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BOOK REVIEW


Reviewed by William Joseph Wagner**

The law passes value judgments in order to allocate the social costs of human activities. Such legal value judgments may be only implicit in a complex society, but the society, nonetheless, remains responsible for them. In a series of important books,1 Guido Calabresi has helped to define the moral challenge posed by our need to attain rational control over value judgments that are implicit in a complex legal system. Although the challenge is daunting, Professor Calabresi persuades us to accept it. He does so because he is a great teacher who uses wit and intellectual brilliance to make all things seem possible for anyone who will only think. He succeeds also, however, because he has labored to give us an analytical and conceptual framework suited to accomplishing the task.

Calabresi's new book, Ideals, Beliefs, Attitudes, and the Law, is the most recent piece of such an analytical and conceptual framework. The book builds upon the analytical structure developed in the author's previous works.2 In his present work, Calabresi has chosen to explore the particular question of the role that ideals, beliefs, and attitudes ought to have in the value judgments which the law makes. He establishes in this book that ideals, beliefs, and attitudes have heretofore played a critical role in legal value judgments, notwithstanding some schools of economic analysis that might

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2. The present book presupposes, in particular, the conceptual apparatus Calabresi develops for evaluating systems of accident law in The Costs of Accidents, as well as the concept of “tragic choices” he develops with Phillip Bobbitt in Tragic Choices.
try to exclude it. He reaches this conclusion by an analysis of the rules, in
his own specialty of tort law, governing the allocation of the costs of acci-
dents. Upon arriving at an account of the role traditionally given ideals,
beliefs, and attitudes in this one area of law, he proceeds to elaborate a gen-
eral framework for how ideals, beliefs, and attitudes might be, in all areas,
more adequately and responsibly valued by the law. It is on this ground that
the book is subtitled Private Law Perspectives on a Public Law Problem.

This book review will seek to introduce the reader to the essential outlines
of the argument which Calabresi develops in Ideals, Beliefs, Attitudes, and
the Law. In order to accomplish this purpose, the review will first clarify the
nature of the moral problem perceived by the author in the valuations made, implicitly and indirectly, by the law. It will then summarize how he
sees this problem unfolding in the context of the impact of traditional tort
law on ideals, beliefs, and attitudes. Finally, it will sketch the general ana-
lytical and conceptual framework he proposes for arriving at a more ade-
quate and responsible legal valuation of these intangibles. After introducing
the reader to the essential outlines of the argument, the review will provide a
brief evaluation of its strengths and weaknesses.

I. THE NATURE OF THE MORAL PROBLEM PRESENTED BY THE
LAW'S IMPLICIT VALUE JUDGMENTS

Essentially, the moral problem that the law's implicit valuations present
for Calabresi is one of distributive justice. While it is clear that distributive

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   (citing Posner, Utilitarianism, Economics, and Legal Theory, 8 J. LEG. STUD. 103 (1979)).

4. This is a term used by Calabresi to indicate a judgment of the value or disvalue placed
   by society on a given societal aim, e.g., G. CALABRESI, supra note 3, at 69. The judgment of
   value or disvalue relates both to the utility of the aim for reaching other long-range goals, as
   well as to whatever competing goods society must give up in exchange for attaining the aim in
   question. In the present book Calabresi is, therefore, interested in ascertaining how ideals,
   attitudes, and beliefs may help to comprise long range goals against which the utility of imme-
   diate aims is to be measured, as well as how they may constitute competing ends against which
   the relative value of other societal aims is to be assessed.

5. This section of the review makes explicit jurisprudential principles which Calabresi
   himself chooses to leave implicit but which are, nonetheless, key to understanding the moral
   structure of his approach. Calabresi refuses to begin with any such abstract statement of prin-
   ciples, preferring to remain carefully within the boundaries of common law case methodology.
   See, G. CALABRESI, supra note 3, at XV.

6. Distributive justice is classically defined by Aristotle as concerned with the allocation
   of shares of common goods to individuals within the political community in proportion to
   their individual merit. ARISTOTLE, NICOMACHEAN ETHICS, Book V, iii. Individual merit
   may be defined by some intrinsic attribute belonging to the individual but which the commu-
   nity values. T. AQUINAS, SUMMA THEOLOGICA, Ila Iiae, q. 61, art. 2. But, it may also be
   defined by reference to other criteria derived from rational strategies to further the common
justice is an issue when the political system makes a direct distribution of
money, goods, or other advantages, Calabresi’s concern is that we see dis-
tributive justice to be equally an issue in our collective choices to distribute
the costs of regulated acts and activities, whether these costs are implicit and
indirect or express and direct.

In our collective decisions to permit, limit, or prohibit by law any of the
burgeoning new activities resulting from technological progress, we neces-
sarily choose, if only implicitly, where the costs of such activities shall be
allowed to fall. Such decisions serve to set a value not only upon societal acts
and activities, but also upon the attitudes and beliefs on which their costs
will impinge. Calabresi’s particular concern in his present study is the jus-
tice of the distribution of activity costs to the holders of attitudes and
beliefs.7

The central normative premise of his argument is that we have an obliga-
tion in distributive justice to allocate such costs, and to make such valua-
tions, in a way that is rationally calculated to advance the basic ideals of
society.8 He presupposes that our own society holds at least three such basic
ideals. These are: 1) equal participation by all in the political process and in
essential societal activities;9 2) the sanctity of the individual life;10 and 3) the
promotion of some mix or range of individual attitudes and beliefs which
fosters the vitality and pluriform richness of our society.11

The justice of a particular distribution of activity costs (of a particular set
of implicit valuations) depends primarily on whether it tends rationally to
advance not only society’s lesser goals, but also these and other ideals. The
assessment, in turn, of whether the distribution is a rational means to these
ends is made possible by modern economic analysis. This analysis allows
society to identify, with scientific breadth and precision, the array of costs

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7. Calabresi never defines either “attitude” or “belief”. Presumably, each represents an
aspect of an individual’s moral commitments and values. An example, for Calabresi, of “atti-
tude” is the stereotypically Italian love of fast driving. G. CALABRESI, supra note 3, at 28. An
instance of a “belief” is the Christian Science objection to receiving the assistance of a physi-
cian. Id. at 46.

8. Calabresi is deliberately ambiguous about whether he conceives of these ideals as
purely conventional or whether he sees them as having some deeper grounding in reason or
nature. Although he often writes as if he means the former, he at times implies the latter, as,
for example, when he speaks of the “many rights that philosophers would deem fundamental.”
Id. at 101. Presumably, his position is that as a legal scholar he works from the society’s given
values, and is entitled to prescind from the question of their source.

9. Calabresi nowhere separately enumerates these ideals. However, his argument is
clearly structured around them. With respect to this first ideal, see, e.g., id. at 99-108.

10. See id. at 102.

11. See, e.g., id. at 27-33 and 84-86.
that it may be required to accept in exchange for a given activity—such analysis having been adjusted, of course, to fit within a framework open, at the appropriate junctures, to particular value judgments.

