1986

Book Reviews

Kenneth S. Abraham

Carl F. Cranor

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol95/iss5/7
The Costs of Attitudes


Kenneth S. Abraham†

Guido Calabresi's work has always recognized that economic considerations cannot entirely explain a decision, a doctrine, or a whole field of law, though they may be an ingredient in the just resolution of private law problems.¹ Until now, however, students of Dean Calabresi's work have been left to wonder how large a role he believes noneconomic values actually play and ought to play in structuring tort law. Many of his most original and important insights have been the product of economic analysis and have seemed useful principally as tools in the analysis of law from the economic point of view. Moreover, although Calabresi has always argued that noneconomic values are legitimate trumps of otherwise appropriate cost-reduction approaches, such values have also seemed in his scheme to be nonrational. Readers might easily have inferred from Calabresi's work that he believes little can be said, in general, about the role of noneconomic values in tort law.

Ideals, Beliefs, Attitudes, and the Law² should put an end to that im-

* Dean and Sterling Professor of Law, Yale Law School.
† Professor of Law, University of Virginia School of Law.
2. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985) [hereinafter cited as IDEALS and referred to by page number only].
pression. At heart, the book is about the law's tolerance of weakness and diversity, and about its ambivalence in the face of tensions between such tolerance and the desire for safety, cost reduction, and the vindication of constitutional values. Derived from Calabresi's Frank W. Abrams lectures at Syracuse University, the book explores the important role played in tort law by three sources of value—ideals, beliefs, and attitudes. Yet *Ideals* is not only about the importance of values in law. In many ways it is also Calabresi's own statement about the meaning of his earlier work, and it paints a revealing portrait of the beliefs of Calabresi at mid-career.

I. **The Gift of the Deity**

Reading *Ideals* is a bit like being a student in a class taught by Calabresi. His strategy is to move from discussion of the specific role of ideals, beliefs, and attitudes in tort law to the more general issue of their proper place in the legal system as a whole. In each chapter, the inquiry proceeds by considering in detail one or a few cases, real or hypothetical, designed to demonstrate the law's approach to the values in question and to illustrate Calabresi's arguments about how these values should be treated. Using this "common law" method of investigation, Calabresi serves the reader a series of insights, fascinating digressions, and surprises about cases and problems that have long troubled students of tort law. But this approach inevitably makes the reader hunger—perhaps like many law students sitting in a torts class—for answers at a higher level of generality than the material may warrant.

One of Calabresi's assets, however, is his ability to construct hypotheticals that not only serve the limited purpose for which he introduces them, but also provide an organizing theme running through a body of seemingly disparate materials. Calabresi adopts this approach at the outset of *Ideals* by telling a story about the gift of an evil deity. This deity offers its subjects any gift that they want, though at the price of one thousand lives. When the subjects, as expected, reject the offer out of hand, Calabresi reveals that they have already been reaping the benefits of a far more expensive gift—the automobile.

The point of the hypothetical, of course, is to demonstrate that almost all benefits must be paid for in one way or another, and that although some of the costs of these good things are less clearly chosen, less predictable at the outset, not as salient, and less easily controlled than others, most costs nonetheless are consciously chosen, predictable, real, and controllable. The deity may seem evil, but only because it forces us to confront directly what we ordinarily find many ways of hiding. Some things,
The Costs of Attitudes

sometimes even our own convenience—are more important than safety,
even more important than human lives.

This allegorical rehearsal of a lesson that Calabresi has taught many
times before both sets the stage for the theme of the book and provides a
link to the kind of analysis that has been central to so much of his earlier
work. Convenience and economic cost are not the only factors that some-
times make safety worth sacrificing. Preserving and protecting ideals, be-
liefs and attitudes may demand such sacrifices as well. We must therefore
decide which and how much of these values we want. It turns out that just
like convenience, the good life, and progress, ideals, beliefs and attitudes
are gifts of the evil deity. 4

Thus, Ideals contains a demonstration of what Calabresi has long been
saying: economic goals are an important but by no means exclusive con-
sideration, and sometimes other values will be important enough to war-
rant our incurring more accidents, injuries and accident costs than might
otherwise be desirable. The critical issue, of course, is how and when the
trade-off between these different values should occur. Who should bear
the burden of accident costs we choose to incur to protect a particular
ideal, belief, or attitude? Under what circumstances do we, or should we,
sacrifice a particular ideal, belief or attitude to achieve other ends? These
are the questions that Calabresi sets out to answer.

To answer these questions, Calabresi first focuses his discussion on
three related problems: the relation between tort law’s notion of reasona-
ble prudence and the ideal that the “disadvantaged” should not be unduly
burdened; the extent to which otherwise unreasonable actions should re-
cieve tort law protection because they are the product of religious or secu-
lar beliefs; and the recoverability of damages for various forms of emo-
tional loss that result from the attitudes of those who suffer these losses.
Employing the notions developed in these inquiries, Calabresi turns last to
the problem of conflicts between beliefs, as exemplified in the controversy
over abortion.

II. DISADVANTAGE

Two distinctions preoccupy Calabresi in his examination of how tort
law’s notion of reasonable prudence treats people who are “disadvan-
taged” by physical, mental, sexual or “status” handicaps. Calabresi first
distinguishes between the treatment accorded disadvantaged victims and
injurers when each fails to behave “reasonably.” Tort law is more likely
to take a victim’s than an injurer’s disadvantage into account in evaluating
his behavior. That is, a typical injurer has to take his disadvantaged vic-

---

tim as he finds him, whereas a disadvantaged injurer usually must conform to an objective standard of reasonableness, notwithstanding his disadvantage.\textsuperscript{5} Doctrinally, this means that what might otherwise be considered contributory negligence and thus bar a disadvantaged victim's recovery is ignored. Substandard behavior by a disadvantaged injurer, on the other hand, is much less likely to receive special protection.

Even distinguishing victims from injurers, however, does not fully explain the current state of the law. Calabresi notes and then criticizes a second distinction, between physical and mental handicaps on the one hand, and behavior that is characteristic of a particular sex or social status on the other. At least if the sex is female and the social status is not that of the white Anglo-Saxon male, the role played by sexual and social status disadvantage becomes "clouded."\textsuperscript{6} For instance, Calabresi questions whether, if women \textit{qua} women happen to drive differently from men, or if Italians in fact drive as they are sometimes stereotypically thought to drive, their behavior should be considered unreasonable when they are victims.

Calabresi seeks an answer to this question not in tort law, but in our broader attitudes toward the tradition of the melting pot. He indicates that there are several ways for the disadvantaged to achieve equality. One is to become more like the advantaged. Women then adopt (and expect to be judged by) attitudes that are characteristically male, and Italians become more like those with a Northern European background. Women drive more like men, and presumably Italians drive more like Anglo-Saxons—whatever that might mean. Another way to achieve equality, however, is for the disadvantaged and the advantaged to become more alike through some kind of amalgamation of their characteristics, or at least their good ones.

Calabresi argues eloquently that these differences and disadvantages should be taken into account in determining what counts as reasonable behavior.\textsuperscript{7} He criticizes the tradition of the melting pot that produces equality through assimilation, and laments the possible loss of female virtues and the disappearance of the "Mediterranean" attitude toward life, both of which may result from achieving this homogenizing form of equality.\textsuperscript{8} The assimilating power of American culture is so strong, he seems to be saying, that we must make special efforts to protect attitudes and cultural idiosyncracies that are, in effect, endangered species. Part of this protection should be a conception of what counts as reasonable behavior in

\textsuperscript{5} Pp. 24, 32-33.
\textsuperscript{6} P. 27.
\textsuperscript{7} Pp. 28-32.
\textsuperscript{8} P. 30.
victims. Certain female virtues (and certain male virtues), as well as some features of the Mediterranean attitude toward life, are gifts of the deity that are worth paying for.

I am not at all certain that particular female virtues or the Mediterranean attitude toward life are the virtues most deserving of protection by a further complication of tort law's notion of reasonable prudence. Even assuming that these virtues are worth protecting, however, if a particular disadvantage is worth protecting, why is it worth protecting only in victims? Why don't we also protect injurers who have the same disadvantages that we protect in victims?

Calabresi's explanation for much of the difference in treatment of victims and injurers is that it would be unfair simply to adjust the standard of reasonable prudence to take account of injurer disadvantage, because the result of this adjustment would be to impose the cost of protection solely on innocent victims. If we collectively want to have the gift of injurers' disadvantages and idiosyncracies, then we should pay for this gift collectively, but the courts have no way of imposing collective liability. Because protecting disadvantaged injurers from liability for the extra injuries they cause would require charging innocent victims for this protection, tort law treats the disadvantages of victims and injurers differently, by giving no special protection to disadvantaged injurers.

But who are the injurers who pay to protect disadvantaged victims? Calabresi seems to assume that we are all potential injurers and therefore that we all bear the cost of protecting disadvantaged victims, or at least that there is nothing distinctive about the injurers who actually bear this cost. His explanation makes sense if those who injure the disadvantaged

9. Moreover, the idea that in allowing recovery by disadvantaged victims who would otherwise be judged contributorily negligent the law is "protecting" them is a bit strained. P. 9. If accepting the gift of victims' disadvantage means that there will be more injuries, then these are largely injuries suffered by the disadvantaged. But for the special "protection" the law accords these victims, some of their injuries would have been avoided. Because the disadvantaged are compensated for their injuries, in theory they are made whole. But they are nevertheless the ones who must suffer the extra injuries that the law has decided it is worth having in order for all of us to accept the gift of their disadvantage.

10. Calabresi argues that although there are also nonjudicial ways of trying to spread the cost of injurer protection, they work poorly. Potential injurers can insure against liability and thereby spread the cost of protecting injurer disadvantage among all who insure. The premiums charged are likely to be higher, however, for those who have recognizable disadvantages. Pp. 33–36. Statutory or regulatory prohibitions on insurance classifications that charge the disadvantaged higher rates may have some impact on this practice. But surrogate forms of classification or subtle forms of discrimination in marketing that indirectly reinstate the prohibited distinctions are much more difficult to control. Although such prohibitions are thus unlikely to relieve disadvantaged injurers of the entire burden of their disadvantage, Calabresi suggests that they may be useful subterfuges nonetheless. Even if they help us hide from ourselves the fact that we still place much of the burden of disadvantage on those we supposedly wish not to burden, these prohibitions may help us eliminate racism and sexism in fact by beginning to eliminate it formally. P. 37.

11. Calabresi later recognizes that injurers are not a monolithic class. That recognition, however, does not seem to influence his discussion of victim disadvantage. Pp. 37–40.
are a cross section of the population, containing proportions of disadvantaged and advantaged people representative of the population as a whole. Only then would the cost of protecting disadvantaged victims be borne, as it should be, by the entire society.

However, Calabresi's apparent assumption that we are all potential injurers, or at least that there is nothing distinctive about injurers as a group, is not necessarily correct. The injurers who pay to protect disadvantaged victims are likely to be composed disproportionately of the disadvantaged, for most of those whom we would wish to call "disadvantaged" are either more likely than others to be involved in accidents, or more likely than others to be held liable for accidents in which they are involved. In fact, in the activities where having a disadvantage could plausibly count in determining whether an injurer behaved reasonably, the disadvantaged seem more likely to be both injurers and victims. These are the activities "central to citizenship," as Calabresi calls them, such as driving a car or maintaining a home. A driver's slow reaction-time, inability to concentrate, or propensity to run red lights increases the risk of accidents in which the driver may be an injurer, a victim, or both. As a consequence, although we may say proudly that as a society we all bear the cost of protecting disadvantaged victims, providing this protection may result in imposing the heaviest burden of protection on the disadvantaged themselves, because they are disproportionately members of both the victim and injurer classes.

