

IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM. By Guido Calabresi.¹ Syracuse, N.Y.: Syracuse University Press. 1985. Pp. 208. Cloth, \$20.00; paper, \$11.95.

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"I am a torts teacher," begins this book on the abortion issue. The author, of course, is not just any torts teacher, but one of the premier legal scholars. His effort to bring concepts from tort law to bear on one of the most intractable issues of our time is not a complete success. It was interesting enough, however, to make me want to teach torts.

Most constitutional scholars teach only public law courses. They tend to know relatively little about private law, and this overspecialization undoubtedly colors their views. For instance, much of the current philosophical writing on interpreting texts, as applied to the Constitution,³ would benefit from an understanding of how ordinary contracts and wills are construed by the courts. Whatever one may think of Dean Calabresi's theory about abortion, his use of a private-law perspective to analyze a constitutional problem deserves emulation.

One further introductory point. Calabresi's book is a good deal more readable than most current constitutional scholarship. In part, this is simply a tribute to his writing style, but intellectual style is also involved. Again, he deserves emulation. As he explains:

I feel more comfortable approaching a topic like this in common law fashion, trying to build up from cases, hypothetical and real, than by working down from great principles. I would rather approach the issues from a specific field of law— itself affected by other fields of law as well as by its own peculiar problems and questions—and see where that leads us, than to try to deal with the topic as if I—or anyone—knew *all law* and was ready to describe it in terms of an abstract theory.⁴

The currently fashionable intellectual style favors grand theory over

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1. Dean, Yale Law School.
 2. Professor of Law, University of Minnesota.
 3. The January 1985 issue of the *Southern California Law Review* is devoted to a symposium on this subject.
 4. G. CALABRESI, *supra*, at xv.

Calabresi's common law method, often leaving the reader with the uncomfortable feeling of being wafted into the stratosphere by a Hegelian updraft. Though perhaps this is a confession of pedestrianism, the worst of all scholarly sins, I prefer the common law approach Calabresi uses.⁵

By now, the reader is probably getting a little impatient to find out how Calabresi connects tort law with abortion. Actually, I felt the same way while reading the book, since Calabresi keeps his rabbit well hidden in the hat almost until the end. Although I will not prolong the suspense quite as long as he does, I think it is better to begin with an earlier part of the book, in which he discusses the place of religious belief in tort law.

I

Religion and tort law may seem at least as far apart as abortion and tort law. As Calabresi points out, a recurrent problem in tort law joins the two. The problem relates to mitigation of damages, and can best be seen by considering one of Calabresi's hypotheticals. In the hypothetical (a simplified version of a real case), a woman is negligently injured and refuses medical treatment because she is a Christian Scientist. As a result, her injuries are aggravated. Is the woman entitled to recover for these aggravated injuries? The normal rule is that one can only recover for damages that a reasonable person could not have avoided. So the question might be rephrased, "In the eyes of the law, can a reasonable person be a Christian Scientist?" The doctrinal answer is "yes," and Calabresi argues that this tort doctrine has been influenced by establishment clause concerns.⁶

This is indeed an interesting question from a constitutional perspective. Calabresi's analysis, however, is less than satisfactory. First, he relies heavily on another case that seems to be clearly distinguishable. In this second case a couple is negligently given tranquilizers instead of birth control pills by a pharmacist, and following what Calabresi describes as a tranquil but erotic interlude, the woman becomes pregnant. Can she recover for the cost of raising the child, or must she mitigate damages by getting an abortion or giving the child up for adoption? Almost everyone seems to agree that she need not mitigate her damages in these ways, and Calabresi views this as mandating the same result for the Christian Scientist.⁷ Perhaps because I teach contracts rather than torts, the

5. See Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

6. G. CALABRESI, *supra*, at 46-60.

7. *Id.* at 52-55.

two cases seem entirely different to me. In the case of the negligent pharmacist, the very reason for using contraceptives was to avoid the need for the other options. Therefore, to require mitigation would deprive the couple of the benefit of their bargain with the pharmacist. The case of the Christian Scientist raises purely tort issues, unlike the contractual issue of the pharmacist case.

Second, Calabresi's treatment of the constitutional setting is oddly one-sided. He speaks entirely in terms of the establishment clause, which would be relevant only to the problem of whether courts can favor certain religious beliefs. But the logically prior issue is whether courts can simply disallow all religious excuses for failure to mitigate. This is not an establishment clause issue, it is a free exercise issue. Can the state penalize a religious practice by taking away tort damages that would otherwise accrue? It's an interesting question, but the relevant text is the free exercise clause. Oddly enough, as far as I can tell, Calabresi never mentions the free exercise clause.⁸

