LIBERAL LAWS AND THE MORAL PLURALISM OF SOCIETY: REFLECTIONS ABOUT "IDEALS, BELIEFS, ATTITUDES, AND THE LAW" BY GUIDO CALABRESI

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The hardest question which must be faced by a proponent of a liberal approach to law, after stating his or her own preferred options about particular matters, is: how should law handle the fundamental disagreements about morally controversial issues in a pluralistic society? Without going into details, I suggest that the method most consistent with a liberal creed is a recourse to a time-honoured distinction between the principles of a "right conduct" and substantive conceptions regarding a morally good life. Law, liberalism postulates, should be governed by principles that do not presuppose any particular conception of what constitutes a morally good life; it should be neutral among those substantive moral ends which individuals might wish to pursue under the condition that they do not interfere with a similar pursuit by other individuals. The basic aim of the right/good distinction regarding individual rights is, therefore, to provide a device for accommodating conflicting moralities in one legal system, while respecting the equality of all the participants, without creating a constant threat to the stability of the system from any of these moralities. The right/good distinction is therefore an answer to the fundamental dilemma of a pluralistic society, and can be seen as a principled framework for a compromise among the conflicting values.

In the last chapter of his new book[1], Dean Guido Calabresi of the Yale Law School discusses a particularly troubling case of the clash of fundamental ideals: the issue of abortion as illustrated by the landmark American case Roe v. Wade[2]. In the first four chapters, Calabresi approaches the role of ideals, attitudes and beliefs in a legal system from an atypical perspective: not, as it is usually done, from the perspective of the public law of civil liberties under the Constitution, but from the perspective of torts law. Believing that particular branches of law (including torts) exert a "gravitational pull" upon all other legal areas, from the analysis of how torts deal with different kinds of beliefs and attitudes he derives some original and important insights into the significance of beliefs in a legal systems as a whole (obviously, he is basically concerned with the American legal system, but both his method of analysis and substantive generalizations have a broader

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1. G. Calabresi, Ideals, Beliefs, Attitudes, and the Law (Syracuse University Press 1985) [hereinafter cited as Ideals, Beliefs].
2. 410 U.S. 113 (1973).

importance, and will be usefully studied by legal scholars from outside the confines of American legal culture).

Calabresi, not surprisingly to those who know his earlier writings, begins with the analysis of the law of accidents: he examines how law treats cost-causing behaviour dependent on the existence of particular beliefs and attitudes. His first concern is with the attitudes which arise out of some social or physical disadvantages or handicaps, but he further focuses on "idiosyncrasies" which stem directly from individual beliefs. He discusses how law accords differential treatment to religious beliefs as contrasted with all other beliefs (by protecting some beliefs which would be deemed idiosyncratic were they not of religious origins), and - within the scope of religious beliefs - differential treatment to minority religions and sects. His last (and, in his own judgment, most important) chapter deals with the solutions to the fundamental clashes of ideals, beliefs and attitudes in a morally pluralistic society.

The book is innovative, important and very informative as well: a rich documentation in the footnotes takes up half of the size of the book. I will not summarize the detailed argument, nor elaborate any further my praise for the book, which it deserves. Instead, I will take up only one issue, about which I have a fundamental disagreement with Dean Calabresi. Although this particular issue occupies only one of the five chapters, the author himself (both in the Introduction and in the Conclusion) stresses that it is the crucial chapter, and that he puts together there his own observations from the earlier chapters, and from his earlier book Tragic Choices. So I think it is not unfair to concentrate in this Review on this one part of his argument.