12. Part of the explanation for the line that tort law draws between physical and mental handicaps (which are accorded protection in victims) and sexual or social status (protection of which is more ambiguous) may well turn on the difference between these two different notions of disadvantage. Physical and mental handicaps probably make people more likely to have accidents. But the effect of sexual or social status handicaps may be harder to pin down. For example, suppose that Italian drivers do have accidents because of their flamboyance and are held liable for these accidents (or are barred from recovering for their own injuries) because juries consider this flamboyance unreasonable. If Italian drivers are average in all other respects, then they are at a disadvantage because of this cultural characteristic. But suppose instead that Italian drivers, flamboyant though they may be, are superior accident avoiders in other respects. Then the term "disadvantage" no longer comfortably fits the situation. All things considered, Italian drivers receive the same treatment as others—they are held liable for their unsafe practices, and benefit from their special abilities, which together render them about average.

Now suppose that everyone has his own set of comparatively unsafe idiosyncracies, some of which are culturally distinctive and some of which are not. To protect idiosyncracies that are culturally distinctive is necessary only if those with such idiosyncracies are at a disadvantage, all things considered, compared to the average person. When this is not the case, protecting sexual or social status idiosyncracy accepts a gift of the deity at a cost not only of extra injuries and suffering, but also by according those with the idiosyncracy an affirmative advantage they do not need. Perhaps they deserve this advantage because they have culturally valuable characteristics and behave reasonably in all other respects, but any protection they receive as a result will be for that reason—because of desert, not need.

13. P. 34.

14. The amount of this disproportion would depend on the size of the group we call "disadvantaged" and how much more likely its members are to have accidents. If the disadvantaged are only slightly more likely than others to have accidents, the effect will be small. Similarly, if only a small
The Costs of Attitudes

This problem cuts deeply into the relation between tort law and some of our fundamental values. Yet Calabresi's explanation for the law's different treatment of victims and injurers rests heavily on the largely unexamined notion that it would be unfair to ask innocent victims to bear the cost of protecting disadvantaged injurers. Admittedly, the courts are institutionally incapable of creating collectively provided protection, and in any case we are ambivalent about providing open subsidies to some of those he considers to be disadvantaged. But is Calabresi correct to assume that it would be unfair to ask victims to bear the cost of protection?

No doubt the victims of disadvantaged injurers are at least as innocent as the injurers themselves, if not more innocent. But suppose that the law imposed the burden of protecting these disadvantaged injurers on their victims anyway. Under such a regime, victims would not have to bear individually the burden of protection any more than disadvantaged injurers must individually bear the cost of injuring under the current regime, when liability is imposed on them. Just as potential injurers can purchase liability insurance, most potential victims could at least to some extent insure themselves against injury and thereby spread the burden of protecting disadvantage to all those in their own insurance pools. Why not impose the cost of protecting injurer disadvantage on victims, allow (or require) them to insure, and thereby both protect injurer disadvantage and spread the cost of protection? That we do not take this approach and protect injurer disadvantage in tort whenever we protect victim disadvantage is all the more interesting in light of the enormous amount of victim (that is, first-party) insurance that is already in place and the fact that

percentage of the population is "disadvantaged," most accidents will still involve those who are not disadvantaged. But the more people who are called "disadvantaged"—and Calabresi's point is to consider enlarging this group—the more likely that accidents will involve members of the very group to whom protection has been extended.

15. For example, Calabresi suggests that one way to neutralize tort law's differential burdening of disadvantaged injurers would be to subsidize them. We could thereby continue to protect disadvantaged victims in tort and compensate disadvantaged injurers for our failure to provide them similar protection. Yet he points out that we are often too ambivalent about the disadvantage in question to be comfortable subsidizing it directly. Pp. 42-43. The implication is that we may well be willing to tolerate the increased accidents that subsidizing such individuals produces, but only when we can subsidize them clandestinely. Of course, the need to hide the subsidy can result in overgenerality. We then end up partially subsidizing all high-risk injurers, not only those with the disadvantaged characteristic we specifically wish to protect. P. 42.


Private disability insurance in 1980 covered only 65 million people on a short-term basis, and only 21 million people on a long-term basis. But in that year 96 million people were covered by the Social Security Disability program, U.S. Dep't of Commerce, supra, at 389, and 79 million (most of
so much of this insurance is marketed or provided in ways that make direct and indirect rate classification based on disadvantage more difficult than in injurer (that is, liability) insurance.17

If we could protect injurer disadvantage by relying on victim insurance in this way, without requiring the courts to create compensation schemes beyond their competence or authority, then Calabresi's explanation for the differences in our treatment of disadvantaged injurers and victims is undermined. If victims can and do so easily insure, why don't we protect injurer disadvantage as well? I think that there are a number of different reasons, and it probably takes all of them to explain our current practice satisfactorily. First, injurer insurance became widely available earlier than many forms of victim insurance. When the doctrines governing the treatment of disadvantage were developing, relieving injurers of responsibility for their disadvantage might in fact have meant placing the entire burden on individual victims. Second, if the disadvantaged are disproportionately likely to be victims themselves, we may not want to place the additional burden of insuring on them, although we could ease the burden in a number of ways.18

A third possibility is that accepting the gift of idiosyncrasy and disadvantage in its entirety might cost more than we are willing to pay. We may have decided, therefore, to accept only the least expensive part of the gift. Perhaps protecting victim disadvantage alone is the least expensive approach, because injurers in general are cheaper cost avoiders than victims. If this were true, then protecting only victim disadvantage would reduce the sum of the costs of accidents and accident cost avoidance more than would protecting injurers only. This seems to me unlikely, for in the activities in question potential victims and potential injurers tend to be the same people. But even if injurers engaged in the ordinary activities of life are not cheaper cost avoiders than are victims, distinguishing between whom were also covered by Social Security) were protected by workers' compensation. Id. at 375.

Data on the Personal Injury Protection component of automobile insurance coverage are more difficult to isolate. It is clear, however, that statutes in eighteen states and the District of Columbia make some such coverage mandatory. INS. INFORMATION INST., INSURANCE FACTS: PROPERTY/CASUALTY FACT BOOK 105 (1985-86). Generally such coverage provides medical and wage loss protection to anyone suffering an injury arising out of the ownership or maintenance of a motor vehicle. In many other states drivers can and do purchase optional medical insurance as part of their liability policies. This coverage resembles the medical component of the Personal Injury Protection coverage that is compulsory in no-fault states.

17. For example, much of this coverage is group insurance that is sold without individualized setting of premiums or refined risk classification, and some of it is social insurance that is not privately marketed at all.

18. We might create victim-assigned risk pools, for example, with subsidies that would enable disadvantaged victims unable to obtain coverage in the primary market to purchase it at reasonable cost from a pool. We would then face questions similar to those faced on the injurer insurance side about whether to subsidize only the disadvantaged or to hide the subsidy by making all high-risk potential victims eligible.
The Costs of Attitudes

them creates a discrete set of cases to which we can apply the lofty ideal of protecting disadvantage. There are other ways to divide the portion of the gift we can afford to accept from the portion we cannot afford, but as long as we had contributory negligence the distinction between injurers and victims was convenient and easily administered. Now that comparative negligence has been widely adopted, we might think about dividing the part we accept from the part we do not in a different way.  

A fourth reason tort law relieves victims but not injurers of the burden of disadvantage is a version of Calabresi’s explanation, but with an important qualification. Protecting disadvantaged injurers would deny their victims pain and suffering damages, but would award these damages to other victims. I argued above that victims can insure against out-of-pocket loss almost as easily as injurers can insure against liability. But victims cannot insure directly against pain and suffering, and there is no reason to suppose that a reversal of the way we treat disadvantaged injurers would create a sufficient market for such coverage. The persuasiveness of this explanation, however, depends on one’s attitude toward pain and suffering damages. To the extent that these are considered an appropriate category of recovery, the distinction in our treatment of injurers and victims makes some sense, because it enables victims to be compensated for their pain and suffering.  

Taken together, these explanations suggest that we could structure tort law’s treatment of disadvantage quite differently, yet still express many of the same ideals that Calabresi has uncovered and dissected. Perhaps what is important, then, is that we be able to express these ideals somewhere in the system; other features of how tort law actually operates may deter-

19. For example, in accidents between otherwise “negligent” disadvantaged victims and otherwise “negligent” disadvantaged injurers, the injurer’s disadvantage could also be taken into account in assessing the reasonableness of his conduct. And in cases involving ordinary injurers we might apply comparative negligence to disadvantaged victims and reduce their recoveries, but take into account their disadvantages in making the reduction. Their recoveries would then be reduced less than those of nondisadvantaged victims in similar circumstances. This might permit protection of more disadvantaged victims, but without increasing the aggregate cost of protection.

20. Victims actually may be able to insure more easily against some risks than can injurers, as the crises in the availability of medical malpractice, product liability and toxic tort liability insurance over the past decade have demonstrated.

21. A potential victim interested in protection against pain and suffering could purchase a crude surrogate, in the form of disability or hospitalization protection keyed to incapacity or confinement rather than wage loss. But it would be the rare potential victim who searched for such coverage.

22. This explanation really is not available to Calabresi, however, though it may well be correct. Later in IDEALS he explains the recoverability of pain and suffering solely on the ground that such awards make the contingent fee system possible. Pp. 80–81. Yet this explanation would render the uninsurability of pain and suffering by potential victims irrelevant in assessing why we distinguish them from injurers as we do. If pain and suffering damages serve mainly to compensate lawyers and not victims, then the unavailability of these damages to victims made to bear their own losses outside the tort system (where they generally do not need lawyers) would not matter if we were deciding whether to charge victims the cost of protecting injurer disadvantage.
mine where that expression can most effectively take place. The last explanation for tort law's treatment of disadvantaged victims and injurers thus derives, I think, from a practical consideration—the constraints that the jury system places on the implementation of our ideals.

Calabresi says little in *Ideals* about the role played by juries. But both the actual protections of disadvantage that he describes, and those for which he appeals, must be implemented through judicial instructions to juries. Except in the rare cases in which a court can rule as a matter of law, to protect disadvantage a court must instruct the jury that it may take into account the victim's handicap or disadvantage in determining whether the behavior in question was reasonable. Such instructions obviously leave the jury with considerable power to deal as it wishes with the disadvantage. But because a jury probably is already sympathetic to the victim, disadvantaged or not, an instruction pertaining to victim disadvantage is likely on the whole to be faithfully implemented.

Protecting disadvantaged injurers, however, would demand much more tolerance on the part of juries in the face of their sympathy for victims and their understandable antipathy toward injurers, disadvantaged or not. Because asking juries to relieve disadvantaged injurers of liability to their victims would be unrealistic, that approach could easily make a mockery of the rule supposedly granting injurers protection. The difference between tort law's treatment of disadvantaged victims and injurers, therefore, is not only grounded in principle, it is also derived from the practical constraints that the jury system places on the implementation of our ideals concerning disadvantage. The "ideals" in the title of Calabresi's book are not only those of victims and injurers, but the ideals of the law, and the best way to undermine an ideal is to make an impossible demand on it.

### III. Belief

The problem that tort law faces in dealing with beliefs is that some beliefs require people to behave dangerously. Beliefs may cause people to perform ceremonies with poisonous snakes, to deny themselves medical care, or to decline to have therapeutic abortions. In this field Calabresi finds the law adopting the same distinction between victims and injurers that it adopts in dealing with disadvantage and, in his view, for much the same reason. What turn out to be interesting and different about beliefs

23. The injurer of a victim with a risky belief is already at fault or otherwise partly responsible for the victim's injury. The injurer consequently can make only the weak argument that because injury would not have occurred if only his victim had not acted on a risky belief, he (the injurer) should be relieved of liability. In contrast, one injured by a person who holds a risky belief can persuasively claim that he (the victim) should not be forced to bear the entire burden of accepting the gift of his injurer's belief. If the gift is worth accepting, then all those who benefit from it should pay
The Costs of Attitudes

are the source of their protection and the basis of the distinction between protected and unprotected beliefs.

Calabresi describes the source of protection as constitutional "gravitational pull," a term he borrows from Ronald Dworkin. We protect religious belief in tort law, Calabresi says, because such belief has a favored status in our system, as evidenced by the constitutional protection accorded the free exercise of religion and the bar against governmental establishment of religion. Not only does the Constitution tell us what government may not do in connection with religion, we can also infer from these prohibitions the social values behind them. We structure tort law accordingly.

