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ROAD SIGNS AND THE GOALS OF JUSTICE

Joseph Sanders*

IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM. By *Guido Calabresi*. Syracuse, N.Y.: Syracuse University Press. 1985. Pp. xv, 208. Cloth, \$20; paper, \$11.95.

But why not say, instead, that all should study the "goal" directly? That assumes that all should be philosophers, and, more important, that the best way to get to a point is always to focus directly on it, rather than on some road signs that point toward it. This is an assumption that is, I think, patently false.¹

Seventeen years ago, with the publication of his classic book *The Costs of Accidents*,² Guido Calabresi helped to usher in a new, sustained interaction between law and economics. A substantial part of the new interaction involved substituting economic analyses for traditional, if vague, legal concepts such as "justice" and "fairness." Nowhere has this interaction been more productive than in the area of torts. Building upon Learned Hand's analysis in *United States v. Carroll Towing Co.*,³ Calabresi (among others) brought into the mainstream of tort analysis the economic concepts of the utility-maximizing individual, efficiency,⁴ cheapest cost avoider, transaction costs, and cost-benefit analysis. In the process they have greatly enriched our understanding of the law of torts⁵ and the inevitable conflicts among its multiple goals.

The power of this point of view on torts has caused some to view the field entirely through the lens of economics. However, every ab-

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1. Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 560 (1980).

2. G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

3. 159 F.2d 169 (2d Cir. 1947).

4. The term "efficiency" has proven to be chameleon-like throughout much of this period. Sometimes it has meant Pareto optimality, sometimes a Kaldor-Hicks wealth maximization. In this latter meaning it has been open to widespread criticism. See *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980). Calabresi agrees with those who hold that wealth maximization per se is not a value for society.

5. See, for example, Coase's famous article on the relationship between liability rules and the allocation of risks in the absence of transaction costs, Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960), and Shavell's analysis of the relationship between strict liability and negligence, Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

straction casts some things in shadow while highlighting others.⁶ Calabresi has never failed to recognize this fact. He begins the discussion of *Costs* with the following premise concerning the law of torts:

What, then, are the principal goals of any system of accident law? First, it must be just or fair; second, it must reduce the costs of accidents.⁷

Costs devotes itself primarily to an economic analysis which has reshaped the way courts think about accidents.⁸ The argument of *Costs* is that an important goal of accident law is to reduce the total costs of accidents — both the costs of accidents themselves and accident-avoidance costs. These include the primary, secondary, and tertiary⁹ costs associated with any scheme we may adopt to deal with accidents. The control of primary costs is to be achieved through both specific and general deterrence.¹⁰ Although justice and fairness are given first priority¹¹ as the goals of accident law, they are set aside in only two pages, reemerging briefly in Part V, nearly three hundred pages later. The content of the idea of justice is not presented. In fact, justice is not considered to be a goal of the tort system, but rather a set of undefined side constraints based upon other values we hold to be important. Collectively, these constitute a veto power which might be used to strike down an otherwise efficient system of allocating accident costs. In this sense conceptions of justice play a secondary role throughout. In *Ideals, Beliefs, Attitudes, and the Law*, a book based upon the Abrams Lectures he gave at Syracuse University in 1982, Calabresi makes some amends. Priority is given to questions of justice. As he sums up near the end of this provocative work:

Beliefs, ideals, and attitudes are an integral part of our law. Whether

6. For an insightful discussion of the costs and benefits of the abstractions of economics, see Lachman, *Knowing and Showing Economics and Law* (Book Review), 93 YALE L.J. 1587 (1984) (reviewing A.M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983)).

7. G. CALABRESI, *supra* note 2, at 24.

8. See, for instance, the New Jersey Supreme Court opinion in *Beshada v. Johns-Manville Prod. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), which parallels *Costs* in speaking of the issues involved in allowing companies to raise a "state of the art" defense in product liability cases.

9. Secondary costs are societal costs resulting from accidents. They include such things as the costs of rehabilitation and care of the injured. Tertiary costs are the administrative costs of an accident-reduction scheme.

10. The term "specific deterrence" is used to describe collective actions mandating certain types of behavior, e.g., stop signs. "General deterrence" describes attempts to allow the market to determine the appropriate level of accident-avoidance behavior by allocating accident costs to certain individuals or groups, e.g., requiring negligent drivers to pay for the harms their negligence causes.

11. Both in *Costs* and in later writings, Calabresi has steadfastly held to the lexical priority of justice or fairness concerns over efficiency or distributional considerations. See Calabresi, *supra* note 1. Nevertheless, some have chosen to read Calabresi as arguing for a balancing, or a trade-off, between justice and efficiency or justice and cost reduction. See Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980). In part, the disagreement about what Calabresi really means is caused by the vague definitions he gives to the ideas of fairness and justice.

based on current creeds, secularized versions of past faiths, or non-religious beliefs, they shape what is expected and what seems reasonable in the most diverse sections of our law. . . .

. . . .

[M]oralisms, faiths, and beliefs do matter and must be taken into account in making law. [pp. 115-16]

The central arguments in *Costs* and *Ideals* are not in opposition. The earlier book is frequently cited in the new work; and as his recent writings indicate, Calabresi consistently holds out a place for economic analysis in torts and other areas of law.¹² The arguments are, however, in a tension created by the effort to find the proper balance between the goals outlined in *Costs* and other goals of tort law. Fifteen years after the publication of the original work, Calabresi is still working toward a balance of this complex relationship. *Ideals* is, in part, a book about the limits of economic analysis.

If one reads *Ideals* with the hope of finding a statement of what the proper mix of goals of tort law should be, one will come away disappointed. As the quotation introducing this essay suggests, Calabresi is less interested in studying goals directly than in examining road signs along the way. These road signs — in the form of insurance rules, tort concepts, and the insight which can be gained from the analysis of difficult cases involving attitudes, beliefs, and ideals — do provide a sense of the boundaries of an economic analysis.

If, however, one of the strengths of *Costs* is that it has a relatively clear purpose — to examine the types of accident costs and ways to reduce them — one of the difficulties with *Ideals* is that it does not have similarly defined goals. The road signs sometimes point in opposite directions. In some passages, *Ideals* argues that optimal cost allocation should be sacrificed for individual values and beliefs, yet in other passages it advocates such sacrifice in order to achieve distributional social goals. Because of this, the book is in places as much an argument with itself as it is with *Costs*.

