

# Book Review

## Tragic Voices

IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM. By Guido Calabresi. *Syracuse: Syracuse University Press*, 1985. Pp. xv, 208. \$20.00 (cloth); \$11.95 (paper).

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The title of this book<sup>1</sup> is perplexing. It is difficult to discern what Guido Calabresi means by "ideals, beliefs and attitudes" or to identify the "public law problem" upon which he means to give perspective. Before I read the book, I thought Calabresi might say that "ideals, beliefs, and attitudes" have *no* relation to law; perhaps he had taken the radical turn of reducing law to questions of resource allocation.<sup>2</sup> Or perhaps, I thought, Calabresi—finally playing out his substantial instinct for social justice—had turned into a lefty realist. He's going to say that he's given up on rationality for rationality's sake—that ideals, beliefs and attitudes are *all* that matter in law.

As it turns out, Calabresi adopts neither of those extreme views. Nor does he describe a middle position that illuminates the diverse topics that he treats. He has organized his book according to different legal contexts in which non-economic interests are salient: Calabresi leaps from the teaching of torts to social disadvantage to religious belief to recovery for emotional harm to abortion. A better (if incomplete) title for the book would have been *My Observations on the Legal Treatment of Non-Economic Interests*. The reader would then

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1. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: A PRIVATE LAW PERSPECTIVE ON A PUBLIC LAW PROBLEM (1985) [hereinafter cited by page or note number only].

2. Neo-logical-positivist perspectives, including the pure "law and economics" approach, are radical in the sense that they make extravagant claims. They are not radical in the literal sense of going to the root of problems. On the contrary, such perspectives, in varying degrees, sever law from its roots in politics, ethics and distributional arrangements. Such perspectives tend to overlook the connection between the ends of law and the consequent importance of the means chosen to articulate law. They ignore Holmes's unsentimental premise that "[t]he law is the witness and external deposit of our moral life." O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 170 (1920).

understand that Calabresi is operating within the bounds marked by some simple propositions: Not all legally cognizable interests are economic in nature; it is therefore difficult to evaluate them in "objective" terms; and the law has taken different—and usually sensible—approaches to the problems raised by these non-economic interests.

I could not help demurring to Calabresi's conclusion: "Beliefs, ideals, and attitudes are an integral part of our law."<sup>3</sup> This did not seem to be news—or, at least, interesting news—until I began to understand Calabresi's dilemma: both his audience and his scope are too general. Calabresi is popularly associated with "[t]he Chicago-based 'economics of law' fraternity,"<sup>4</sup> but he wishes not to associate himself too closely with that group.<sup>5</sup> He has removed himself by a series of elegant distinctions, and in this book he seeks to preserve that neutrality.<sup>6</sup> But he also wants to educate a wide audience on a difficult theme: the relationship of morality to law. How can the legal system, with no claim to truth of its own,<sup>7</sup> handle the conspicuous diversity of truths in our society?

Calabresi begins the inquiry in his own field, the law of torts. Proceeding in a "common law fashion,"<sup>8</sup> he discerns a normative goal in the results attained by tort law: namely, the preservation of pluralism. Then, armed with "pluralism" as a heuristic device, he turns his attention to wider fields, such as social inequality and abortion. Ultimately, Calabresi attempts to say too much about too many topics without providing an adequate unifying theme. The focus on pluralism illuminates the current state of tort law far more than it

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3. P. 115.

4. That is how Calabresi himself refers to the persons connected with the "law and economics" school. N. 50.

5. See Calabresi, *The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence*, 68 PROC. BRIT. ACAD. 85 (1982) [hereinafter cited as Calabresi, *The New Economic Analysis of Law*].

6. I see Calabresi's overall contribution to legal scholarship to be his attempt to map a precarious middle road between the "law and economics" movements and the realist legacy by way of his own elusive but sincere liberalism. His best cartography is G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970). Those who follow Calabresi's work will find much in *IDEALS, BELIEFS, ATTITUDES AND THE LAW* to remind them of his descriptions of conflict in *THE COSTS OF ACCIDENTS* and of methods of resolution in G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

7. As Calabresi recognizes, the law's imposition of normative standards ("attitudes") is troubling given that these "inevitably derive from the point of view of those who dominate law-making in a given society." P. 22. He does not, however, go beyond that observation. See *infra* notes 96-120 and accompanying text.

8. ". . . 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." P. xv.

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does Calabresi's other subjects. Thus, this book divides itself into two: "Calabresi's Torts Teaching Guide" and "Calabresi's Thoughts on Social Inequality."

### *Calabresi's Torts Teaching Guide*

As this book indicates, Calabresi is a marvelous torts teacher. As a teacher of the subject myself, I find the discussion of tort law in his book to be provocative and helpful. One always searches for new and better ways to explain why tort law adheres to the "reasonable person" standard when it is patently clear that such a creature has never existed; students are justifiably eager to understand why in some cases the defendant "takes the plaintiff as she finds him" and in others does not. Calabresi acknowledges that it is often useless to seek general rules governing legal treatment of the differences among us.<sup>9</sup> Starting from the premise,<sup>10</sup> however, that the engine of tort law is the tension between the goals of objectivity and pluralism, Calabresi offers rough guidelines for determining when individual beliefs should be considered in the calculus of reasonableness.

Tort law, Calabresi says, fairly consistently permits consideration of religious belief;<sup>11</sup> injured parties tend to recover when the harm results at least in part from behavior based on religious conscience, however unpopular or "unscientific."<sup>12</sup> This persistent deference to religious belief, Calabresi suggests, is due to the "gravitational pull" of the first amendment religion clauses.<sup>13</sup> Further, the law will often

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9. P. 52.

10. Calabresi's premises are not always explicit, but rather tend to emerge long after they have determined a particular result. Indeed, Calabresi obscures the book's insights by taking so long to state his case. The first chapter, for example, entitled "The Gift of the Evil Deity," is a description of an extended torts class discussion. Hypothetically, this deity offers society certain "advantages" (say, the use of automobiles) but at a cost in lives. How will we go about deciding whether, and to what extent, and on whose behalf, to accept such gifts? Calabresi continues for some time to recount (usually misguided) student responses to these questions. Only at page 9 does Calabresi even elliptically engage the theme of the book, that diversity is a costly business: "[B]eliefs and attitudes must themselves be viewed as gifts of the evil deity." P. 9.

11. See p. 45.

12. See various cases, hypotheticals, and discussion, pp. 46-52: *Lange v. Hoyt*, 114 Conn. 590, 159 A. 575 (1932) (injured party delayed seeking medical treatment; on issue of mitigation of damages, jury may consider that Christian Science is a widely held belief); *Friedman v. New York*, 54 Misc. 2d 448, 282 N.Y.S. 858 (Ct. Cl. 1967) (orthodox Jewish unmarried woman jumped out of ski lift to avoid being with unmarried man after dark; held in bench trial to be reasonable behavior).

