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The Costs of Choice: A Review of Guido Calabresi's Ideals, Beliefs, ltttitudes, and the Law

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The Costs of Choice: A Review of Guido Calabresi's *Ideals, Beliefs, Attitudes, and the Law*[1]

"Can aliens make treaties easier than friends can make laws?"[2]

I. The Problem of Conflicting Ideals, Beliefs, and Attitudes

The foundation of this profound book is the concept that the highest function of the law is to balance conflicting individual and societal values. This conflict is most intensely expressed between society's need to treat life as sacred and its need to do things which we believe will enrich our individual lives, but which ultimately endanger the lives or happiness of others. In the first four chapters of this book, Calabresi uses common law case analogy to discuss the law's treatment of conflicting values and beliefs. In the last chapter, entitled "When Ideals Clash," he proposes an approach for dealing with extremely divisive issues such as abortion.

Calabresi begins by setting up, in simplified form, the problem of conflicting values. He describes a hypothetical that he often poses to his first year torts classes in which they are leaders of a great nation.[3] An evil deity comes to them proposing that he provide them with a gift, or "boon," of their choosing.[4] This boon can be of unimaginable value to society. It can make the lives of almost all citizens richer, happier, and more enjoyable than ever before. In exchange for this gift, the evil deity requires "the lives of [about] one thousand young men and women . . . who will each year die horrible deaths."[5] The number who actually die will depend upon the level of use and enjoyment of the boon society chooses to exercise.[6] Everyone is free to refuse

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1. G. Calabresi, Ideals, Beliefs, Attitudes, and the Law (1985).

2. A. Lincoln, *First Inaugural Address* in Abraham Lincoln, Speeches and Writings 1859-1865, at 222 (Library of America ed. 1989).

3. G. Calabresi, *supra* note 1, at 1.

4. *Id.*

5. *Id.*

6. *Id.* at 8-9.

the gift, but those who refuse it will be worse off than before the gift was offered because society will have radically changed to accommodate this new factor. Also, they may still be among the one thousand victims.[7]

Calabresi uses this hypothetical to mirror society's conflict between its desire to treat life as sacred and its need to make life as rich and enjoyable as possible for as many as possible. This hypothetical also primes the reader's mind for the ensuing discussion about the law's attempts to reconcile the many conflicting values and beliefs in modern society.

Calabresi compares this hypothetical to the modern automobile.[8] The car certainly has made life more enjoyable for most of us. But it does cost many lives every year, and because our society is so dependent upon it, the lives of those without cars are made comparatively more difficult than they would otherwise be in a society without cars.[9] Calabresi goes on to present many variations of this boon and its associated price, ever expanding the analogy, until it is clear that the boon he is speaking of can be any idea, discovery, freedom, or societal value which makes most of us better off at the expense of some of us.[10]

The core problem of this hypothetical is not whether to accept the boon; we have already done so many times over. The core problem is how to allocate the cost of the boon. At the beginning of his book, the boon is the automobile, and the subject is allocating the costs of accidents. At the end, the boon is freedom and equality of opportunity, and the subject is abortion. At each level of analysis the reader is indirectly asked, "Is the boon worth the price we pay as a society?" and, "Who should pay the price?" Calabresi does not pretend to have a ready answer to these questions. Rather, he merely attempts to get the reader to understand the trade-offs being made between the values of differing segments of society in nearly every area of modern life.

Calabresi goes on to describe the evil deity's gift as a roulette wheel of variable quality from which we can derive variable levels of enjoyment.[11] If we spend more time and money improving the roulette wheel's quality and playing the game more carefully, fewer people will be harmed by the evil deity's gift, but the

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7. *Id.* at 2.
8. *Id.* at 1.
9. *Id.* at 2.
10. *See generally id.* at 1-19.
11. *Id.* at 7.

game will be much less fun. The amount spent on the roulette wheel equals the level of "reasonable" behavior required of those who choose to partake of the evil deity's gift.[12] The more we are willing to sacrifice in the enjoyment of the gift (by driving slower, spending more for safer cars, or requiring women to bear the children they conceive) the less enjoyment we will derive from the gift, but the fewer innocent lives will be lost. By speeding, or even just driving more often, we increase both our enjoyment of the gift and the harm we can do to others. Finally, we set a supposedly common standard of reasonable behavior regarding the roulette wheel, and sometimes we hold those who exceed that standard responsible for the lives harmed because of their excess.[13]

Having established that society generally allocates the costs of the gift according to its reasonable use, Calabresi's central question, expressed throughout the book, is "Who decides what is a 'reasonable' use of the gift?" Those harmed by unreasonable use of the gift are often not those deriving the enjoyment from that unreasonable use. The person who spends a lot of time and money to make the roulette game safer can still be injured by one who spends nothing. The speeding driver survives the crash, but the careful, broad-sided victim does not. The ghetto child derives little benefit from the factories nearby, but still breathes more concentrated pollutants than the factory owners who live in Malibu beach houses. The unborn child enjoys no choice, equal opportunity, or sexual freedom, but is aborted in the name of such causes. So, either common or legislative law steps in to define what is a reasonable use of the gift, how losses associated with the gift are allocated, and how to encourage reasonable behavior.