To illustrate this constitutional gravitational pull, Calabresi considers "the case of Minelda's pelvis." Minelda is a Christian Scientist, and because of her beliefs she does not seek medical treatment that would have mitigated her injuries. Can she recover all her damages from her negligent injurer, or only those that would have been incurred had she acted contrary to her beliefs and mitigated? The jury in Minelda's case was allowed to consider her beliefs in deciding whether she had reasonably failed to mitigate, and an appellate court refused to set aside the jury's verdict in her favor. Other courts in similar cases of victim belief have gone even further, holding the victim's belief reasonable as a matter of law. Calabresi indicates that the availability of such protection depends on the belief's being part of what most people would call a religion, rather than merely a cult. When the belief is not a "religious" one, it must be much more "reasonable" to receive protection. In his view, this is because tort law is more powerfully affected by the gravitational pull of the constitutional protections afforded by the religion clauses than by the less constitutionally grounded concern for freedom of secular belief.

The difficulty with this explanation, as Calabresi points out, is that distinguishing between religions and mere cults is difficult, and distin-
guishing between religious and secular beliefs establishes—that is, gives a priority to—religion, even if it does not establish a particular religion. These questionable distinctions, however, are not simple doctrinal flaws, but subterfuges reflecting our ambivalence—our desire to underscore constitutional values and yet simultaneously to evaluate individual behavior by an objective standard that reflects nonidiosyncratic beliefs. By denying protection to cults and idiosyncratic secular beliefs, Calabresi says, we preserve our commitment to an objective standard while protecting “respectable” minority beliefs that might otherwise be trampled by the majority. But he is disappointed that we are able to do this only by denying protection to the religions and beliefs of immigrant groups and other outsiders. As a result, these newcomers and outsiders are in effect treated as less worthy.

There is certainly considerable intolerance in this denial of protection to bizarre beliefs. But some tyranny of the melting pot probably would be unavoidable even if we purported to protect all beliefs of victims, however strange. As I argued about the protection of disadvantage, whatever rule we have, juries are going to be required to implement it. It would be unrealistic, therefore, to fashion a rule that extends the legal protection afforded beliefs far beyond the tolerance of the typical jury. Even if the reasonableness of particular beliefs were determined as a matter of law, juries still would be required to find as a matter of fact whether the belief in question was actually held by the victim, and whether it was a contributing cause of the victim’s injury. Otherwise the injurer’s defense that the victim was contributorily (or comparatively) negligent would have to be assessed by trial judges alone, in separate hearings divorced from all the other considerations relevant to the outcome of a negligence suit.

Juries would therefore retain the power, if not the right, to nullify a rule granting protection to any belief, no matter how strange or weird. Anyone who has ever taught law students the case of Minelda’s pelvis, however, has witnessed their reluctance to tolerate protection of even her comparatively mainstream belief. If law students’ attitudes are at all representative of those of jurors, we can expect only limited tolerance of unconventional belief in the secrecy of the jury room. It is therefore no surprise that the law bows to reality and protects only conventionally unconventional beliefs.

In addition to such practical constraints, there are probably deeper rea-

31. P. 52.
32. Pp. 59–60. I use the term “ambivalence,” as Calabresi seems to use it, to refer to the desire of individuals (or society at large) simultaneously to achieve two inconsistent goals.
33. P. 61.
34. Lange v. Hoyt, 114 Conn. 590, 159 A. 575 (1932).
The Costs of Attitudes

sons for drawing a line between protected and unprotected beliefs, as well as between protected and unprotected disadvantage. If tort law protected victims who were members of cult religions, held utterly idiosyncratic beliefs, or had culturally derived disadvantages, the subterfuge embodied in the objective standard of reasonable behavior—the notion that most people are capable of complying with the standard, and capable of complying through roughly the same investment of energy or money—would start to unravel.35

Once we protected one kind of “can’t help” (to use Holmes’ term) solely on the ground that its holder cannot help having it, then it would become very difficult to distinguish it from the other “can’t helps” that the objective standard of reasonableness does not protect. Minelda believes that she is under divine command not to seek certain forms of medical treatment; arguably she should not be penalized for having this belief, because she cannot help having it. Calabresi uses the example of a person who believes so strongly in progress that he never takes a step backward, and consequently is run down because on principle he will not jump back onto the sidewalk to avoid a negligently driven vehicle.36 This person cannot help believing what he believes either. On what basis are we to grant Minelda protection but deny it to him? And if protection were extended to beliefs that people cannot help having, it would be difficult to deny similar protection to the disadvantages they cannot help having.

I am not arguing that it would be impossible to find a distinguishing principle that provides protection for certain personal qualities that cause accidents, yet denies protection to others.37 But applying such a principle without relying on the objective standard of negligence, as qualified by the doctrines Calabresi scrutinizes, would put the law into a very different business from the one it is in now. Calabresi argues for the protection of

35. The current standard governing the reasonableness of beliefs judges them by their place in a “respectable” religion or (if they are nonreligious) their acceptance by “normal” people. Although juries may not be explicitly instructed to this effect (perhaps because we do not like to admit the limits of our tolerance), my sense is that Calabresi’s characterization of the law on this point is on the mark, and that defenses based on cult religions or beliefs that most people would call lunatic are unlikely to be admitted into evidence or, when they are admitted, submitted to juries for assessment. If we decided not to judge beliefs in this way, by their pedigree, then I can think of at least two other options. First, we could import some other, independent, substantive standard for judging whether a belief is reasonable. Unfortunately, no such standard seems to be available, and in any case it would probably be inconsistent with the constitutional pull that Calabresi traces for the law to adopt a single standard. In contrast, we might ask not whether a belief is reasonable, but whether it is reasonable to possess it. The obvious problem with this approach, however, is that once we ignore both pedigree and substance, it is reasonable to hold any belief. A belief is simply an idea one cannot help having. One does not “decide” to have or not to have a belief. One believes or one does not.


37. In a few cases we actually do protect potentially dangerous personal qualities such as bravery. See, e.g., Eckert v. Long Island R.R., 43 N.Y. 502 (1871) (plaintiff’s decedent not contributorily negligent in rescuing child from path of oncoming train, despite risk to himself).
those who have sexual or social status disadvantages. But these are not the only disadvantages that a pluralistic and tolerant society might want its tort law to value and protect. Perhaps we should also accord explicit and special protection to those who have accidents because they are unusually gentle or extremely timid. These qualities make us a more diverse society in much the same way as do the other "cultural" characteristics that Calabresi suggests we consider protecting. The subterfuge hiding the fact that an objective standard of negligence often produces strict liability in cases like these is the assumption that most unreasonable behavior can be avoided by those who commit it, and at a cost that is not excessively burdensome even for unusual individuals. Protecting only beliefs with a "religious" subject matter or majority acceptance as plausible, and protecting only those disadvantages that somehow seem to be unchangeable, helps keep closed the Pandora's box that would be opened by questioning that assumption.

Of course, we might try to eliminate the need for this subterfuge by abolishing the fault system. Calabresi suggests early in Ideals that while he focuses on negligence doctrine, analogous questions regarding the significance of ideals, beliefs, and attitudes arise in strict liability. But I am not convinced that we can talk about these questions in quite the same way in the non-fault world. The language of reasonableness is particularly well suited to the characterization of ideals, beliefs, and attitudes, because it can be used to imply tolerance without suggesting agreement on the merits. This language allows us to ask judges and juries to decide whether a belief is reasonable without asking them to agree with the belief in order to protect it.

In strict liability, analogous issues do arise when we ask whether the holder of a belief is nonetheless in the best position to decide whether to risk an accident. And in a no-fault system such issues are posed when we determine whether to charge holders of risky beliefs more than others for their insurance. But in neither case is it likely to be as comfortable to use the language of reasonableness in deciding whether to burden or to protect the ideal, belief or attitude in question. We are therefore likely to

38. P. 18.
use other language that does the job less suitably.40 No doubt the same message can be sent in strict liability and no-fault, and the same burdens or protections adopted as in negligence. But the message may be sent without the same manifestations of tolerance and clarity of principle. Ironically, then, a chief virtue of the fault system Calabresi has so effectively criticized over the years may be its capacity to give articulate protection to some of the very ideals, beliefs and attitudes that he believes should be championed.

IV. MORALISMS AND EMOTIONS

The last feature of tort law that Calabresi examines is the treatment of moralisms and emotions which, though commonly held, receive far less protection in tort than either disadvantage or belief. These include such feelings as personal attachment to a possession, and the anguish that one individual experiences as a result of someone else’s suffering. Victims who suffer losses in either respect are usually not entitled to recover them in tort. This rule holds even though such losses are not entirely idiosyncratic—most people would suffer similarly under similar circumstances. Sentiment and compassion, and other moralisms and emotions as well, are gifts of the deity we accept, but unlike at least some disadvantages and beliefs, tort law tends to place the burden of accepting these gifts on victims instead of injurers.

One explanation for tort law’s stance might be that moralisms and emotions, such as sentimental attachment to a possession, simply are not as deserving of protection as disadvantage and belief.41 This rationale for the treatment of intangible loss, however, will not explain the denial of dam-

40. For example, consider the way Calabresi would pose the issue in a strict liability setting: “Is this person really best suited to make the choice or will this person’s belief system impede him or her from choosing well? And, if the person is impeded from making choices for or against safety because of beliefs, is there another party available who, if faced with the incentives can make an appropriate choice at little or no cost to beliefs? Does the existence of beliefs make someone other than the believer a better decision maker, a better vicar for society, in opting whether or not to take the deity’s boon?” P. 18 (footnote omitted).

41. Calabresi says that if I own a watch that means a lot to me because it was a gift from my favorite aunt, then for a variety of reasons I am in the best position to decide how to use it and whether to risk or protect it. P. 73. This is a straightforward cheapest cost avoider argument, and would be unremarkable in another place. The central message of Ideals, however, is that sometimes cheapest cost avoider arguments are unacceptable because, though they will reduce accident costs, they burden the wrong people. Should we infer, therefore, that there is nothing objectionable about burdening those who suffer these “fanciful” damages?

Although Calabresi is not as clear at this point as he might be, I think that this has to be a large part of the explanation. Sentimental attachment to a watch simply is not terribly important, and because most people tend to fancy certain possessions, the burden of accepting the gift of sentimentality is spread rather equitably if we award only market value when a tortfeasor destroys such possessions. Because having sentimental attachments is not an activity central to citizenship, and because denying this activity tort protection does not burden any recognizably disadvantaged group, the ordinary incentive-creating goals of allocating tort liability are allowed to operate. Pp. 74–75.
ages suffered by those who witness or otherwise encounter others being injured. Such suffering is intangible but real, and most often the injurer, not the victim, is in the best position to compare the relevant costs and benefits of avoiding the infliction of such suffering. We do not want people staying home out of fear that they will encounter a grisly accident on the street, yet for the most part we deny them compensation even when they are severely upset by injuries they witness. The explanation for denying recovery of these emotional losses cannot be only that we are afraid of fraud, since when we do want to award emotional damages we forge ahead, notwithstanding the possibility of fraud.  

The explanation Calabresi proposes is that the denial of emotional damages may be justified by the “plausible, and perhaps correct” fear that allowing recovery would exacerbate the loss.  Once we grant an entitlement to something, he argues, its loss becomes more troubling; by denying recovery for negligently inflicted emotional harm, we reduce the feeling of outrage that accompanies the loss, reduce the expectation of vindication a victim would naturally feel, and thereby minimize the amount of suffering those who witness accidents will undergo. In short, he believes that sometimes we can serve victims more effectively by denying them recovery than by awarding it.  