Even with full empirical information, however, Calabresi postulates that legal value judgments are tragically complicated by the fact that they at times ineluctably require the compromise of one fundamental ideal for another. He holds that it is, moreover, at times even necessary to compromise a fundamental ideal in favor of some lesser but nonetheless still desired goal, such as convenience.\(^\text{12}\) In this latter case, our dilemma is strikingly expressed by the author's image of an Evil Deity making the offer of "a gift, a boon, which would make life more pleasant, more enjoyable than it is today . . . anything you want . . . in exchange for one thing . . . the lives of one thousand young men and women picked by him at random who will each year die horrible deaths."\(^\text{13}\)

Society faces the tragic necessity of commensurating the incommensurable\(^\text{14}\) when it is required to subordinate a basic ideal to some other goal, since each ideal is, in principle, absolute in the demand it makes upon us. In this connection justice imposes a second normative requirement. It requires that society rationally and carefully review the full range of its options so that basic ideals are actually compromised, even in practice, only where strictly necessary. Further, where this kind of practical compromise is truly unavoidable, it is to be accomplished with the degree of tact required to avoid the suggestion that any compromise of a basic ideal is being accepted on the level of principle.\(^\text{15}\)

\(^\text{12}\) Calabresi does not appear to treat efficiency as a fundamental ideal. Rather, he appears to treat considerations of efficiency as a tragically necessary condition to collective human action in a world of scarce resources.

\(^\text{13}\) G. CALABRESI, supra note 3, at 1.

\(^\text{14}\) In Roman Catholic ethics, a debated question is the degree to which basic values can be commensurated in the context of personal moral choice. Acceptance of Calabresi's "Evil Deity" dilemma as pertinent to the morality of law and policy decisions made in pursuit of the common good does not necessarily entail a willingness to adopt this model as particularly pertinent to what is at stake in personal moral choice. Further, even on the plane of law and policy decisions, it would appear possible to restrict the application of Calabresi's principle of commensuration to the summing of indirect consequences. While Calabresi does not acknowledge any moral distinction between direct and indirect consequences, it would appear to some to be a critical distinction for the morality of political as well as personal choice.

\(^\text{15}\) The challenge, according to Calabresi, is to avoid the appearance of directly attacking the ideal without going as far as dishonesty or evasion of responsibility for the compromise actually being made. In attempting to salvage, as far as possible, goods which are subject to loss by reason of fidelity to principle (here a basic societal ideal), Calabresi is acting in the best tradition of "casuistry." G. CALABRESI, supra note 3, at 120-21 & n.7. For another legal philosopher who does not consider casuistry a bad word, see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 123-24, 225-26 (1980). What is unusual about Calabresi is that he is not, unlike self-confessed casuists generally, working within a deductive system of abstract princi-
The author defends his claim that society's collective decision of whether to permit, limit, or prohibit a given activity is the locus of the moral responsibility here described, against a series of objections. Of these, the most significant would seem to be that the locus of moral responsibility can be shifted to those individuals who happen to cause specific accidents by violating some perfectible standard which society has imposed on the conduct of the activity. He answers this objection by showing that the content of any standard which has been imposed upon individuals will always reveal a more basic, societal decision about how much resultant harm the society is willing to tolerate. Thus, even if it tries to do so, society cannot wash its hands of collective moral responsibility, either for the social costs of regulated activities, or for the pattern of their distribution.

The moral obligation of which Calabresi conceives is, finally, one of society's responsibility to its own ideals. Society fails in this obligation if it relinquishes rational control over its implicit legal valuations. The penalty for such a failure is that society's cherished ideals will be violated in the long run under the pressure of short run considerations. The consequence is that our society may be transformed into one which we ultimately would find to be morally repugnant.

II. THE PROBLEM OF LEGAL VALUATION IN THE CONTEXT OF THE IMPACT OF TRADITIONAL TORT RULES ON IDEALS, BELIEFS, AND ATTITUDES

A dominant feature of Calabresi's methodology is its reliance on the reasoning patterns developed by common law judges, as these have been interpreted by Holmes and others. This thoroughly inductive method is premised on the assumption that "[t]he life of the law has not been logic: it has been experience." It typifies a good deal of American legal scholarship, although few other scholars use it as brilliantly or creatively as Calabresi.

The method has two phases. The first phase turns to precedent to see how judges have handled problems in the past. In this phase, the scholar restates

16. These objections are placed in the mouths of Calabresi's law students who are accorded a function not unlike that of Socrates' disciples in the Platonic dialogues. See G. CALABRESI, supra note 3, at 1-19.
17. See id. at 7-9.
18. Calabresi alludes briefly to his methodology. See id. at xv. For perhaps the historically most important interpretation of common law methodology, see O.W. HOLMES, JR., THE COMMON LAW (1881).
judicial strategies within his own chosen analytical framework. The second phase applies past paradigms to the solution of present problems. This second phase is both critical and adaptive, allowing the academic commentator to modify the model derived from the common law in order to meet present needs. Such needs are naturally articulated from the scholar's systematic and reflective perspective.

In keeping with this methodology, Calabresi first analyzes the traditional rules of common law tort governing the allocation of accident costs. In this phase of his argument, he shows the manner in which a number of traditional rules implicitly allocate activity costs to attitudes and beliefs in order to advance one or another basic societal ideal. Once he establishes how a given rule advances a basic ideal, he then ascertains whether and how, in the case of ineluctable conflict, the rule also limits such advancement for the sake of favoring a separate ideal or goal. This phase of the argument both illumines the moral or jurisprudential principles of distributive justice discussed in the abstract above, and establishes practical patterns or paradigms for use as models for resolving concrete problems of a similar kind in the future. Inasfar as the author is interested in past patterns or paradigms as models, he seeks to identify in them not only strengths but also deficiencies requiring the correction he is able to supply in the second, critical phase of his argument.

A. Tort Rules Advancing the Basic Societal Ideal of Attitudes Fostering the Vitality of Society

By examining the function of three traditional tort doctrines—the standard of the “reasonable man,” the rule on “fanciful” damages, and tort’s treatment of what he terms “moralisms”—Calabresi establishes that tort law has, at times, valued attitudes and beliefs in order to advance a particular basic ideal. He demonstrates that each of these doctrines advances, in particular, the basic ideal of promoting a mix or range of attitudes that fosters the vitality of society.

Calabresi examines “the reasonable man” standard, and he shows that, most immediately, it is a device used by traditional tort law to allocate accident losses between injurers and victims. Under this rule, if an injury occurs despite the injurer’s reasonableness, the cost of the accident ordinarily is allocated to the victim. If the injury occurs because of the injurer’s departure from this standard, the loss is allocated instead to him.

20. As was noted above, however, Calabresi does not begin with the principles or requirements of justice. Rather, he begins with the cases which illumine his principles as well as show strategies for applying them.
On close examination, Calabresi is able, however, to establish that reasonableness is not, in this context, open to scientific demonstration. The standard reflects, rather, a composite of attitudes and beliefs which is merely shared by the majority of those with the power to make laws. Traditionally, reasonableness has been defined as encompassing the beliefs and attitudes of "the man on the Clapham Omnibus" or "the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves."21 In short, the beliefs and attitudes being promoted by the standard are those of the white Anglo-Saxon male. This is not surprising since such beliefs and attitudes are the ones most pervasive among persons who traditionally have had lawmaking power.