13. Pp. 45-46. The gravity metaphor is somewhat misleading. Though it has a distinguished pedigree, see n. 177, its mysticism is more appropriate in those other contexts. Calabresi needs to be particularly clear at this stage because the nature of the

protect a person even when her behavior is based upon a widely held but non-religious belief.<sup>14</sup> Thus, as one rule of thumb, the law can recognize belief in negligence cases<sup>15</sup> if the belief is religious or is obviously normative.<sup>16</sup>

Of course, there are some widely held beliefs that the law will not protect, whether based on religion or not. The complex of beliefs underlying racist attitudes is one example.<sup>17</sup> Nor will the law award "fanciful damages," even if based on commonly held emotional attachments.<sup>18</sup> Calabresi suggests that part of the reason for the prohibition on fanciful damages is the typical difference between plaintiffs and defendants in "cost-avoidance potential." It is impractical to make you pay for "taking me as you find me" when I could so easily avoid taking fragile and cherished possessions with me to rock-and-roll concerts.<sup>19</sup> Calabresi's normative explanation for this result reflects the principle he applies so faithfully throughout the book: I can avoid that damage without relinquishing any significant participation in society. To refuse those damages will not "emarginate" me, will not offend the pluralist ideal.<sup>20</sup>

The normative impulse to avoid "emargination" provides the next guideline for categorizing tort claims. Though the first amendment does not ordinarily require any particular result in a tort case,<sup>21</sup> any legal result that even suggests an "establishment of religion" would emarginate the losers, would tell them that their beliefs do not count as beliefs in our system.<sup>22</sup> To emarginate those people

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connection between tort law and constitutional law is central to his final chapter. See *infra* notes 82-95 and accompanying text.

14. Pp. 52-54; *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W. 2d 511 (1971) (pharmacist negligently filled birth-control prescription; held, in wrongful life suit, that couple acted reasonably in refusal to seek abortion or adoption).

15. Calabresi declines to address the question of how beliefs might be accommodated in strict liability contexts. Pp. 17-19.

16. Pp. 54-60. The non-religious beliefs to which tort law defers, however, typically derive from moral conventions that are themselves based on religious traditions. Calabresi anguishes over the implications of this practice: if the law protects idiosyncratic religious beliefs and these widely held "non-religious" beliefs, why not protect idiosyncratic non-religious beliefs? Surely the normative core of the Establishment Clause prohibits the elevation of religious over non-religious beliefs just as it prohibits the elevation of one religion over another. P. 58. The conclusion that tort law is animated by a desire to avoid the establishment of religion is therefore a misleading and costly, if useful, subterfuge. Pp. 60-61.

17. P. 62.

18. Calabresi gives as an example a watch that one might receive from a favorite aunt. Pp. 69-70.

19. P. 73.

20. P. 74.

21. P. 60.

22. P. 61.

may result in violence,<sup>23</sup> or it may lead them to abandon their religion, thus injuring the pluralist values which Calabresi views as fundamentally embodied in the Constitution.<sup>24</sup> When emargination is not a concern, as in the example of fanciful damages, the calculus is simplified.

The fact that the law permits compensation for some categories of emotional harm,<sup>25</sup> but not for others,<sup>26</sup> provides another rule of thumb in understanding the role of beliefs and attitudes in law. This rule is expressly normative, expressly a matter of social engineering.

At the same time we make the decision of whom to burden, we also are deciding whether we want to get accustomed, whether we wish to become callous, or whether, instead, we think that as a society we would be better off if we continued to view some things as shocking, offensive, and even abominable.<sup>27</sup>

Thus, the "liberalization" of laws regarding divorce and pornography<sup>28</sup> have changed attitudes, respectively, about alienation of affections and the need for censorship.<sup>29</sup> By the same token, the law does *not* allow the sale of "live" bodily parts such as hearts and kidneys because society does not wish to become callous to such practices.<sup>30</sup> Further, it may be that legitimization of awards for some emotional harms (such as the sight of gruesome automobile accidents on the highway) would create an expectation of those damages. If that is so, the expectation of award may actually increase that harm by prolonging the agony. "Society" would rather that people went home and forgot it.<sup>31</sup>

In sum, three factors—the normative or religious nature of belief, the potential for emargination, and the effect on shaping of future attitudes—may explain why tort law treats different beliefs and attitudes differently. These rationales are problematic, and they are

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23. *Id.*

24. Pp. 85-86.

25. An example would be intentional emotional injuries and situations in which plaintiffs witness harms negligently inflicted upon their relatives. P. 70.

26. For example, one may not recover for the trauma one experiences when seeing an accident on the highway. P. 76. Similarly, one cannot ordinarily recover for the disgust at seeing pornography. P. 78. In addition, recovery is no longer available for "alienation of affection." *Id.*

27. P. 83 (emphasis omitted).

28. I put the word "liberalization" in quotation marks because, from a feminist point of view, the more lenient obscenity standard/pornography practice is liberal, but far from liberating. See MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

29. P. 78.

30. Pp. 81-82.

31. P. 77. See *infra* notes 33-34 and accompanying text.

certainly not exhaustive. But they provide a useful way for torts students to observe the shaping of the law, even when seen only after the fact. Given Calabresi's laudable efforts to temper the "law and economics" approach,<sup>32</sup> his remarks on tort law also serve as an illustration of the inherent ethical, non-economic content of tort judgments. In that respect, these parts of the book will be of considerable appeal to anyone undecided as to whether economic approaches are always or only sometimes helpful.

*Calabresi's Thoughts on Social Inequality*

In his discussion of tort law, Calabresi appropriately relies on normative explanations. When trying to understand what the law has done, it is sensible to recognize that tort law has encouraged diversity within very conventional limits. Calabresi merely discerns the norms themselves, however, without questioning them. For example, when he says that "society" prefers that people go home and forget the sight of gruesome accidents,<sup>33</sup> he does not add that anyone *should* (or should not) go home and forget it. In general, Calabresi does not allocate moral responsibility when he says that "the law" or "society" has imposed a preference, and he regularly declines to tell us what attitudes *he* thinks the law ought to foster. This detachment in his discussion of tort law<sup>34</sup> is a bit vexing, but it is forgivable given the basically descriptive nature of that discussion.

The failure to examine value choices, however, seriously undermines Calabresi's discussion of social inequality. In this area (where, by his own admission, Calabresi treads on unfamiliar ground<sup>35</sup>), it is extraordinarily difficult to describe conflict in any-

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32. See *supra* notes 4-6.

33. P. 77.

34. Who has decided, for example, that we must continue to bear *any* automobile accident costs? Why can't we focus on the social processes that produce accidents to the benefit of capitalist accumulation? See R. JACOBY, *SOCIAL AMNESIA* 65-66 (1975). Why, really, do we resist the selling of bodily parts? Couldn't such a practice be limited so as to respect legitimate concerns? Insofar as we fail to explore those boundaries, we tend to reinforce illegitimate goals (such as the control of women's bodies in the contexts of prostitution and childbearing) which can be maintained only by the across-the-board restriction. See, e.g., C. Shalev, "Surrogate Mothers: The Contractual Establishment of Parent-Child Relations" (1985) (unpublished manuscript in the possession of the author). Sometimes, once we begin to unpack the normative agenda, it appears that general rules are announced as a way of avoiding unwanted political particulars. For example, *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), which rendered the fourteenth amendment's "privileges and immunities" clause a nullity for a century, was announced only a day before *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), which rejected a woman's claim, on the basis of the privileges and immunities clause, that she had a right to be admitted to the bar.

