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Laudatio: Pietro Trimarchi

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AN INTRODUCTION

It is truly a great honor to be asked to introduce Professor Pietro Trimarchi for the award of honorary membership in the European Association of Law and Economics (EALE). This is the first such honorary membership ever awarded by this association.

A few days ago, Professor Trimarchi and I spoke on the phone to discuss this event. During this brief conversation – Professor Trimarchi never uses words unnecessarily – he confessed to me that he does not like to talk about himself publicly. He observed that since “it will be dinner time...I do not think that people really want to hear too much about me.” This comment made it clear to me that Professor Trimarchi was kindly encouraging me to be as minimalist in this laudatio as he is in his scholarship. So, I shall endeavor to limit my introduction to just five minutes.

I think that I could indeed dispense with other comments and just introduce Professor Trimarchi with one sentence from a conversation I had with Guido Calabresi over the summer (Calabresi reported this story on other public occasions and gladly authorized me to share it with you on this occasion). Calabresi told me that during his first meeting with Trimarchi he realized after a few minutes he had “met a man of great stature. Sharp, rigorous, essential.”

Calabresi continued by describing how he had discovered the existence of Trimarchi’s 1961 book, which was published only a few months after his own first article, “*Some Thoughts on Risk Distribution and the Law of Torts*.” The two were written completely independently of each other, and were strikingly similar. But the remarkable thing, Calabresi added, is that Trimarchi had presaged the approach of his 1961 book in his 1959 article on vicarious

liability. "I only found that article after I read Trimarchi's book. And this was lucky. For if I had seen that article when it first appeared, I probably would have written a very different piece in 1961, or not written it at all." Fortunately, both wrote their 1961 works, for both Trimarchi's and Calabresi's 1961 contributions are truly original masterpieces, revealing independent and seminal thinking. Our field of research would have suffered greatly if either of these contributions had not come to fruition. In addition, what makes Trimarchi's work even more remarkable, as Calabresi also pointed out, is that it was written in a different language and in an academic environment that did not fully appreciate its foundational value for the field of law and economics.

In compliance with Professor Trimarchi's request for brevity, I will dispense with a thorough discussion of the substantive merits of any of his scholarly contributions. But to do justice to Pietro Trimarchi's remarkable role in legal academia, I'd like to give you a brief sketch of his career and scholarly production. For a more extensive discussion, I shall refer you to an entry devoted to the work of Pietro Trimarchi which I co-authored (with Giampaolo Frezza) in the *Elgar Companion to Law and Economics*. A slightly revised biography is also included in the recently published second edition of the *Elgar Companion*.

Pietro Trimarchi is the only living scholar whose biography was included in the *Elgar Companion*. In 1995, when I wrote that biography, though I had not yet met Professor Trimarchi, his scholarship was well-known to me - his is one of those names in Italy that even a first-year law student would recognize - as the author of the leading textbook on Private Law ("*Istituzioni di diritto privato*" (first edition published in 1973, now available in its 16th edition). In the process of reading Trimarchi's work for the commissioned biography, I came to realize that his substantive merits by far surpassed the legend that preceded him.

PIETRO TRIMARCHI: A BIOGRAPHICAL SKETCH

Professor Trimarchi was born in 1934. He became a Professor of Private Law at the University of Urbino in 1960 (so, if my math is correct, he had his first chaired appointment at the age of 26 - quite an extraordinary accomplishment by Italian standards), where he taught until 1963. He subsequently held chairs in Private Law and Civil Law at the University of Genoa (1963-1966) and the University of Milan, where he has been teaching since 1966.

Trimarchi has been intimately involved in a number of important legal reforms. He served as chairman of the Drafting Committee for the Italian Products Liability Law of 1988 and was a member of the Drafting Committee for the Reform of Company Law (2002) and Rules of Arbitration (2004-2005).