Because those who do not share such attitudes and beliefs ordinarily must, under this standard, absorb the costs of the accidents they cause such persons are subjected to legally imposed pressure to conform their attitudes and beliefs to those the law has defined as reasonable, i.e., to the attitudes and beliefs of the lawmaking majority. Those who remain loyal to nonconforming attitudes and beliefs are forced to withdraw from essential activities rather than accept costs they cannot afford to pay. The reasonableness standard thus ultimately serves to make the possession of favored attitudes a prerequisite to full participation in essential societal activities. In the second phase of his analysis Calabresi, not surprisingly, argues that the law's valuation of attitudes should be changed to a valuation which promotes an overall set of attitudes more likely to foster the pluriform richness of our society. For the present, however, it need merely be noted that the rule serves to promote certain attitudes which have been deemed to be desirable.22

Calabresi examines two other common law tort rules and concludes that they have served to give a certain countervailing negative valuation to these

21. G. CALABRESI, supra note 3, at 23. The "Clapham Omnibus" and "shirt sleeves" descriptions are both cited from Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224. Calabresi does not analyze the contents of this standard for its nonmasculinist elements. The descriptive phrases which help define the standard and which are here cited by Calabresi show, however, that the reasonable man is not just male; he is also a property owner (owns a home); he is not wealthy (mows the lawn, rides the omnibus); he is well-informed (reads periodicals); he knows how practical problems are solved (can roll up his shirtsleeves); and he has the responsibility for maintaining a household on a small budget (mows his own lawn). If Calabresi analyzed this additional content, it would be interesting to see whether he would add anything to his conclusions about the functioning of the reasonableness standard.

22. When lawmakers have simply enacted protection for the attitudes that their own class happens to hold, they have legislated not for the common good but for their own advantage. Justice requires, however, that desired attitudes be identified not just with respect to the perspective of a given class, but with respect to the perspective of the good of society as a whole. Calabresi develops the implications of this point in the second phase of his argument, as will be discussed below.
same reasonable attitudes where such negative valuation has been required to advance some preferred goal or ideal. The first of these rules deals with so-called “fanciful” damages. Under this rule, subjective injury resulting from sentimental attachment to an object is not compensated, even though the attachment is “reasonable.” Here the law chooses to favor the activity causing the injury, because the sentimentalist can avoid the injury without relinquishing access to essential societal activities simply by removing the valued thing from circulation. The rule on fanciful damages, thus, aims at cost avoidance.

The second of these rules is one dealing with the question of recovery for injury of a psychic nature sustained because of moral distress, which is typically suffered by witnessing an injury to another person. Calabresi terms such moral distress a “moralism.” Under the rule, as the author articulates it, the law refuses recovery. The law does so despite the fact that the distress is “reasonable.” He concludes that here the law chooses to favor the activity causing the injury over allowing recovery even to a “reasonable” man. The theory is that, ironically recovery would tend only to heighten the victim’s subjective sense of injury. The denial of recovery is thus paradoxically deemed to lessen rather than to increase the overall costs of psychic injury caused by the activity in question. The rule dealing with moralisms of this kind, therefore, also aims at cost avoidance.

By reaching for analogies from domestic relations and criminal law, Calabresi demonstrates that at times the law has, by contrast, intervened to favor moralisms over the offending activity and that it does so precisely for the sake of heightening the sufferer’s sense of psychic injury. Pornography was outlawed, for instance, in part to arouse the sense of psychic injury people experience when confronted with pornography. Similarly, an action for the alienation of affections was permitted, to fuel the offense taken at divorce and its accompanying destabilization of families. Moralisms were favored over net efficiency in these contexts for the sake of reinforcing the value of public morality.

In sum, by its use of the reasonableness standard and by means of its treatment of both fanciful damages and moralisms, the common law of tort traditionally has distributed the costs of activities (valuated them) in a manner advancing a mix or range of individual attitudes. This mix or range of attitudes has presumably been deemed best to foster the overall welfare and vitality of our society. The preferred composite of attitudes, which is known as those of the “reasonable man,” has not, however, been advanced absolutely. Rather it has been advanced in a way qualified to promote secon-

23. One of Calabresi’s primary interests throughout his common law analysis is to ascer-
dary concerns such as cost avoidance and public morality.\textsuperscript{24}

\textbf{B. Tort Rules Advancing the Basic Societal Ideal of Equal Participation in Essential Societal Activities}

Calabresi shows that, just as traditional tort rules have assigned accident costs with the aim of promoting preferred attitudes and beliefs, at times they have also assigned these costs in ways that promote the separate basic societal ideal calling for equal participation by all in the political process and in essential societal activities. For the author, this latter ideal serves as the paramount principle of a pluralistic society. The tort rules which he analyzes in order to establish the influence of this ideal include the "contributory" negligence rule and the "thin skull" doctrine.

Calabresi establishes that tort law has sought to promote the ideal of equal participation through its application of the contributory negligence rule. Under the contributory negligence rule, if the victim has departed from the standard of reasonableness, he, and not the negligent injurer, must ordinarily bear the cost of the accident. As the author demonstrates, however, there has existed one very significant exception to this rule. Where his departure from reasonableness is the result of religious belief, the victim is shielded from absorbing the cost of the accident. It is this exception that places the rule at the service of the ideal of equal participation.

In order to affirm the existence of this exception, the author cites the case of "Minelda's Pelvis," a Connecticut case in which an injurer was required to pay, in full, for pelvic injuries which were aggravated by the failure of an injured Christian Scientist to seek the timely assistance of a physician.\textsuperscript{25} Had the aggravation of injuries been caused by a nonreligious departure from "reasonableness," the victim would, by contrast, have been denied recovery on the ground of "contributory negligence" in failing to mitigate damages.\textsuperscript{26}

Calabresi hypothetically varies the facts of the case to consider injuries to a Roman Catholic who suffers aggravation of pelvic harm, not through failure to see a physician, but rather through the complications involved in a

\begin{footnotes}
\footnote{Calabresi does not use the term public morality, but the purpose for which the attitudes in question are valuated can probably be best so designated.}
\footnote{\textsc{G. Calabresi}, \textit{supra} note 3, at 46. The facts in the case, \textit{Lange v. Hoyt}, 114 Conn. 590, 159 A. 575 (1932), have been somewhat simplified by Calabresi.}
\footnote{For the sake of simplicity, Calabresi treats the tort rule requiring reasonable efforts to mitigate damages as an extension of the rule on contributory negligence which requires the victim to behave reasonably at the time of the accident.}
\end{footnotes}
pregnancy arising from a refusal, in keeping with church teaching, to use contraception.\textsuperscript{27} The result, he shows, would be the same. The hypothetical victim would be spared the costs of the accident despite a departure from the ordinary standard of reasonableness. Similarly, in the case of an unmarried orthodox Jewish woman who leaped from a stalled ski lift in order to avoid being alone with a man after dusk, Calabresi arrives at the same outcome.\textsuperscript{28} In abiding by a religious conviction the victim had departed from the ordinary standard of reasonableness. Yet, she was not burdened with the costs of the ensuing accident.