Generally this allocation is based on the perceived "reasonableness" of each party's use of the gift. But again Calabresi asks "Who's value system determines what is reasonable?" Those making the rules are likely to be the ones deriving the most enjoyment from the game. We all place differing values on the many "boons" of modern society depending upon our ideals, beliefs, and attitudes. We all balance differently the costs and benefits of the many "boons" we enjoy. To some of us the moral, economic, and emotional costs of abortion far outweigh the in-

12. *Id.*
13. *Id.* at 17-19.

creased freedom it provides women. To others, abortion is perceived as the only way for women to maintain freedom over their lives and equal opportunity with men.

II. What We Can Learn From Dealing With Conflicting Values

In setting up the problem of conflicting values and their treatment in the law, Calabresi makes two key points. The first is that ideals, beliefs, and attitudes do matter; they do influence results in many areas of the law. Attempting to ignore beliefs and values merely translates into giving weight only to traditional, dominant values, while blocking holders of less traditional beliefs from full participation in society. Calabresi's second and more powerful point is that the way we choose to handle those issues in the law in which citizens' values incompatibly conflict will determine the law's ability to command the respect it needs to motivate our behavior.

A. Ideals, Beliefs, and Attitudes Do Matter

Our society was formed by white, Anglo-Saxon males whose values permeate those very documents which formed our government and which guarantee freedom of religion and abolish the idea of an official belief system.[14] Ever since, we have tried to balance the two mutually exclusive goals of treating all people equally while respecting all beliefs equally. While on the surface it may seem easy to treat all people and all beliefs equally, it has

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14. See, for example, T. Jefferson, *Query XVII*, in Thomas Jefferson 283-87 (Library of America ed. 1984), where Mr. Jefferson defends the separation of church and state, not because religion has nothing to do with government, but because he believes such separation will better advance the causes of both Christianity and government. *See also* T. Jefferson, *Revisal of the Laws: Drafts of Legislation, A Bill for Establishing Religious Freedom*, in Thomas Jefferson 346-48 (Library of America ed. 1984). Mr. Jefferson begins this draft bill for the Assembly of Virginia with the following paragraph:

> Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone. . . .

Id. at 346.

led to over 200 years of conflict in the streets, the courtroom and on the battlefields of our own soil.

The problem is that we cannot respect all beliefs equally and still maintain a common law by which we all are bound. Differing belief systems will resolve societal issues such as criminal punishment, injuries to people and property, divorce, and abortion differently. No matter how the legislatures and the courts resolve these types of issues, the laws chosen will conflict with the beliefs of large segments of society. One of the most important insights of this book is that, although we want a pluralistic, "melting pot" society, full participation in society often requires the sacrifice of many non-traditional, minority beliefs.[15]

Some may point to this dilemma of conflicting beliefs as the reason our Constitution forbids an official belief system. They may argue that ideals, beliefs, and values should have no part in legal decisions. But Calabresi points out that, like it or not, people will always hold to certain beliefs and values, and those beliefs and values will always affect the results of legal disputes.[16] To demonstrate his point, he uses that area of the law with which he is most familiar—torts.

The most common thread in all of tort law is the concept of "reasonableness." Generally the concept of reasonableness is used to allocate the burdens of accidents. Calabresi argues that our ideals, beliefs, and attitudes shape what we expect from "reasonable" people, not just in tort law, but in even the most diverse areas of the law.[17] However, by closely examining our use of this concept, Calabresi shows that reasonableness is not a matter of scientific objectivity but is merely a composite of ideals, attitudes, and beliefs held by those with the majority of the law-making power in society.[18]

Calabresi restates the traditional definition of the "reasonable man" as the man who "rides the Clapham Omnibus. . . [and] . . . takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."[19] Several things stand out about this "reasonable man." He is a man, doing traditionally masculine things like mowing his lawn in his shirt sleeves. He reads magazines, typical, middle-class literature, not

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15. G. CALABRESI, *supra* note 1, at 28-29.
16. *Id.* at 45-68.
17. *Id.* at 46, 65-68, 115.
18. *See generally id.* at 28-31.
19. *Id.* at 23 (citing Hall v. Brooklands Auto Racing Club, 1 K.B. 205, 224 (1933)).

too stuffy, but informative. He owns property (presumably mowing his own lawn). He is not wealthy (rides the bus and mows his own lawn) but maintains a household. This describes the archetypical Anglo-Saxon, American male. Even though we have gone a long way toward broadening this concept of reasonableness, the point remains valid that our definition of reasonable behavior depends upon what we view as mainstream, non-idiosyncratic behavior.