As a way of developing this point I wish to concentrate on one basic micro-assumption of economic models: the assumption that people will behave rationally to maximize their utility, and thus that law — through general and specific sanctions — can cause rational utility-maximizers to alter their behavior to reduce accidents. By examining the various levels at which we may disagree with this relatively modest assumption,¹³ we can gain further insight into the proper mix of the

12. Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833 (1984).

13. The premises of *Costs* are relatively modest and straightforward compared to assumptions of other works in the area of law and economics. In particular, the assumption in the work of Posner that economic efficiency means wealth maximization has been widely criticized. See Calabresi, *supra* note 1; Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811

efficiency, distribution, and justice goals of tort law.

The next section will provide a brief summary of *Ideals*. Building upon the analysis in the book, I will expand upon two ways in which we may disagree with this premise of an economic analysis.¹⁴ Whenever possible, I will discuss the data upon which the objections are based. I will then discuss the relationship of these objections to each other and to an economic analysis.

I. THE BOOK

Ideals examines the legal response to beliefs and attitudes. The first four chapters explore this issue within the context of accident law. Chapter One examines the reasons we give for accepting some accidents while trying to prevent others, and what we should do with respect to those who are injured by our choices. Chapter Two looks at how law treats those with social disadvantages or handicaps. Chapter Three examines the tort liability of those who are different not because of social or physical handicaps, but because of their beliefs. Chapter Four examines attitudes and beliefs which are widely held, but are disfavored by law.¹⁵ Each chapter contains road signs indicating the role of attitudes, ideals, and beliefs in the legal system.

The first road sign is the automobile and our response to the carnage it causes. Calabresi discusses the automobile through the metaphor of a gift from an evil deity who offers to make life more enjoyable for society, at the cost of the sacrifice of the lives of 1000 randomly chosen young people. Calabresi asks his first-year torts students if they would accept such a gift; and when they say no he asks them how such a gift differs from accepting the "gift" of the automobile which kills 50,000 citizens a year and maims many more. Because the students are not anxious to surrender their cars, they strive to find distinctions. The distinctions constitute the reasons we give for accepting some accidents while trying to prevent others.

Three points raised by the students are relevant because they touch upon basic behavioral and moral assumptions of the economic model.

(1980); Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 487 (1980). There has also been controversy about the assumptions underlying the Coase Theorem, see Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979), and about the general validity of assumptions and procedures in cost-benefit analysis, see Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Markovits, *Duncan's Do Nois: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984).

14. As will become obvious, this essay goes beyond *Ideals* in the critique of economic premises. I believe, however, that the seeds of each of these objections can be found in Calabresi's book.

15. Chapter Five uses ideas from the first four chapters to speak to the conflict of values and beliefs in the abortion controversy. Because this review focuses on tort law, I will limit my discussion to the first four chapters.

First, automobiles take "statistical" lives, while the deity wants "real" lives. Second, the automobile has saved more lives than it has cost. Third, and more fundamentally, cars kill people because of "bad" driving. If people behaved like the reasonable person no one would die.

Calabresi answers each of these points. He responds to the statistical point with the argument that costs are costs, not to be altered by our psychological discount functions. We should recognize that there is no such thing as a "statistical" life — as pictures of grieving families demonstrate.¹⁶

Positions are reversed with respect to the students' second point. They argue that we should accept the automobile because its costs are less than its benefits. Calabresi responds with the distributional point that while it may be true that cars save more lives than they cost, the lives saved are not the same as the lives lost. What of the injuries to the victims?

Victims could, of course, buy insurance against such disasters, but, as Calabresi notes, many will fail to do so. Just as outside observers may discount statistical lives, actors may underestimate, and thus fail to prepare for, the possibility of future injury. Calabresi argues that if the issue were put to a vote, most of us would opt for compulsory insurance out of a sense of what he calls "self-paternalism."

Afraid of squandering the money available in short-run pleasures rather than long-run security, we wish to compel ourselves to look after long-run interests. Absent such compulsion it seems inevitable that many will fail to look to long-term interests. Some fail to buy insurance, and live (or die) to regret it. In hindsight this might be viewed as a failure to conduct one's affairs as would a rational person maximizing his utility. How should society and the legal system respond to this psychological reality?

The solution presented in *Ideals* is to require compulsory insurance, thus forcing individuals to guard against future catastrophe. Calabresi would not allow people to make their own decisions — not even those individuals who argue that their decision to choose present gratification over provision for future costs is a rational, utility-maximizing one because they are not risk averse, or because their discount function is large.¹⁷

16. There are at least two aspects to the statistical observation. First, the victim is not identified. Unknown, he is stripped of individual identifiers which might raise his worth in our eyes and thus raise the cost of his death. As outsiders, we discount statistical costs. Second, statistical risk implies uncertainty. Although someone will be injured, we might get "lucky" and not be hurt. Risk takers undervalue certain statistical risks. We will return to these points below.

17. Calabresi attempts to justify this result by arguing that insurance is a collective good. In one sense, at least, this may be true. As a society we cannot bring ourselves to allow the widow and orphan to starve. The noninsurers coerce the rest of us through the emotional blackmail of their suffering. We might compel them to insure to avoid their potentially becoming free riders in the future.

The students' third point, that cars kill people because of "unreasonable" driving, raises two of the book's fundamental questions: what constitutes reasonableness, and what are the causes of reasonable and unreasonable behavior? Calabresi's first response is similar to his response to the "statistical person" argument. We should recognize that "reasonableness" is, ultimately, a name we give to the risk-benefit trade-off we choose to make. The definition of careless driving, speeding, design defects, and unsafe roads, "in effect represents a decision of how much of the evil deity's gift we have chosen to accept, and how much we have rejected" (p. 9). Even were perfectibility possible, we would be unwilling to pay the cost in terms of safety precautions.

The students do, however, raise a fundamental point. In many circumstances people continue to care about what Calabresi has called the "moral distribution" of accidents.¹⁸ We wish to place the burden of accidents on those who, by their unreasonable behavior, cause the accidents.¹⁹ The question remains, what counts as reasonable behavior? Specifically, what of behavior motivated by attitudes, beliefs, or values arising from cultural differences or from physical, mental, or economic handicap? Calabresi argues that to fail to take account of such attitudinal factors in the reasonableness calculus is to burden them whenever they entail a risk of harm: "We declare that those who hold beliefs should either give them up or pay for them" (p. 19). When, if ever, should we treat attitudes and beliefs in this way?