According to Calabresi, the value which motivates the courts to make such exceptions to the ordinary operation of the contributory negligence rule and its correlaries is that of the nonestablishment of religion.\textsuperscript{29} The courts favor even idiosyncratic and "unreasonable" beliefs, in order to avoid selecting between acceptable and unacceptable religious beliefs in a way that establishes some innocuous core of reasonable religious or quasi-religious beliefs. Such an establishment of acceptable religious beliefs is objectionable because it would effectively discourage those with nonconforming beliefs from full participation in essential societal activities.

The option of simply denying protection to all religious beliefs is, on the other hand, unavailable, he argues, because of the constitutional principle of neutrality towards religion. Besides, the "reasonableness" standard is, in any case, dependent upon beliefs that are indistinguishable from ones religious in nature. To demonstrate, the author cites the case of a couple who became pregnant when the pharmacist incorrectly filled their prescription for birth control pills with tranquilizers. The couple refused to mitigate their "injury" by resorting either to abortion or adoption.\textsuperscript{30} The court held that the couple's attitudes were "reasonable," as a matter of law. According

\textsuperscript{27} The Catholic teaching in question limits licit means of birth control to those relying on periodic continence. Although the papal encyclical, \textit{Humanae vitae}, which is cited by Calabresi, brought the doctrine to renewed public focus in 1968, the teaching itself is an ancient one. It was not originally a uniquely Catholic doctrine, but rather was taught by all mainline Christian Churches. Protestant Churches began to modify the teaching at the time of the Anglican Church's Lambeth Conference in 1930. \textit{See J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists} 409 (1965).

\textsuperscript{28} G. \textsc{Calabresi}, \textit{supra} note 3, at 51 (citing Friedman v. New York, 282 N.Y.S.2d 858, 54 Misc. 2d 448 (1967)).

\textsuperscript{29} Calabresi identifies the ideal here in question with the value of nonestablishment enshrined in the first amendment. He is not, however, interested in the strictly constitutional role of the Amendment. Rather, he is exploring a secondary, "gravitational" influence of the first amendment value on other areas of law, as they attempt to accommodate the amendment in indirect ways.

\textsuperscript{30} G. \textsc{Calabresi}, \textit{supra} note 3, at 52 (citing Troppi v. Scarf, 31 Mich. App. 240, 187 N.W. 2d 511 (1971)).
to Calabresi, the court here treated a belief that was implicitly quasi-religious as an aspect of reasonableness itself, solely because the belief was shared by the majority of citizens. Thus, it is his contention that the standard of “reasonableness” is reliant on a cluster of popular attitudes, none of which is subject to “scientific” validation.

The author asks us to observe, however, that the contributory negligence rule’s preference for the ideal of equal participation is not absolute. Beyond a certain point, the ideal is sacrificed to other preferred goals by the use of at least three legal devices. First, wrongdoers and victims are artificially distinguished, so that the exception provided for the victim’s religious deviations from “reasonableness” under the contributory negligence rule is not extended to similar deviations by the wrongdoer. Thus, where the injurer’s conduct places the value of nonestablishment at issue, the value is subordinated to a preferred goal i.e., that of compensating innocent victims. Second, even where it is the victim’s conduct which places the value at issue, courts artificially distinguish between religions and “cults,” in order to deny protection to religious beliefs that are extremely idiosyncratic. Third, idiosyncratic religious belief is artificially distinguished from idiosyncratic nonreligious belief in order to deny protection to the latter, even though doing so actually offends the constitutional principle of neutrality towards religion. This last limitation is unavoidable since idiosyncratic nonreligious beliefs could not be favored without overturning the reasonableness standard, the fundamental organizing principle in this area of law.

The traditional tort rule on liability for injuries aggravated by the victim’s peculiar physical defects is also analyzed by Calabresi to show that traditional tort law has distributed costs in order to advance the ideal of equal participation in essential societal activities. Under the so-called “thin skull” doctrine, the wrongdoer, rather than the victim, is required to absorb the costs of injuries occurring because of the particular victim’s peculiar physical defects. Thus, the wrongdoer is liable even though the injuries are ones which an ordinary victim would not have suffered. The effect of the rule, Calabresi alleges, is to shield those who are already physically disadvantaged from absorbing further social costs. The ideal at stake is equal participation by such persons in essential societal activities.

Calabresi shows that the protection given is not absolute, but extends rather only to participation in essential activities. Where participation in a particular activity presents specialized risks, protection is withheld under the doctrine of “assumption of the risk.” Under that doctrine, an wrongdoer who would be liable for damage to a violinist’s hand incurred in the ordinary course of social interaction, would not be held liable if the injury occurs
because the violinist has chosen to take employment in heavy industry for the sake, say, of preparing to write "the great proletarian symphony." The violinist has assumed the risk by choosing to participate in a nonessential activity posing special dangers in view of his "handicap." Once again, it is evident that the law goes only so far in advancing one ideal over other ideals and desired goods. Here, the law limits its promotion of the ideal of equal participation by distinguishing between essential and nonessential activities.

Insofar as physical attributes are correlated with race and sex, the thin skull rule, as limited by the doctrine of assumption of the risk, protects equal participation in essential societal activities by all persons, regardless of race or sex. However, the author emphasizes that the rule does not protect equal participation to the extent of shielding attitudes which may be correlated with race or sex. These are burdened by operation of the reasonableness standard, as was discussed above. Consequently, any distinctive attitudes belonging to women and minorities must be sacrificed as the price of full participation by such groups in essential societal activities. As was previously stated, Calabresi argues, in the second phase of his analysis, that the law should be changed to modify this effect.

Recent efforts to abolish insurance categories based on sex or race might appear to remove this burden on full participation by women and minorities. After all, the ostensible result of such legislation would be a shift of accident costs away from the disadvantaged groups and onto participants in the activity generally. In fact, however, the actual result is somewhat more insidious. The author argues that costs are simply shifted, by means of insurance companies' actuarial calculations, onto surrogate categories for predicting the risks at issue. Membership in these surrogate categories is closely correlated with membership in the categories originally outlawed. As a consequence, disadvantaged minorities continue to shoulder the costs of accidents associated with divergences in their attitudes from the standard of the dominant group. However, the society no longer has to admit openly what is going on. Calabresi alleges that the prohibition of race and sex as insurance categories is seen as desirable, precisely because it has the effect of upholding the symbol of equal participation, without requiring that society actually absorb the cost of providing it. Society settles for this compromise,

31. G. CALABRESI, supra note 3, at 36. Calabresi cites § 11,628 of the California Insurance Code, first enacted in 1955, as an early example of such a legislative effort. The section forbade racial discrimination in motor vehicle insurance. In an attempt to combat the resulting use of geographic areas as surrogates for race, the California legislature amended the statute in 1967 to outlaw the use of geographic areas of less than 20 square miles as actuarial categories. See G. CALABRESI, supra note 3, at 151 n.153.
he says, because it believes in equality in theory, but hesitates to encourage the rise in accidents which full participation would bring about.