Calabresi argues that this definition of reasonableness forces those of less mainstream cultures and belief systems to bear a greater proportion of the costs of accidents than those holding mainstream ideals.[20] Ultimately it forces them to choose between some of their beliefs and the benefits of full participation in society.[21] This occurs because all areas of the law must channel through common principles of justice and constitutionality. Each part of the law must be reasonably consistent with all others, and this consistency disallows specific consideration of idiosyncratic beliefs and values.[22]

B. Conflicts Between Values: Uneasy Compromises

Calabresi states that the task of balancing conflicting ideals while maintaining the law's consistency is complicated by our desire to avoid endangering or devaluing lives without unfairly burdening those whom the law tells us should not be disfavored because of their age, sex, race, religion, or handicap.[23] Thus, two purposes of the law can conflict. The law must at once be consistent but must not penalize disfavored groups for their ideals, whether or not those ideals are popular. Calabresi uses several examples to demonstrate that, in dealing with divisive issues, we have not been able to ignore ideals, beliefs, and attitudes, but have created "a series of uneasy compromises."[24] Calabresi loosely divides these compromises into four categories.

1. The open compromise

In the first of these categories, we act as though the conflict of values and ideals does not exist, or as if the differential treat-

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20. *See supra* note 16 and accompanying text.
21. *Id.*
22. G. CALABRESI, *supra* note 1, at 115.
23. *Id.* at 115.
24. *Id.* at 116.

ment accorded to the same types of beliefs, whether in separate areas of the law, or when held by different actors in legal disputes, is natural and correct. We are open about our differential treatment of beliefs.

One example he discusses of this compromise is the differential treatment accorded to the beliefs of tortfeasors and victims in accident cases.[25] Often, even if an accident victim's injuries are exacerbated because of his unusual beliefs, he is still allowed to recover his full damages. The victim is not penalized for acting according to his beliefs. Yet the citizen who injures another while acting according to deeply-held but equally unusual beliefs is required to fully compensate his victim. The injurer must take his victim as he finds him, beliefs and all, but the injurer's beliefs do not mitigate his behavior.[26] Both the injurer and his victim are supposedly held to the same standard of a "reasonable man," yet their beliefs are treated quite differently depending on their role in the accident.

This compromise works because it seems logical to most of us that, since the victim did nothing to cause the accident, he should not be penalized for acting according to his beliefs, while the tortfeasor should not be allowed to avoid responsibility by relying upon his beliefs.[27] Most of us don't even think about the respect we show to one party's beliefs while negating those of another.

2. *The comfortable myth*

In the second area of compromise between conflicting ideals, we "give lip service to one ideal, while serving other goals."[28] This compromise lets us espouse idealism while avoiding the turmoil of creating laws to carry out that idealism. For example, we declare that insurance categories based on race, age, or sex unfairly discriminate against these groups. But we allow insurance categorization by different criteria such as place of residence, which effects the same disproportionate burdens on disadvantaged groups.[29] Outwardly we deny public acceptance of racism and bigotry by disallowing such categorizations. But, at

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25. *Id.* at 46-54.
26. *Id.* at 46-48.
27. *See generally id.* at 48-49.
28. *Id.* at 116.
29. *Id.* at 34-40.

the same time, we allow alternative categorizations which have the same discriminatory effect because these categorizations prove statistically helpful in reducing everyone's insurance rates. This compromise works because our entire insurance system is based on fault, and we recognize that fault must be allocated.

3. The admitted trade-off

In the third area, we choose trade-offs between the need to establish clear, enforceable legal rules and the need to maintain societal moral sensitivities. One example of this is when we refuse to allow compensation for purely emotional damages, not because we as a society do not believe such losses exist, but because we cannot accurately gauge them, and because allowing them would increase accident costs beyond anyone's control.[30] This compromise works because it is apparent to all that giving monetary value to emotions is impossible, even though we all can feel and empathize with the accident victim's grief.