My disagreement with Calabresi is all the more instructive (for me at least), because actually I find myself in agreement with most of his substantive political and philosophical attitudes. To the extent to which it is possible to reconstruct a broader "ideology" behind his disparate views on moral-philosophical-political issues, Calabresi seems to be a left-of-the-center liberal in the best American tradition: egalitarian with regard to social welfare and libertarian with regard to civil liberties. In a sense, Calabresi's priorities seem to be a direct opposite of the doctrine of the current American officialdom which proposes to intervene less in the area of social inequalities but more in individuals' private lives. This seems also to be the direction of the shifting philosophy of the United States' Supreme Court, which - as its most recent decisions indicate - is increasingly willing to endorse

state interference with individual life-styles[3]. And this trend may well continue in the years to come: with the forthcoming departure of such liberals as Brennan and Blackmun, with the entrance of Justice Scalia and the promotion of Justice Rehnquist to the rank of Chief Justice, the balance on the Court will probably shift to the right. This dominant trend seems to embody ideals opposite to those proclaimed by liberal American legal scholarship, represented by such writers (otherwise differing among themselves on many issues) as Ronald Dworkin, John Hart Ely, Lawrence Tribe, Frank Michelman, Owen Fiss and - last but not least - Guido Calabresi. I mention all this because I discovered, with a certain bewilderment, that while espousing fundamental liberal priorities about many particular issues (such as law regarding homosexuality[4], Good Samaritan duties[5], sexual discrimination[6], just to mention a few), Dean Calabresi proposes an approach to the resolution of fundamental conflicts in values which is, ultimately, surprisingly illiberal.

As will be remembered, in Roe v. Wade a divided Supreme Court overturned a Texas anti-abortion statute on the basis of the right to privacy. Calabresi criticizes the decision severely, not so much for the actual result but rather for the way the Court reached it. According to Calabresi, by resting its verdict on the premise that a fetus is not a person[7] the Court has committed the unforgivable sin of "emarginating" a large segment of the American public by effectively telling them that their beliefs and ideals are rejected as invalid and outside American law. Calabresi goes as far as to compare this result to the infamous Dredd Scott decision[8] when the Court declared that the provisions of the Constitution did not apply to Blacks and that no state had the power

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3. See Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (upholding a state criminal statute outlawing consensual sodomy).
4. Calabresi, Ideals, Beliefs pp. 100.
5. Id pp. 102-5
6. Id. pp. 35-38, 97
7. Ideals, Beliefs p. 93. I am assuming arguendo that it is a correct interpretation of the Court's decision, but I am not convinced about its accuracy. Calabresi attributes to the Court the statement that "for purposes of our Constitution, a fetus (at least until independently viable) is not a person" (id. p. 93, footnote omitted). But the actual words by Blackmun J. on which Calabresi bases his paraphrase are: "the word 'person', as used in the Fourteenth Amendment, does not include the unborn" 410 U.S. 158 (Blackmun J., delivering the opinion of the Court), emphasis added. This does not appear to contain as strong a message to the community at large that "a fetus is not a person" as Calabresi seems to imply.
8. Dredd Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

to confer the rights of a citizen on a Negro[9]: Roe v. Wade was (according to Calabresi) similarly a signal to the "pro-life" people that their deeply held beliefs are unworthy and that "they are not a part of our establishment"[10]. As a consequence, the decision "opened wounds one wishes were closed" and "made it impossible for the opposing views to live with each other"[11].

An alternative and proper way for the Court to proceed when fundamental values conflict is, Calabresi claims, by "respect[ing] the beliefs of all those in conflict"[12], by "preserv[ing] and strengthen[ing] the belief - the moralism - of those who lost"[13] and by avoiding "emarginating, or treating as unworthy, beliefs that are deeply held in the society"[14]. A proper way of dealing with highly diverse beliefs is by "recogniz[ing] the values on the losing side as real and significant"[15]. Even if more weight, in the present case, has to be given to the opposed beliefs, both sets of beliefs can be accommodated within the constitutional frameworks by respecting the losing beliefs as worthy, and by "look[ing] to a time where it may be possible to accommodate both sets of beliefs"[16]. With regard to the abortion debate, this could have been done, Calabresi says, by conceptualizing the real issue in Roe v. Wade as the conflict between two values: equality of the right to engage in sex versus preservation of fetal life. The real trouble with the prohibition of abortion is that it discriminates against women with respect to access to sex, Calabresi claims. If the Court's decision were presented as a balancing act between two fundamental (though not absolute) values in question, its outcome would be seen as respecting the beliefs of both sides. It would "tell[] the losers that, though they lost, they and their values do carry weight and are recognized in our society, even when they don't win"[17].

