to the second gain from Coleman, he surfaces, by raising the question as to whether liability rules satisfactory right wrongs, the idea that when crafting entitlements and rules that objectives other than efficiency and distribution, such as liberty and necessities, are at stake. Freedom from harm might be considered as either a liberty objective or a necessity objective. The benefit of recognizing the inadequacy of liability rules is that it heightens a policymaker’s attention to the need and benefits of entitlement change to meet broader objectives. Coleman’s effort to justify markets on bases other than efficiency, such as stability and autonomy leads one to recognize the value of additional buckets of objectives. He succeeds in noting that liberty and necessities are inadequately addressed in the framework article. He fails, however, by not recognizing the way that the framework provided for addressing those other objectives is to carve out additional buckets of objectives to be balanced. And, yet, there is another gain from Coleman’s emphasis on the value of markets, which he grounds in the aforementioned objectives. It leads one to recognize the value of markets as being something related to, but functionally different from, the four dimensions of the framework. The fundamental difference is that markets reflect transactions and exchange while the four dimensions reflect upon the transaction quality. In the sense that markets contract and expand and help pump goods throughout the body, they are like the muscles. “The wealth and riches of all the particular members are the strength….” Note that such reflects the result or measurement of market strength or effectiveness.

B. Losing the forest: forest, transactions; trees, transaction costs

Because an immense amount has been written about transaction cost and the implication of the framework regarding the choice of property or liability rules, it would seem incomplete to those engaged in the debate as to which type of rule is better when transaction costs are high, were this article to ignore that scholarship. Though, once you’ve looked at that issue in this section, you may wish that this section were omitted - Calabresi, himself, noted the overemphasis on it. It might be refreshing to ignore the issue, and quite frankly, it is, this Article has attempted to show, less important than the broader methodology. Furthermore, it is impossible to do that topic justice in the remaining few thousand words, so, at best the emphasis in this section can be on two points. One, transaction cost is not one criterion, but rather several criteria; the set of criteria and objectives will determine whether a property or liability rule is in order. And, two, it is unclear, according to the scholarship, thus far, whether traditional transaction cost analysis and criteria provide an especially useful way of looking at challenges.

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130 See Coleman, Risks, supra note 114.
131 See supra note 114 and accompanying text (noting the anomalous treatment of necessities and need for a framework to address it).
132 See supra text accompanying note 50.
133 See supra note 61.
135 See Hobbes, Leviathan, supra note 91.
136 See infra text accompanying note 144 (noting his preference).
137 See Kaplow & Shavell, supra note 140, 720 n.19 (citing Polinsky for this conclusion).
It is understandable, considering how well the framework described the four dimensions, and since it did not emphasize the methodology of connecting each of them, that scholars would focus on only one particular dimension: some focused on the structural components, entitlements and rules; others on efficiency and distribution objectives; others on the property, liability inalienable division; still others on criteria. Because each of these dimensions, alone, offer extensive room for analyses, scholars tended to focus on one or another dimension in detail, rather than develop the big picture methodology. And, considering the adeptness with which the framework described the forest, what value was there for scholars to do a further overall review of it. Can we blame scholars if they, further, honed in on one particular question: what transaction costs imply about the choice of property or liability rules. The framework, itself, noted transaction cost criteria, thereby, partly fueling the debate. Perhaps, scholars saw it as a magic bullet. After all, Coase’s work had focused on transaction costs and seemed to have utopian implications.


142 See, e.g., Calabresi & Melamed, supra note 1, at 1106. The framework offers a general rationale for a liability rule over a property rule:

Often the cost of establishing the value of an initial entitlement by negotiation is so great that even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur. If a collective determination of the value were available instead, the beneficial transfer would quickly come about.

Id. 143 Ayres and Talley describe the important implications in terms of what they see as the folklore:

This descriptive distinction between property rules and liability rules has led some scholars to suggest that the normative choice of the appropriate form of protection is really between contracting costs and litigation costs. The “folklore” among law-and-economics academics is that property rules induce negotiation and contracting, while liability rules induce nonconsensual taking, subsequent litigation, and judicially determined prices. The folklore instructs efficiency-minded lawmakers to choose the form of protection that minimizes these costs.

Ayres & Talley, Solomonic, supra note 16, at 1037 (footnote omitted).
Law scholars, thus, had a responsibility to address the legal implications of transaction costs. So they did. And, it exhausted them. And, they exhausted the subject. Calabresi expressed the concern that more attention was given to that criterion than to the general purpose, all four dimensions, asserting a preference that the emphasis be on the need for criteria to set the entitlements and rules in accordance with broader societal objectives than efficiency:

In addition, [beyond looking at efficiency] the article was a way of saying that we can look at a situation and consider ... distributional desires as well. ... I have relatively little patience with the debate over which is more efficient, a property rule or a liability rule when transaction costs are high or low. This debate is certainly worth having, but it is not as interesting as the question of when we want to use one remedy rather than another for broader reasons.144

I might add, to be consistent with this Article’s emphasis and that of the framework article,145 that it is not as interesting as the question of how we might reset the entitlement to meet broader objectives.