Trimarchi's early works include two articles: one on vicarious and enterprise liability (*La responsabilità per il fatto dei dipendenti: Contributo ad una teoria del rischio d'impresa*, 1959a); and a paper on a "fortuitous event" as a limit to strict liability (*Il "caso fortuito" quale limite della responsabilità per il danno da cose* 1959b:827 ff.). Trimarchi begins his examination of vicarious liability by describing its rationale. Because an owner of a business has repeated exposure to a risk, he is better able to calculate that risk and thus reduce or distribute its costs through insurance or modification, substitution, or termination of the risky activity. By placing liability on the person who can best translate the risk into cost, the rule of vicarious liability provides an economically efficient incentive, guarantees recovery for injured third parties, and keeps total damages within tolerable limits. In his discussion on the foundations of the rules of liability for harm occasioned by things, Trimarchi proposes that these rules developed along with the principle of vicarious liability. He considers criteria for allocating liability among the parties that own, use or control a thing which has caused a harm. He concludes that liability should be placed on the person who is in the best position to predict and calculate the risk, and thus in the best position to control or modify the risk.

Trimarchi's first book, published when he was 24 years old, discussed the invalidation of corporate deliberations (*Invalità delle deliberazioni di assemblea di società per azioni*, 1958). Soon after, he wrote his seminal book on risk and liability (*Rischio e responsabilità oggettiva*, 1961). This important work was written while Ronald Coase was writing his paper "The Problem of Social Cost" (which, though dated 1960 actually appeared in print in mid-1961), and Calabresi published his article, "Some Thoughts on Risk Distribution and the Law of Torts." This was a decade before Calabresi's "The Costs of Accidents," even longer before most of Trimarchi's American counterparts began to utilize economics to analyze tort law (I am referring to the early work of Richard A. Posner, William Landes, and a few others), and while the so-called "New Law and Economics" was still being popularized. In his analysis of risk and liability, Trimarchi focuses on the delicate question of the function and structure of strict liability in the microeconomic terms of resource allocation. He concludes that the Italian legal system recognizes a principle of strict liability for "risk of enterprise" in some special cases of civil responsibility. He proposes possible reasons for this policy and examines it in light of various concepts of modern legal doctrine. Trimarchi further proposes that, for several reasons, strict liability can be applied only to economic activity and not to biological activities, for which a calculation of costs and benefits would be unfruitful. He emphasizes that strict liability for "avoidable risk" must be differentiated because it would only require the entrepreneur to adopt reasonable precautions

for his current system of production. Under general strict liability, the entrepreneur might be required to effect major changes in his production system or a partial or total termination of the enterprise. In addition, strict liability would incentivize the entrepreneur to create new technologies to reduce accident losses.

This work was soon followed by his books on Unjust Enrichment (*L'arricchimento senza causa*, 1962) and Causality and Harm (*Causalità e danno*, 1967). The book on causality and harm discusses the content of the author's theory on strict liability with enterprise risk. Trimarchi analyzes and criticizes theories of industrial accident liability using factors of causation, fault, profit, fairness, and insurance. He concludes that a system of strict liability creates incentives for the entrepreneur to control the risk created by his production activity, allows the entrepreneur to calculate his potential liability and insure against it, and minimizes the occurrence of uncompensated injuries. Trimarchi further theorizes on the apportionment of liability when two or more activities, some subject to the no-fault and some to the fault regime, together cause a single loss.

In subsequent years, Professor Trimarchi's work encompassed many other areas, including contract, commercial and competition law ("*Sul significato economico dei criteri di responsabilità contrattuale*," 1970; "*Il problema giuridico delle pratiche concordate fra oligopolisti*," 1969; "*Commercial Impracticability in Contract Law: An Economic Analysis*," 1991). Trimarchi proposes that the concept of least cost avoider could successfully address three fundamental objectives of contractual liability. First, the least cost avoider rule would promote the adoption of socially efficient precautions to avoid breach, thus maximizing social wealth and achieving the objective of improving the distribution of productive resources. Second, the least cost avoider rule would help distribute the economic burden of losses without substantially endangering the financial status of the enterprise, because the least cost avoider would be in the best position to prevent loss or insure against it. Third, the rule would reduce the cost of the judicial distribution of losses because it simplifies the calculation required and thus minimizes the dead weight costs of judicial decision-making on society.

When writing the entry on Pietro Trimarchi for the *Elgar Companion* we had no opportunity to discuss his 2003 article "*Transfers, Uncertainty, and the Cost of Disruption*," so let me use this opportunity to say a few words about it here.