35. P. 45.

thing *other* than evaluative terms. Hence, it is essential that Calabresi be clear about the values he is bringing to bear on the question of social inequality. As a feminist and civil rights lawyer, I was taken aback by Calabresi's continued failure to defend his presuppositions that the system works and that pluralism is its engine.

Calabresi's least useful discussion concerns the potential effects of social inequality on the "reasonable person" standard in tort law. He offers the commonsense observation that what tort law now calls the "reasonable person" has as its model the white middle-class male.<sup>36</sup> Some socially disadvantaged persons, he recognizes, may not exhibit the normative characteristics of that model. "[I]t would not be odd that people within. . . society who were characterized as *different* and treated *differently* would react to different treatment by behaving differently in a wide variety of everyday contexts."<sup>37</sup> Therefore, law must not subject those people to the white/middle-class/male standard because to do so would be unfair<sup>38</sup> and because the goal of pluralism would be offended.<sup>39</sup> In urging that the law be "very careful" when it imposes a universal stereotype in tort cases,<sup>40</sup> however, Calabresi confounds the problem without offering a solution.

The common-law method<sup>41</sup> of Calabresi's book relies here largely upon a conversation in which a drunken insurance executive confided that low-income blacks have the most traffic accidents.<sup>42</sup> What if that offensive unsubstantiated remark were accurate? How could society prevent that "fact" from setting back the pluralist ideal? Calabresi expounds at some length upon options available to society through the insurance system. With respect to the bad black driver, the legislature could prohibit discrimination on the basis of race in the distribution of insurance benefits and premiums.<sup>43</sup> That sounds fine, but the disadvantaged would end up paying just as much because insurance companies would contrive other actuarial criteria, such as "place of residence," to penalize low-income black drivers. The disadvantaged would likely be more angry due to the subter-

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36. Pp. 22-27 ("white reasonable fathers riding Clapham Omnibuses while mowing the lawns in their shirt sleeves").

37. P. 27.

38. P. 28.

39. Pp. 28-29. That is, we would be offering legal benefits, including equal treatment, only to persons who had become for all practical purposes like white middle-class males.

40. P. 31.

41. P. xv. See *infra* notes 121-23 and accompanying text.

42. Pp. 40-41.

43. P. 35.

fuge, and persons identified by the alternative criteria but who didn't actually meet the risk description (that is, un-poor, un-black people) would be resentful.<sup>44</sup> One solution, says Calabresi, is government subsidization of insurance for those who fall into high-risk categories on account of a characteristic we prefer to treat as irrelevant. That political outcome, Calabresi admits, is almost impossible to envision.<sup>45</sup>

Since it is difficult to imagine how the dilemma would actually arise in our tort system, based as it is on the reality of economic feasibility,<sup>46</sup> I have to wonder why Calabresi engages in this exercise at all. How could a poor person become involved in the first place? As troubling as it may be, the truth is that the majority of such cases would be "resolved" by the defendant's inability to pay damages. If such cases were to arise, what would the litigation look like? Would the disadvantaged person have the further disadvantage of having to show (as she now does in civil rights cases) that the differentiation in question is group-based and is thus the cause of the burden with which she as an individual is threatened?<sup>47</sup> Should there be instead a less linear notion of causation at play?<sup>48</sup> Because there are many unexplored difficulties in the theory that Calabresi suggests, one should be hesitant to embrace it without a consideration of concrete examples. The case of the poor black driver (a strange example coming from one who repeatedly claims not to believe in "race or racial characteristics"<sup>49</sup>) is implausible and submerges the more important issues.

Calabresi does not dig his well of inquiry deeply enough. The

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44. Pp. 35-38.

45. P. 40.

46. I suppose that one could *transform* tort problems into questions of social disadvantage. Consider *Tuttle v. Atlantic City R. Co.*, 66 N.J.L. 327, 49 A. 450 (1901). In that case, a train car in a freight yard jumped the tracks and rolled down a city street. Mrs. Tuttle, in her effort to move out of the way, fell and hurt her knee. Perhaps the railroad could have defended on the ground that a reasonably fit person (measured by male physical norms) could have safely removed "herself." As a judge, I would have entertained Mrs. Tuttle's rebuttal that the standard should be relaxed, since, in nineteenth-century New Jersey, female children were in no way encouraged or allowed to develop dexterity or speed. But it is hard to imagine the proceedings reaching that stage. The New Jersey court ruled that Mrs. Tuttle's conduct was not an intervening cause of her harm, since it was a terrified effort to escape the risk imposed by the defendant. The case could have been decided on any version of the emergency doctrine. And, of course, the jury would likely have taken the plaintiff's gender into account somehow, whether that be a welcome "subterfuge" or not.

47. C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 106-07 (1979) [hereinafter cited as C. MACKINNON, *SEXUAL HARASSMENT*].

48. See *infra* note 57 and accompanying text.

49. P. 41.



premise underpinning his remarks on social inequality is that society is ambivalent about how to treat those who have historically been disadvantaged.<sup>50</sup> Certainly that is true, as the civil rights struggle dramatically illustrates.<sup>51</sup> But more than mere “ambivalence” is at work. That societal ambivalence is not only mirrored, but enhanced and enforced, by the law’s adherence to an individualist bias that denies our interdependence.<sup>52</sup> Antidiscrimination laws, for example, are “an exception to the legal system’s basic unwillingness to intervene in those processes of social selection which systematically produce variances in social outcomes. . . .”<sup>53</sup> Because the law ordinarily overrides the normative configuration of human predicaments with its own norms, we must concern ourselves with the latter if the law is to be more than a tool for the few.

Calabresi’s uneasy allegiance to the “reasonable person” standard is a case in point. Calabresi states that “[t]he objective nature of the standard of reasonableness was settled in American law by a series of articles published in the Harvard Law Review during the second and third decades of this century.”<sup>54</sup> What was settled, of course, was *not* that there is an objective fact of the matter (that “reasonable people” exist), nor that the standard is capable of objective administration. What seems to have been settled is that there were good reasons why we want to act *as if* the standard could be objectively ascertained and applied.

Calabresi does not address the question whether the “reasonable person” standard has any meaning in a society as stratified as ours. All his observations compel the conclusion that it does not apply to most people and, by virtue of his own analysis, cannot be made to

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50. Pp. 43, 44.

51. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (West 1981 and Supp. 1985), for example, the ambivalence is manifest in a pro-defendant skew in the burden of persuasion, *see* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), and, particularly, in the practical requirement that the plaintiff prove the defendant’s intention to discriminate. *Id.*; *cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971). For my analysis of Congress’ profound ambivalence about the critical issue of pregnancy discrimination, see Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 401-10 (1981) [hereinafter cited as Scales, *Feminist Jurisprudence*].