Having noted the limited value of the transaction cost analyses, one need only skim the next two paragraphs describing the arguments, some advocating property rules, others liability rules, to see the rabbit hole of the transaction cost debate. You may notice the almost dizzying nature of the analysis of some of the arguments pro and con regarding the superiority of one or another. Henry Smith, first, notes a paradox: “Property rules find relatively few defenders among legal economists which is surprising since property rules abound in the law.”146 He highlights some of the property rule defenders, Richard A. Epstein, Richard R.W. Brooks, and James Krier and Stewart Schwab, and lists their arguments. He notes that Epstein “argu[es] that undercompensation concerns usually outweigh hold-out problems, making property rules dominant.”147 In other words, that argument goes, that the potential for undercompensation associated with, for example, eminent domain, a liability rule, is of greater concern than that parties will holdout when property is needed for public use and a property rule is the only means for obtaining the transfer. That argument goes that the risk that parties will not transfer and hold-out for a better deal does not warrant, in terms of efficiency, the use of imposing a liability approach on some transfers.148 As for Epstein’s support for property rules, his argument, that liability rules can be inefficient, a, per se, cost assessment, is augmented, by arguments he makes on both normative and necessity grounds,149 reflecting transaction quality arguments.150 As for

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144 Calabresi, Simple Virtue, supra note 17, at 2204-05 (1997).
145 The framework does reflect development of the role of both entitlement and rule, but also notes an emphasis on the rule: “In any given dispute, for example, the state must decide not only which side wins but also the kind of protection to grant. It is with the latter decisions, decisions which shape the subsequent relationship between the winner and the loser, that this article is primarily concerned.” Calabresi & Melamed, supra note 1, at 1092. Such a statement should not be reason for scholars to ignore or under-appreciate the role of the entitlement, but may provide some support for the focus by others as well being placed on the rule. Though, perhaps, not to the extent it was.
146 Smith, supra note 138, at 1721-22.
147 Smith, supra note 138 at 1722 n.6 (citing Epstein, supra note 138).
148 Epstein notes: “Over time, the inefficiencies of a liability system cascade until the security of possession and the security of exchange needed for complex commercial life and a satisfying personal one are no longer available.” Epstein, supra note 138, at 2093.
149 See id. at 2092, 2120. See also Jane B. Baron, Property and “No Property,” 42:5 Hous. L. Rev. 1425 (2006) (considering the relationship of property to freedom for those whose freedom is limited by others who have property).
Brooks’ support, Smith notes that he similarly “argu[es] that comparative evaluation required under property rule can be easier than absolute valuation under liability rule,” a cost argument. And, as for Krier and Schwab, they “arg[ue] for property rules when administrative costs are high,” Again, it’s a cost, not a quality, argument being made. What should be clear is that transaction cost reflects several criteria, but that they might be considered in conjunction with several other normative, necessity and distributional criteria (such may be considered transaction quality – see The Role of Government, The Coase, Hobbes, and Calabresi Theorems).

But there are counter-arguments in the debate reflecting a preference for liability rules summarized as follows:

[S]cholars… noted with approval the tendency towards giving damages [a liability rule] in the case of nuisances with widespread effects like pollution. This initially favorable but limited view of liability rules has gathered steam, and over the years most commentators theorizing about entitlement protection have come to conclude that liability rules are generally preferable to property rules in achieving an efficient allocation of resources.

Again, highlighted is the difficulty of a property rule: requiring, or gaining, agreement before transfer and restoring property to its pre-nuisanced or pre-polluted state. How would all neighboring parties agree? It is the free-rider problem. The strength of liability rules: awarding plaintiffs damages is, relatively, easier. The framework makes the point that perhaps the most common reason for liability rules is that collective valuation is an alternative when market valuation is unavailable or more inefficient on the basis of cost. Further advancing liability rules, though acknowledging strengths of property rules, Kaplow and Shavell argue:

150 A succinct statement captures some generalized criteria:

The standard practice in virtually all legal systems assumes the dominance of property rules over liability rules, except under those circumstances where some serious holdout problem is created because circumstances limit each side to a single trading partner. In these cases of necessity, the holdout problem could prove enormous, so that the strong protection of a property rule is relaxed. One person may be allowed to take the property of another upon payment of compensation, but only in a constrained institutional setting that limits the cases in which that right can be exercised and supervises the payment of compensation for it.

Epstein, supra note 138, at 2092.

Smith, supra note 138 at 1722 n.6 (citing Brooks, supra note 141).

Id. (citing Krier and Schwab, supra note 140).