Perhaps he is right. But even if the denial of such recoveries sometimes has the effect Calabresi hypothesizes, his explanation for the denial cannot bear all the weight that he places on it. For example, personal injury victims are entitled to recover pain and suffering damages even though denying recovery would, on Calabresi’s theory, reduce the amount of their suffering. He says that pain and suffering is nonetheless made recoverable in these cases in order to finance the contingent fee system, and thereby to pay the counsel fees of personal injury victims who are in court in order to recover for more tangible losses.  But he finds it “harder to understand” the recoverability of pain and suffering (albeit at a lower level) in England, where the contingent fee is prohibited.  In fact, pain and suffering from personal injury probably is compensable for a series of reasons, some of which do and some of which do not obtain in relation to pure emotional loss.  The contingent fee system’s influence cannot entirely ex-

42. For example, a personal injury victim is entitled to damages for pain and suffering, although fraudulent claims for pain and suffering do not seem significantly less likely to be made or easier to police than fraudulent claims for “pure” emotional losses.
43. P. 77.
44. P. 81.
45. P. 81 n.302.
46. For instance, awarding such damages may (1) assure full recovery of out-of-pocket damages that are difficult to prove; (2) counterbalance the cases in which responsible parties are not sued at all; or (3) express moral outrage at the occurrence of suffering for which out-of-pocket damages alone are thought to be insufficient compensation.
plain the recoverability of pain and suffering any more than the fear of exacerbating loss can entirely explain denying recovery of pure emotional loss.

If Calabresi’s unitary explanation of the law’s treatment of emotional loss falls a bit flat, it is nonetheless useful as a foil for his explanation of the cases in which emotional losses are recoverable. In light of Calabresi’s theory, the easy, almost automatic explanation for such cases would be that they are a group in which denying recovery would not reduce suffering. The mother who witnesses the death of her small child will suffer terribly, whether or not she has a pre-existing right to compensation for that suffering.47 But Calabresi does not rest with this explanation. He says that when we deny liability for a category of emotional loss, we signify that we are willing, if not desirous, of becoming accustomed to that kind of loss. In that way we reduce the suffering associated with the loss. It follows that when we allow recovery for pure emotional loss we are affirming that we actually want to be offended, shocked and appalled by the kind of event that produces the loss.48 We are making a statement about the kind of society we want to be in the long run, because by denying liability we would be discouraging the emotion in question.

Some readers are likely to find this whole line of argument a bit preposterous. Surely the reason we award damages to mothers who witness their children’s death is not that we want these mothers to suffer. Calabresi’s answer to this reaction, however, is that part of the function of a rule allowing or denying recovery for emotional loss is to express and maintain the attitudes it reflects. Any such rule is not only directed at those who suffer such loss, but at the society that has adopted the rule. His argument suggests that the expressive and symbolic functions of law serve not only to affirm who we are, but to strengthen our resolve to remain that way. And he warns that what we do as a society with even obscure legal doctrines can very easily cause us to lose something of what we are, not only symbolically but in fact. Calabresi is confident that human beings are highly adaptable, and he is therefore especially concerned that lawmakers be sensitive to their ability to shape tastes and attitudes, purposefully or by accident. The passages in which he speaks about the dangers of human adaptability have an almost dark view of this aspect of human nature, especially for a book that in other respects is so sanguine about our capacity, through law, to achieve our ideals.49

Perhaps the history of this century proves Calabresi to be right. I am a bit more inclined to believe that people are stubborn and quite difficult to

47. See, e.g., Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
48. P. 83.
49. See pp. 81–82.
change, especially in ways that often are important to tort law. Therefore, the symbolic impact of the protections which tort law extends to emotional and other losses seems to me a good deal more important than their practical effect. But on either view, in making law we state both what we think we are and also what we want to become. This expression of ideals, even when it does not shape other attitudes directly, is bound to shape attitudes toward law. These attitudes have a central place in dealing with another problem related to beliefs—how the law resolves the conflict that arises when beliefs clash.

V. Abortion

In certain ways Calabresi's essay on the clash of beliefs is very different from those that precede it. The clash he chooses to analyze—the abortion controversy—is more obviously a public law problem. But just as the book's essays on the private law problems of torts are concerned with ideals and beliefs, so is this public law essay. In the preceding essays, the value conflict is between the protection of disadvantage, belief, or emotional well-being, and safety. In this last essay the conflict is between two different sets of beliefs. Calabresi does not confront the merits of the abortion conflict; instead he argues for resolving clashes of beliefs so as to preserve respect for believing, even when a particular belief cannot be fully protected. He contends that preserving such respect requires an honest approach to issues rather than subterfuges.

In Tragic Choices, Calabresi and Bobbitt defined the subterfuge as a device that hides our inability to have two irreconcilable desires simultaneously. Calabresi does not like subterfuges; he prefers honest solutions whenever they are possible. Apparently, however, there are some good subterfuges and some bad ones; the good ones seem to be those that enable us to achieve both desires, and the bad ones seem to be those that do not, or cannot. For instance, we send euthanasia cases to juries, which regularly acquit without saying why. Calabresi suggests that in so doing we

50. Cigarette smoking, for example, has not declined substantially in the past decade (although the groups that do and do not smoke may have shifted some), notwithstanding the widespread publicity about the dangers of smoking. Consumption of cigarettes by persons eighteen years of age and over declined in the United States from an average of 7.73 pounds per person in 1975 to 6.15 pounds in 1984. See U.S. DEPT. OF AGRICULTURE, TOBACCO: OUTLOOK AND SITUATION REPORT 6 (March 1985).

Similarly, many people still do not wear seat belts when they drive. A 1982 survey conducted in twenty-four states and the District of Columbia reported that more than half of those surveyed had never used a seat belt while riding in or driving a car. Centers for Disease Control, Annual Summary 1982: Reported Morbidity and Mortality in the U.S., 31 MORBIDITY MORTALITY WEEKLY REP. No. 54, at 131 (Dec. 1983).

can say that euthanasia is wrong and yet still permit it.\footnote{2} The subterfuge works, I think, not because it hides very much—most people know that some jurors vote to acquit because they think that euthanasia was justifiable in the case at hand—but because it allows us to say one thing and do another. Perhaps that is all Calabresi means when he says that subterfuges hide something from ourselves. A subterfuge could never satisfy arch opponents of euthanasia, however, because they do not want to have things both ways.

According to Calabresi, \textit{Roe v. Wade}\footnote{3} used a subterfuge that was undesirable in part because it did not work and had little prospect of doing so. The Court held that an unviable fetus was not a person within the meaning of the Constitution, and therefore was not protected by it. This holding was not only a defeat for those who opposed abortion; \textit{Roe} also was problematic for many of those who supported the result the Court reached, because what they wanted was to have abortion be permitted and yet also to affirm life.\footnote{4} That could not be accomplished by saying that an unviable fetus was not a person.

I doubt that there was any available subterfuge that could have satisfied the internally conflicting desires of those who are pro-choice. The one the Court adopted certainly does not satisfy. But no subterfuge could have been acceptable to those who strongly opposed abortion. They would have seen through any attempt at camouflage, whether or not it left those who are pro-choice comfortable doing one thing and saying another. The transparency of many such subterfuges is a strong argument for Calabresi’s contention that an honest solution is preferable to a subterfuge, and that the availability of an honest solution inevitably affects whether a subterfuge is a good one. An honest solution, he argues, minimizes the alienation and sense of exclusion the losers feel upon losing. It can affirm their belief at the same time that the belief is denied full vindication, and thereby underscore both the worthiness of believing and the full membership of the belief’s adherents in the polity. An honest solution need not reject believers or wholly reject their belief, as \textit{Roe} seemed to reject the pure pro-life position; instead it can reject only a particular feature of their belief in a particular context.\footnote{5} Moreover, Calabresi says, on an issue about which many people each hold beliefs that are not entirely consistent, an honest solution reflects the internal conflict that they feel as well as or better than any subterfuge.\footnote{6} It allows the winners to do one
thing and at the same time to assert both of the conflicting things they believe.

Calabresi argues that an honest solution to Roe was available and that it might have been used to great effect. The Court should have seen Roe not as a conflict between those who believe life begins at conception and those who believe it begins only later, but between two other values: equality of participation in sexual activity by women, and the preservation of life, even if not fully developed. He believes that an opinion written in these terms, regardless of the result, would have spoken to the ambivalence many people feel in choosing between these values. The Court could have affirmed the value not given primacy and provided the losers with reason to hope that the value they cherish would not be abandoned by society. That would have been especially important in Roe because, in Calabresi’s view, the value rejected was held by “highly defensive groups comprised in significant part of recent immigrants.” Such an opinion would have heeded the lesson of tort law’s treatment of emotional losses, and recognized that special efforts must be made to preserve values that cannot be protected in a particular case, for failure to protect these values runs the risk that society will become callous toward them. In Roe the Court opened new wounds when it failed to recognize and capitalize on society’s ambivalence about abortion.

It is difficult to disagree with Calabresi’s argument that honesty is usually the best policy, and that those whose beliefs do not prevail in a conflict should be made to feel that they remain full and respected members of the polity. I find it much more difficult, however, to be as optimistic as Calabresi seems to be that honesty can achieve this aim. Calabresi shows remarkable faith in the power of the words and formulations of a judicial decision to mollify the understandable passion that is generated when beliefs clash. The view that lost out in Roe, for example, was and still is deeply held. That view often has its source in a religious belief of great importance to its adherents. For these people, judicial recognition of the worthiness of the belief that abortion is wrong at the same time that the belief is denied judicial vindication probably would have been of little consolation, even at the time Roe was decided. Perhaps men and women who share most of their values can maintain a personal sense of commu-

57. P. 99.
59. P. 96.
60. To support his argument, Calabresi describes his discussion of the issue with an anti-abortion Senator and a Catholic Bishop, both of whom indicated that they would not have been offended (as they apparently were by Roe) by an opinion which recognized legal value in fetal life, even if it found other, egalitarian values to be dominant. P. 110. Undoubtedly some people would have this reaction; the issue, however, is how many would not.
The Costs of Attitudes

... while they fervently disagree about one or two fundamental matters. That is not easy even for friends, though it can be accomplished. But whether mutual respect among those who violently disagree is enough to hold a political community together is a separate question. And it is a question on which the jury deciding the fate of our form of democracy is still out.

VI. AMBIVALENCE

The Calabresian vision of the functions of judicial decision thus seems to presuppose the kind of community in which people can tolerate fundamental differences of belief, just as they can cherish disadvantage and idiosyncracy. Yet for those who conclude that shared civility and tolerance of diversity are not enough to maintain a modern political community, he has uncovered something else that we share as well. Calabresi’s discussions of disadvantage, beliefs, moralisms, and emotions are in a sense only examples of a larger point that I think lies behind his entire analysis.

Calabresi actually seems to envision a community in which ambivalence itself is recognized to be one of the principal gifts of the deity. Each of his case studies, in fact, is ultimately about the way the law handles ambivalence. We want to protect cultural and ethnic diversity, but simultaneously we want to prevent the extra accidents that providing protection would cause. We want to accord everyone freedom of conscience and belief, but we want to invoke an objective standard in assessing the reasonableness of risky behavior, even when that behavior is based on conscience or belief. We want to provide compensation to those who suffer emotional loss through the negligence of others, but we believe that sometimes we can reduce such loss by denying compensation for it.

Even when we disagree about which of these conflicting desires to pursue, however, Calabresi seems to suggest that we often share ambivalence about that choice. It may well be that for his scheme ambivalence is our most important common characteristic, because it may be the source of our ability to tolerate, even welcome, disagreement and difference. Recognizing our ambivalence may help teach us what we have in common with those who disagree, for such a recognition may demonstrate that our dominant beliefs are not our only ones. In short, by accepting the gift of ambivalence, we have obtained the ability to have complex emotions and multiple desires. But like any of the deity’s gifts, we must pay for ambivalence. It can produce severe social tension, hypocrisy and paralyzing contradiction. Ambivalence can prevent us from being fully satisfied by those things we achieve, because we also want other things which are inconsistent with those achievements.