4. The big lie

In the book's last chapter, it becomes clear that all of the rights, privileges, and material things we enjoy in our society can also fit the automobile and roulette wheel analogies. Our very freedom is a gift from the evil deity. The more freely we exercise our right to free speech, the more likely it is that we will injure someone through our expression. The more freely we exercise the freedom to decide whether to bear children or abort them, the more innocent lives are harmed. Yet the less we exercise these gifts of free speech and choice, the less equal and less happy many of us feel. In the fourth area, we use subterfuge to hide the conflict behind muddled logic.

Calabresi states that, when confronted with "tragic choices"[31] between conflicting beliefs, courts often resort to subterfuge to hide the conflict, thereby allowing us to assert that we hold to both beliefs.[32] The first example he gives is euthanasia.[33] Because we believe in the sanctity of life, and because we fear that removing legal punishments for euthanasia would increase its prevalence unreasonably, we make euthanasia against the

30. *Id.* at 69-70 (citing F. HARPER & F. JAMES, 2 THE LAW OF TORTS § 18.4 (1956)).
31. *Id.* at 88 (citing G. CALABRESI & P. BOBBIT, TRAGIC CHOICES (1978)).
32. *Id.* at 87-90.
33. *Id.* at 88.

law. But our jury system permits us to allow mercy killers to go free without our having to admit that we want to be merciful to a mercy killer.[34] Instead we rely on some other technical defense such as temporary insanity to provide a subterfuge rationale under which we can superficially reconcile the conflicting beliefs.

Another example of a subterfuge which satisfactorily pacifies our need to resolve conflicts of beliefs involves accident law. As Calabresi states,

> We want people (drivers, manufacturers of dangerous products, road builders) to take into account the lives that would be saved if they choose a more expensive, but safer way, approach, or device. But we do not want to *price* lives. Heaven forbid we should openly say that device X is worth installing because it costs Y dollars and that is less than a life is worth, while device Z is not worth installing because it costs Y plus 10 dollars, which is more than a life is worth. Yet by requiring (in many cases) that victims be compensated financially, we introduce into the system monetary values which create just such limited incentives for safety, without requiring an open pricing of lives."[35]

As Calabresi implies, this subterfuge works because it is market driven, and the market does a reasonable job of making such tough choices for us.[36]

One subterfuge Calabresi believes does not work is that used by the Supreme Court in *Regents v. Bakke*.[37] The conflict in *Bakke* was between the belief that we should act positively to improve opportunities for minorities and the belief that the Constitution should be color blind. But the subterfuge used by Justice Powell failed to pacify this conflict of beliefs because it was simply too obvious. "He said, in effect, you cannot admit people to a medical school on the basis of race. . . . On the other hand, diversity is a perfectly acceptable ground for selecting a class and its use is almost constitutionally protected. . . ."[38] The obvious subterfuge involved in telling admissions committees that they cannot admit based on race but that they can based on diversity is so insulting to peoples' intelli-

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34. *Id.*

35. *Id.* at 89 (citing Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)).

36. *Id.*

37. 438 U.S. 265 (1978).

38. CALABRESI, *supra* note 1, at 90. *See Bakke*, *supra* note 38, at 310-12.

gence that it simply fails to pacify the conflict of attitudes regarding affirmative action.

C. *How Beliefs are Treated Determines the Law's Power to Motivate Behavior*

Calabresi points out that, sooner or later, a court will not be able to form one of these "uneasy compromises" between conflicting values.[39] The conflict will be too naked, and the parties too fragmented by their respective beliefs, to forge a compromise.

The first four chapters of the book make one basic statement: ideals, beliefs, and attitudes do matter in the law. We cannot escape their impact by claiming that, since all should be treated equally no matter what their beliefs, beliefs don't matter. Then in the last chapter, "When Ideals Clash," Calabresi changes the basic problem from one of ideals and beliefs being pitted against ordinary costs of accidents and the like, to one in which ideals of similar moral strength are pitted against each other in a legal forum.[40] The first chapters ask whether one has a right to impose the *cost* of one's beliefs on another. But the last chapter asks whether one has the right to impose one person's *belief* on another.[41]

Calabresi describes such conflicts as those in which "[r]ebellion, flight or martyrdom might be acceptable possibilities—conformity never would,"[42] but in which many "sympathize with, and long to be able to give weight to, the feelings of those who disagree with them."[43] It is probable that slavery was such a conflict for many.[44] To those who address it with open hearts, abortion is such a conflict. As Calabresi sates, both the "pro-choice" and the "pro-life" movements "have some justification when they claim that the other is seeking to impose its world view . . . to the detriment of their beliefs and world view. . . . Both want to do something which, apart from any