52. *See infra* note 57 and accompanying text.

53. C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 47, at 106.

54. N. 235. Because he assumes that there is something inherently objective about tort law, Calabresi also suggests that accommodation of belief is a more difficult task in that context than in constitutional law. P. 58. The suggestion is implausible. My experience has been to the contrary: we want objectivity *most* in constitutional law due to the high stakes of decision, but there it is *least* available. For a candid assessment of the extreme difficulty of administering constitutional standards in the late twentieth century, see *Garcia v. San Antonio Metropolitan Transit*, 105 S. Ct 1005, 1011 (1985); *id.* at 1038 (O’Connor, J., dissenting).

apply without fundamental political change. Yet Calabresi seems not to envision any agenda beyond the mere fine-tuning of standards. He simply avoids the fact that the ethics of tort law and the reality of social inequality inhabit different universes. In short, Calabresi's approach allows us to maintain the fiction that the white middle-class male is the reasonable person, and to think that the behavior of the fictional poor black constitutes a mere "attitude."<sup>55</sup> But, contrary to what Calabresi implies, poverty and racism are not "attitudes" on the part of their victims. They are political arrangements which the legal system as it is does almost nothing to eradicate. Calabresi's failure to consider those political realities renders the legal discussion almost whimsical.

Calabresi also skates over the issue of whether a common-law standard *should* be adjusted according to social disadvantage. The prospect of standard-adjustment is problematic, not because the alleged objectivity of the "reasonable person"<sup>56</sup> would be thereby compromised, but rather because the adjustment would reinforce negative stereotypes without much promise of social gain. The "special treatment" sketched here by Calabresi in the area of tort law is therefore different from that which operates in the realm of affirmative action. Both affirmative action and standard-adjustment in tort law raise the spectre of "burdening innocent people."<sup>57</sup> As

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55. Pp. 43, 44. When we sort things this way, we are engaging in what Adrienne Rich has called "white solipsism". She defines it as "a tunnel vision which simply does not see nonwhite experience or existence as precious or significant, unless in spasmodic, impotent guilt-reflexes, which have little or no long-term, continuing momentum or political usefulness." A. RICH, *Disloyal to Civilization: Feminism, Racism, Gynophobia*, in *ON LIES, SECRETS AND SILENCE: SELECTED PROSE 1966-1978* 306 (1979) [hereinafter cited as *LIES, SECRETS AND SILENCE*]. I don't think Calabresi means to imply that tort law holds any solution to terrible political problems. But there is a sense in which he trivializes those problems by discussing them in this context.

56. See *supra* note 54 and accompanying text.

57. So long as we have an adversary system for the adjudication of accident claims, the spectre of "burdening the innocent" is more menacing in tort than in affirmative action circumstances. In a tort case, the application of a more permissive standard for "poor black drivers" would disadvantage only the person hit by the poor black driver. Fundamental to the justification for affirmative action, however, is the prediction that the white males of this world will, by virtue of their race and gender, have other opportunities to achieve what a given policy of affirmative action seems to take away.

That assumption animates any effective strategy for eliminating discrimination. If the law has a role to play in the struggle for equality, it must not require proof that the privileged party to a lawsuit was the efficient cause of the other party's social disadvantage. "Remedying past discrimination," which is by definition a costly business, is the only reason to have civil rights laws. The court's failure to recognize this was the flaw in *American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985) (state cannot be held liable for the "market conditions" upon which was predicated the state's admitted wage discrimination against women). See also MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 337-40

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Calabresi himself has recognized, however, the goal of affirmative action is to prepare the ground for the elimination of affirmative action:<sup>58</sup> when opportunities are truly equal and when no negative preferences exist, there should be no need for affirmative preferences. Calabresi wisely does not offer the attenuated argument that the same promise exists in accident adjudication—that disadvantaged parties could be brought into economic parity if only law would change the standards it brought to bear.

### *The Case of Gender*

In the troubling area of gender differences, Calabresi significantly abets the reinforcement of stereotypes. The fundamental issue for women's liberation, he says, is whether equality requires women to act like men, or whether it requires men to act, at least in part, like women.<sup>59</sup> He is quite right to insist that we must not accept maleness as the norm of reasonableness,<sup>60</sup> but the alternative norms he chooses bespeak very little appreciation of the dilemma. Calabresi seems to think that gender differences manifest themselves mainly in driving habits,<sup>61</sup> as well as in certain values that women "have traditionally nurtured"—"care of children," "gentility, gentleness, and perhaps even a bit of reticence in sexual matters."<sup>62</sup> He proposes that the law adopt a standard that "might include the better parts of past [male and female] stereotypes."<sup>63</sup> Calabresi's approach to the feminist movement is "incorporationism"—a shallow view I have criticized elsewhere<sup>64</sup> as co-optation, as a failure to take differences seriously,<sup>65</sup> as an effort to translate woman into man by

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(1984) (the legal battle against pornography cannot depend upon an "individuated, atomistic, linear, isolated, tort-like—in a word, positivistic" conception of causation and injury).

The causation requirement in tort law is theoretically no less problematic. See Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW* 201 (D. Kairys ed. 1982). Practically, however, a preference for the disadvantaged party is more difficult to justify in tort cases, because the non-socially-disadvantaged party (and there will be one, if the resources exist to bring the case to court) has less clearly benefited from the group-based discrimination that caused the other's suffering.

58. Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979).

59. P. 29.

60. P. 30.

61. P. 27.

62. Pp. 30-31.

63. P. 32.

64. See Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. (forthcoming 1986) [hereinafter cited as Scales, *Emergence*].

65. Calabresi's approach to differences is, at times, truly trivial. He decries, for example, the shift in designation from "Men's Room and Ladies' Room" to "Men's Room and Women's Room." In Calabresi's view, the fact that society could instead have cho-

way of a strictly male ontology.

The question of differences between the sexes requires more than reference to tidbits from the unconscious. Difference is a crucial and hotly contested issue. As between the sexes, the female's capacity to bear children is a real, and, practically speaking, a permanent difference.<sup>66</sup> The questions persist, however, about whether there are other differences,<sup>67</sup> about their origins ("nature or nurture"),<sup>68</sup> and about what should be done with respect to them. This last is the most difficult question. In a just society, how would the law treat gender differences? If differences exist, does it make sense to speak of "special" treatment for women, or isn't that designation itself a manifestation of male ontology? Does it matter whether the differences are real or imagined or—most likely—cultivated by a history of domination?<sup>69</sup> The debate has been long, difficult, and well-documented.<sup>70</sup> Calabresi does not refer to the voluminous work of feminist scholars<sup>71</sup> and does not examine the philosophy of "special" rights, yet he devotes twenty pages to a haphazard look at those issues as they arise in tort law. His observations lack force because of his failure to consider the relevant scholarship.