C. Conclusions of Calabresi's Review of the Treatment of Ideals, Beliefs, and Attitudes Under Traditional Tort Law

Calabresi is able to conclude that the common law of tort very definitely takes ideals, beliefs, and attitudes into account in its distribution of the costs of accidents. For example, the legal rules in this area have favored a composite of individual attitudes as being conducive to the welfare and vitality of society. They have also, to a certain degree, favored ideals, such as equal participation for all persons in essential societal activities, regardless of religion and physical handicap. In order to advance the ideal of equal participation, rules have necessarily given recognition to the existence of religious beliefs.

Calabresi concludes that this positive valuation of certain ideals, beliefs, and attitudes has not been absolute. It has been limited by subordination, at certain points, to competing values. For instance, the promotion of attitudes beneficial to society has been subordinated at times to considerations of efficiency. Equal participation has been subordinated at times to the value of compensating innocent victims. Finally, the sanctity of life has been subordinated at times to both considerations of efficiency and the ideal of equal participation.32

Under the common law rules he considers, Calabresi concludes that such subordinations have been accomplished by means of covert devices he terms "subterfuges."33 In the context of the present discussion subterfuges are seen in such artificial distinctions as those which tort law makes between religion and "cult," injurer and victim, and religious and nonreligious idiosyncratic beliefs. A further example of a subterfuge can be seen in the statutory prohibition of race and sex-linked insurance categories.

As was noted, Calabresi interprets distributive justice to at times require, tragically, that fundamental ideals be compromised. Such compromises are often accomplished by indirect devices in order to avoid the appearance of a

32. Although it has not been expressly discussed here, Calabresi maintains that society chooses to trade human lives for convenience, such as that made possible by the automobile, id. at 1-19. He also argues that the Supreme Court's decriminalization of abortion can be understood as a trade off of human lives in exchange for the ideal of equal participation of women in essential societal activities. Id. at 101-08.

33. Id. at 88-90. Calabresi considers a subterfuge a "lie," id. at 89, which permits the evasion of responsibility for the sacrifice of a basic societal ideal. Calabresi is, however, ambivalent about common law subterfuges. While he ultimately rejects them in favor of a more honest approach, he seems to respect their purpose of avoiding the scandal of appearing to compromise basic values.
direct attack on an ideal which is, in principle, supposed to be absolute. Thus subterfuges, such as those identified here, may be necessary. However, as a rule, Calabresi holds that they should be repudiated in favor of a more satisfactory approach, maintaining that they pose a grave risk of escaping society's control, with the result that the very values which are to be protected are subject to unjustifiable compromise.

III. THE FRAMEWORK PROPOSED BY CALABRESI FOR A MORE ADEQUATE AND RESPONSIBLE LEGAL VALUATION OF IDEALS, BELIEFS, AND ATTITUDES

In the second, critical and adaptive phase of his analysis, Calabresi moves beyond the paradigm of past common law valuations of ideals, beliefs, and attitudes, in order to elaborate a general framework for the legal valuation of ideals, beliefs, and attitudes that more fully satisfies the requirements of distributive justice. In this phase of his analysis, Calabresi both delineates a framework of principles and seeks to validate that framework by application to the intractable contemporary problem of abortion.

A. The Outlines of the Framework

As a matter of distributive justice, the law must distribute its burdens in order rationally to promote society's basic ideals. In order to satisfy this imperative, Calabresi suggests that lawmaking processes, whether judicial or legislative, should be so structured that society's basic moral ideals are kept clearly in view as overriding goals or ends of the process; rational consideration is given to all available patterns for the distribution of costs to attitudes and beliefs so that, in addition to advancing lesser goals, the legal system fully advances these overriding goals or ends, and responsibility is taken for subordinating one basic ideal to another in the case of an ineluctable conflict.

If it is to keep its fundamental ideals fully in view, a society must clarify what these ideals are. In this connection, Calabresi gives special attention in the present book to a basic ideal that is particularly at stake in the area of tort law he reviews: the ideal of encouraging a range of individual attitudes and beliefs fostering the vitality and pluriform richness of the society. He suggests that a society's continuous attention is required in order to clarify and focus the precise composition of the mix or range of attitudes and beliefs which deserve to be favored.

34. See, e.g., id. at 90-91.
35. See, e.g., id. at 39-44.
36. See, e.g., id. at 94-96.
Calabresi observes that, at present, the value of attitudes that are supportive of the vitality, and indeed in some cases of the very survival of society seem to have been obscured. Certain of these attitudes have been traditionally associated with women. They include the nurture and care of children, appreciation for civility, and sexual modesty.\footnote{Id. at 26-32. Calabresi explores the effect that a mere linguistic change from a “reasonable man” to a “reasonable person” standard can have in papering over the continued dominance of the old stereotypically masculine attributes. Our goal, he suggests, should be to foster the best attitudes and traits associated with the stereotype of either sex.} Similarly, the perceived importance, if not to society’s survival, at least to its pluriform richness of the distinctive attitudes of ethnic minorities have also been obscured.\footnote{Id. at 26-31. In Calabresi’s view, the “melting pot” has in certain ways impoverished American social life by inducing an excessive “Americanization” of immigrant cultures. It is quite difficult, however, to conceive of how society could implement “several more diverse” standards of reasonableness “applying to different groups,” as Calabresi envisions doing as part of the solution to the melting pot problem. Id. at 32.}

Another example of attitudes cited by the author as being not adequately appreciated are those “moralisms” (instances of moral distress) that some individuals experience when confronted with acts or activities attacking basic societal values and ideals. Such moralisms might include distress experienced at perceived attacks on life, family stability, or sexual modesty. At present, such attitudes are regularly sacrificed, according to Calabresi, for the sake of short term cost avoidance. This occurs, he posits, where society’s collective judgments about long range values are politically stalemate, so that society either chooses or drifts toward short-term cost avoidance. The author suggests that this society has yet to arrive at a coherent and defensible vision of the composite or range of individual attitudes and beliefs which are worthy of being fostered.

Once fundamental ideals, including this one, are fully clarified, Calabresi’s framework requires that creative and informed approaches to assessing the value of law for furthering them, based on economics and other social science analyses, be considered alongside older approaches. This is to allow the true range of possible options to be considered in order to keep the incidental harm to any given ideal at the true necessary minimum. In other words, he requires a rational means-ends analysis based on all available information.

In Calabresi’s framework, a premium is placed on both accountability and self-awareness. It is in this respect that he is the most critical of, and departs the farthest from, the paradigms he discovers in the common law of tort. In contrast to the common law approach, under this scheme the impact of the law on fundamental ideals is to be fully acknowledged and explored quite apart from whether, in its final form, the law will be able fully to advance every ideal. Keeping ideals in view even when they cannot be fully realized
allows them to exercise their just “gravitational” influence on the continuing development of the law.

When the relative subordination of a fundamental ideal, to either another fundamental ideal or a lesser societal goal, is truly required, the lawmaker should, moreover, be held accountable for whether that subordination is accomplished in the least destructive manner. Although tort law subterfuges have developed for the purpose of avoiding a moral affront to society by appearing directly to attack a basic ideal, and although they are sometimes appropriate as a least destructive means of subordination, as a rule Calabresi rejects their use because they involve the danger of evading collective responsibility for the value being suppressed.