It is beside the point in this Article to consider whether indeed the issues of abortion are better tackled in terms of discrimination against women rather than (as the Court decided) in terms of the right to privacy: actually I do not wish to enter into the merits of abortion arguments at all. My concern here is more general, with Calabresi's proposed procedure of compromise "that is appropriate to a society that wishes to include within it highly diverse beliefs, moralisms, and attitudes"[18]. For this diversity of beliefs is

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9. Ideals, Beliefs, pp. 96 and 190 n.357.
10. Id. p. 96.
11. Id. p. 97.
12. Id. p. 116.
13. Id. p. 116.
14. Id. p. 117.
15. Id. p. 109.
16. Id. p. 98.
17. Id. p. 109.
18. Id. p. 109.

precisely the matter that triggers the liberal "right/good" distinction, and the significance of Calabresi's method is that he tries to do without it. Thus if the outcome is ultimately illiberal (as I will attempt to show), there is a message for his method.

It may seem at first blush ironic that the very decision, which is considered by many as an example of an ad hoc, opportunistic compromise (as one writer sarcastically says, Roe v. Wade is a masterpiece of peacekeeping among rival factions, for "every ideology gets its own trimester"[19]), is condemned by Calabresi as excluding a compromise and reconciliation of beliefs. But this irony is instructive for our purposes: the Court would have escaped Calabresi's criticism if, instead of affirming categorically the principle of privacy so stringently as to embrace a woman's right to terminate her pregnancy, it engaged in the weighing and balancing of competing values of equality and preservation of fetal life But on what basis could such a balancing act be said to result in the pro-abortion (or, alternatively, anti-abortion) verdict? To say that after a careful balancing of two conflicting values one outweighed the other may be an effective rhetorical device of reducing dissatisfaction of the "losers" but says nothing about the actual ethical grounds of the outcome of the balancing. Admittedly, in order to decide about the relative importance of these two conflicting values one has to appeal to a higher principle: there is no other valid way to balance our competing aims against one another except as a means to a higher end. But this is exactly what Calabresi excludes because it would immediately "put beyond the pale" those who reject this higher, coordinating principle. So what Calabresi's proposal amounts to is, in effect, an example of the very "subterfuge" which he criticizes in a different context[20]: as long as the Court does not tell us how it is balancing the two values and why (that is, it does not disclose its higher, coordinating principle), it may nominally adhere both to the principle of equality of

19. J G. Murphy, "Rationality and Constraints on Democratic Rule", in J. R. Pennock & J. W. Chapman, eds, Justification: Nomos XXVIII (New York U.P. 1986), p. 158. Murphy's observation, whatever its taste, relates clearly to the fact that the Court in Roe has distinguished between the stage prior to the end of the first trimester (when the abortion decision must be left to the pregnant woman and her physician) and the stage subsequent to the end of the first trimester (when the State may regulate the abortion procedure "in ways that are reasonably related to maternal health") Roe 410 U.S. 163-4.

20. Ideals, Beliefs p. 90 (criticizing Justice Powell's decision in the Bakke case for effectively allowing the selection committees to make their decisions in an arbitrary way so long as, in Calabresi's words, they "do not tell us what they are doing and why").

women with respect to sex and to the principle of a fetus's right to live.