When we are all ambivalent in the same way, subterfuges may help to
reduce the costs of our ambivalence. But we are rarely ambivalent in exactly the same way, and when we are not, subterfuges place the burden of accepting the gift on those whose views (more accurately, those whose predominant views) lose out. And it is a double burden, for such views are not only rejected but also ignored. Just as the economic costs of accidents can be spread through careful imposition or denial of tort liability, the costs of ambivalence can be spread, though not always through the same devices. Honesty about choice in the face of ambivalence can spread at least some of the cost of accepting the gift to all of us. Honest can force all who are ambivalent to admit that something they care about cannot be fully protected. The core of Calabresi’s vision thus seems to be that, when the ambivalence of individuals is mirrored in the social clash of beliefs, contending forces actually have the potential to recognize some of their own views in those of their opponents. Legal decisions can certainly reflect this recognition. And great decisions may even help bring this recognition into being and deepen it, thereby alleviating conflict instead of furthering it.

This is certainly a hopeful vision—perhaps, as I suggested earlier, too hopeful. The mutual recognition of ambivalence is precious little to bind us together in the face of deeply conflicting ideological and religious differences. Nor does Calabresi promise a systematic formula for making legal decisions when important values conflict. He seems to believe—and I agree with him—that no single formula at a high level of generality is available even in principle, at least not available now. His is a common law approach, moving from concrete problems to generalizations that are more procedural than substantive; he prescribes ways to implement the values we have decided to favor while moderating the conflicts produced by these decisions. He directs us to recognize that moralisms, faiths and beliefs, even those that are rejected, must be respected; to avoid subterfuges; and to use honest solutions that trigger or enlist sympathy for the losing side.

Although Calabresi’s analysis may thus lack the theoretical generality for which some of his past work has created a taste, it also possesses a compensating virtue. It may mark the opening of a dialogue between him and those who see social division and disagreement as fundamental obstacles to the maintenance of legal and political community. One of the significant advantages of Calabresi’s recognition of ambivalence and the approach he proposes is that he is willing to take the world as it is, seizing attitudes that seem to separate people and showing how a deeper appreci-

61. P. 98.
ation of their complexity might reduce that separation. Calabresi demands no new community or global change in our values as a prerequisite to principled lawmaking; instead he suggests a way for law to deal with conflict and apparent contradiction that accepts these phenomena without surrendering to them. Indeed, in a very real sense he wants law to capitalize on conflicts and contradictions in order to teach us about ourselves.
Political Philosophy, Morality and the Law


Carl F. Cranor†

James L. Dronenburg served nine years in the United States Navy as a linguist and cryptographer with top security clearance. He was discharged in accordance with a Navy "instruction" which states that any member of the Navy "who solicits, attempts or engages in homosexual acts shall normally be separated from the service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale."¹

On appeal, the United States Court of Appeals for the District of Columbia upheld Dronenburg's dismissal.² His appeal and the controversy surrounding it raise several questions about the relation between morality and law. The first and most obvious question concerns the extent to which a legislature ought to enforce a community's moral code. Ought there even be laws on the books forbidding homosexuals from serving in the Navy or from having homosexual relations? A second question concerns the moral evaluation of laws passed by the legislature or adjudicated by judges: For example, was it just to discharge Dronenburg from the Navy because of his sexual preference?

A third and less obvious question concerns the nature of law itself: is there a necessary connection between law and morality such that laws have no authority unless they have a certain moral content? This last issue is raised in *Dronenburg* with respect to whether morality necessarily informs constitutional interpretation of Dronenburg's rights. Professor Ronald Dworkin addresses this issue explicitly:

Academic lawyers have developed a large number of theories ranging from the claim that the only fair interpretation [of the Constitution] is one limited to what the "framers" actually contemplated, in concrete detail, to the claim that a fair interpretation is one that treats the framers as having laid down general concepts of political principle that the Supreme Court must fill out through philosophically defensible accounts of those concepts.

The Circuit Court opinion in Dronenburg's case, written by Judge Robert Bork, takes the first view quoted above. The opinion obviously reflects the views of Judge Bork, who is "well known . . . for his extremely conservative views on constitutional law. He is fond of saying that judges should enforce the law they find, not make up new laws to suit their own political convictions." Yet if the views of prominent legal philosophers are correct, one may not be able properly to interpret hard cases without resort to political philosophy and moral principles. Professor Dworkin, for example, has argued at great length that judges must find political and moral principles that best "explain and justify" existing law—that political philosophy and moral principles are essential to understanding and interpreting law. Once identified, these principles must be used to settle hard cases such as *Dronenburg*. Thus, contrary to the D.C. Circuit opinion, Dworkin argues that a line of cases based on a defensible political principle gives Dronenburg privacy rights in this case, and that these rights were violated by his dismissal from the Navy.

What is important for my purposes is not the *Dronenburg* case in particular or even the controversy between Dworkin and Bork arising out of it. The troubling questions posed by this case dramatically illustrate the

---

3. There are two different interpretations of this claim: first, morality may be essential to interpreting a particular provision of the Constitution, such as the First or Fourteenth Amendments; second, morality may be a necessary condition of any law's validity in a legal system.

4. Dworkin, supra note 1, at 29. In addition, Dworkin claims that both of these philosophical accounts necessarily include reference to principles of political morality. See infra text accompanying note 94.

5. Id. at 27.

6. Dworkin's views with respect to the two views mentioned above, see supra text accompanying note 5, are frequently ambiguous. For a critique of Dworkin's more recent writings, see Hutchinson, Of Kings and Dirty Rascals: The Struggle for Democracy, 9 Queen's L.J. 273 (1984).

7. Dworkin, supra note 1, at 27.
critical importance of political and moral philosophy to settling disputes such as the one between Dworkin and Bork, to doing legal philosophy, and perhaps to understanding and interpreting the law. Two excellent, introductory books of legal philosophy, The Philosophy of Law: An Introduction to Jurisprudence by Jeffrie Murphy and Jules Colman and Ethics and the Rule of Law by David Lyons, address these issues and guide us through difficult controversies such as that posed by Dronenburg.

Because of the importance, which has recently become more prominent, of political philosophy and morality to the law, I focus on two themes running through these works. The first theme, a traditional issue of legal philosophy, asks what justifies government interference with our lives through both criminal law and contract law. This theme has been raised anew partly by a conservative presidential administration, partly by that administration’s judicial appointees (such as Judge Bork), and partly by the writing of libertarians such as Robert Nozick. All ask us to rethink the justification of governmental interference in our lives.

The second theme stresses the importance of ethical theories to political theory and to legal interpretation. It arises from two contrasting philosophic concerns: the importance of normative ethical theories for legislation and for adjudication; and increasing philosophic skepticism about the extent to which there are correct moral theories. If recent philosophic skeptics are correct to doubt the justification of moral principles, where does this leave the law, which generally looks to such principles for its underpinnings?

I. An Overview

Ethics and the Rule of Law and The Philosophy of Law address many of the same issues. First, both discuss moral theory and its application to law. Discussions in both include considerations of normative ethics (general theories designed to guide agents in their actions, or in the case of law, to guide policy makers and judges in crafting legal policy), and both raise and address meta-normative questions of moral skepticism, sub-


9. Nozick argues that it is permissible for the state to protect citizens from one another, but apart from such minimal interferences, the state should not interfere with its citizens’ lives. In particular, the state should not redistribute wealth in order to provide benefits, even for those worst off. R. NOZICK, ANARCHY, STATE AND UTOPIA 26-28, 333-34 (1974).


11. In his chapter on moral theory and the law, Murphy also suggests an interesting Kantian theory for interpreting the First Amendment which merits more attention than can be given here. See MURPHY & COLEMAN, pp. 91-101.
Philosophy, Morality and the Law

jects that have increasingly plagued philosophers, and that have recently appeared in the legal literature.\(^{12}\) I return to some of these issues below.\(^{18}\)

Both books also discuss the nature of a legal system and what counts as a law within a legal system.\(^{14}\) On this topic, Murphy\(^{16}\) tends to describe and explicate the traditional positive and natural law positions, as well as Dworkin’s more recent “third theory of Law,” (which to a large extent resembles natural law theories). Lyons, on the other hand, not only describes the positive and natural law positions and their major problems, but joins issue with each position, providing counter-examples and counter-arguments. Thus, reading Lyons gives one a feeling not merely of watching the debates being set out, but of being taken carefully through them.

In addition, both works discuss the nature of criminal law and criminal punishment,\(^{16}\) but both express unease with the traditional justification of punishment, to which I return below.\(^{17}\)

Beyond treatment of these common subjects, the books diverge. In his sixth chapter Lyons considers how legal paternalism, enforcement of the community’s moral code, and free speech define the moral limits of criminal law. In the last chapter he considers procedural values, treating like cases alike, and the ideal of the rule of law in a community.

Coleman’s two chapters are “Philosophy and Private Law,” a discussion of a few philosophic problems of torts and contracts, and “Law and Economics,” a philosophic discussion of the relatively recent field of law and economics. The strategy in these chapters is different both from Murphy’s and from Lyons’ contributions, for in the private law chapter Coleman, after introducing torts and contracts, focuses on a particular problem of each.\(^{18}\)

\(^{12}\) The debate engendered by the Critical Legal Studies movement hinges in large measure upon skepticism toward traditional schools of legal theory which suggest that law can be determinate and objective. See Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984).

\(^{13}\) See infra Part IV.


\(^{15}\) Although The Philosophy of Law is co-written, Murphy and Coleman have distinct responsibilities: Murphy is responsible for the Introduction and Chapters 1–3 and Coleman is responsible for Chapters 4–5.


\(^{17}\) Lyons, p. 151; Murphy & Coleman, p. 114. In addition, Murphy suggests an interesting retributivist treatment of capital punishment. Id. at 144–48.

\(^{18}\) For example, with regard to torts Coleman argues that neither retributive justice (the requirement that those at fault forfeit) nor corrective justice (the requirement that unjust gains be disgorged) requires a faulty agent to compensate automobile accident victims. His careful discussion of retributive, corrective, and distributive justice shows the value to the law of thinking through such moral matters, for they provide the justification for tort law rules. Murphy & Coleman, pp. 174–89. In his discussion of contract law, Coleman considers a current dispute, the extent to which the state is justified in interfering with contractual arrangements between two individuals, a topic discussed be-
Coleman's treatment of the economic theory of law provides both an excellent introduction and some little known objections to the theory by pointing out major problems with the Coase theorem and with Posner's economic analysis of law. Coleman is not opposed to economic analysis of law, but he is a powerful critic who presents a careful, balanced view of law and economics which should be valuable to practitioners as well as to philosophers.

Coleman's chapters on private law are a welcome contribution. For too long philosophers have been concerned simply with traditional questions such as the nature of law, criminal law, and to some extent with issues of constitutional law. With philosophers' increasing legal sophistication, however, we have begun to see philosophic consideration of other areas of law, such as torts and contracts.

One final preliminary point should be made. Both volumes are well written, but Murphy's contribution is especially good reading.

II. THE JUSTIFICATION OF LEGAL COERCION: CRIMINAL LAW

Both books grapple with the proper role of political philosophy in interpreting law and in doing legal philosophy. Both Murphy and Lyons raise this issue with respect to criminal law, while Coleman considers it in discussing state interference with contracts.

Lyons begins with a fundamental question about legal coercion: Because "law is morally fallible," one cannot assume that "legal uses of coercion are justifiable," and therefore it is "appropriate to ask for a defense of legal coercion." He first looks for such a defense in a traditional retributive theory of punishment. Even as well-developed a theory as Kant's has difficulty justifying legal punishment, he claims, for it does not follow from the premise "that someone deserves to suffer because he is wicked . . . that I or anyone else has the right to impose punishments in order to insure that result." Retributive theories generally "give us no idea how one person acquires the right to punish another or, if they do, they give us no idea why the state should have a special role in punishment. They ignore the political context within which legal punishment occurs." It is not entirely clear what justifies giving even a victim a right to punish others.

low. Id. at 189-93.
20. Id. at 151.
21. Id. (emphasis added).
22. As Lyons notes:
If others fail to respect my rights or threaten to infringe them, I can be justified in complaining, demanding compensation, and acting in other ways that would not ordinarily be warranted. It does not follow, however, that I may use force whenever my rights are
As problematic as individual action is, state action is more difficult to justify, because "[i]t does not merely enforce my rights, but treats the matter as one of public concern." While simplified retributive theories cannot justify state coercion, Lyons believes that utilitarian, and perhaps hybrid retributive-utilitarian, theories can.