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39. *Id.* at 87-88.
40. *Id.*
41. *Id.*
42. *Id.* at 88.
43. *Id.* at 89.
44. *See generally* A. LINCOLN, *supra*, note 2, at 220-24. "From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease." *Id.* at 220.

physical harm it may cause, deeply offends beliefs and values of the other."[45]

This brings the reader to the most important point Calabresi makes in this book: that *Roe v. Wade* was expressed unwisely, at least in its rationale, if not in its result. In the last chapter, entitled "When Ideals Clash," Calabresi states from the start that he is not addressing the correctness of *Roe v. Wade*. Rather, he is interested in "defining a way of looking at things that is appropriate to a society that wishes to include within it highly diverse beliefs, moralisms, and attitudes."[46] His argument is engrossing and respectful of the complexity of the abortion issue. Moreover, his framework for dealing with such divisive issues has broad applicability.

1. *Why* Roe v. Wade *was a "highly unfortunate"*[47] *decision*

Although Calabresi makes no flat judgment against subterfuges as a means of resolving conflicting beliefs, he strongly criticizes the two subterfuges he believes were used in *Roe v. Wade* to avoid dealing with the flatly conflicting beliefs of the pro-life and pro-choice groups.[48] He describes both a simple and a complex subterfuge.

The simple subterfuge used "would urge us to regard that which is not seen (the fetus) as nonexistent."[49] Calabresi argues that this subterfuge is "too transparent. It becomes an incitement to conflict by inducing people opposed to abortion to try to show it up as a sham."[50] He cites this subterfuge as a partial cause for laws requiring women to see photographs of fetuses before abortion and for the provocative behavior of many anti-abortion groups of carrying fetuses at demonstrations.[51]

Calabresi laments most deeply the complex, and more unfortunate, subterfuge used by the Court in "trying to duck the

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45. G. CALABRESI, *supra* note 1, at 91.
46. *Id.* at 109.
47. *Id.* at 92.
48. *Id.* 92-98.
49. *Id.* at 92.
50. *Id.* at 93.
51. *Id.* Another possible reason for such conduct is that the anti-abortion demonstrators are trying to strike an empathetic chord, which exists in most all of us, for the pain felt by fetuses during abortion. The viability standard used by the Court in *Roe* completely ignored this suffering, but most people are unable to do so. What may have angered people most was the knowledge that, whether a fetus is or is not a "person" under the Constitution, it still suffers horribly when aborted.

underlying conflict" of beliefs.[52] According to Calabresi, the Court "did not say that the metaphysics of those who believe life occurs at conception are not true,"[53] but instead stated that "for purposes of our Constitution, a fetus (at least until independently viable) is not a person."[54] Calabresi attacks this rationale on two bases: 1) that the statement is probably incorrect; and 2) that it was unnecessarily divisive and offensive to a large segment of our population.

Calabresi argues, quite correctly, that this rationale was probably incorrect because it ignored the "gravitational pull of other areas of the law."[55] He cites the pre-*Roe v. Wade* unconstitutionality of laws denying an unborn fetus the right to inherit from its parents.[56] He cites old English law recognizing fetuses as persons for the purpose of maintaining seisin.[57] He cites pre-*Roe v. Wade* American criminal and tort law administering penalties to criminals who harmed fetuses and awarding damages to those hurt by tortfeasors while still fetuses.[58]

Calabresi then argues that, even though the Court could not rule in favor of both sides of the dispute in *Roe v. Wade*, it could have reached the same result without telling a huge portion of the U.S. population that its beliefs were not recognized by the Constitution. His complaint is best expressed in the following paragraph:

> The Court, when it said that fetuses are not persons for purposes of due process, said to a large and politically active group: "*Your* metaphysics are not part of *our* constitution." This is far worse (and more dangerous) in a pluralistic society than the statement the court sought to avoid making, namely,

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52. G. CALABRESI, *supra* note 1, at 93.

53. *Id.*

54. *Id.* (citing Roe v. Wade, 410 U.S. 113, at 158 (1973)).

55. *Id.* at 93.

56. *Id.* (citing U.S. CONST. amend. XIV, S 1.); *Cf.* Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164 (1972)); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

57. *Id.* at 94 (citing Reeve v. Long, 408 (1695)).

58. *Id.* (citing J. DOOLEY, MODERN TORT LAW §§ 14.02-14.04 (rev. ed. 1982); *see also Id.* at 157, n.178 (citing Wallace v. Wallace, 120 N.H. 675, 421 A.2d 134, 137 (1980)) (post *Roe* case reversing pre-*Roe* decision allowing a nonviable fetus to sue for prenatal injuries).