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sen the designation "Gentlemen's Room and Ladies' Room," but did not, indicates a societal deprecation of the quality of gentility in the female gender. P. 29. The intellectual force of this argument resembles that of the objection made by some to the ERA—that it would lead to a proliferation of "unisex bathrooms." Perhaps my reaction to it assimilates an earlier reaction to a male law professor whose response to feminism was to begin stories with, "When I was a little boy or girl. . ." Trivialization of political movements, whether conscious or not, is a tried and true means of denying them. See Scales, *Emergence*, *supra* note 64.

66. But see Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 611-12 (1977) (suggesting that technology could eliminate even that difference). For my criticism of that view, which I termed "assimilationist," and a survey of the alternatives, see Scales, *Feminist Jurisprudence*, *supra* note 51, at 422-43.

67. See, e.g., E. MACCoby & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 360-66 (1974); Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and Reprise*, 51 CHILD DEVELOPMENT 964 (1980) (making case for biological basis of greater male aggressiveness); C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (describing and interpreting findings by psychologists on different ethical approaches taken by males and females).

68. See, e.g., Tieger, *On the Biological Basis of Sex Differences in Aggression*, 51 CHILD DEV. 943 (1980) (criticizing conclusion that alleged difference in aggression is biological).

69. See, e.g., C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 47, at 121-27.

70. Scales, *Feminist Jurisprudence*, *supra* note 67, is an example of this literature. For a contrast in approach, see Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) and E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980). The most illuminating piece thus far has been C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 47, at 101-41. For a critique of the equal rights/special rights debate, see Scales, *Emergence*, *supra* note 64.

71. Calabresi's supporting references are to NEWSWEEK, n. 117, and to psychological literature describing child-rearing habits, n. 123, and the genders' respective attitudes toward sex, n. 116.

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Calabresi's analysis of the abortion controversy<sup>72</sup> is similarly cursory. Consequently, he reaches a superficially correct conclusion (that abortion is a matter of gender equality) for an indefensible reason (because pluralism demands it). As I have indicated, Calabresi earlier discusses the problem of factoring personal belief into a calculus otherwise dominated by purely economic considerations. In the context of abortion, he says, the stakes are very different. In *Roe v. Wade*,<sup>73</sup> the United States Supreme Court faced the ultimate tragic choice: the situation in which fundamental value meets fundamental value.<sup>74</sup> There, according to Calabresi, the conflict was between gender equality<sup>75</sup> and "sanctity of life."<sup>76</sup> The danger of emargination loomed particularly large,<sup>77</sup> and our Supreme Court maximized it by subterfuge, saying that for purposes of the fourteenth amendment, a fetus (at least until viable) is not a person.<sup>78</sup>

This is far worse (and more dangerous) in a pluralistic society than the statement the Court sought to avoid making, namely, "Sorry, but your metaphysics are wrong. A fetus is not alive." The Court said it does not matter whether a fetus is alive (whether *your* metaphysics are correct). A fetus still is not protected by *our* Constitution.

Such a statement is about as bad as can be made by the Supreme Court of the United States in the area of conflicting beliefs.<sup>79</sup>

This argument baffles me. Does Calabresi really want the Supreme Court ever to say to anyone, "Your metaphysics are wrong"? The suggestion that the Supreme Court should have acted as supreme scientist and theologian contradicts all the conventional wisdom<sup>80</sup> about the role of courts in our society. Further, Calabresi's opinion is inconsistent with his own overarching theme of avoiding emargination. If pluralism is so worthy a goal, one would think that courts should attempt to avoid confrontation over metaphysical and moral points of view by appearing, at least, to decide within the lim-

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72. Pp. 91-114.

73. 410 U.S. 113 (1973).

74. Pp. 87-88. Calabresi defines fundamental values as those which we would like to hold absolutely, i.e., the opposing view is intolerable. If such an opposing view prevails, "[r]ebellion, flight, or martyrdom might be acceptable possibilities—conformity never would."

75. P. 87.

76. Pp. 87-88.

77. P. 95.

78. *Roe*, 410 U.S. at 158.

79. P. 95.

80. That conventional wisdom has not always struck me as wise. I am critical of judges' tendency to let their office preclude inquiry into and judgment about underlying phenomena. Discrimination, for example, cannot be identified and eradicated without consideration of its psychoanalytic, political, and economic roots. See, e.g., Scales, *Emergence*, *supra* note 64. See also *infra* notes 98-120 and accompanying text.

ited context of the law. If a judge wants to preserve the dignity of opposing views, she should act as if their truth or falsity is not at stake. If Calabresi is right that legal decisions must not rock our pluralist boat, courts should say to any litigant only that "your metaphysics, right or wrong, lose this time for purposes of this law."<sup>81</sup>

Calabresi is obviously concerned, as are many others, about the soundness of the abortion decision and the violence of its repercussions. He is right to suggest that the Court's participation in the abortion debate has advertised the delicacy of judicial review. Calabresi's anxiety about the controversy, however, leads him to infirm criticisms. He confuses, for example, the constitutional and common-law issues. Once again criticizing the Supreme Court's statement that for purposes of the fourteenth amendment a non-viable fetus is not a person, Calabresi states:

. . .[F]rom the standpoint of constitutional law in most other legal contexts, the statement. . .completely ignored the gravitational pull of other areas of the law. . . .[The statement] has made recovery of damages for injuries and killing of fetuses considerably more difficult. . . .The Court, absurdly, acted as if the right of a woman to have a voluntary abortion depended on our law's willingness: (a) to deny damages to would-be parents when their unborn child was killed by a negligent driver, and (b) to let a thug off lightly for shooting a pregnant woman in the stomach, because "nothing had been killed."<sup>82</sup>

Calabresi's indictment clashes with the legal history on which he relies. The American law of the unborn begins with Justice Holmes's pronouncement in 1884 that there could be no cause of action for prenatal injuries, in part because the unborn child was "a part of the mother at the time of the injury."<sup>83</sup> By all accounts, the "viability" distinction that permeates the reasoning in *Roe v. Wade* first arose in 1900 as a means of circumventing the consequences of considering the fetus to be "a part of the mother."<sup>84</sup> The viability distinction is, thus, an historical by-product of the evolution of fetal protections.<sup>85</sup> In accord with that history, a majority of jurisdictions now allow re-

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81. And, of course, those same metaphysics might well be vindicated in cases involving different laws—in this instance, wrongful death actions. See *infra* notes 82-95 and accompanying text.

82. Pp. 93-95.

83. *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14, 17 (1884).

84. *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 368, 56 N.E. 638 (1900) (Boggs, J., dissenting). For helpful historical accounts, see *Toth v. Goree*, 65 Mich.App. 29, 237 N.W.2d 297, 302-05 (Ct. App. 1975) (Maher, J., dissenting); Comment, *Wrongful Death of the Fetus: Viability is Not a Viable Distinction*, 8 PUGET SOUND L. REV. 103 (1984) [hereinafter cited as Comment, *Wrongful Death*].