Several results in law and economics hinge upon the assumption of the risk neutrality or risk aversion of the relevant parties. Risk aversion assumptions are generally presented as the unavoidable byproduct of diminishing marginal utility of wealth and are considered appropriate for the study of individual

consumer behavior. Due to the investor's ability to diversify risk, firms and corporate entities are instead frequently modeled as risk-neutral, profit-maximizing, agents. This paper suggests that, irrespective of any consideration of subjective utility, unexpected and substantial wealth transfers lead to disruption costs, which in turn generate a net welfare loss. This paper explores the extent to which this overlooked type of cost may change, or corroborate, the results reached in a variety of law and economics analyses of private law. Trimarchi divides his discussion of disruption costs into two types of transfers: pure transfers, i.e., transfers not caused by prior damage suffered by the beneficiary of the transfer; and compensation transfers, i.e., transfers that result from the indemnification of one party at the expense of another when the damage was unforeseeable and unavoidable for both. He proposes that, in either case, disruption costs make large, unexpected transfers, whether pure or compensatory, economically inefficient. He concludes by suggesting areas of law for which this concept would provide a useful tool for economic analysis.

Despite their quite different origin and rationale, disruption costs generate normative implications that, for many practical purposes, are akin to those derived from risk-aversion: indeed, disruption costs may be considered a (further) cause of risk aversion. If properly understood and accepted by contemporary scholars, this article by Professor Trimarchi has the potential of reshaping the basic foundations of much scholarship on the economics of corporate law and, more generally, on the design of legal remedies and risk allocation mechanisms.

PIETRO TRIMARCHI: THE MAN AND THE SCHOLAR

Pietro Trimarchi is known and will be remembered by future generations as a truly pivotal figure in the history of Italian law. He independently developed many intuitions that subsequently became milestones in American legal literature. Moreover, Pietro Trimarchi is a thoughtful, uncompromising, and gentle scholar. He is a passionate guardian of intellectual rigor, impatient with the verbosity and muddled logic of much of contemporary legal scholarship.

Before concluding, allow me to add a couple of brief personal memories closely related to the way in which I think of Professor Trimarchi as a man and a scholar.

In the year 2000, I had the honor of observing, reading, and commenting on the drafts of Trimarchi's article "*Transfers, Uncertainty and the Cost of Disruption*" (later published in the *Int'l Review of Law and Economics* in 2003). Articles written by most people generally start short and grow longer (and not necessarily better). Trimarchi's paper became shorter and more concise with each

successive draft. Arguments were made without apologetics. Redundancies were sliced away unforgettingly as the skeleton of his logic became increasingly transparent and exposed to the reader. The result of this assiduous work generated an incisive article, one that brings scientific methodology into legal scholarship.

Another episode is worth sharing with you. There is a saying that the secret to being a good teacher is to always keep the attitude of a student (I like to say, as a joke, that good professors are those that would have loved to remain students for life, but needed to find a job to pay for their living). In 1997, soon after I met Professor Trimarchi, I was invited to teach a condensed seminar at the Bocconi University in Milan. Professor Trimarchi – the legend I had written about! – came from his University and sat in the classes taking notes along with rows of economics students (I remember the fear of walking into that classroom knowing that I would have to teach in front of Professor Trimarchi – I had to make each minute of that class worth the opportunity cost he was facing, and it was not an easy task). Trimarchi's eagerness to learn continues. My students and young colleagues report having seen Professor Trimarchi studying on the beach with a book that resembled an advanced calculus textbook, and just today I have spotted him writing down the title of a new game theory text that he was planning to purchase. In this sense, Professor Trimarchi is a true scholar for more reasons than just his academic contribution. He has an unquenchable thirst for knowledge and is ever a student of the field to which he has so significantly contributed.

During the last four years, I have had the great honor of sharing an office with Professor Trimarchi at the University of Milan. Although it is customary in our profession to address faculty colleagues by their first name, I still address Trimarchi as "Professor Trimarchi." He always encourages me to change this, and occasionally tries to retaliate, but I shall always be Francesco for him, and he shall always remain Professor Trimarchi for me, and for all of us.

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