Calabresi begins the discussion of this question by making another observation about automobile driving: there are correlations between demographic characteristics and accident frequency. He makes the reasonable assumption that part of these correlations can be explained by attitudinal and value differences among groups of drivers. How should we treat members of groups who collectively may have attitudes toward driving that cause them to have a higher incidence of accidents?²⁰

Throughout *Ideals* Calabresi distinguishes between person as "vic-

18. Calabresi, *Policy Goals of the "Swedish Alternative,"* 34 AM. J. COMP. L. 657, 657 (1986).

19. Calabresi believes that many accidents are marginally related to the degree of care taken by drivers, and that determining fault is an uncertain and expensive business. Because of this, he would prefer some type of strict liability system to allocate the costs of automobile accidents. In *Ideals*, however, he limits discussion to systems of rules that allocate costs based upon actor and victim reasonableness.

20. The common law has traditionally had difficulty with different types of disability. Age and physical handicaps are usually taken into account in the reasonableness equation, whereas mental handicaps are not. Calabresi asks why the law should treat people with certain demographic attributes (race, ethnicity, etc.) the way it treats mental handicaps, rather than the way it treats physical handicaps. H.L.A. Hart explains the distinction between physical and mental handicaps by saying the law is more willing to entertain limitations based on physical ability than limitations of will, partly because it is relatively difficult to prove defects of will. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 91-92 (1968). By analogy the limitations based upon gender or race, at least as they are defined in *Ideals*, are more like defects of will than physical defects.

tim" and person as "injurer." When the belief-holder is a victim, Calabresi is sometimes willing to entertain attitudinal and value excuses. When the individual is the injurer, however, it is more difficult to justify the conclusion that an innocent victim should bear the loss of injury because of the injurer's idiosyncratic values. Nevertheless, Calabresi argues that we should not burden the young, the old, or ethnic groups with bad accident records by requiring them to pay higher insurance rates, even though the higher rates might discourage such people from driving as much as they do, or from driving higher-risk automobiles.

Still, honesty does not require us to conclude that members of this group should be excluded from driving, or even limited in their driving by making them pay very high insurance rates in order to take part. The slaughter — to be blunt — may be worth it in order to include them without discrimination! [pp. 34-35]

Toward this objective, legislatures have attempted to limit some rate differences by forbidding insurance companies from setting rates based upon gender, age, or ethnicity. Many states spread risk by establishing uninsured motorist pools, under which insurance companies operating in the state must insure those who cannot obtain coverage in the private market. Calabresi notes, however, that when insurers are forbidden from using age and ethnicity to set rates they may attempt to substitute other categories which have the effect of burdening some of the same groups.²¹ He objects to this alternative because it still places increased burdens on certain groups. More surprisingly, perhaps, he also objects to any alternative that sets rates based on an individual's past accidents, because it places all in accident-prone categories at greater risk of facing the higher insurance rates assigned to those who cause accidents.²²

Calabresi's rejection of the individualizing solution follows from his assumptions about the distribution and malleability of driving behavior. First, groups who have poor driving records and thus will be forced to bear this extra cost are also groups which are otherwise relatively disadvantaged. Thus, unequal insurance rates will have undesirable distributional consequences. Second, the driving behavior of such groups is partly caused by cultural factors, or by traits arising out of

21. The example he gives is the use of geographically based rate structures, which may act as surrogates for ethnic categories. On a similar note, some insurance companies now offer lower rates to nonsmokers. Perhaps this is a surrogate for other, accident-related attributes. In both cases, however, these alternative categories are not purely subterfuges. For example, the higher accident rate of urban areas is not entirely explained by the ethnic composition of these areas.

22. The premise upon which this point rests can be questioned. In rejecting the individual driving record alternative Calabresi says, "But charging drivers on the basis of past accident records may instead be of very limited use if the object is *not* to discriminate against certain groups." P. 38. Of course many would say that this is not the objective. Rather, the objective is not to discriminate against individuals because of their group membership. Individual insurance rates do not do this.

past mistreatment of group members.²³ These groups have attributes that are "undesirable and even dangerous," (p. 42) but society has caused these attributes and should collectively bear their costs. Third, this type of bad driving behavior cannot easily be altered by law. Many individuals will not respond to economic incentives and behave as rational utility-maximizers. Any attempt to use law to make them behave in this way will only further burden already overburdened groups.

Private insurance companies offer no solution to these problems, for they will pursue their economic self-interest. Insurance companies, unlike individuals, will behave as rational utility-maximizers, altering their rate structures in the face of changing risks. Thus, the best alternative is to subsidize²⁴ the insurance rates offered to people who fall into high-risk categories because of attributes such as age, gender, or ethnicity.

To summarize, the automobile and insurance road signs indicate several ways in which the economic assumption of a society of equally rational utility-maximizers is inaccurate. Some actors will fail to purchase insurance against injuries, some will fail to drive as safely as is called for by the reasonable-person standard, and some will not be properly deterred by insurance rates. Moreover, these "failures of rationality" are not randomly distributed in society.

Calabresi next turns his attention to attitudes and values that derive from religious and moral beliefs rather than social position. He makes the important point that many areas of law are subject to a type of constitutional gravitational pull. For example, the free exercise and establishment clauses may protect some narrowly held religious beliefs by creating a gravitational pull in tort to recognize unusual beliefs as

23. Unfortunately, Calabresi's discussion in this chapter is not informed by a statement about the relative homogeneity and separation of groups. The presentation seems to assume that the accident experience of individuals within groups is reasonably homogeneous, and that the differences between groups are substantial. Perfect homogeneity and complete separation would exist, for instance, if all men had two accidents per year and all women had one. If all accidents generated the same cost, we would have to charge males twice as much for accident insurance to internalize costs to the drivers who caused them, and an equal rate for all men would be fair to all men. As groups become less homogeneous, a flat rate within the group becomes less and less fair. However, as long as the two groups are distinctive, the unfairness (the subsidy of the bad drivers by the good) exists only within the group. As the accident experience of members of different groups begins to overlap, unfairness emerges between groups. Bad-driving women may be charged less than good-driving men because the mean accident experience of women is less. As the driving experience of the two groups overlaps, however, gender becomes a less useful predictor, and thus the difference between groups would shrink if insurance company rates were driven solely by group accident costs. See K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 68-75 (1986).