The Court in *Webster v. Reproductive Health Services* was swept up by this gravitational pull in refusing to overturn the preamble to a new Missouri statute expressing that life begins at conception. 109 S. Ct. 3040, 3050 (1989) (citing Roe v. Wade, 410 U.S. 113, at 161-62 (1973)).

> "Sorry, but your metaphysics are wrong. A fetus is not alive." The Court said it does not matter whether a fetus is alive (whether *your* metaphysics are correct). A fetus is still not protected by *our* Constitution.[59]

Calabresi continues:

> [I]f the Court had simply denied that fetuses were alive, unpleasant arguments on metaphysics would have followed . . . but they would have been debated within the Constitution. The argument would have been between people in the same polity, under the same *acceptable* Constitution, seeking to convince each other about an unprovable, metaphysical issue—whether a fetus is alive.
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> When, instead, the Court proclaimed that the truth of beliefs did not matter—that anti—abortion beliefs as to commencement of life . . . are not part of our Constitution, of our legal system—it immediately made that Constitution unacceptable to the holders of these beliefs. . . . In effect, it told these groups that their beliefs are not acceptable, that they are not a part of our establishment, whether or not they happen to be true . . . that even now . . . [these groups] could not be true Americans so long as they held to their beliefs."[60]

Calabresi argues that pro-life groups could possibly have accepted a government which recognized its beliefs but ruled against those beliefs in favor of other, equally compelling beliefs, but they could not accept "the statement that the beliefs themselves were valueless and beyond pale."[61] Such a statement made the abortion debate a kill-or-be-killed war in which "the only way to affirm the fact that the belief—and its holders—were part of the polity seemed to be to enshrine the belief and its practical consequences *absolutely* in the law."[62] Calabresi cites this rationale as the reason for the present wave of "almost fanatical pressure to forbid abortion, even in situations where, before [*Roe v. Wade*], abortion was virtually universally permitted by the law."[63]

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59. G. CALABRESI, *supra* note 1, at 95.

60. *Id.* at 95-96.

61. *Id.* at 97.

62. *Id.*

63. *Id.* Within three years after *Roe v. Wade*, 31 states passed legislation attempting to restrict or regulate abortions. *Id.* at 191, n.359 (citing Doe v. Israel, 358 F. Supp. 1193 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974); *see also* Witherspoon, *The New Pro-Life Legislation: Patterns and Recommendations*, 7 ST. MARY'S L.J. 637, at 646, n.31 (1976)).

2. Calabresi's approach for handling the divisive conflicts of beliefs over abortion

Calabresi recognizes the strong beliefs of the pro-choice groups regarding access to abortion as a means of gaining equality with men and of preventing dangerous, illegal abortions. Indeed, he states that "[t]o have acted as though *our* Constitution was unconcerned with the effect of anti-abortion laws on women would have been about as bad as to make the statement the Court made."[64]

Calabresi would redefine the issue of abortion from a conflict over when life begins according to our Constitution to a conflict in which equal opportunity values are pitted against values of life preservation and sanctity.[65] Unlike many, Calabresi believes that the pro-abortion argument relying on the rights to privacy and to control over one's own body is not supportable by the present body of law.[66]

Instead of a due process argument concerning choice and privacy, Calabresi believes that the argument in favor of abortion is an equal protection, equality argument—specifically, equality in access to sex and in bearing the burden of its consequences. As he puts it, "[W]hat makes anti-abortion laws suspect is the fact that they put the burden of fetal life saving (given sexual freedom) solely on women. . . ."[67] Calabresi describes such laws as invidiously discriminating because these are "laws enacted by a dominant group which disproportionately burden a disfavored group—laws which frequently would not be passed if their burden were equally shared by all."[68]

Calabresi also argues that viewing the pro-abortion argument as an equal protection argument makes it easier to reconcile the values on both sides of the issue.

> [I]t puts the argument in terms that most of us can understand and sympathize with. Life values and equality among men and women are ideals to which most of us can respond, and hence

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64. *Id.* at 97.

65. *Id.* at 99.

66. *Id.* at 100, nn.368-71; *see also id.* at 193, nn. 368-71 (citing several areas of law in which governmental regulation over sexual relations and over the sale of body parts is regularly held constitutional).

67. *Id.* at 101.