Murphy is much less sanguine. He argues that neither utilitarian nor retributive rationales clearly justify criminal law. For example, utilitarians would make criminal and punish seriously harmful conduct, such as murder, rape, and burglary. Yet the fact that conduct is seriously harmful is not sufficient reason to make it criminal, for neither defamation nor unconscionable contracts, although arguably quite harmful, are now criminalized in the United States. Furthermore, conduct need not be seriously harmful to be made criminal, for car theft, seemingly a clear case of criminal misconduct, does not, except in unusual cases, cause such harm to the victim. Of course, car theft violates one's rights, but so do libel and unconscionable contracts.

Murphy also intimates that retributive theories, in claiming that the purpose of criminal law is to ensure that criminals receive their just deserts, fare no better. Both the libeler and the maker of unconscionable contracts are "actively evil and hurtful," yet the criminal law punishes neither. Perhaps Murphy thinks that just deserts is not a necessary condition of criminal punishment: After all, strict liability laws are part of the criminal law (although they are not the 'core' criminal offenses), and even the violators of core criminal offenses are not always "actively evil and hurtful." Murphy concludes that "the issue of criminalization just may be too complex to be settled simply by trotting out the common slogans, either utilitarian or Kantian."

threatened or infringed, either to protect them or to secure an appropriate remedy. That would seem to depend on further circumstances, including the importance of the right and what else may be at stake.

Id. at 152.
23. Id.
24. Id. at 157. Indeed, Lyons suggests that utilitarian theories provide a better answer by making punishment useful. Id. at 155-57.
26. Id. at 114-15.
27. Id.
28. Murphy further explains:
My loss here will be one primarily of money and convenience, and so long as I am paid off for these injuries (either by an insurance company or the thief himself if caught and solvent), then it would be hard for me to defend the claim that I had been seriously harmed by the theft.

Id. at 115.
29. Id.
30. Id. at 115.
31. It may be, for example, that large numbers of auto theft cases are instances of joyriding or other relatively innocent pastimes.
To understand and justify legal coercion, Murphy claims we must consider the broader question of state interference in our lives. A legal system can protect rights yet have the potential to interfere with our liberty through several institutional mechanisms: property, contract, tort, and criminal law. A proper justification of legal coercion should acknowledge differences among these institutional mechanisms and define the “appropriate” one to protect the rights in question. Furthermore, if one places a high value on liberty, as Murphy does, one would choose the legal mechanism that minimizes interference with one’s liberty and one’s rights. Let me explain.

Rights might be secured by means of property rules in conjunction with contract law: a right to X (my house or car) secured by a property rule “requires that others bargain or negociate with me before acquiring X, that they cross the border defined by my right to X only with my consent or permission.”\(^{33}\) In addition, contract law makes it possible to dispose of property by structuring private relationships which, if violated, can be enforced by the victim.\(^{34}\) Together, property and contract law protect my property interest in my car because no one else has a right to my car unless she contracts with me for a transfer of the property.\(^{35}\) Contract and property law involve minimal state interference because the state intervenes only when the parties invoke its judicial processes to resolve disputes about the proper interpretation of the contract’s terms to enforce the court’s decision.

One’s rights may also be secured by means of tort law liability rules.\(^{36}\) For example, my right not to have my car stolen is secured by a liability rule as long as I am compensated properly when my car is stolen.\(^{37}\) Liability rules secure rights with minimal state interference because the state intervenes only if a victim brings suit, and then only to set proper compensation for the violation and to enforce the judgment. A deficiency of relying only on tort law rules to protect rights is that an agent may choose to violate my rights and compensate me after the fact.

Finally, an inalienability rule and the criminal law may secure my right not to be killed. “My right to X (my life, say) is such that even I

---

33. *Id.*
34. *Id.* at 189–93.
35. Contract law alone is not a sufficient means of protecting one’s property rights, for one needs a guarantee that those rights will be protected so that they can be contracted away. In short, another kind of legal protection is necessary to ensure that one’s rights, e.g., to property, exist to be contracted away.
36. “My right to X (my security against being harmed by the reckless driving of others, say) requires that others compensate me (pay me damages) for crossing the border defined by my right to X.” MURPHY & COLEMAN, p. 116.
37. Although we do not typically think of car theft as a tort, Murphy invites us to imagine securing our rights in our cars by means of the tort law.
Philosophy, Morality and the Law

may not bargain it away and thus others are prohibited from crossing the border defined by the right even if they obtain my consent or even if they are willing to compensate me fully for any resulting harm. 28 Criminal law protects rights by publicly announced rules that state that border crossings are prohibited and, should the border be crossed, that a public agency will press legal action to punish the violator. 29 The criminal law has considerable potential for interference with one's liberty, for it not only forbids certain conduct, but concentrates the enforcement mechanism in the state and threatens harsh treatment and condemnation of the violator.

What, though, suggests that criminal law is the appropriate mechanism for protecting one's rights? 40 Murphy begins with the premise that liberty is a good thing, interferences with it are bad, including state interference, and argues that we should choose those legal mechanisms that interfere least with our liberties while protecting rights we regard as important. This view is consistent with both the libertarian and the liberal tradition. His idea is that as citizens we should think of governmental protection of our rights as analogous to our hiring someone (a gunman?) to protect us. The gunman might protect our legitimate interests, but, because he might also invade them, we should give him limited enforcement powers.

Thus, Murphy argues that rights should first be secured by contract and property rules, because these are the least intrusive governmental mechanisms. Property and contract rules will not always be sufficiently protective, however, because in many circumstances one cannot negotiate in advance with everyone who might invade one's interests. Thus, when property and contract rules fail, tort liability rules may be required. At times, however, even liability rules will provide insufficient protection either because some harms, such as death, are incompensable ("the incompensability thesis"), or because special incentives are needed to comply both with the "established structures and mechanisms of private protection" and with the rules of important social institutions ("the compliance thesis"). 43 The incompensability thesis applies to core areas of

---

39. Id. at 117, 167–71.
40. One’s answer to this depends upon whether one follows Coleman or Murphy. Coleman seems to assume that criminal law is justified, and argues that, given criminal law, there is a need for tort law to compensate victims for their losses. Id. at 168–69. But Coleman leaves unanswered the threshold question of justification raised by Murphy.
41. The metaphor of a gunman has long been a favorite of legal philosophers. See, e.g., H.L.A. Hart, The Concept of Law 18–25 (1961).
42. Murphy & Coleman, p. 121.
43. Sometimes Murphy appears to be defending only mechanisms of private rights protection, e.g., property or tort law, but at other times he takes up basic institutions in society, e.g., the economic system. I treat both together under his institutional protection thesis.
criminal law, such as laws forbidding murder and rape, while the compliance thesis applies to crimes such as auto theft where people attempt to bypass established and useful mechanisms of economic exchange and property transfer.\footnote{44. MURPHY \& COLEMAN, pp. 121–22.}

In short, to justify the use of criminal law, legal philosophy must resort to political philosophy and justifications for having the state at all: Liberty-loving people would create a criminal law only to provide additional protection against incompensable harms, to secure their most important values,\footnote{45. Murphy also thinks the criminal law should protect society's most important values, \textit{id.} at 120, but does not highlight this as a separate reason on page 121. Rather, he seems to lump it under his rationale of "incompensable harms."} and to induce potential violators of rights to comply with essential societal structures. If rights can be secured through private law, Murphy argues, there is no case for using the criminal law.\footnote{46. For example, Murphy argues, in the case of defamation and libel: i) our society is not held together by reputational respect, the way it is by our economic system; ii) private remedies work well enough in most cases to protect reputations; but iii) even where they do not, criminalization might be too drastic a response in light of a state's responsibility to protect the entire system of rights, including free speech and publication. Thus, the aim of protecting reputational respect, which might be a permissible aim of the criminal law, is outweighed by potential and actual threats to free expression. \textit{Id.} at 122.}

Murphy's theory is important for demonstrating the need to bring the larger perspective of political philosophy to bear on legal philosophy.\footnote{47. For a more elaborate presentation of this theme, see Murphy, \textit{Retributivism, Moral Education, and the Liberal State}, \textit{4 CRIM. JUST. ETHICS} 3 (1985).} As interesting and intriguing as his particular thesis is for justifying the use of criminal law to protect rights, the incompensability and institutional compliance theses are problematic. First, it is not entirely clear what should count as "data" by which to judge his theory. Are we to take all criminal laws as we find them?\footnote{48. Should we consider as legitimate parts of criminal law those rules forbidding homosexual conduct between consenting adults, prohibiting the use of marijuana, or prohibiting the desecration of corpses? Murphy issues a general disclaimer that all is not "conceptually and morally acceptable in the criminal law as we find it" without specifically addressing these traditional examples. MURPHY \& COLEMAN, p. 116.} Similarly, are we to accept all conduct not presently criminalized as conduct that should be beyond the pale of the criminal law? Despite some comments indicating that his standard is simply a description of the existing law, Murphy's theory is at least partially normative.\footnote{49. \textit{Id.}, p. 116.}

Second, Murphy's argument for using the criminal law to protect institutions and mechanisms that prevent society from coming "unglued" provides a \textit{prima facie} justification for the criminalization of a wider range of conduct than recent discussions in legal philosophy have been willing to tolerate and a wider range than Murphy himself may be willing to defend. It is thus plausible to regard our moral relationships and moral in-
stitutions as being as important to the existence of society as our economic institutions. These “moral relationships” might include not only rules forbidding the grosser forms of violence, theft and deception, but also rules protecting family relationships, such as the monogamous heterosexual marriage. If so, then it may be a permissible use of criminal law to prevent persons from ignoring those rules. This rationale may permit criminal laws forbidding adultery and homosexual acts between consenting adults insofar as these might threaten marital and family relationships.50

Third, Murphy’s incompensability rationale for justifying use of the criminal law is not fully explanatory. Murphy suggests that the fact that a violation of rights is incompensable may merely be a sufficient condition for using the criminal law, not a necessary one.51 This is problematic. Once a victim is dead, for example, he and his family have suffered an incompensable harm in Murphy’s sense, yet not all liability is criminal. What explains the difference in treatment between a wrongful death in torts and a criminal prosecution for some form of homicide? Following others, I suggest that in addition to the preventive and harsh treatment function of the criminal law, there is also a condemnatory, expressive function that aims at condemning the agent who performs certain kinds of acts.52 In focusing on the protective aspect of the criminal law, Murphy seems to have overlooked the peculiarly condemnatory, stigma-assigning, expressive function of punishment. Criminal law emphatically condemns the individual who causes such harms.

Fourth, we can get a sense of the limited scope and other shortcomings of Murphy’s theory of justification by considering how one cluster of rights—protection of workers’ health in the workplace—might be pro-

50. Murphy’s justification for criminalizing conduct invites the charge that he is committed in principle to protecting established institutions, no matter what they are, including moral or religious institutions. His argument further invites the criticism that he is committed to a kind of legal moralism: The mere fact that conduct is immoral according to established societal institutions provides at least a morally good reason for making that conduct illegal, even if it does not always provide a morally overriding reason for criminalizing conduct. It is surprising to find Murphy committed in principle to such a view, for it is one liberals traditionally have renounced. Some, including H.L.A. Hart, seem to have suggested that it is mistaken in principle to believe that the fact that conduct is immoral provides a reason for criminalizing it. Yet, even if immoral conduct provides a principled reason for making such conduct illegal, this reason does not necessarily outweigh other considerations. See Cranor, Legal Moralism Reconsidered, 89 Ethics 147 (1980). Murphy seems to have the theoretical apparatus available to take this second position, for as we have seen, supra note 47, he uses such an argument with respect to defamation. Thus, he could argue with regard to violations of the community moral code that the attempt to prohibit such violations by means of criminal law so greatly interferes with other values that the state might settle for less than complete protection. Nevertheless, his particular justification of the criminal law as part of the larger justification of the state gives legal moralists a foot in the door that some liberals would not find desirable.