24. The size of the subsidy is not discussed. Yet unless there is to be but one flat insurance rate for all drivers, a problem which is discussed in *Costs*, "what is a cost of what" must be confronted. Is the higher accident rate in cities due only to the attitudes of city drivers, or to the nature of city driving (e.g., crowded freeways)? If the accident rate is due in part to the nature of city driving, should those risks be spread to rural drivers? On what distributional criteria?

"reasonable," at least when held by victims. He presents four cases, partly real and partly hypothetical, which demonstrate this influence.

The first hypothetical case is loosely based on the facts in *Lange v. Hoyt*.²⁵ As Calabresi states the facts, a young woman named Minelda delays treatment for her shattered pelvis because the treatment conflicts with her religious beliefs as a Christian Scientist.²⁶ As a consequence her injuries are compounded. Should her damages be limited to those which she suffers due to the initial injury, or must the injurer "take his victim as he finds him," including a victim with religious objections to medical treatment?

The second case, constructed by Calabresi, involves a Catholic Minelda who, suffering from a broken pelvis, nevertheless becomes pregnant partly because of her religiously based refusal to use artificial methods of contraception. She also refuses abortion, and due to the earlier injury dies from complications of childbirth. Again, the question is whether she or her heirs should be allowed to recover for her consequential damages?

Calabresi calls his third case the Jewish case. In *Friedman v. New York*,²⁷ Miss Friedman sued the state of New York for its negligence in shutting down a ski lift for the evening while she and a young man were still on board. The case occurred in the summertime, and thus injury from exposure was not likely. The plaintiff, however, jumped from the lift and was injured in the fall. What makes the case interesting is her reason for jumping. Miss Friedman said that she believed it was a violation of Jewish law for an unmarried woman to be with a man after dark in a place where she could not readily be reached. She was apparently in error in this belief.²⁸ Nevertheless, she sued for injuries due to the fall.²⁹ The New York Court of Claims, sitting without a jury, awarded her damages for her injuries.

The final case is *Troppi v. Scarf*.³⁰ A pharmacist negligently gave the plaintiffs tranquilizers instead of birth control pills. A pregnancy resulted, and they sued the pharmacist for the cost of bringing up the child. The defense was that the couple should have mitigated their damages either through abortion or adoption. Plaintiffs responded that their beliefs prevented them from pursuing these alternatives.

25. 114 Conn. 590, 159 A. 575 (1932).

26. In the actual case the plaintiff was a young girl and it was her mother who was accused of delaying or avoiding treatment because of her beliefs, thus exacerbating the daughter's injuries. The court allowed an instruction that the jury could consider the mother's conscientiously held beliefs in determining whether the plaintiff's behavior was reasonable.

27. 54 Misc. 2d 448, 282 N.Y.S.2d 858 (N.Y. Ct. Cl. 1967).

28. The error was not hers but that of the rabbi who instructed her that the rule was an absolute prohibition.

29. Calabresi reports that her "most significant injuries were facial lacerations," p. 51, so the distance of the fall must not have been too great.

30. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

Again the court rejected the defendant's argument, refusing even to let the question go to the jury. The pharmacist must take his victims as he finds them, including their beliefs.

If, as Calabresi suggests, we view these cases from the point of view of a Learned Hand type of analysis,³¹ then the decision to jump, and the decision to keep the child, may appear more reasonable when the beliefs of the plaintiffs are included in the equation. Alternative behavior would require a violation of those beliefs with some attached cost to the individual.

As in the case of the evil deity, Calabresi presents these and other cases to his first-year torts classes. He reports that they generally disagree with the outcome in the ski lift case, arguing that Miss Friedman should not recover for injuries suffered when she jumped, but that the Troppis should be compensated for the costs of raising the child.³² Calabresi says that if this were the rule, then only "banquet" religious beliefs which are shared by most citizens are reasonable, whereas other beliefs are not. He argues to the contrary — that due to the gravitational pull of the first amendment all religious values should be given equal weight. A question remains, however: what weight?

A substantial part of our difficulty with religious beliefs arises not because we reject minority religious views in a cavalier way, but because we do not know how much weight to give them in an analysis of reasonableness. How heavily should a belief in the sin of being alone with a person of the opposite sex weigh in solving the reasonableness equation? Does it justify jumping off the lift when the ground is but a few feet below? Does it make suicide reasonable? Since there is no obvious answer, we tend to treat such religious beliefs either as irrelevant or as trumps which make otherwise unreasonable behavior reasonable.³³

31. Calabresi states the test as follows: One should compare the costs and benefits of behavior against the costs and benefits of behaving differently, in both cases discounting by the likelihood that the harms or benefits will occur. If, on striking this balance, a behavior is reasonable (its benefit-cost ratio is superior to the benefit-cost ratio of behaving differently) then the behavior is reasonable even though there is a bad outcome. This is a more complicated test than that presented by Hand in *Carroll Towing*, which only looked at the costs and benefits of a particular action, without explicit reference to alternative lines of conduct. The core of both analyses, however, is to invite a person to do a type of cost-benefit analysis concerning their own behavior, and then to act to maximize the benefit-cost ratio. This is, of course, the rational utility-maximizing model of behavior assumed by economic analyses.

32. True to the teaching tradition, upon reading *Ideals* I immediately plagiarized Calabresi's material and asked my first-year torts students about these cases. Unfortunately they did not make the same distinction. They agreed that Miss Friedman should not recover, but a majority felt that the Troppis also should not recover because their decision to keep the child indicated that it had a high value for them. Perhaps there is some aspect of the way I posed the cases which accounts for the different response.

33. The statement in the text is not true in every case. Recall that in the Christian Scientist case the court allowed an instruction that the jury could *consider* the mother's religious beliefs in determining whether the delay in seeking treatment was reasonable.

While Calabresi is never perfectly clear on the question of the weight to be given to values, his

The difficulty of assigning a weight to beliefs is perhaps one factor causing us to ignore "odd" beliefs when the actor is the injurer rather than the victim, and when there is an identifiable victim. Were the young lady on the ski lift to negligently jump on top of someone below, causing injury to the person on the ground, her religious conviction would almost certainly not excuse her behavior in a civil suit.