68. *Id.*

> which we can respect even when they ultimately are balanced in ways with which we would not agree."[69]

At first blush it is easy to flatly hold that life values are more important than equal access to sex. But Calabresi reminds us of the consequences of this inequality: the added health risks of pregnancy, the pain and discomfort, and most importantly, the further discrimination women face in the work force because of their pregnancy, or even their possibility of pregnancy.[70]

Viewing the abortion debate as an equality issue also places it within the logic of Calabresi's evil deity hypothetical. Within this hypothetical, the boon offered us is equality among men and women, and the cost demanded by the evil deity is measured in lives of unborn fetuses. Conversely, the boon could be considered the preservation of life values, and the cost the resulting inequality among men and women. Calabresi reviews the many examples found earlier in the book in which lives were allowed to be lost so that other values such as low cost, convenience, and freedom could be preserved.[71] Although we don't like to openly admit it, we do willingly sacrifice lives for these and other values. Also, as Calabresi points out, viewing the abortion debate in this way allows us to feel sympathy for the opposing view.[72] We wish we could both preserve absolute equality and preserve all fetal life.

Calabresi's approach to abortion, and to all such divisive issues involving mutually exclusive beliefs and values, is simple and ill-defined.[73] He states that first we should look for a solution which does not involve subterfuge. Second, we should be honest and open about the conflicting values involved. Third, we should give some weight to both beliefs, while recognizing that, one belief must win over the other. Finally, we should openly look forward to the day when both beliefs can be accommodated.[74] For example, he suggests that there may come a day when fetal transplants can replace abortions to resolve the equality/life value conflict.[75] This of course could be a viable so-

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69. *Id.* at 101-02.
70. *Id.* at 104-08.
71. *Id.* at 102 & n.374.
72. *Id.* at 99.
73. *Id.* at 90.
74. *Id.* at 90.
75. *Id.* at 113. Note that if abortion is defined as a choice versus life values debate, this future solution would be unavailable.

lution if the debate is between equality and life values, but no solution at all if it is between privacy and choice and life values.

C. *Is the Genie Out of the Bottle?*

Calabresi is pessimistic. He believes that, because of the polarizing nature of the *Roe v. Wade* decision, both sides of the debate will fight on at the extremes until one side's beliefs are sufficiently emarginated to render them meaningless as a political force.[76] In essence, he believes that his approach to the abortion issue can never be adopted now that our nation has entered the path created by *Roe v. Wade*.

It is not altogether clear that Calabresi is correct in his pessimism. Since his book was published, the Supreme Court has rendered its *Webster* decision recognizing a state's interest in preserving fetal life both before and after viability.[77]

From its first sentence, the plurality opinion in *Webster* seemed to reach for a reconciliation with those alienated by the *Roe* Court's deconstitutionalization of their beliefs regarding the sanctity of fetal life. The first issue addressed by the *Webster* Court was whether it was constitutional for a state to base an abortion statute on a stated belief as to when life begins.[78] The preamble of a challenged Missouri statute regulating abortion stated as some of the state legislature's "findings" that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being."[79] In the same section with these "findings" the act required that all Missouri laws be interpreted to provide unborn children with the same rights as other "persons."[80]

Those challenging the statute relied on Supreme Court dictum from *Akron v. Akron Center for Reproductive Health, Inc.*,[81] which stated that "a state may not adopt one theory of

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76. *Id.* at 110.

77. Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3049-50 (1989) (upholding a legislative declaration that fetuses have protectable interests in life, health and well-being from conception, as long as the declaration has no operative effect). *Id.* at 3057 ("[w]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability. . . ."). *See generally* Wilkins, *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 B.Y.U. L. REV. 403.

78. *Webster*, 109 S. Ct. at 3049.

79. MO. REV. STAT. §§ 1205.1(1) & (2) (1986).

80. *Id.* at § 1205.2.

81. 462 U.S. 416 (1983).

when life begins to justify its regulation of abortions."[82] Nevertheless, the *Webster* Court reversed the eighth circuit, holding that the *Akron* dictum meant only "that a State could not 'justify' an abortion regulation otherwise invalid under *Roe* on the ground that it embodied the State's view about when life begins."[83] The Court continued, "[t]he Court has emphasized that *Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.' "[84] Apparently states may base an abortion statute upon the state's view of when life begins, as long as that statute does not violate constitutional principles. But states may not attempt to justify an otherwise unconstitutional statute by basing it on the state's theory of life's beginnings.