51. Recall Murphy’s argument that auto theft would seldom result in incompensable rights violations, see supra text accompanying note 29.

tected by contract, tort, criminal, and regulatory law. Certainly it is conceivable to use all four areas to protect this right; historically, some form of each kind of protection has been used.

We might imagine, as was once surely the case, that an employee's protection was secured by contractual agreement between him and his employer. This arrangement, however, has obvious problems: Employees may not be fully informed and sufficiently aware of potential harms to protect themselves from risks, and their bargaining power is almost never equal to that of their employers. At present, employees are protected from workplace health hazards by both workers' compensation law and tort law. Tort law, however, often provides inadequate compensation, for in nearly all cases compensation comes only after the fact of injury. When one suffers a terminal illness, compensation is small consolation. When workplace illnesses are caused by carcinogenic substances, not all victims will be compensated, because the requisite causation is often quite difficult or impossible to establish. Consequently, tort rules may provide little deterrent and preventive effect. A company may choose to conduct business as usual, gambling that the legal costs, discounted by the probability of plaintiffs' chances for success, will be less than the costs of prevention.

In addition to state workers' compensation statutes, the Occupational Safety and Health Act of 1970 seeks to protect workers from employment-related harms. The Act is explicitly preventive, not reparative or compensatory as in tort law, nor condemnatory as in criminal law. Regulatory law is superior to tort law in protecting employee health in several respects. It is much easier to establish probability of harm to a group (as required by regulatory law) than to show probability of harm to an individual (as required by tort law). Second, requirements for proof of causation may well be lower for preventive regulations. Additionally, preventive measures may be preferable, for it is possible that firms will be judgment-proof against tort claims.

55. In American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981), the Court reported cost estimates for instituting protective standards for workers exposed to cotton dust ranging between $543 million and $1.1 billion. Id. at 524-25. Yet, the Charlotte Observer reported that there had been few workers' compensation payments to disabled workers and presumably no tort settlements. Drogin, A Story of Dust, Delays—and Death, Charlotte Observer, Feb. 10, 1981, Special Section at 2, col. 1.
57. See Black & Lilienfeld, supra note 54, at 777.
Finally, criminal law has been used recently to try to secure employees' health rights in the workplace. A state court in Illinois found three former executives—president, plant supervisor, and foreman of Film Recovery Systems—guilty of murder for the death of one of its employees, Stefan Golab, who had been exposed to canisters containing residues of cyanide. The court found that the company's officers were aware of the risks posed to its employees. 59

These examples sharply raise Murphy's questions of justification. Although exactly the same right is at stake in each case, 60 the examples challenge Murphy's liberal and libertarian assumptions. Murphy's general strategy is to argue that we should "hire" the state to protect us from various rights violations, but should minimize the state's power to secure our rights.

Assuming this, how can one justify preventive regulations such as OSHA? Many of the forward-looking utilitarian principles that justify tort law compensation also support preventive regulations. 61 In addition, if regulatory law seeks to prevent incompensable harms, part of Murphy's rationale for using criminal law may provide reasons for using regulatory law as well. If, however, Murphy seeks to minimize state interference with citizens while protecting their rights, how must he view regulations to prevent injuries that often restrict behavior prior to harm? Murphy's assumptions about minimizing state interference may be inconsistent with his incompensability thesis and with the use of regulatory law to prevent incompensable harms.

Although I have no difficulty with preventive regulations, a political theorist who seeks to minimize state interference may. Of course, Murphy could argue that there should be no preventive measures, but I am not sure that he would want to say this, for employees would lose important protections of their right to work in a safe environment.

One could also argue that while tort law is an appropriate method for preventing and compensating employment-related harms, it is not an efficient method. Thus, it is largely a matter of utility or efficiency that preventive regulations rather than compensatory torts are used. Still, this logic has two problems: It ignores the extent to which regulatory law, in contrast with tort law, may interfere with an employer, and it relies on a utilitarian justification which Murphy may find objectionable.

60. The Film Recovery Systems case makes the point that the justification for using the criminal law rests not only on preventive aims, but also on condemnatory and expressive aims.
The use of preventive regulations in the area of workplace health protection conflicts with Murphy's presumption against state interference. The conflict raises several questions: How strong is Murphy's presumption? Would he permit efficiency arguments to overcome this presumption? Or would he permit antecedent state interference because of the especially important values of health?

One may ask to what extent the justification of regulatory law depends upon matters of moral principle, and to what extent it depends upon matters of fact, of convenience, or of efficiency. These important and timely questions have been raised by both Lyons' and Murphy's approach to justifying legal coercion. It is unusual for contemporary legal philosophers to raise such general political philosophical issues. Murphy has given the debate on these matters new importance.

III. Contract Sanctions and the Justification of Legal Coercion

Political philosophy is central to the justification not only of criminal punishment but also of sanctions in contract law, a topic which Coleman considers. Contract law, in contrast to criminal law, is private in two senses: Contractual norms are self-imposed and enforced privately.62 The nature of contracts and contract law raises the question about the state's proper role in enforcing what are essentially private arrangements. Coleman suggests two answers: One might deny that contractual norms are private; or one might hold that "the state has a legitimate interest in providing the parties with access to the public power in the event one or the other of them fails to live by the terms of the bargain."63 One might hold the latter view either because state enforcement of promises is necessary for the functioning of private markets64 or because the law ought to enforce what is morally correct;65 it is right to keep promises, wrong to break them. Coleman disagrees with both rationales for the latter view, because he believes that contract law does not entirely or even primarily enforce responsibilities derived from promises. Not all promises are legally enforceable; the law of contracts "imposes duties in some cases where no promise has been made,"66 and fails to enforce unconscionable contracts.67

62. Murphy & Coleman, p. 190.
63. Id.
64. "Traders in markets might have incentives to defect from their bargains, so everyone who might make a bargain has an interest in having the other party held to the terms of the bargain. It is in everyone's rational self-interest therefore, for a state to provide for the enforcement of agreements."
65. Id. at 190.
66. Id. at 190-91.
67. Id.
One major issue between Coleman and someone who holds that contracts derive from promises is whether courts are permitted to impose external standards of justice and public policy in settling contract disputes, or whether such standards are irrelevant to a private dispute where parties create their own legal responsibilities.\(^6\) This issue mirrors a central question of contract theory: Does "contract law enforce promises or does it enforce external standards of justice or utility, and is it therefore an appropriate institution by which a state can legitimately seek to promote its conception of the public good?"\(^6,9\)

There are several manifestations of this issue. One concerns the proper measure of damages for breach of contract:\(^7\) expectation, reliance, or restitution damages.\(^7\) If reliance or restitution damages are awarded, courts seek to execute corrective justice, but corrective justice is usually associated with torts.\(^7\) Indeed, Coleman, toward the end of his discussion of contract law, notes the view that breaches of contracts are themselves torts.\(^7\) In order to evaluate his conclusion, issues he did not consider regarding the justification of contract damage awards must be examined.\(^7\)

Whether expectation, reliance, or restitution damages are appropriate for contract breaches is an issue that has recently received considerable attention. Patrick Atiyah argues that, since expectation damages arose in a particular historical period and now may be in decline, they should no longer have the prominence they have acquired.\(^7\)

---

68. Id. at 205-06.
69. Id. at 193.
70. Id. at 192. Another concerns the possibility that contract law may also enforce an ideal of distributive justice. Enforcing a distributive ideal might well allow the state greater intrusion into private arrangements. Id. at 192-206.
71. Expectation damages awarded upon breach of contract seek to provide to the plaintiff what she would have received had the contract been fulfilled. Reliance damages provide compensation for losses or damages the plaintiff suffered because she relied upon defendant's promise of performance. Restitution damages aim to prevent any wrongful gain on the part of one who reneges. See id. at 192-93.
72. [The view that contract law seeks to do justice between the parties . . . is very closely tied to the view that contract law actually imposes external norms, not unlike those imposed in torts—i.e., the tort prohibition against wrongful gain (which in contract is unjust benefit rectified by restitution damages) and that against imposing wrongful losses (which in contract becomes wrongfully induced reliance rectified by reliance damages). Id. at 193.
73. Id. at 206-07.
74. The following discussion is taken from C. Cranor, Damages and Supervening Impossibility in Contracts and Promises, (delivered to the Pacific Division Meetings of the American Philosophical Assoc., Mar. 25, 1982).
75. P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Atiyah argues that expectation interests were not protected in the law before the late eighteenth century, but grew into prominence in the nineteenth century. Id. at 142. During this period, the wholly executory contract, a contract agreed to, but not yet acted upon, or perhaps not even relied upon by either party, came to be the paradigm of a legal contract. Id. at 399-505. Since the late nineteenth century, the award of expectation damages has declined somewhat, although in theory it remains the paradigm sanction for
This argument has inspired a defense by Charles Fried of expectation damages that is based upon his conception of promising and his notion of liberal political morality. Liberal political morality requires that "we respect the person and property of others, leaving them free to make their lives as we are free to make ours." Fried seems to argue that, because the aim of the institution of promising, and hence of contract law, is to increase our freedom or autonomy, it follows that the appropriate sanction for breach of contract is an award of expectation damages. This is because expectation damages will guarantee to the promisee what performance of the promise would have.

But what is the justification for having a particular institution, rather than some other or none at all? Once this institution exists, what reasons are there for the particular rules that dictate how benefits and burdens should be distributed?

Thus, it does not follow, at least not directly, that if an unrelied upon promise is broken, the appropriate sanction is expectation damages. In fact, the freedom of the promisor may be increased, especially when she does not have to pay expectation damages to a promisee who has not relied upon or benefited unjustly from the promise. In addition, the appropriate sanction for unrelied upon promises does not have to be one that

---

76. Fried argues:

The assault on the classical conception of contract . . . has centered on the connection . . . between contract law and expectation damages . . . [T]o the extent that contract is grounded in promise, it seems natural to measure relief by the expectation, that is, by the promise itself. If that link can be threatened, then contract itself may be grounded elsewhere than in promise, elsewhere than in the will of the parties.


77. C. FRIED, supra note 76, at 7.

78. Id. at 17.

79. These distinctions are familiar from discussions regarding punishment. Such diverse theorists as Kant, H.L.A. Hart, and John Rawls agree that the purpose of punishment is to deter harmful conduct. See generally H.L.A. HART, PROLEGOMENON TO THE PRINCIPLES OF PUNISHMENT, in PUNISHMENT AND RESPONSIBILITY 11 (1968); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35–36 (J. Ladd trans. 1965); Rawls, supra note 76. Nevertheless, it does not follow that this aim ought to be pursued at all costs in designing rules that distribute punishment under the institution. Considerations of justice may properly limit pursuit of deterrence; it may be unjust to punish people when they had no opportunity to conform their behavior to the law, and thus we want to have excusing conditions to exempt them from punishment. Even when the general justifying aim is an acceptable reason for having an institution, it is not necessarily a good reason for every rule within that institution.

promotes the aim of the institution as a whole, for other considerations may be relevant.81

Some, like Fried, would hold promisors to their promises despite such considerations, because this is "a way of taking them seriously" and showing respect for people as free and rational.82 The promisee is not harmed, by hypothesis, and the promisor might have made a mistake or reevaluated his choice, so why should the promisor be held to the monetary equivalent of his promise simply to "take him seriously" or to "show respect to him?" This certainly seems a heavy-handed form of respect.83

This sketch of a major dispute concerning contract remedies is evidence for Coleman's proposal that contracts might indeed be a species of tort law, for if the reliance interest is the proper basis of damage awards, as he and others indicate, this is very like the tort remedy of preventing wrongful losses.