Calabresi, however, would like to protect Miss Friedman's beliefs because, he says, the society has an interest in protecting religious values. He would create a fund to compensate victims of those who would be at fault if their actions were not due to idiosyncratic beliefs. In this way, odd and acceptable beliefs would be treated the same. This is acceptable because the extra risk these beliefs create will be spread so that no set of victims must bear the bulk of the cost.³⁴

The final chapter on tort law moves from a discussion of the courts' willingness to consider beliefs when determining the reasonableness of behavior, to a discussion of their unwillingness to award damages for many harms to beliefs and values themselves. One example of this is judicial treatment of the special value individuals attach to certain items, such as a watch given by a favorite aunt. In a suit against the person who negligently destroyed it, one will not be compensated for the special psychic loss suffered due to the watch's destruction. A second example of an injury which often goes uncompensated is the emotional injury suffered when one observes some horrific effect occasioned by another's negligence, as when witnessing a fatal accident on the highway. Certainly these are both real losses, and certainly they are widely experienced, as anyone who has lost a favorite keepsake or has had to witness a fatal automobile accident can report. Why aren't they compensated?

In the case of a thing of special value Calabresi offers an efficiency answer. He argues that knowledge of value is in possession of the victim, not the injurer. Putting the burden for the special losses attached to keepsakes on the injurer would be an inefficient allocation, because the injurer would have to act more carefully toward all objects, both those with special value and those with only market value. He would be too careful with respect to objects with no intrinsic value, and yet still not be careful enough toward those objects with special value. The owners of things of special intrinsic value are in a better position than

argument appears to assume that if the harm entailed in violating one's beliefs counts in the balance of reasonableness, then the actions of Miss Friedman and the Mineldas are reasonable. He does not discuss the possibility that even when this harm is factored into our equation the behavior might be unreasonable. Certain values and beliefs appear to act as trumps, short-circuiting our normal mode of analysis.

34. Of course, as Calabresi notes, physical injuries, especially serious physical injuries, are not amenable to financial compensation. Calabresi's response to this most difficult problem is to note that beliefs are not easily monetized either. There is no marketplace where people are actively trying to sell their beliefs, or buy broken backs.

even a negligent injurer to give those things extra protection. This argument echoes a discussion earlier in *Ideals* concerning an injury to a violinist who, because of his desire to write a proletarian symphony, goes to work in a steel mill and loses his hand in a mishap. Calabresi says that in such a circumstance the violinist should only recover the value of an ordinary steelworker's hand. In the case of the aunt's watch and the violinist's hand, the victims have in some sense assumed the risk. Calabresi is willing to apply the cheapest cost avoider analysis of *Costs* to bar recovery for special damages, because the victim could take special precautions.

Why, however, in the case of the watch or the violinist's hand does Calabresi believe it correct to place efficiency concerns (cheapest cost avoider) above other considerations? Why not take a similar view toward the insurance rates of young male drivers? Calabresi's answer is in two parts. First, he distinguishes among various activities in terms of their relative importance for full participation in the society. If, to protect special hands or special watches, one must not work in factories³⁵ or take a favorite timepiece out on the road, this is not an unfair burden which removes one from society in general. It is not necessary to choose between protecting special property and withdrawing from "ordinary" life.³⁶ One cannot, however, reasonably choose between driving a car and protecting valuable hands. Driving is an essential part of full participation in the society. Thus, according to Calabresi, if the violinist loses his hand in a driving accident the injurer should have to pay for the full economic loss.

With respect to emotional harms suffered from witnessing calamities, Calabresi offers a different, psychological explanation for the courts' unwillingness to allow recovery. Recovery for this type of emotional harm might not be allowed because to do so would increase actual suffering.³⁷

35. Or at least not work in factories in order to gain experience for a great proletarian symphony. It is not clear how Calabresi would respond if the reason the violinist is working in the mill is to feed his starving family. The musician is presumably still the cheapest cost avoider, yet on these facts employment in the mill is a more important part of participation in the society than is the right to drive a car. Basing recovery upon the ability of the victim to know and act on his limitations is a difficult rule, for there are many things we might do less of in order to limit our risks. On the other hand, an "ordinary places" rule refusing recovery where the victim with special risk places himself in a setting of extraordinary risk is an arbitrary rule which may often fail to capture the ability of the victim to reduce risk.

36. The perceptive reader may ask, given that the owner of the watch is in the best position to know what needs to be done to protect the property, and that providing special protection would not exclude the individual from ordinary social life, might not the same argument justify the conclusion that Miss Friedman should be held to assume the risk of her special disability when she chooses to ride ski lifts with young men? Calabresi implicitly answers this question by noting that Miss Friedman was fortunate that the court focused on the reasonableness of her jumping, and not on whether, knowing her unique beliefs, she should have boarded the lift at all. P. 175 n.280.

37. Calabresi is ultimately unwilling to say whether such damages should be awarded. Other, countervailing arguments might support awarding damages. P. 81.

[T]he very fact of focusing on these items, as is necessary in order to bring a claim, makes the hurt last. . . .

. . . Most people . . . who see . . . an accident may feel some emotion, but they get over it, and that is the end of it. If, instead, they had a right to recover for their emotion, that passing pang would surely *not* be the end of it. . . . Again, this is not because of dishonesty . . . but because the law told them they had been violated, had been hurt, and induced them to pay attention to that hurt. [pp. 77-78]

Throughout this discussion and throughout *Ideals*, Calabresi recognizes that legal entitlements themselves alter our perception of costs and benefits. Entitlements create value.³⁸ "Law, unlike economics, is not concerned only, or even primarily, with reduction of costs, 'given tastes.' It is fundamentally concerned with *shaping* tastes" (p. 84). He assumes that the ability of law to shape tastes is greatest where injury is solely emotional, unaccompanied by physical harm to self or loved one. No data is offered to support this latter argument. For purposes of the present discussion, however, what is important is not its truth, but rather the fact that Calabresi has used a psychological analysis to alter the efficiency conclusions we would draw if we were to use an economically rational, utility-maximizing individual as our model.

II. THE LIMITS OF THE ECONOMIC MODEL

Throughout the book, Calabresi is concerned with the insights a consideration of ideals, attitudes, and beliefs brings to our understanding of what it is to be a reasonable person. In the process he suggests various ways in which an economic definition of reasonableness as utility-maximizing behavior inadequately describes individual actions. However, the source and nature of our inability to act as utility maximizers is not always clearly presented. Partly for this reason it is not obvious why, on some occasions, Calabresi argues for legal rules that protect beliefs and values and at other times for legal rules that ignore them or sacrifice them for some other goal. In my judgment this is due substantially to the fact that the book is based on a set of partly complementary and partly competing psychological and sociological critiques of the economic model's micro-assumptions. In what follows I will review the general outline of these critiques and indicate how they relate to one another and to the micro-assumptions of the economic model.