85. *Toth v. Goree*, 237 N.W.2d at 303-05 (Maher, J., dissenting).

covery for the wrongful death of a viable fetus.<sup>86</sup>

Typically, courts deny recoveries for wrongful death of non-viable fetuses, but when they do, they recognize the arbitrariness of the distinction. An example is *Wallace v. Wallace*,<sup>87</sup> which Calabresi mistakenly cites<sup>88</sup> for the proposition that *Roe v. Wade* has thwarted protection of fetuses in tort. In *Wallace*, the New Hampshire Supreme Court acknowledged that the viability distinction was an artifact, but it employed the distinction solely for reasons of policy.<sup>89</sup> The court remarked only in passing that such a distinction was consistent with the temporal constraints on a woman's constitutional right to terminate a pregnancy.<sup>90</sup>

Thus, contrary to Calabresi's perception, the United States Supreme Court's mistake was in adhering to the common law, not in ignoring it. *Roe v. Wade* does muddle the law of the unborn, but not because of a "willful ignoring and undermining of what had seemed to be a sound and growing tendency in the law."<sup>91</sup> Rather, *Roe* incorporated an unsound common law doctrine wholesale, without giving adequate weight to the rights of women. That incorporation leads to the unnecessary and unwise conclusion that the definition of "person" in statutes and in the fourteenth amendment should be the same. The better reasoning is that, where the interests served are different, the definitions should be different.<sup>92</sup> Wrongful death statutes, for example, are solely for the benefit of survivors.<sup>93</sup> Abor-

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86. See Comment, *Wrongful Death*, *supra* note 84, at 108 and cases collected therein at n.39.

87. 120 N.H. 675, 421 A.2d 134 (1980).

88. N. 178. It is misleading for Calabresi to suggest that New Hampshire changed its mind about fetal protections after the *Roe* decision. Calabresi mentions a 1958 decision which, he intimates, was overruled by *Wallace*. Rather, in *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958), the New Hampshire Supreme Court held that a child born alive could recover for prenatal injuries regardless of when received (before or after viability). That is still the law in New Hampshire. There has long been a distinction between tort actions regarding those who are born alive and tort actions regarding the stillborn. *Wallace*, 421 A.2d at 135; Comment, *Wrongful Death*, *supra* note 84, at 107-08.

89. *Wallace*, 421 A.2d at 136.

90. *Id.* at 137.

91. P. 95.

92. See Scales, *Torts*, 12 N.M.L. REV. 481, 488-89 (1982). In this brief survey, I argue that the viability distinction, however unwise, is more appropriate in the context of abortion than in wrongful death actions. I say that recovery for wrongful death should be available for non-viable fetuses, because, whereas the interests implicated in abortion can be accommodated by making temporal distinctions, those implicated in wrongful death cannot.

93. *Wallace*, 421 A.2d at 136; *cf.* *Hollis v. Commonwealth*, 652 S.W.2d 61, 63 (Ky. 1983) (fetuses appropriately recognized as persons for wrongful death purposes, but not for criminal homicide purposes, since penal statutes must be strictly construed). Contrary to Calabresi's suggestions, pp. 94-95, n. 350, there is very little evidence that *Roe v.*

tion rights, on the other hand, guarantee that women have freedom of choice, at least until the time that the state's interest in protecting potential life outweighs the woman's interest.<sup>94</sup> In a context where a woman's right is not at issue, a fetus of any age can be a statutory person. Indeed, because the right to terminate a pregnancy implies a corresponding right to carry it to term, a refusal to grant fetal tort protection at any stage of pregnancy might offend constitutional law.<sup>95</sup>

Calabresi's central argument that *Roe v. Wade* tragically emarginated large groups is not persuasive. If he is correct that the primary role of the courts in the abortion controversy is to avoid the emargination of fetuses and those defending their rights, then the courts failed of their task long before *Roe*; these groups would have been "emarginated" by the limitations on fetal protection in tort and criminal law. But of course, in our lifetime,<sup>96</sup> abortion has been a frenzied public topic only since 1973. That is not, however, because the Supreme Court painted with too indelicate a brush; the controversy is a result of the Supreme Court's failure to recognize the domination of the majority by the minority. Anti-choice strategies are not motivated by metaphysics concerning the beginning of a human life. Rather, they are a last-ditch effort to avoid a formidable storm—the women's movement.<sup>97</sup>

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*Wade* has thwarted the evolution of protections for fetuses in the criminal law. Typically those cases do not rely on *Roe*, but are decided on grounds of legislative intent and the necessity for strict construction of criminal statutes. See *Hollis*, 652 S.W.2d at 61; *State v. Amaro*, 448 A.2d 1257, 1259 (R.I. 1982); cf. *Commonwealth v. Cass*, 467 N.E.2d 1324, 1328-29 (Mass. 1984).

94. *Roe*, 410 U.S. at 154.

95. See Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. Rev. 639, 664 (1980). Based on the principle of constitutional consistency, the Family Court of Richmond County, New York granted a protective order on behalf of a four-month-old fetus:

In the case at bar, the state's interest in protecting the fetus is consistent with the petitioner-mother's desire and right to give birth to a healthy baby and in no way conflicts with her privacy right to freely decide what to do with her pregnancy. Exclusion of the fetus from protection under a remedial statute "serves only to immunize a wrongdoer from liability"; it does not serve to further the woman's constitutional right to privacy.

*Gloria C. v. William C.*, 124 Misc.2d 313, 323, 476 N.Y.S.2d 991, 997 (Fam. Ct. 1984) (citation to Kader's article omitted).

96. In 1871, for example, the *New York Times* called abortion "[t]he Evil of the Age." L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT* 52 (1977). Regarding the historical ebb and flow of regulation of reproduction, see *infra* notes 104-108 and accompanying text.

97. As a social force the [right-to-life] movement represents not Catholics in general but the threatened Church hierarchy and its right-wing supporters. Right-to-life forces have generally opposed the kinds of social programs that would make abortion less frequent: child care, sex education, contraception, and so forth. Right-to-lifers are not usually pacifists, though pacifism is the only over-all philosophy that could make their position on abortion honorable and consistent. They



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Calabresi does have a vague sense of what's at stake. He argues that the danger of emargination could have been minimized if the Court had seen the controversy in terms of equality, rather than privacy.

Women bore the brunt of anti-abortion laws which not only limited their access to sex, but also placed on them the catastrophic consequences of illegal abortions. And women have traditionally been discriminated against in our society. . . .<sup>98</sup>

If the law had treated the conflict as one between social equality and the preservation of life, says Calabresi, the opposing factions would be more inclined to give some credence to each other, the results of the decision might be more palatable to the losers, and society wouldn't seem as if it were falling apart.<sup>99</sup> Calabresi is right insofar as he declares that abortion is an issue of women's rights. The Supreme Court even acknowledged this to some extent,<sup>100</sup> though commentators have criticized the Court for diluting the concern for equality with language about privacy.<sup>101</sup> Yet the enormity of the problem eludes Calabresi: He is led to propose a shallow solution as the Supreme Court was led to write a shallow opinion.