Third, and most important, the constitutional interests are not all on one side of the balance. If the tortfeasor must pay higher damages because of the Christian Scientist's religious beliefs, then in a sense the tortfeasor is being required to subsidize a religious practice. Calabresi would, indeed, go much farther toward subsidizing religion. Religious beliefs might under some circumstances cause injuries to others that would otherwise be considered tortious.⁹ Calabresi advocates setting up social insurance, funded by taxes, to compensate the victims. As he recognizes, such a scheme would "subsidize unusual religious beliefs by means of a small tax placed on other members of society."¹⁰ But such a subsidy for religious practices surely raises grave establishment clause problems. Indeed, it seems likely that the Supreme Court would hold it unconstitutional,¹¹ though the Court's handling of religious issues is notoriously unpredictable. Surprisingly, Calabresi does not even discuss

8. There is a passing reference to "the constitutional notions of separation of church and state and free exercise of religion" on page 55, but the discussion surrounding this phrase involves whether favoring secular beliefs over religious beliefs violates the establishment clause. Calabresi contends, not very persuasively, that secular beliefs are simply watered down versions of mainstream religious beliefs, and therefore that favoring secular beliefs is a discrimination against minority religions. *Id.* at 55-57. Since philosophy is several hundred years older than Christianity, and almost 2000 years older than Protestantism (the dominant American religion), one might just as well argue that religions are merely embroidered versions of secular philosophies. Neither position strikes me as sensible.

9. *Id.* at 62-63.

10. *Id.* at 170 n.260. The relevant textual discussion is at pp. 62-68.

11. The case that seems most closely on point is *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985), in which the Court recently held that an employer cannot be required to make substantial sacrifices in order to subsidize an employee's religious preferences.

the possibility that subsidizing "unusual religious beliefs" might violate the establishment clause.

Perhaps the explanation for this curious omission is that Calabresi has other fish to fry. The point he is trying to make with these mitigation cases is that courts try hard to avoid stigmatizing religious beliefs by labeling them as unworthy. This is the link with abortion, for Calabresi says the Court did exactly that to the "pro-lifers" in *Roe v. Wade*.¹²

This accusation seems a bit unfair. It is true that the Court refused to hold that fetuses are persons under the fourteenth amendment. But the Court did make some concessions to the pro-life perspective. It refused to hold as a matter of constitutional law that the pro-lifers were wrong about when human life begins. It also held that in the third trimester the state's interest in preserving potential human life becomes compelling. Perhaps the Court could have held, as Calabresi would have preferred, that fetuses are persons but that abortion is nonetheless permissible. Many pro-lifers simply would have regarded this as a confirmation that the Court lacked respect for human life. In a later case, the Court did explicitly state that the government has a legitimate interest in preventing abortion, though it may not use criminal sanctions to implement that interest.¹³ The Court's decisions may all have been wrong, but the Justices cannot be fairly accused of exhibiting contempt for the values of the right-to-life movement.

II

Calabresi argues that the basic flaw in *Roe v. Wade* was the Court's failure to give weight to the values of both sides. His own approach to abortion can best be explained with a hypothetical. Suppose that women who engaged in traditionally male activities, such as working outside the home and driving cars, suffered from an increased rate of miscarriages, and that the number of these miscarriages equalled the present abortion rate. This would create a square conflict between women's right to equality and the interest in preserving fetal life. Although some might simply view the miscarriage rate as proof of women's "natural place," most people would

12. G. CALABRESI, *supra*, at 95-97.

13. See *Maher v. Roe*, 432 U.S. 464, 473-74 (1977):

Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

undoubtedly view it as simply the price paid for greater equality in our society. Everyone would undoubtedly agree that this was an unfortunate price, and the government would probably fund a huge research program to reduce the miscarriage rate. Even if we all agreed that human life was being lost, our society would surely be willing to endure predictable human deaths in its pursuit of other goals. More generally, our failure to ban automobiles, which Calabresi calls the “gift of the evil deity,”¹⁴ shows that saving human lives is not always our highest priority; otherwise, we would all ride horses and bicycles.

From Calabresi’s perspective, this hypothetical is essentially identical to reality. If women are to enjoy equal access to sexual activity, he says, they must be allowed to have abortions.¹⁵ Otherwise, they are being singled out for good Samaritan duty, by being forced to donate their bodies to keep fetuses alive.

Many people might find Calabresi’s argument more convincing if only the facts of human biology were different. If it took a conscious effort for a woman to keep the placenta supplied with blood, a woman who refused to do so might be considered only to have declined good Samaritan duty. But the relevance of the “good Samaritan” argument seems more dubious given the way abortion and pregnancy actually work.

As Calabresi notes, the “good Samaritan” approach originated with Judith Thompson, a philosopher.¹⁶ She asks the reader to consider the following hypothetical. (The Socratic method seems to be as popular with philosophers as law professors, no surprise in view of its origins.) You are kidnapped and attached to some kind of new medical equipment, the other end of which is attached to a world-famous violinist. Unless you remain attached to the machine for nine months, the violinist will die. Do you have a moral duty to be a good Samaritan under these circumstances? She thinks not.

The appeal of this popular argument is that it finesses the “personhood” issue. But it has some weaknesses. Intuitions about the proper response seem sensitive to small changes in the facts. Suppose you weren’t kidnapped, but were somehow accidentally attached to the machine? Suppose you can’t just get up and walk away but have to kill the violinist first?