The alternative he proposes for accomplishing the truly unavoidable subordination of a fundamental value can be stated as follows: first, when the subordination of an ideal is required, the ideal is to be expressly acknowledged as still binding in principle; second, even this subordination in practice is to be presented as a regrettable present necessity, and as one that is to be alleviated when technological or other progress places new societal and legal means at our disposal.

Calabresi’s alternative framework for accomplishing the subordination of ideals avoids the danger of moral evasion through its principle of accountability. Just as importantly, it avoids the moral affront of appearing directly to attack fundamental ideals. It accomplishes the latter task by interpreting the subordination of the ideal in an historical framework oriented to an asymptotic future of unlimited means. There is no moral acquiescence to present subordinations but rather they are left open to interpretation as at most a postponement of the eventual full vindication of a value temporarily suppressed.

A difficulty which Calabresi recognizes in his approach is the need to explain how it is possible, in a pluralistic society, to arrive openly at cohesive societal judgments regarding the appropriate ideal to subordinate in the event of a conflict of ideals. He suggests that two aspects of his approach help overcome this difficulty. First, his framework calls for the fullest possible vindication of the fundamental ideal of equal participation by all groups. This provides the losers in a conflict with assurance that the subordination of the ideal they champion does not mean the subordination of their group. Second, since the ideal that has been subordinated is still expressly acknowledged, its “gravitational” influence on questions other than the immediate

39. Calabresi maintains that subterfuges can be tolerated as acceptable solutions only where an honest approach is not possible, id. at 90, and where the subterfuge relies on a distinction which has an independent principled basis. Id. at 92.
point in conflict remains intact. This leaves the group with power to influence outcomes in other conflicts involving the same ideal.

B. Validation of the Framework Through an Application to the Abortion Controversy

While Calabresi develops his statement of principles from the particular private law perspective of tort, he seeks to elaborate a framework having general legal applicability. It is, for this reason, that he wishes to test the validity of his framework by applying it to the most intractable of contemporary public law problems: abortion.

As a first step in testing the validity of his principles, Calabresi applies them negatively in a critique of the United States Supreme Court's action in the case of Roe v. Wade. While he prescinds from questioning the Court's ultimate holding, he argues that, in light of his analytical and conceptual framework, the method employed by the court in reaching that holding was, bluntly speaking, a "disaster." Confronted with two fundamental ideals in conflict, the Court violated nearly every principle articulated by Calabresi relating to the legal valuation of basic ideals. Most fundamentally, the Court's error was to suppress, in principle and absolutely, the ideal which was in conflict with the ideal it chose to advance. As a consequence of this excessively broad response the countervailing ideal, that of the sanctity of fetal life, has now been denied its appropriate "gravitational" influence in the context of other unrelated conflicts. Laws charging third-parties with criminal and tort-law responsibility for injury to the unborn child have been, at one stroke, largely invalidated. Laws aimed at sustaining the lives of babies surviving or capable of surviving the abortion procedure have been rejected. Without the gravitational pull of the principle of the sanctity of life, the mother's negative right to be free of the burden of the dependence of the fetus is, insidiously, transformed into a positive right to destroy the life of the fetus.

The Court erred, moreover, under Calabresi's scheme, by not acknowledging that its holding had negatively affected a fundamental ideal. The Court chose, instead, to effect its subordination of the ideal through subterfuges which could only serve to add a profound insult to the injury already experienced by those who had been overruled. On a superficial level, the subterfuge in which the Court would seem to rely is as follows: the sanctity of life

40. 410 U.S. 113 (1973).
41. G. CALABRESI, supra note 3, at 97.
42. Id. at 94-95.
43. Id. at 112.
is not an issue in abortion, because what cannot be seen does not exist. According to Calabresi, pro-life demonstrations fixate on photographs and depictions of unborn and aborted fetuses in an attempt to unmask just this subterfuge. A closer reading of the opinion, moreover, reveals that the court relies on an even more morally evasive and destructive subterfuge. Specifically, the court asserts that the sanctity of life is not an issue, because personhood, not life, is the concept at stake. The Court held that the fetus is not protected, whether or not not alive, because the fetus is not a person under the fourteenth amendment.\(^{44}\)

Calabresi alleges that, while pretending to prescind from metaphysics, the Court was actually holding that the metaphysics of those concerned for the life of the fetus was outside the pale of the American Constitution. The Court was, in effect, ruling on metaphysics. In deciding the issue as it did the Court chose to emarginate a significant part of the American populace, leaving it no alternative but either to violate its own ideals or to withdraw from full political participation. This emargination is similar to that wrought on the holders of idiosyncratic religious beliefs under tort law, when their religions are termed “cults” as a subterfuge for denying them unburdened participation in essential societal activities. While the latter instance of emargination should be disturbing, it affects few enough people that it probably does not threaten the political cohesiveness of society. The emargination wrought by Roe, by contrast, does threaten society’s fundamental political cohesiveness, since it excludes a segment of the population, which is both large and historically subject to discrimination.\(^{45}\)

As a second step of validation Calabresi reconstructs the Supreme Court’s approach in Roe v. Wade as it would have appeared had it been based on his principles. Through this reconstruction, he seeks to show that, had the court employed his framework, its distribution of burdens would have been far more just, and the political consequences of its action a good deal less destructive.

Had it employed Calabresi’s framework, the Court first would have clarified the fundamental ideals at issue. Broadly, these were, according to the author: 1) equality of social and political participation by women and 2) the

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\(^{44}\) It is arguable that an even deeper subterfuge was at work in Roe v. Wade than the ones Calabresi identifies. In view of contemporary alarm over population growth, the Court may have used the issue of women’s equality as a subterfuge precisely to permit a direct attack on life. In support of this interpretation, one can ask whether the decision would have been imaginable against a backdrop of population trends which were precipitously downward rather than upward.

\(^{45}\) Calabresi interprets the clash of ideals involved in the abortion debate as one between two groups which historically have been oppressed: women and “highly defensive groups comprised in significant part of recent immigrants.” G. CALABRESI, supra note 3, at 96-97.
sanctity of life. The Court then would have sought to frame the dispute in a manner that would subordinate the losing value only where strictly necessary. Thus, the Court would have further narrowed its statement of the ideals at stake to those of equality of participation by women in only one essential area (sexual freedom), and to sanctity of life in only one of its aspects (fetal life). Having narrowed the conflict, the Court would have made its decision as to which ideal to vindicate. Assuming, for the sake of argument, that equality of participation would have been chosen, the Court would have specified the reason for its preference—the dispositive weight given to the negative burden of anti-abortion laws on equal participation by women in the essential societal good of sexual freedom.