A. *Psychological Critique*

The first and most direct critique is psychological.³⁹ The nature of the psychological critique is exemplified by a body of research con-

38. For a similar point with respect to the effect of property rules, see Kelman, *supra* note 13.

39. Needless to say, there may be several additional critiques of the economic model. In this review I do not presume to survey the whole range of possible critiques.

ducted by Kahneman and Tversky which indicates that in certain situations individuals usually fail to make utility-maximizing decisions.⁴⁰

In one important article they call their theory of decisionmaking "prospect theory."⁴¹ A central conclusion of prospect theory is that individuals usually fail to assign a linear value function to risky choices. Measured by probability functions, they overweight sure things and improbable events. For example, a large majority of people would choose a sure \$800 rather than an 85% chance at \$1000. In such situations individuals tend to be risk averse.⁴² Note that in this respect prospect theory does not argue that people are not maximizing utility, but rather that utility is not simply a function of wealth. Kahneman and Tversky explain these results by arguing that individuals' subjective values are measured in terms of gains and losses rather than in terms of total wealth. Subjective value is a function of the relative size of a gain. The utility difference between \$200 and \$100 is greater than the utility difference between \$1200 and \$1100.

The same is true of losses. The difference in subjective value between a loss of \$200 and a loss of \$100 is greater than the difference in subjective value between a loss of \$1200 and a loss of \$1100. The value function is concave in the domain of gains and convex in the domain of losses.

Finally, individuals tend to be loss averse; the subjective value function is steeper for losses than for gains. Most people are reluctant to bet on a fair coin for equal stakes. A loss of \$100 is subjectively greater than a gain of \$100. Because the subjective value function is convex in the domain of losses, individuals tend to be risk-seeking when confronting losses. Most individuals forced to choose between an 85% chance of losing \$1000 and a sure loss of \$800 prefer the gamble over the sure loss. Individuals will make similar choices with respect to the loss of life.⁴³

The fact that value functions are not linear leads to a second and more fundamental way in which individual decisions do not conform

40. See especially Kahneman & Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981) [hereinafter Tversky & Kahneman, *Psychology of Choice*]; *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (D. Kahneman, P. Slovic & A. Tversky eds. 1982); Kahneman & Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOLOGIST* 341 (1984) [hereinafter Kahneman & Tversky, *Choices*]; Tversky & Kahneman, *Rational Choice and the Framing of Decisions*, in *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* 67 (R. Hogarth & M. Reder eds. 1987).

41. Kahneman & Tversky, *Prospect Theory*, *supra* note 40.

42. In such situations we can understand individual preferences by positing a diminishing utility of money. The subjective value of \$800 is more than 80% of the value of \$1000. As discussed in the text, however, the valuation of losses is less easily understood in these terms.

43. Fischhoff, *Predicting Frames*, 9 *J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY & COGNITION* 103 (1983).

to the model of a utility maximizer. Choices in situations of risk are affected by the way the choice is "framed," either as a gain or a loss relative to the status quo. Individuals fail to obey the invariance requirement of rational choice, that the preference order between prospects should not depend upon the manner in which they are described. Kahneman and Tversky provide the results of the following experiment⁴⁴ to exhibit this tendency.

Imagine that the United States is preparing for the outbreak of an unusual disease, which is expected to kill six hundred people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of their consequences are as follows:⁴⁵

If Program *A* is adopted, two hundred people will be saved. If Program *B* is adopted, there is a one-third probability that six hundred people will be saved and a two-thirds probability that no people will be saved. Which of the two programs would you favor?

When presented with this pair of choices, framed so as to create a choice between "gains," people are risk averse and choose the sure thing (72%) over the gamble (28%). Next, the researchers reframed the choice so that it is between losses.

If Program *C* is adopted, four hundred people will die. If Program *D* is adopted, there is a one-third probability that nobody will die and a two-thirds probability that six hundred people will die.

Given this pair of choices subjects are risk-seeking, choosing the gamble (78%) over the sure thing (22%). The pair of choices indicates a failure of invariance.

A similar failure may occur in individual choices which turn on whether we frame some disadvantage of a decision as a loss or a cost. Kahneman and Tversky invite us to consider the choice between a sure loss of \$50 and a 25% chance to lose \$200. Slovic, Fischhoff, and Lichtenstein report that 80% of the subjects in one experiment chose, as we would expect, the gamble over the sure loss. However, only 35% of a group of subjects refused to pay \$50 for insurance against a 25% risk of losing \$200.⁴⁶ Kahneman and Tversky report:

The failure of invariance is both pervasive and robust. It is as common among sophisticated respondents as among naive ones, and it is not eliminated even when the same respondents answer both questions within a

44. $N = 152$.

45. The example is from Tversky & Kahneman, *Psychology of Choice*, *supra* note 40, at 453.

46. Slovic, Fischhoff & Lichtenstein, *Response Mode, Framing, and Information-Processing Effects in Risk Assessment*, in *NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE: QUESTION FRAMING AND RESPONSE CONSISTENCY* 21 (R. Hogarth ed. 1982); see also Schoemaker & Kunreuther, *An Experimental Study of Insurance Decisions*, 46 *J. RISK & INS.* 603 (1979); Hershey & Schoemaker, *Risk Taking and Problem Contest in the Domain of Losses: An Expected-Utility Analysis*, 47 *J. RISK & INS.* 111 (1980); Slovic, Fischhoff & Lichtenstein, *Regulation of Risk: A Psychological Perspective*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 241 (R. Noll ed. 1985).

few minutes. Respondents confronted with their conflicting answers are typically puzzled. Even after rereading the problems, they still wish to be risk averse in the "lives saved" version; they wish to be risk seeking in the "lives lost" version; and they also wish to obey invariance and give consistent answers in the two versions. In their stubborn appeal, framing effects resemble perceptual illusions more than computational errors.

....

The moral of these results is disturbing: Invariance is normatively essential, intuitively compelling, and psychologically unfeasible.⁴⁷

As the quotation suggests, Kahneman and Tversky are disturbed by the results of these experiments. Because failure of invariance in judgment is in substantial part due to a focus on gains or losses, Kahneman and Tversky propose various methods of rephrasing problems which will cause the individual to make decisions that meet the invariance requirement. One method is to force all choices into choices between states of wealth (total assets) rather than gains and losses. This is relatively easy to do when the choice can be monetized. If this is not possible, as, for example, when we are considering human lives, an alternative method is to evaluate options in terms of their actuarial consequences.