Id. at 1721 (footnote omitted).

That is a restatement of the problem with the notion that parties can bargain without cost or time constraints. See also supra note 142.

See e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 61 (6th ed. 2003).

Calabresi & Melamed, supra note 1, at 1110.

Smith, supra note 138, at 1721 n.5.
To be clear that liability rules ought to be limited to specific situations, Krier argues in the face
of strong opposition: “the virtual dogma that liability rules should be used when transaction costs
are high … the dogma is incorrect.”\(^{158}\) In that vein, Smith similarly argues, “that the preference
for liability rules rests on certain overly simple assumptions about how assets and activities are
individuated and evaluated.”\(^{159}\) He notes, “when liability rules are used as in eminent domain or
in the law of necessity, they are often hedged about with conditions and restrictions that are hard
to justify if liability rules are to be preferred as a general matter.”\(^{160}\) Smith’s point is that liability
rules, and damage awards, do not offer broad solutions – they offer solutions for very narrow
circumstances.

Further, Smith challenges the pro liability argument “that one of liability rules’ chief advantages
is that they economize on the information that officials need in order to ensure efficient allocation …
because they ‘harness’ the information that private parties have about the value of
assets and activities.”\(^{161}\) Smith, to make the point, presents three pro-property rule
counterarguments “based on information costs resulting from uncertainty.”\(^{162}\) He argues that
property rules are not inferior to liability rules in harnessing information of the parties: the
argument is whether the government can more accurately and efficiently value each party’s
bargaining position than the parties’ private valuations, which might reflect a higher value to the
party than the party actually reveals. That is the dilemma posed by allowing a private valuation.
But, the counter dilemma with the liability valuation is that officials will not be able to obtain
accurate information about valuations.

The conclusion of all this debate about transaction cost criteria related to choice of rules? The
jury is out and it depends upon several factors.\(^{163}\) Besides that, it is no wonder the greater
significance of the framework has been missed, with the laser focus on one set of criteria,
transaction costs, associated with efficiency, and on one piece of the entitlement and rules
dimension, the rule. Moreover, the predominant focus is on the type of rule (the third dimension)
of rule and cost. The criteria sets will dictate the optimal combination of entitlements and rules.
In the process of going down that transaction cost rabbit hole, scholars failed to realize they were
chasing only one type of criteria in a vast sea of possibilities that the framework and Calabresi’s
other works enlighten: ability to pay, merit, cost reduction, level of pollution, and fault, to name
only a handful (again, such may be considered as reflective of both transaction cost and
transaction quality). It is not necessarily that transaction cost is a dead end relevant to the choice
of entitlements and rules; transaction cost is important,\(^{164}\) but it must be considered with other
categorical objectives and criteria.

impede efficient exchanges by the parties in property rule cases, so problems in obtaining and processing
information (assessment costs) might impede efficient damage calculations by the judge in liability rule cases.”).

\(^{159}\) Smith, supra note 138, at 1722.

\(^{160}\) Id. at 1723.

\(^{161}\) Id. at 1722.

\(^{162}\) Id.

\(^{163}\) See Antonio Nicita and Matteo Rizzolli, Property Rules, Liability Rules and Externalities, 4 (2007),
at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1068623, at 7 (making this point relative to the framework) (last
visited Sept. 11, 2009).

\(^{164}\) See Calabresi, Simple Virtue, supra text accompanying note 144.
VI. CONCLUSION

This Article has approached the Calabresi-Melamed framework differently than others before it, in that: one, it emphasizes and clarifies the methodology by which more responsive laws may be crafted, by explaining a Calabresi Theorem which separates and recombines four dimensions of the framework. It emphasizes how the methodology may be used to change entitlements, or incentives, in conjunction with rules or penalties. To demonstrate how the methodology may instruct entitlement change, three criteria are offered (termed PROACTIVE criteria) along with a sample legislative application (termed the PROFIT Act, the Productivity, Responsibility, Opportunity FIT Act – it reflects a fit of entitlements and rules that meets both efficiency and distributive objectives). The application extends the framework into the legislative sphere, whereas the framework article focused the model on the judicial. In so doing, this Article clarifies that knowing when and how to change each of the structure of rights, the entitlement and the rule, is critical to crafting effective policies. Further, this Article highlights that knowing the attributes of rights (property, liability and inalienable) and when to use each, while important is not the main benefit of the framework – rather, the methodology for using each of the four dimensions to instruct a choice of entitlement change or rule change is. Moreover, knowing the role of criteria, allows for various balances of objective categories (efficiency and distribution) to be achieved. Looking at the framework in terms of four dimensions offers a conceptual way to understand the quality, not simply the cost, of a transaction. For policymakers looking for methodology to use to motivate and deter behavior that strikes a balance of competing objectives, this methodology, previously clouded, now clear, will serve immense value.