In striking down pernicious abortion laws, the Court had an opportunity to do for women what it had done symbolically for blacks in *Brown v. Board of Education*.<sup>102</sup> In that case, the Court found the courage to re-define equality with a firmness that has brought discussion of *one* point, at least, to a virtual end: "Separate educational facilities are inherently unequal."<sup>103</sup> In the abortion case, the Court

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oppose the specific forms of "killing" that amount to women's self-defense. They are reacting not merely to a "loosening of morals" but to the whole feminist struggle of the last century; they are fighting for male supremacy.

L. GORDON, *supra* note 96, at 415.

98. In fairness to Calabresi, he is trying to incorporate feminist form into his writing. See, e.g., pp. 22-23, 30, 99-102.

99. P. 99.

100. "This right of privacy. . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent." *Roe v. Wade*, 410 U.S. at 153.

101. See, e.g., Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1007-13 (1984) (proposing an equality-based approach to biological differences); Scales, *Feminist Jurisprudence*, *supra* note 51, at 437-38 (1981) ("[I]t seems a mere failure of imagination to preclude the application of the principle of equality to the issues. . .").

102. 347 U.S. 483 (1954).

103. 347 U.S. at 495. I would emphasize the symbolic nature of the utterance. It is taking a long time to manifest the reality of *Brown's* command, and at times we wonder whether or not, in such a thoroughly racist and classist society, its promise was just a sham. See Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* 96 (D. Kairys ed. 1982). Still, on that symbolic level, when as now the moral fiber of the

should have said, "Restrictions on abortion, like other regulations of reproductive matters, are inherently a denial of equality." The Court itself referred to evidence of the historic conspiracy to abolish voluntary motherhood. In ancient times, the few restrictions on abortion that existed were there to protect a "father's right to his offspring."<sup>104</sup> Christianity and canonical law consolidated the view that "animation" occurred at 40 days for a male, and 80 days for a female:<sup>105</sup> thus, female fetuses (being less valuable for military and industrial purposes) could be aborted further into the pregnancy. Restrictions on abortion in this country arose only at the end of the Civil War.<sup>106</sup> A little more research would have revealed that regulations on reproduction historically have occurred at times of demographic disturbance, at moments when the male population is in danger.<sup>107</sup> Indeed, in a later case, the Court endorsed restrictions on abortion for demographic reasons.<sup>108</sup>

In *Roe*, the Supreme Court looked into the situation, and it simply could not or would not see that women in their reproductive capabilities have been held hostage, have been seen as investments in property accumulation and demography. It fled instead to an amalgam of false concerns, and it essentially produced an elementary school formula: if pregnancy takes nine months, and we want to preserve three separate interests (those of women, doctors, and legislators), each gets three months.

We must ask: Why should the state be able to regulate abortions in the second trimester for reasons of health?<sup>109</sup> Though it is true that the later the abortion, the more complex the medical procedure, the Supreme Court's formulation ignores the fact that restric-

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nation seems to be unraveling, one can point to *Brown* and say: "Once, we took racism seriously. Our Supreme Court said so, forcefully and unanimously. Those of you who would elevate your pathology to the level of national policy will have to find a way to retract that commitment." There is nothing similar in the women's movement to which to point.

104. 410 U.S. at 130.

105. 410 U.S. at 134. We can only guess how the sex of the fetus was to be determined.

106. 410 U.S. at 139.

107. See, e.g., L. GORDON, *supra* note 96, at 49-61; G. BARKER-BENFIELD, *THE HORRORS OF THE HALF-KNOWN LIFE* (1976).

108. In holding that a state may refuse to fund non-therapeutic abortions, the Court stated:

In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth. *Maher v. Roe*, 432 U.S. 464, 478 n.11 (1977).

109. *Roe*, 410 U.S. at 163.

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tions which make abortions more difficult to obtain also impose health risks.<sup>110</sup> There is no justification for state-imposed uniformity in this area of health care: informed pregnant women know when medical problems arise;<sup>111</sup> they do not need statesmen to direct their child-bearing. I have yet to meet the "pro-life" legislator who has the foggiest idea what pregnancy is like. The "health" interest is simply a paternalistic ruse, a subterfuge *par excellence*.

The other two interests identified by the Court—the woman's in freedom and the state's in "potential life"—were presented as if irreconcilable. Yet, as Calabresi has always said, it is simply untrue that the law protects "life" above all other interests.<sup>112</sup> And the tort and criminal law of the unborn have been quite flexible when only "potential" life is at stake. Indeed, in all legal contexts, "personhood" is a fiction, an occasion for choices among norms.<sup>113</sup>

Thus, both the Court and Calabresi are mistaken in seeing the abortion case as a logical toss-up. Having correctly stated that the abortion controversy should be cast in terms of equality, Calabresi goes on to take the shallowest view of the latter. According to him, the threat posed to equality by restrictions on abortion lies in their inhibition on women's access to sexual expression.<sup>114</sup> Such a view only demonstrates Calabresi's inability to see the connections among all reproductive decisions and the freedom of women.

. . . [A]bortion is hardly the "final triumph" envisaged by all or the final stage of the revolution. There are deep questions beneath and beyond this, such as: Why should women be in situations of unwanted pregnancy at all? Some women see abortion as a necessary measure for themselves but no one sees it as the fulfillment of her greatest dreams. . . . Few if any feminists are deceived in this matter, although

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110. Risks increase when the difficulties preclude legal abortion. Those risks comprise not only the consequences of illegal abortion, but also the consequences of unwanted pregnancy and childbirth. Cates, *Legal Abortion: The Public Health Record*, 215 SCI. 1586, 1587 (1982).

111. By "informed pregnant women," I mean those educated about, and rich enough to afford, prenatal care. Others are already at the mercy of their ignorance, their poverty, and the health-care establishment. If second-trimester restrictions have any effect upon them at all, it is only to enhance their extreme difficulties by making medical bureaucracy more impenetrable and abortions more costly.

112. See, e.g., p. 102.

113. See McCoy, *Logic vs. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277, 1288-90 (1970) (the objects of abortion and euthanasia "are simply at different points on the continuum of similarity to you and me, part of which we choose to call human life").

114. Pp. 101-102. Only in a Freudian universe is heterosexual expression the noblest of goals. See the discussion in Law, *supra* note 101, at 1019. Cf. Gray, *Eros, Civilization, and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 88 (1980) (arguing that the Court's abortion and contraception decisions have nothing to do with the sexual liberation of the individual).

male proponents of the repeal of abortion laws tend often to be short-sighted in this respect, confusing the feminist revolution with the sexual revolution.<sup>115</sup>

The notion that freedom of choice concerning abortion enhances access to sex not only overlooks the prevalence of pregnancy resulting from actual force (rape and incest); it ignores the existence of institutional force, and it otherwise presumes that women have enough interest in heterosexual sex to litigate about it.<sup>116</sup> To say that "access to sex" animates the abortion controversy trivializes the problem and smacks of the underlying outrage: the sexual objectification of women. Sex is not the issue. What is really at stake is female personhood: "[To] be a person is to respect one's own ability to make responsible choices in controlling one's own destiny, to be an active participant in society rather than an object."<sup>117</sup>

Abortion is not a question of autonomy or privacy or any other liberal catch-all. It is a matter of the domination of women by men, of a power strategy that objectifies women, depriving them of existence by male sexuality.<sup>118</sup> Restrictions on abortion are part of a cluster of forces that perpetuate institutional and physical violence upon women;<sup>119</sup> current arguments against abortion are perverse

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115. M. DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 112 (1973).