Having subordinated the value of the sanctity of life, the Court would have taken great care to affirm the validity, in principle, of this ideal. It would also have specified that subordination in this particular case did not imply any subordination of the ideal in principle, nor any subordination in the practical context of other unrelated conflicts. Had the Court taken this approach, the burdens placed on the losing side would have been both lighter and more just. They would have been lighter because the losing side's values would not have been directly attacked and the losing side would not have been politically emarginated. The decision would have been more just because the burdens would have been allocated in accord with the principle of distributive justice. They would have been imposed in a way which served, as rationally as possible, all of the society's fundamental ideals.

The value at stake for the winning side would, nonetheless, have been fully vindicated. The decision would have left a woman free to separate herself from the burden of the dependent fetus.46 On the other hand, the value at stake for the losing side would not have been compromised so thoroughly, even in practice. The law would still have served to prohibit harm to the unborn child when such was not the direct consequence of the woman's need for separation. Insofar as the losing ideal would have been compromised in practice because of the regrettable deaths of fetuses separated from their mothers prior to viability, the residual "gravitational" pull of that ideal would have served to draw society into finding new means of avoiding even this incidental harm. New technologies for the implantation of rejected fetuses in surrogate mothers and the like might have been pursued with the goal of eliminating any loss of life. Even the losers in the conflict, then, would have had scope for pursuing the full vindication of their ideal within a

46. Calabresi's jurisprudential resolution of the abortion problem is based on Judith Jarvis Thomson's theory that the right of abortion means the right of the mother to separate herself from the fetus. See G. CALABRESI, supra note 3, at 114 (citing Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFFAIRS 47 (1971)).
cohesive political structure, rather than to have been emarginated in a way disruptive of society’s political unity.

IV. A CRITICAL EVALUATION OF CALABRESI’S CONCEPTUAL AND ANALYTICAL FRAMEWORK

With the essential outlines of Calabresi’s argument in view, it is possible to evaluate it for its cogency and value. For convenience, this evaluation can take the form of enumerating, in turn, the strengths and weaknesses of the argument.

A. Strengths of the Author’s Conceptual and Analytical Framework

The most notable strength of Calabresi’s framework lies in its basic reconceptualization of the moral problem posed by our legal system. In keeping with an intuition shared generally by modern thinkers, Calabresi frames the problem as one primarily of distributive rather than commutative justice. In so framing the issue, he is supported by our sense that the social and economic systems subject to our collective control appear to have more to say about outcomes and our moral evaluation of them, than do isolated transactions between individuals. His most fundamental achievement lies in showing how the law functions as one system, among these others, which both directly and indirectly distributes outcomes. In doing so, he demonstrates that the law is subject to evaluation for the justice of its distributions.

This reconceptualization of the relationship between law and justice is especially valuable because it protects against the undermining of the moral foundation of law which would occur if the law’s effects were subject to economic, and other social science analyses, without also being open to justice-oriented evaluation. Interestingly, Calabresi is able to impose a moral or justice-oriented perspective on the problem of legal valuations, due to the scope he is able to give to a reasoned exploration of the empirical dimension of the problem. This scope is made possible by his control of the tools of economic theory. His stress on reason in the service of justice is evident, not just in this, but in virtually every aspect of his argument. It is a salient characteristic of Calabresi’s work. Although it could not be more contemporary, this author’s work has, in this respect, a quality that reminds one of the most attractive aspects of enlightenment thought.

On a more concrete level, the framework which Calabresi proposes for use in adjudicating and in legislating the resolution of conflicts affecting atti-

47. See, e.g., J. Rawls, A Theory of Justice (1971). Commutative justice is classically defined as concerned with the allocation of shares of disputed goods between private individuals, according to the mean of fairness. Aristotle, Nicomachean Ethics, Book V, iv.
tudes, beliefs, and ideals also merits appreciation. By providing for an irredu
cible and even primary role for these intangible dimensions of the human
person, he protects against dehumanizing distortion in legal valuations
which may be caused by a one sided focus on tangibles precipitated by an
unduly exclusive reliance on economic analysis. The danger of such distor-
tion is real, and the framework he proposes for dealing with it provides sig-
nificant analytical and conceptual assistance in responding to it.

Among the analytical and conceptual elements of the framework which
are of fundamental value, at least two can be mentioned. The first is the
concept that all lawmaking efforts be held accountable for their systematic
effects on basic societal ideals. He has made a contribution not only by mak-
ing this principle fundamental, but also by his sensitive analysis and exposi-
tion of how the traditional law of tort has advanced basic ideals without
being fully accountable for the results. The second is his foundational in-
sight that a critical locus of the problem of justice necessarily is found at the
point where basic ideals conflict since it is at such junctures that society is
most likely to fail to achieve accountability for values which are in fact sup-
pressed. It would seem that future attempts to deal with the problem of law
and distributive justice will have to begin by responding to this Calabresian
insight, presented by the author as the “Evil Deity” problem.48

Yet another strength of Calabresi’s approach lies in his “common law”
methodology. By using this methodology both to articulate his system’s
conceptual underpinnings and to arrive at a statement of its more concrete
lawmaking framework, Calabresi serves several purposes well. For instance,
he provides an inductive verification of his principles by showing that they
worked, and how they worked, in previous experience. In addition, he legiti-
mizes his framework by demonstrating, with this methodology, the con-
tinuity of his approach with the rest of our legal system. As a result, judges
are free to incorporate his insights into their adjudicatory reasoning without
further mediation. Finally, his methodology allows for application to the
analysis of contemporary problems, such as the abortion issue, without fur-
ther mediation or development.

A final strength meriting mention are the intellectual virtues or attitudes
with which Calabresi pursues his argument. These attitudes would seem to
be a model for the lawmaker exercising practical reason in pursuit of the
ideal of distributive justice. Specifically, he possesses the detachment neces-

sary for systematic and consistent valuations in complex settings. And yet,
he also shows compassion for, and human solidarity with, the persons who
are subject to the impact of the law’s distribution of costs. These exemplary

48. See supra note 13.
attitudes of detachment and human solidarity are in evidence in his many wonderfully humorous illustrations and analogies.

B. Weaknesses of the Author's Conceptual and Analytical Framework

If each of the strengths of Calabresi's approach, in one way or another, can be traced to confidence in practical reason's capacity for solving the moral challenges of our complex contemporary system of law, then its weaknesses are equally to be traced to what appears to be a lack of sufficient appreciation for structural limits on practical reason's fulfillment of this essential task. The author's lack of interest in structure manifests itself on three levels: a) the level of philosophical grounding; b) the level of historical and empirical verification; and c) the level of political structures and relationships. As a result, certain weaknesses in his approach are to be noted on each of these levels.

On the philosophical level, Calabresi's argument presupposes a high level of implicit sophistication. This sophistication is seen, for example, in his reconceptualization of the moral problem of law, as well as in his efforts to interrelate the category of value judgments and commitments with that of the empirical data derived from economics. Yet, Calabresi does not expressly ground or develop his framework philosophically. This lack of philosophical grounding is apparent at numerous points. For instance, he never rigorously defines basic terms such as ideal, attitude or belief. Nor does he attempt to demonstrate that the relationships he posits among these and other terms yield a framework which is philosophically coherent.