This is a prescription for hypocrisy: it concerns a public relations exercise, not the deep structure of moral reasoning. It tells the Court how to cover up its actual moral choice, rather than how to make it. Calabresi reaches this strange result because he wants to achieve a compromise between the conflicting beliefs in a pluralistic society without being willing at the same time to concede that there must be some common ground rules that all the substantive principles must satisfy in order to be registered in the moral bargaining. If no such minimal ground rules are required, then all the postulated principles are of the same dimension and are freely entered into the weighing and balancing procedure: but then it is puzzling to consider on what basis Calabresi at some points would disqualify some preferences after all (e.g. racism)[21]. The liberal solution outlined earlier in this paper differs fundamentally from Calabresi's procedure by insisting on the initial ground rules for moral bargaining: the principles that are registered in the law-making process must all respect the equal moral agency of all individuals. This is the basis upon which the law may perform, in a principled manner, its regulative function "among warring sects, each of which wraps itself in the mantle of a law of its own"[22]. A principle on the basis of which all have equal rights over their private lives does not have to compete (on equal basis) with a putative principle which would deny this right to some because the latter one does not respect the basic and unchallengeable principle of equal moral agency which must be accepted by all the participants.

But why should all the participants be expected to accept this ground rule in the first place? Here I can only begin sketching a possible answer: such an answer must pinpoint the strong connection between this basic ground rule (of equal moral agency of individuals in pursuit of their conceptions of the good) and our widely held liberal intuitions about the plausible scope of legally protected liberty. Obviously someone who does not share these intuitions will be unmoved by this answer, but the point is that Calabresi <u>does</u> accept the particular substantive liberal judgments about liberty; hence if they can be shown to be inconsistent with his

21. <u>Id.</u> p. 117: he makes this point in the very last paragraph of his "Conclusion" and, oddly, does not elaborate.

22 The quoted words are by Robert Cover: "Among warring sects, each of which wraps itself in the mantle of a law of its own, [judges] assert a regulative function that permits a life of law rather than violence", "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative", <u>Harv. L. Rev.</u> 97 (1983) 4, 53.

proposed method of balancing opposed ideals, there must be a message in it for his method

One reason to prefer the right/good distinction approach over the "balancing of all the principles" approach is that the latter does not provide a generalized (as contrasted to an ad-hoc) explanation of the moral intuition that some preferences about other people's behaviour must be disqualified at the outset. Calabresi would disqualify racist preferences: why not anti-homosexual or anti-pornography ones? It is hard to see what general principle, consistent with Calabresi's balancing formula, would allow us to draw the distinction. Second, and consequently upon the first observation, Calabresi's formula falsely indicates to the "losers" of the present moral calculus that their beliefs are basically as legitimate as the winning ones, except that in this particular case they happen to be defeated. They are not: racist preferences are not even initially as legitimate and valid as the non-racist one (a fact that Calabresi admits), and the sooner racists realize this, the better. A principled liberal must make it clear that law has no business saying to everyone: all your preferences, however illiberal and harmful to others they happen to be, have a place in our legal system. There are, for a liberal, some beliefs which are beyond the pale and which must be disallowed from entering into the forum of societal moral bargaining: they are those which contradict the liberal ground rules for dealing with the differences in moral beliefs[23].

Thirdly, Calabresi's procedure promotes, on the part of those whose preferences require imposition of their conceptions of the good upon the others, false expectations that despite the present setback they may well achieve their desire the next time around[24]. Calabresi himself admits (and treats it as an advantage of his proposed procedure) that the judicial decision "which recognizes the values on the losing side as real

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23 "The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good.... The priority of justice is accounted for, in part, by holding that the interests requiring the violation of justice have no value.", J. Rawls, A Theory of Justice (Oxford: Clarendon Press 1972), p. 31. Elsewhere in the book Rawls says: "[W]e may think of the principles of justice as an agreement not to take into account certain feelings when assessing the conduct of others", p. 450.

24 This is how Calabresi describes the message of the Court to the "losers" produced by his "balancing" procedure: "Your views matter, and are worthy. They are part of our law and on many occasions they will be upheld. On this occasion, however, they do not prevail" Ideals, Beliefs p. 98, emphasis in the original.