In Chapter One of *Ideals*, Calabresi uses arguments based upon actuarial and total wealth considerations to attack student distinctions between the gift of the evil deity and deaths due to automobiles. When the students suggest that the difference between the evil deity gift and cars is that cars take statistical lives rather than real lives, they seem to be searching for a solution that will trade a sure number of deaths for some gamble on an unknown number of road fatalities.⁴⁸ When they argue that "bad drivers" cause accidents, and that if people behaved "reasonably" many fewer would die, they seek to frame the issue in terms of the number of lives that could be saved if only people would drive safely. Calabresi relentlessly forces them (and the reader) to focus on the actuarial consequences of their decision, rather than on the gains or losses of life, or upon probabilistic versus certain outcomes. In this chapter he prefers basing decisions on the model of utility maximization rather than the decision rules of prospect theory.

In most of *Ideals*, however, Calabresi refuses to adopt this position when he is considering the plight of specific individuals. He does not force plaintiffs to consider from such a perspective the decisions to jump from a ski lift or to have an abortion. Nor, at least in the case

47. Kahneman & Tversky, *Choices*, *supra* note 40, at 343-44. Along with invariance, another principle of rational choice is dominance. If choice *A* is at least as good as choice *B* in every respect, and better than *B* in at least one respect, then *A* should be preferred to (should dominate) *B*. Most individuals also violate the principle of dominance when presented with certain pairs of choices. *Id.* at 344.

48. For a discussion of the different reactions people have to endangered known individuals versus endangered statistical lives, see C. FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 155-57 (1970).

where the individual is the victim, does he accept a legal standard that requires the trier of fact to judge such behavior from this point of view. Why?

In part this is because, as Kahneman and Tversky note, state-of-wealth and actuarial perspectives are inadequate for outcomes which lack an objective metric.⁴⁹ Thus there is no actuarial way to frame the choice between jumping from a ski lift and being alone with a man after dark. The lack of a metric is in part due to the fact that there is no clear frame of reference within which to assess the costs and benefits of the alternatives. The nature of this difficulty is captured with the idea of mental accounting.⁵⁰

A *minimal account* is one in which the only mental accounting is with respect to the difference between two options. One disregards any features the options might share. A *topical account* judges the consequences of possible choices based on the context within which the decision arises. Topical accounting occurs when we find we will drive to a different shopping mall to save five dollars on the purchase of a fifteen-dollar pocket calculator, but will not drive the same distance to save five dollars on a \$1500 stereo system. By a minimal accounting one would look only to the five-dollar difference in each case. Finally, there is *comprehensive accounting* in which the relative advantage between two options is calculated within some larger context, such as monthly expenses.⁵¹

The problem of mental accounting is particularly difficult when one attempts to deflect responsibility not by an excuse but by a justification based upon an appeal to moral, political, or religious values.⁵² The "cost" to an individual of some line of conduct may spill over far beyond the immediate transaction. To assess the utility of conduct requires a comprehensive accounting.

Special difficulties arise when others are required to assess the reasonableness of "odd" beliefs as a justification for behavior. As Calabresi notes, from the very beginnings of the tort of negligence there has been a tension between a subjective view and an objective view of reasonable behavior. In judging the worth of values the tension is heightened. Since there is no unambiguous way to assign a utility to a value,

49. Kahneman & Tversky, *Choices*, *supra* note 40, at 344.

50. *See id.* at 346-48; *see also* Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORGANIZATION 39 (1980).

51. Kahneman and Tversky note that in accordance with prospect theory, most people use topical accounting when reaching decisions. Gains and losses are judged in relative rather than absolute terms. Kahneman & Tversky, *Choices*, *supra* note 40, at 347.

52. For a discussion of the distinction between justifications and excuses, *see* Scott & Lyman, *Accounts*, 33 AM. SOC. REV. 46, 47 (1968). For a useful taxonomy of excuses and justifications, *see* G. SEMIN & A. MANSTEAD, *THE ACCOUNTABILITY OF CONDUCT: A SOCIAL PSYCHOLOGICAL ANALYSIS* (1983).

there is a risk that the judge will apply his or her own values to the case.

This occurs when Calabresi's first-year tort students are more sympathetic to the couple who refuse an abortion than to Miss Friedman when she jumps from the lift. Studies in the attribution theory tradition in social psychology lend support for Calabresi's concern that we are more likely to judge those similar to us according to an attribution process that considers their unique situation and the meaning of their action to them.⁵³ When judging individuals who are different from us, on the other hand, we are more likely to judge their activities from the perspective of an average person, and to rely upon a topical or even a minimal accounting which disregards the importance of a set of values in the individual's life. This is especially likely if we have as part of our purpose an attempt to influence the behavior of others in the future.⁵⁴ If one does not agree with the worth of a belief, a failure to recognize it is a way to discourage future action based on the belief.

In summary, a utility-maximization model for assessing the reasonableness of a line of conduct offers little guidance when the conclusion rests on an implicit choice between a typified, topical accounting and an individualized, comprehensive accounting. Confronted with this limitation there are several ways we might proceed. First, we could continue with a minimal or topical accounting. Calabresi rejects this option because it is a recipe for decisions based upon commonly held, majoritarian values. This is particularly dangerous because, as we know from Kahneman and Tversky's results, individuals frequently behave irrationally (from the perspective of a linear utility-maximization model), at least in the narrow sense that they are risk-seekers. For example, Miss Friedman was confronted with the choice between certain sin if she stayed on the lift and some probability (less than 100%) of injury if she jumped; prospect theory suggests that the choice to jump was probably overweighted. Of course she could respond that this was still a rational choice because the expected loss of staying on the lift was greater than the expected loss of jumping. But because there is no metric, nor even an agreed-upon level of accounting by which we might judge such a question, we cannot assess the truth of such an assertion except by her behavior. The corrupting influence of Kahneman and Tversky is precisely that their work suggests that behavior in risky situations often is *not* a good measure of the preference of an economically rational, utility-maximizing

53. See, e.g., Jones & Nisbett, *The Actor and the Observer: Divergent Perceptions of the Cause of Behavior*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR* 79 (E. Jones, D. Kanouse, H. Kelley, R. Nisbett, S. Valins & B. Weiner eds. 1972).