While there is a strongly normative element in his approach, Calabresi never attempts expressly to demonstrate its ground.49 His failure to ground the normative element in his framework has, among its other consequences, the effect of leaving the relationships among the basic ideals he posits in a state of theoretical uncertainty. As a result, conflicts among these ideals include not only the ineluctable practical accidents addressed by Calabresi. In some cases, they also appear to include necessary conflicts on the level of principle. For instance, the author posits, as aspects of basic ideals, on the one hand, sexual modesty and selfless devotion to children and, on the other, female sexual freedom, defined by the pursuit of sexual gratification with the assurance of abortion of any offspring thereby conceived. The conflict between these respective ideals is deeper than the level of mere tragic practical necessity.

49. As a result, Calabresi has been interpreted as proposing basic ideals grounded solely in conventional morality. Coleman & Holahan, Book Review, 67 CALIF. L. REV. 1379-80 (1979) (reviewing P. BOBBIT & G. CALABRESI, TRAGIC CHOICES (1978)).
Calabresi's approach requires, moreover, a complex calculus of the relative value of goods on disparate levels, e.g. activities, attitudes, and beliefs. Yet, he does not attempt to show exactly how value on one of these levels is translated into terms allowing comparison with value on another. Nor does he attempt to test his framework for its reliability as a consistent matrix for the comprehensive calculus he envisions, i.e. for whether it allows lawmakers to count all costs and benefits once and only once. Finally, he does not attempt philosophically to state the methodological controls that could make the inductive case methodology he employs truly persuasive.

It would be particularly interesting to learn through systematic philosophical development what, if any, side constraints might limit Calabresi's basic teleological approach. For instance, he treats human attitudes and beliefs as a kind of social resource, but he does not develop an account of the persons who hold such attitudes and beliefs. Do such persons have rights that limit his means-ends analysis? He gives a priority to distributive justice concerns, but he never rules out the continuing, relative validity of the model of commutative justice. Do the demands of commutative justice limit his teleology? He likens the moral responsibility of collective judgments to that of individuals. Are the moral criteria governing collective judgments different than those governing individual judgments? If so, do those differences impose any limits on his means-end analysis? He likens the indirect effect of the rule against prior restraints on freedom of the press to a judicial death sentence. Is he completely literal in this equation, or would he concede that some actions such as the judicial murder of an innocent person are morally unavailable as means? Convincing answers to these and other questions would have to be supplied before the current losers in the abortion controversy could, for example, subscribe to Calabresi's otherwise valuable proposal for compromise.

In view of his implicit sophistication and his originality, the narrowly inductive case methodology Calabresi employs can never adequately demonstrate the coherence of his framework. Granted there is pragmatic value in leaving philosophical terms and presuppositions ambiguous in a pluralistic society, he would strengthen his framework if he supported it with a greater measure of philosophical clarification and development.

On another level, Calabresi can be faulted for bypassing questions of the truth of particular historical and empirical facts in the course of applying his inductive methodology to understanding the traditional law of tort and other

50. A teleological approach to moral philosophy is one which measures the morality of an act according to how it relates means to ends. C. BROAD, FIVE TYPES OF ETHICAL THEORY 276-78 (1930).
51. G. CALABRESI, supra note 3, at 15-16.
legal rules. On the historical level, he shows, for example, little interest in controlling the horizons of either contemporary social conditions or judicial mentality when he interprets past rules.

On the empirical level, he prefers not to pursue the verification of facts on which his argument rests. For instance, an important analytical device he uses is specification of the moral meaning of legal responses by reference to alternative responses which were passed over. Frequently, the response allegedly passed over will be one requiring a centralized, systematic form of implementation, e.g. an insurance or subsidy arrangement. Since he often makes no serious attempt to prove empirically that such an alternative was actually feasible, his conclusions at times remain less than convincing.

With respect to narrower points of fact, Calabresi also eschews verification which would be rather simple. For instance, he suggests that a society with a Catholic tradition might provide for the legal protection of selective conscientious objection. A check of the facts shows, however, that Catholic societies have existed, but that they have not tended to give legal protection to selective conscientious objectors. In fact, as recently as the 1950's, Pope Pius XII taught authoritatively that Church teaching supplied no basis for such protection.

Nowhere in the book, moreover, does Calabresi show an interest in political structures and relationships which might impose side constraints on the means-ends analysis that constitutes the core of his analytical framework. Constitutional ideals are seen as somehow normative, but the language of the Constitution is not seriously examined, nor are norms of interpretation addressed. While Calabresi subjects the United States Supreme Court decision in Roe v. Wade to extensive analysis, in the course of that analysis he makes no allusion to any theory of the proper function of judicial review. And while Calabresi explores legislative and judicial processes throughout the book, he never defines the difference in their respective roles. As a conse-

52. G. CALABRESI, supra note 3, at 56-57.
53. "A Catholic citizen may not make appeal to his own conscience as grounds for refusing to give his services and to fulfill duties fixed by law." Pius XII, Christmas Message, 1956, 49 AAS 19 (1957). For an instance of how a Catholic society (Austria) responded to a selective conscientious objector, see G. ZAHN, IN SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JÄGERSTÄTTER (1964).
54. Calabresi has been criticized for this oversight by others. See, e.g., Cox, Book Review, 70 CALIF. L. REV. 1463, 1469-75 (1982) (reviewing G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, (1982)).
55. Throughout his extended discussion of the Supreme Court's opinion in Roe v. Wade, G. CALABRESI, supra note 3, at 92-114, Calabresi remains at the general level of jurisprudence and declines to enter into a technical discussion of whether the Court decided the case correctly under the Constitution. See id. at 108-09.
quence of these lacunae, Calabresi’s framework is left without a reliable theory of how the basic ideals at his framework’s core are to receive political or judicial legitimization. Professor Calabresi is well aware that he has excluded political structures and relationships from the ambit of his analysis. Whatever his reason for doing so, however, by neglecting these questions he has created a substantial barrier to the acceptance of his ideas.

V. CONCLUSION

The humanism that inspires Guido Calabresi to evaluate the legal system according to its effects on ideals, beliefs, and attitudes is very admirable. In *Ideals, Beliefs, Attitudes, and the Law*, Calabresi, moreover, offers considerable analytical and conceptual assistance in making such a humanism workable in practice. This is an exceptional achievement. It merits being applied, extended, and developed by others.

As a result of his humanism, Calabresi insists that the collective choices, which the law represents, are to be made in accountability for their consequences for human values. His method seeks to direct critical light on past instances in which this accountability was absent and choices were thus made by evasion, subterfuge, and default.

Ironically, the weakness of Calabresi’s approach would seem to consist in a failure to shed his light of critical reflection quite far enough. The lacunae which Calabresi leaves in the areas of philosophical grounding, empirical verification, and political structure and relationship would seem to allow ample room for new evasions, subterfuges, and defaults. Perhaps we can hope that he, at some point in the future, will choose to set out an explicit jurisprudence which will fill these gaps.

In the meanwhile, it should not be concluded that the gaps in Calabresi’s approach diminish the positive value of the framework he offers. Rather, they merely point to Calabresi’s role as the creative and seminal thinker who chooses to provide not detailed blueprints, but pioneering concepts and original analytical insights.

57. *Id.* at 113.