A second major point to draw from this discussion is the resurgence of a concern with political philosophy. Just as Murphy argued that criminal law sanctions cannot adequately be justified without resorting to political theory, we have also seen how political theory is important to one's view of contract law, for one cannot have a view of the proper damage awards without thinking about the proper role of state intervention in private contracts.

It is, however, not quite clear what to make of Murphy's and Coleman's arguments on this point, for they seem inconsistent. Murphy favors a liberal point of view for justifying criminal sanctions, while Coleman's views are inconsistent with Fried's, an avowed liberal with respect to contract law. Do Coleman's arguments commit him to a political philosophy inconsistent with Murphy's, or do Murphy's arguments commit him to a

81. Our pretheoretical beliefs about promising may suggest that there is a duty of compensation only where there is actual reliance, thus the duty of redress may modify pursuit of the aim of the institution. Furthermore, rewarding reliance losses only in principle may give recognition to the foibles of a promisor who changes his mind because he "was mistaken about the nature of the burdens he was assuming" or because "he no longer values the promise as highly as when he made it." C. Fried, supra note 76, at 20.

82. Id.

83. Even if there are good reasons for only awarding reliance damages in principle, why the prominence of expectation damages? Fuller and Perdue give several reasons for requiring their payment on administrative, utilitarian grounds: First, expectations awards are those "most likely to reimburse the plaintiff for the (often very numerous and very difficult to prove) individual acts and forbearance which make up his total reliance on the contract." Fuller & Perdue, The Reliance Interest in Contract Damages (pt. I), 46 Yale L.J. 52, 60 (1936). Second, expectation damages are much more easily administered and in practice offer "a more effective sanction against contract breach." Id. at 61. (Thus, it is seen as a kind of penalty to one who would breach the contract.) Finally, perhaps the best way to promote reliance on promises, given the difficulties of proof of reliance, is to dispense with its proof, in the sense that "in some cases the promise is enforced though not relied on (as in the bilateral business agreement) and in the sense that recovery is not limited to the detriment incurred in reliance." Id. at 62. This suggests that if proof were not a problem and if administrative concerns did not require expectation damages, reliance would be the proper basis for damage awards.
view of contracts inconsistent with Coleman’s? Or is there sufficient flexibility and indeterminancy in liberalism to accommodate both views? Considerable discussion is needed to distinguish varieties of liberalism and their normative weight in law so that these broader questions of justification of a legal system can be addressed. Although this issue cannot be pursued further here, the evidence, especially that from contract and regulatory law, is against conservative writers such as Nozick and Fried. Contract remedies might be better treated as tort remedies, and preventive regulatory law (intrusive though it may be and offensive as it may be to conservatives) has an important role in protecting rights.

These concerns raise the further question: “[w]hat is the best political justification, if there is one, that is adequate for various parts of a mature legal system, e.g., contracts, torts, criminal regulatory law, considered together?” This question inevitably raises questions about the soundness of normative justifications for the legal system. But what if moral and political philosophy are less objective than we had thought; is this a safe foundation on which to justify our legal system and state coercion?

IV. THE OBJECTIVITY OF MORALITY AND THE FOUNDATIONS OF LAW

Legal philosophers have always concerned themselves with morality and moral theory, but it may be that lawyers and law students now consider moral issues more self-consciously than in the past. Questions regarding the validity of moral principles are inextricably involved with the law. If one believes that a legal system ought to incorporate and to enforce a society’s moral norms, one would like to know how to identify those that are valid or correct, those that should be codified. One would also want to know which principles are correct for evaluating the justice or utility of a legal system or its laws, and for reforming or making new laws.

The problem of the justification of moral beliefs has, because of the views of Ronald Dworkin, been given more urgency. Although stated here summarily, he argues that a judge, in reasoning about hard legal cases, must necessarily rely upon moral principles for guidance—there is some

84. Lyons, p. 7.
85. The Watergate affair, which tainted an entire presidential administration and a host of lawyers, may have made the legal community more sensitive to codes of conduct and to the behavior of lawyers. Even though Watergate largely involved personal moral shortcomings, it may have sensitized lawyers to theoretical moral issues about law. The work of two theorists has also brought morality to recent prominence in the law. Ronald Dworkin has argued since 1967 that a proper understanding of the law will lead one to recognize that in some, not entirely clear, sense the law is based on moral principles. John Rawls’s A Theory of Justice has also greatly influenced developments in law and other fields. See R. Dworkin, Taking Rights Seriously (1977); J. Rawls, A Theory of Justice (1971).
86. For a succinct discussion of Dworkin’s view, see Mackie, The Third Theory of Law, 7 Phil.
Philosophy, Morality and the Law

essential connection between what counts as law and morality. Much law in a particular jurisdiction is settled and comparatively uncontroversial—the black letter law of statutes and precedents and the plain language of a constitution. Using these as data, a judge must seek the theory compatible with further rights and principles that best justifies and explains existing settled law. The best theory, then, is applied to the hard case at bar, and the principle undergirding that theory has a moral aspect to it. Thus, a judge must, in finding the morally best justification of the settled law, make substantive moral judgments about such rules.\(^8\)

If Dworkin is correct, law and legal decisions depend crucially on substantive moral judgments; the validity and correctness of those judgments are of great moment for the law. According to Dworkin’s view, there must be a “coherent theory for a body of law,” it must have a moral dimension, and that moral dimension must be “objectively correct or rationally defensible.”\(^8\) But how does one show that a moral position is objectively correct or rationally defensible?

In answering this question, both Murphy and Lyons, whose discussion is quite extensive, entertain various skeptical theories with respect to moral truth and justification. Rather than rehearse several positions considered (and rejected) by the two authors, consider briefly the theory both find critical for moral justification.\(^8\)

First, Lyons distinguishes between moral truth and the justification of moral beliefs.\(^9\) One can have a good justification for what one believes, even if what one believes is false. Good justification is the critical notion for both Lyons and for Murphy.\(^9\)

Furthermore, Lyons points out that some critics of morality may have “misplaced expectations” about the possibilities of justification of moral beliefs or principles.\(^9\) They might be holding out for a particular kind of “foundationalist” justification— the view that “[i]f we have any knowledge at all, it must rest on some things that are certain, that could not possibly be otherwise.”\(^9\) In ethics this suggests that:

\(^{87}\) Murphy & Coleman, p. 45.
\(^{88}\) Lyons, p. 92.
\(^{89}\) Id. at 101.
\(^{90}\) Lyons is not persuaded by Dworkin and offers an argument to show there is no essential connection between what counts as law and morality. Lyons, pp. 92–104.
\(^{91}\) In discussing skepticism, Lyons, Murphy and I all avoid explicit meta-ethical theories for justifying fundamental moral principles. For such a discussion, see W. Frankena, Ethics (2d ed. 1973).
\(^{92}\) Lyons, p. 27.
\(^{93}\) Although Lyons argues that there is little reason to believe in ethical nihilism, social relativism, and individual relativism, he correctly shows that there can be no conclusive refutation of all such positions, for each must be evaluated individually.
\(^{94}\) Id. at 101.
If we have any moral knowledge at all, it must be based on certain knowledge of undeniable general principles or else must be built up from certain knowledge that we obtain of what is right or wrong, good or bad, just or unjust in particular cases [and this] knowledge . . . must be derived from some mysterious faculty of 'moral intuition.' These views are misplaced, for we do not demand so much of knowledge in other areas of our lives. If we were to take the foundationalist model seriously:

Almost all that we have thought we gained from science, for example, must be illusory. Scientific progress does not rest on indubitable truths. Nor could it do so, since we have no special faculty delivering insight about the general laws of nature, and our knowledge of those laws always goes beyond specific observations that we have made or ever could make.

How then do we justify moral beliefs? One widely supported procedure that also appears to be crucial in legal reasoning is that of coherence arguments, made explicit and popular in John Rawls's A Theory of Justice. Rawls's view is that one justifies moral theory in roughly the same way one justifies rules of grammar.

There are, however, three immediate problems with such a theory of justification. First, at best it seems to guarantee consistency between our particular moral beliefs and our general principles, not the truth of either the beliefs or the principles. Second, whose beliefs or principles are we talking about: mine, yours, a Nazi's, or the whole moral community in the U.S.? Finally, how reliable are either the beliefs or principles? But consistency, although not a guarantee of correspondence with facts

94. Id.
95. Id. at 31.
96. Rawls explains:
What is required is a formulation of a set of principles which, when conjoined to our beliefs and knowledge of the circumstances, would lead us to make these judgments with their supporting reasons were we to apply these principles conscientiously and intelligently. A conception of justice characterizes our moral sensibility when the everyday judgments we do make are in accordance with its principles. . . . We do not understand our sense of justice until we know in some systematic way covering a wide range of cases what these principles are.

J. Rawls, supra note 85, at 46.
97. As Rawls elaborates:
A useful comparison here is with the problem of describing the sense of grammaticalness that we have for the sentences of our native language. In this case the aim is to characterize the ability to recognize well-formed sentences by formulating clearly expressed principles which make the same discriminations as the native speaker. This is a difficult undertaking which, although still unfinished, is known to require theoretical constructions that far outrun the ad hoc precepts of our explicit grammatical knowledge.

Id. at 47 (footnote omitted).
of the world, should not be underestimated, for "[m]oral positions can be discredited if they are internally inconsistent," just as scientific positions can be similarly discredited. Furthermore, consistency in belief is a considerable improvement over ethical nihilism. Nonetheless, consistency does not guarantee truth as we ordinarily understand it.

Thus, even if we cannot show that moral beliefs are indubitably true, or that they conform to facts as some believe scientific theories do, we can at least engage in moral debate to find agreement on examples of right and wrong conduct, as well as on defensible moral principles. We might do as Lyons suggests with regard to thinking about rape:

[O]ur experience so far suggests that nihilism and relativism have much more dubious foundations than the judgment that rape is wrong.

If someone wishes to challenge that judgment, he needs to show that the factors cited are irrelevant or illusory. If his arguments fail, then our judgment, which is not groundless to begin with, will have an even greater claim to being sound, because it will have resisted challenges. If his arguments advance our understanding of what is at stake, then he will have increased our moral knowledge, for our moral knowledge, just like our knowledge of other matters, depends on how our judgments fit together and can be reinforced by further experience. That is the standard for knowledge in the rest of our lives. We can ask for no less here.

If Lyons is correct, normative ethical views may not be without justification, but providing a justification will require identification of areas of agreement and increased debate to narrow the scope of disagreements. Both tasks are important to law and to philosophy.

98. Lyons, p. 32.
99. Id.
100. Lyons asks us to imagine a theory T where acts are morally right to the extent that they produce pleasure and wrong as they produce pain. Thus, in rape, for example, the pleasure a rapist receives tends to justify rape while any pain produced for the victim tends to make it wrong. Yet, this example shows that such a theory is problematic:

We are almost certainly ignorant of just how much pain or pleasure is caused by a given act of rape and yet we can be confident in the judgment that rape cannot be justified in such terms, if it can be justified at all. The idea that rape is wrong seems much more certain than the theory under consideration or the facts about pleasure and pain produced in particular cases. And the claim that rape is wrong is not insupportable. Although the pleasure it occasions appears morally irrelevant, the pain it causes is surely not. The act furthermore involves a brutal, if only temporary, domination of one person by another. . . . Between man and woman, the act of rape symbolizes and reinforces a pattern of domination that transcends the individual act—a pattern of treatment and training that not only discriminates but also shrivels hopes and crushes aspirations.

Id. at 34.
101. Id. at 35.
V. CONCLUSION

These two books reflect much of the current fermentation in philosophy and law. Both revitalize political philosophy and its importance for law and philosophy of law. Political philosophy, a normative enterprise, in turn presupposes moral views. Both books, however, indicate the growing unease philosophers and some lawyers have with the foundations of normative ethical theories. Surely much more discussion remains in this area. These works by Murphy and Coleman and by Lyons, even though introductory texts, contribute to this effort.