The “good Samaritan” issue, from its biblical origins through Thompson’s hypothetical, concerns the proper moral attitude to-

14. G. CALABRESI, *supra*, at 1-19.

15. *Id.* at 97-102, 106.

16. *See id.* at 114. The bulk of Calabresi’s discussion of the “good Samaritan” issue is at pp. 102-05 and the accompanying notes.

ward helping strangers. If the violinist is a family member, for example, you may have a stronger obligation not to unplug yourself.¹⁷ It is not at all clear that the fetus and the pregnant woman should be considered strangers. Besides, some people, including both Calabresi and myself (not to mention the Minnesota legislature),¹⁸ believe that people do indeed have duties to aid even strangers. And finally, the "right to unplug yourself from stray violinists" is a little hard to find in the Constitution.

To avoid these difficulties, Calabresi does not rely on any absolute right to refuse aid. Instead, he makes an equal protection argument. Society may create duties of good Samaritanism, but what it must not do is to impose such duties only on one politically disadvantaged class. Hence, although Calabresi considers fetuses to be persons,¹⁹ he reluctantly concludes that in this case equality must triumph over the conflicting goal of preserving human life.²⁰ The fatal flaw in this argument is that if fetuses are persons, they too must have equality interests. (A colleague of mine once said that if liberals ever decided to oppose abortion, they would call it "age discrimination.") Indeed, Calabresi himself thinks it would be unconstitutional to deprive fetuses of the right to inherit property;²¹ one would think the right to life would receive equally stringent protection. And if fetuses do have an interest in equality, that interest would seem to be even more powerful than that asserted by women who want abortions. As John Hart Ely said:

Compared with men, women may constitute such a [discrete and insular] "minority"; compared with the unborn, they do not. I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.²²

17. Although the common law did not recognize any general duty to render affirmative assistance to another, one of the exceptions involved victims with a "special relationship" to the individual. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 373-74 (5th ed. 1984).

18. Minn. Rev. Stat. 604.05 subd. 1, provides:

Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanor.

19. G. CALABRESI, *supra*, at 93.

20. *Id.* at 104.

21. *Id.* at 93.

22. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 934-35 (1973). Earlier in the same paragraph, Dean Ely observes: "Compared with men, very few women sit in our legislatures, a fact I believe should bear some relevance . . . to the appropriate standard of review for legislation that favors men over women. But *no* fetuses sit in our legislatures." *Id.* at 933.

As with his failure to recognize the competing constitutional interests on both sides of the religious mitigation cases discussed earlier, here too Calabresi fails to acknowledge that the equality interest is found on both sides of the balance.

Despite its initial appeal, the "good Samaritan" approach seems ultimately unsuccessful. If fetuses are persons, then abortion raises many of the same ethical problems as euthanasia, and the issue cannot be avoided simply by agreeing to call abortion a passive denial of placental support.²³ Indeed, in many of the most heart-rending cases, the purpose of the abortion is not simply to "separate" the fetus from the mother, as Calabresi would have it.²⁴ Instead, the purpose is to prevent the fetus from being born, because it is so seriously defective its parents believe it is better to end its life now. Some people find this morally reprehensible, but it is hard to see how anyone could avoid having sympathy for parents who must make such a decision.

On the other hand, if fetuses are not persons, it does not follow that abortion is always morally permissible, because even non-human things can have some moral value. Gratuitously destroying a kitten (or a work of art) is wrong, and fetuses presumably at least have some value on that scale. Perhaps fetuses are quasi-persons, and have a status intermediate between those of humans and animals. But there doesn't seem to be any way to avoid the ultimate question of the fetus's moral status. From a constitutional point of view, of course, there is the further question of whether judges or legislators should decide the question; this is something Calabresi never addresses.²⁵

It would be astounding if anyone were able to resolve the abortion issue satisfactorily. Indeed, the deepest message of Calabresi's book is that no satisfactory resolution is possible given present technology. Technological change may eliminate the problem of unwanted pregnancies, or as Calabresi points out, may make it possible to remove the fetus from the mother and bring it to term somewhere else.²⁶ Absent such a technological revolution, Calabresi believes that we face what he called in an earlier book a "tragic choice" between competing values.²⁷ He may well be right.

23. After all, euthanasia can often be accomplished by withdrawing some form of medical assistance.

24. "[A]bortion, as Professor Judith Thompson has so brilliantly argued, goes to the right to separate, even if destruction follows." G. CALABRESI, *supra*, at 114.

25. He does devote a lengthy footnote to whether the issue should be left to the states. *Id.* at 191-92 n.363. He does not, however, discuss whether Congress would be a more appropriate decisionmaker than the Supreme Court.

26. *Id.* at 113.

27. G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

In conclusion, this book fails to resolve the abortion issue, but then the author never purports to present a definitive resolution. What he does attempt to do, quite successfully, is to shed new light on the problem. Along the way, he has much of interest to say about issues like discriminatory insurance rates, tort recoveries for emotional injuries, and whether the "reasonable man" can be Italian. Unlike most recent books about constitutional law, this book is not only insightful, but also enjoyable reading.