... can even lead to a strengthening of those values"[25]. So his procedure is educationally counter-productive: instead of educating people that some illiberal attitudes have no place in a liberal community, the "balancing" procedure is actively complacent towards these attitudes and, in consequence, tends to keep the wounds open (the very wrong Calabresi depicts in the Roe approach). Consider a possible racist reaction to the Brown decision[26] (which invalidated the school segregation policies as unconstitutional) if the balancing procedure were adopted there: "today we have lost, but tomorrow...". Fourthly, the balancing procedure is inherently destabilizing: since the procedure of weighing and balancing is inevitably intuitionist (we are precluded from affirming a categorical higher principle: if we could do so, then arguably it would have to be balanced against a corresponding principle of the same order, and we would find ourselves in the infinite regress until we affirmed one principle as fundamental, thus offending Calabresi's requirements of a compromise), therefore the standards of the compromise are uncertain and non-transparent. The decision reached can be easily overturned without the injection of any new moral ingredients for consideration, but merely by attaching a slightly different weight to the principles at stake. Finally, the balancing formula of the "compromise" fails to take any notice of the reality of the "liberal dilemma" of both condemning private immorality and defending the individual right to be (what we may consider) immoral. In Calabresi's calculus, there is no room for such a combination of attitudes: the private condemnation of an immoral action simply enters into the balances by reducing the weight of a liberal's predisposition to protect it while in the liberal reasoning based on the "right/good" distinction, a principle of the protection of non-harmful (even though immoral) actions trumps the distaste for the immorality before it enters the arena of moral bargaining about the content of laws.

Now the fact that Calabresi develops his procedure for dealing with clashes of moral beliefs on the basis of the analysis of abortion, rather than of other morally controversial legal issues, makes a contrast we drew between the two approaches less transparent and clear than in cases of other clashes of moralities. This is for two reasons. First, in the case of abortion, but not in the case of homosexuality or pornography, one can theoretically imagine a situation of a future reconciliation of both opposing views. Calabresi supports his idea of a compromise with a following prediction: "One can imagine a time and a technology in which a woman who wished an abortion could have the fetus removed without pain or risk to her ... [and that] women who wished to adopt babies, could have that same fetus

25. Id p. 109.
26. Brown v. Board of Education, 347 U S 483 (1954).

implanted in them and brought to term"[27]. Futuristic though it sounds, one can imagine such a future reconciliation of the conflicting values in the abortion dispute, and this makes Calabresi's plea for an ad-hoc, tentative compromise all the more convincing. But no such reconciliation is conceivable with regard to the conflicting beliefs about homosexuality (for it is impossible to have, in one and the same society, the practicing homosexuals and people living in a homosexuals-free social milieu), or pornography. This indicates, at the very least, that Calabresi's procedure of balancing is not available as a general method for reconciling conflicting moral ideals (notwithstanding Calabresi's intentions)[28]. Secondly, a clash of moralities is most "pure" when some people demand prohibitions of a behaviour which offends them without causing harm to others (except of the "harm" inseparable from the moral outrage). But one of the crucial characteristics about the abortion debate is that one party claims that there is a clear "harm to others" (i.e. to fetuses equated in this argument with living persons) produced by abortion, while the other party denies this. If a fetus is a person, then abortion is murder and so is properly within the ambit of the harm principle. I will not go into this debate here, because my purpose is not to pronounce upon the merits of the abortion issue but merely to consider the different approaches to reconciling conflicting moralities in a pluralistic society. But clearly a metaphysical question about the definition of human life precedes the moral arguments about the legitimacy of abortion. This, however, is not the case with the homosexuality, pornography etc., for with respect to these problems we encounter strong and persistent demands for prohibition, even regardless of detectable harm to others.

27. Ideals, Beliefs p. 113.
28. See G Calabresi, "Bakke as Pseudo-Tragedy", Catholic Univ L. Rev. 28 (1979) 427, where Calabresi applies the same method to the moral controversies surrounding the issue of "positive discrimination"