Having stated this, the *Webster* Court placed itself on a collision course with *Roe*, because *Roe* drew a clear, unyielding line as to when a state's interest in protecting potential life became sufficiently compelling to justify regulation of abortion—that line was at the beginning of the second trimester.[85] Obviously, it is impossible for a state legislature, which believes that human life begins during the first trimester, to frame an abortion statute based on that belief without directly contradicting *Roe*. Recognizing the conflict it had thus created with *Roe*, the *Webster* Court chose to indirectly overturn the subterfuge used by the *Roe* Court in defining the rights of fetuses—the subterfuge so aptly criticized by Calabresi—that an unborn baby is not a "person" under the Constitution.[86] In *Roe* the Court, relying for its logic on its own constitutional definition of a "person," held that a state's interest in "potential" human life did not become compelling until that life was capable of separate existence outside its mother's womb.[87] But the *Webster* Court flatly stated, "we do not see why the state's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[88]

With this olive branch recognizing the states' compelling in-

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82. *Id.* at 416. This dictum was relied upon by the Eighth Circuit Court of Appeals in overturning this part of the preamble. *Webster*, 109 S. Ct. at 3076.

83. *Webster*, 109 S. Ct. at 3050.

84. *Id.* (quoting Mayer v. Roe, 432 U.S. 464, at 474 (1977)).

85. Roe v. Wade, 410 U.S. 113, 164 (1973).

86. *See supra* notes 65-74 and accompanying text.

87. *Roe*, 410 U.S. at 164.

88. *Webster*, 109 S. Ct. at 3057.

terest in protecting potential human life *before* viability, the *Webster* Court invited back into the fold of constitutional law those most alienated by *Roe*. Although it did not frame the balance in equal protection terms, as Calabresi would have liked, the Court went on to define, without subterfuge, that balance which must be struck between womens' rights of privacy and equality and the states' interest in protecting potential human life. Quoting from the dissent of *Thornburgh v. American College of Obstetricians and Gynecologists*,[89] the Court held that the balance should be between the " 'fundamental right' recognized in *Roe* [and] the State's 'compelling interest' in protecting potential human life throughout pregnancy.[90] '[T]he State's interest, if compelling after viability, is equally compelling before viability.' "[91] The Court criticized the balance struck in *Roe* by stating,

> That framework sought to deal with areas of medical practice traditionally subject to state regulation, and it sought to balance once and for all by reference only to the calendar the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.[92]

Ironically, the *Webster* dissent accuses the plurality of cowardice,[93] yet for the first time, the Court has squarely stated the difficult balance we must reach as a society in deciding how to deal with abortion.

IV. Conclusion

Guido Calabresi's 1985 book, "Ideals, Beliefs, Attitudes, and the Law," is a call to approach conflicting beliefs, including those involving abortion, honestly. Calabresi compels us to articulate the trade-offs we accept in our values, our quality of life, and even some of our lives, when we embrace a new technology or way of life. He urges us to avoid subterfuge when balancing

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89. 476 U.S. 747, 795 (1986).

90. *Webster*, 109 S. Ct. at 3057.

91. *Id.*

92. *Id.* at 3058.

93. *Id.* at 3079. As Justice Blackmun, joined by Justices Brennan and Marshall, barked in his angry dissent: "It is impossible to read the plurality opinion. . .without recognizing its implicit invitation to every state to enact more and more restrictive abortion laws, and to assert their interest in potential life as of the moment of conception." *Id.* at 3077.

conflicting beliefs and values. When (for political or other reasons) we must hide the direct conflict of values, Calabresi urges us to frame our decisions in ways which do not wholly emarginate one group by refusing to recognize that its beliefs are considerable under our Constitution. Regarding abortion, Calabresi laments the declaration in *Roe v. Wade* that an unborn baby is not a "person" under our Constitution, not because he agrees or disagrees with abortion, but because this declaration placed outside constitutional consideration the beliefs of a huge portion of our citizenry. Calabresi would rather we face the abortion conflict directly—as one between the equal protection and privacy rights of women and the rights of unborn children to a full life.

The *Webster* decision is an invitation, or really a mandate, to the states to approach abortion in much the same way Calabresi calls for, i.e., a balancing (undue burden) approach which recognizes both the life values and the egalitarian values on both sides of the issue.[94] Indeed, the *Webster* decision may force states to begin to evaluate abortion in precisely this manner. At the very least, *Webster* invited back into the fold those groups emarginated by the *Roe* decision's refusal to recognize the validity of their beliefs regarding human life before viability. The debate is hot, but it is again between members of the same polity, attempting, under Supreme Court mandate, to hammer out a balance between two sets of conflicting beliefs which cannot be equally treated, but which must now be equally considered.

Reviewed by Ron Christian

94. *See generally Webster*, 109 S. Ct. at 3049-57.