116. This proposition is far from clear. According to a survey conducted by Ann Landers (to which over 100,000 women from around the world responded), 72% of women would prefer to forego sexual intercourse in favor of other forms of affectional activity. Landers, *Closing the Book on Landers Sex Poll*, Albuquerque Tribune, Feb. 18, 1985, at B-10, col. 3.

117. Karst, *supra* note 101, at 58.

118. Femaleness, and hence female autonomy and privacy, cannot be viewed apart from the enforced definition of female sexuality: "[T]here is no such thing as a woman as such, there are only walking embodiments of men's projected needs." MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 534 (1982). See generally *id.* at 528-43.

119.

We are undermined and subverted, not simply by precarious and whimsical abortion laws, precarious and fallible birth-control devices; but also by laws and conventions protecting a husband's right to rape and batter his wife or kidnap his children; by pornographic advertising which tells us we love to submit to sexual violence; by the victim-imagery of the Christian Church, which extols passive motherhood in the person of the Virgin Mary; by the very manner in which we give birth in hospitals, surrounded by male experts, supinely drugged or stirred up against our will, our babies taken from us at birth by other experts who will tell us how often to feed, when we may hold, our newborns. And, finally, by the whispering voice of the culture, internalized in us, that says *we* are forever guilty; guilty of living in a woman's body, guilty of getting pregnant, guilty of refusing the mother-role altogether. A male-dominated technological establishment and a male-dominated population-control network view both the planet and women's bodies as resources to be seized, exploited, milked, excavated, and controlled. Somehow, in the nightmare image of an earth overrun with starving people because feckless, antisocial women refuse to stop breeding, we can perceive contempt for women, for the children of women, and for the earth herself.

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attempts to portray the violated as the violent;<sup>120</sup> the abortion decision must be defended as a first step toward the elimination of sexual slavery. There is much to be done. But Calabresi deludes himself in thinking that the Supreme Court might have avoided biting some bullet, or that monumental dissension could be avoided at such an historic moment.

### Conclusion

Early in *Ideals, Beliefs, Attitudes and the Law*, Calabresi professes to adhere to the method of the common law; he modestly eschews generality and abstraction.<sup>121</sup> When he deals with tort law, that method provides a helpful medium for discussion of cases and possible explanations for them. The approach is not helpful when Calabresi attempts to apply it to current examples of domination and disempowerment. When confronted with the realities of social inequality, particularly the reality of abortion, Calabresi's method doesn't work. Those situations require more than figuring from the cases. We lawyers tend to mistake cases for legal history, to mistake artifacts for the real conflicts that produce them. Like the accumulation of historical "facts," case law is "a mere by-product, a kind of 'side issue' which—and this is a mistake—is studied as an end in itself."<sup>122</sup> Calabresi denies the usefulness of beginning with "great principles," claims for his use the "common-law method," and arrives at principles which are not themselves great<sup>123</sup> but which are greatly destructive in their power to prevent us from reaching important questions.

Calabresi has criticized the "law and economics" school for being unable or unwilling to address the "endpoints," the evaluative distributions of wealth that society would wish to maximize.<sup>124</sup> He suffers in this book from the same failure: he is undoubtedly right in

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Rich, *The Contemporary Emergency and the Quantum Leap*, in LIES, SECRETS AND SILENCE, *supra* note 55, at 269-70.

120. "[W]ho indeed hates whom, who is killing whom, whose interest is served, and whose fantasies expressed, by representing abortion as the selfish, wilful, morally contagious expression of woman's predilection for violence?" Rich, *Foreword: On History, Illiteracy, Passivity, Violence, and Women's Culture*, in LIES, SECRETS AND SILENCE, *supra* note 55, at 17 (emphasis in the original).

121. Pp. xiii-xv.

122. I. BERLIN, *THE HEDGEHOG AND THE FOX* 13 (1970).

123. After finishing his discussion of abortion, Calabresi states: ". . . [W]e can now draw some conclusions. These are few and may seem obvious, but we can take some comfort in this obviousness because we have journeyed long in order to arrive at it." P. 114.

124. Calabresi, *The New Economic Analysis of Law*, *supra* note 5, at 93.

concluding that attitudes and beliefs are part of the law, yet he never tries to tell us how we might distinguish among beliefs that are good or bad for society, even within the context of the legal system. Calabresi consistently avoids taking a stand, returning again and again to how tragic all our choices are and how important it is to preserve pluralism, seemingly at any cost.<sup>125</sup> His reliance on pluralism, however, is too broad. Calabresi fails to recognize that pluralism is itself a construct, a normative description of the polity,<sup>126</sup> which is regularly used to defuse very real and necessary conflicts. If "[t]he genius of American politics is its ability to treat even matters of principle as though they were conflicts of interest,"<sup>127</sup> then this is also the irony of American politics. The legal system in particular, in its rhetoric of rule-based fairness, shouts down those who justly claim to have an unequal voice. Pluralism tends not to operate fairly. Its argumentative force is available to some and not to others. As Sylvia Law points out in the abortion context, "anti-choice theologies are explicitly anti-pluralist."<sup>128</sup> At times of historic crisis, pluralism is not a matter of "interest-conflict" but one of "power-conflict."<sup>129</sup>

More often than not, pluralism serves only to avoid the pain necessary to create a truly multi-cultural society. When we let the goal of pluralism obscure questions of society-wide importance, we disable ourselves from considering what is right and what is wrong.<sup>130</sup> When Calabresi arrives in the name of pluralism at the solution of tinkering with legal standards and statements, his message is that, so far as we can manage, let's be nice and not emarginate anybody. It is a valuable message for the colonizers, those who need to maintain their power by avoiding conflict. But it is not a message that can be

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125. Pp. 109-10.

126.

America, according to this account, is a complex interlocking of ethnic, religious, racial, regional, and economic groups, whose members pursue their diverse interests through the medium of private associations, which in turn are coordinated, regulated, contained, encouraged, and guided by a federal system of representative democracy.

R. WOLFF, *THE POVERTY OF LIBERALISM* 130-31 (1968).

127. *Id.* at 137.

128. Law, *supra* note 101, at 1026 n.250. Law goes on to say: "The self-proclaimed 'moral majority' asserts that '[a]fter the Christian majority takes control, pluralism will be seen as immoral and evil and the state will not permit anybody the right to practice evil.' Gary Potter, President, Catholics for Political Action, *quoted in* Greene, *The Astonishing Wrongs of the New Moral Right*, *PLAYBOY*, Jan. 1981, at 118."

129. R. WOLFF, *supra* note 126, at 152-57.

130. *See id.* at 160.

## Tragic Voices

of use to a genuinely fair society faced with the complaints of genuinely emarginated and angry people.