54. See Schmitt, *The Invocation of Moral Obligation*, 27 *SOCIOMETRY* 299 (1964); Kelley, *Attribution in Social Interaction*, in *ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR*, *supra* note 53, at 1.

individual.⁵⁵

A second option is to conduct a deep analysis of the meaning and circumstances implied by a comprehensive accounting scheme. This alternative, too, is rejected. Calabresi never suggests that the courts should attempt a comprehensive accounting of the utility of violating a belief versus the utility of injury. To do so might lead to the conclusion that the reasonable thing to do is to abandon the belief and act to avoid injury or to mitigate damages. While Calabresi never explicitly states why this course would be unwise, reasons quickly come to mind. Consistency in such judgments seems unlikely, leading to a perception of unfairness across cases. Moreover, the tertiary costs of such a decision-making process would be substantial.

The third option is to make an a priori decision as to whether the justification is to be honored, and if so, allow it to trump, at least in cases where the belief-holder is the victim. Calabresi appears to opt for an absolute solution. Either a belief is to be recognized and honored or it is not. The decision as to whether to honor a belief is to be made on the basis of other considerations, which Calabresi purports to derive from the Constitution, *e.g.*, the establishment clause of the first amendment. In the domain of justifications based on beliefs, a cost-benefit utility-maximization analysis is inappropriate.

B. *Sociological Critique*

If the difficulties we confront in applying an economic model to religious beliefs are primarily psychological, the difficulties presented by the disadvantaged are primarily sociological. Like the rest of us, the disadvantaged may make risky decisions according to the hypotheses of prospect theory, and if their actions are adjudicated by strangers, their value-based justifications may be judged within the context of a minimal account which gives little weight to values. The disadvantaged, however, suffer from an additional handicap: they do not have the same choices that others do. This is the heart of the sociological critique. Insofar as an economic analysis is premised upon equal human autonomy and ability, it misrepresents the reality of individual choice, and thus may misinterpret the meaning of an exchange. The sociological critique is aimed at the equality part of the assumption that people are equally rational utility-maximizers.

The problem is most frequently discussed in terms of wealth and the effect of the choice of money as a metric of comparison. If two people are given an opportunity to purchase apples in a market and one offers more than another, we cannot say that the utility of the apple is higher for the first person. This conclusion is contingent upon

55. If utility maximization is the measure of reasonable behavior, jumping was unreasonable. If, however, reasonableness is measured by typical behavior, Miss Friedman's choice might be considered reasonable since most people would overweight the risky choice in such a situation.

the choice of metric. A metric which does not account for initial position sends an ambiguous signal. If person one — who has three times the assets of person two — offers twice as much money, does the outcome reflect the different utility of apples, or does it reflect the differences in starting position? Presumably it reflects some of both. A metric which takes account of starting position — for instance, one which measures utility on the basis of the relative proportion of total wealth two people would be willing to pay for an item — would be a better measure of underlying utility in the sense that it would be less influenced by initial starting position.⁵⁶ Thus the use of a metric such as money introduces one type of sociological effect. People with less money confront constrained choices, at least in those circumstances when the choice involves more than a trivial cost. Wealth effects per se, however, are only part of the sociological critique.

Consider the situation where a single person is given a choice between an apple and an orange. If the individual chooses an apple, can we say that the apple maximizes utility? Mark Kelman argues that the neoclassical utilitarian answer is a tautological yes. One is better off when one gets what one chooses because one chooses what makes one better off.⁵⁷ Certainly, however, this is not always the case.⁵⁸ Even when people know what is best they may not act on it. For example, some choices are “choices of unwanted habituation,” unwelcome even as they are made. Such a state of affairs describes the alcoholic’s choice to drink. To say the choice must represent a preference for intoxication over sobriety in the same sense that the choice of an apple represents a preference against citrus, or even to say that the choice of an alcoholic is the same as the choice of most people to drink or not, is to disregard the differences among the sorts and conditions of men.

In the present context, an even more important restriction on choice is the fact that actions are influenced by attitudes and values that are in part the product of accommodations to background conditions.⁵⁹ Driving behavior may be influenced by attitudes that are in turn a product of one’s social position.

When we say attitudes prevent someone from driving more safely

56. Less, but not totally uninfluenced since we should expect that an individual’s tastes change with changes in wealth. Calabresi, among others, makes this point. Calabresi, *supra* note 1, at 555. This is one explanation for the so-called Scitovsky paradox in cost-benefit analyses, whereby a change from position one to position two is efficient (benefits outweigh costs), and a change back from position two to position one is also efficient. See Markovits, *supra* note 13, at 820 n.12. Of course, if all actual exchanges — rather than the measurement of utility — were to occur on the basis of percentage of wealth, then there would be no wealth effects, for there would be no effective differences in wealth.

57. Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 778.

58. Horwitz, *supra* note 11, at 908, cites an early Calabresi article for this point of view: Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 502 (1961).

59. Kelman, *supra* note 57, at 772.

we do not mean, presumably, that the individual does not have the ability to drive better (as perhaps we may say of some new drivers). Nor is this inability a matter of capacity to learn. The person could learn to drive better by changing his attitudes about driving (as perhaps some old people could not). This is not to say that attitudes may not act as impediments to safer driving. Young male drivers may drive relatively badly because of attitudes toward cars, driving, and their sense of self. Calabresi thinks the same might be said of some other drivers. The circumstances of their lives compel them to certain points of view which are not easily changed absent a change in their circumstances.

At times these social differences may alter psychological perceptions of risk, which in turn influence risk-taking behavior. Consider, for example, the decision to wear seat belts. If the individual chooses not to wear a belt, what does this choice tell us about the individual? Some insight into this question may be gained by considering the results of an experiment by Slovic, Fischhoff, and Lichtenstein.⁶⁰ They begin by noting that a fatal auto accident occurs only once in every 3.5 million person-trips, and a disabling injury only once in every 100,000 person-trips. Thus, to fasten one's seat belt may seem to be an unnecessary precaution. But from the point of view of a lifetime (fifty years) of driving (approximately 40,000 trips), the odds of being killed are approximately one percent, and those of a disabling injury exceed one in three. The study showed that people asked to consider this lifetime perspective were more favorably disposed toward seat belts than those asked to consider the trip-by-trip perspective. People who do not attend to long-run costs are less likely to wear seat belts. However, the probability that an individual will adopt the long view may not be randomly distributed in the society. Younger and poorer members of the society may be less likely to take a longer view. When individuals take a shorter view the probability of catastrophic injury becomes very small, and prospect theory argues that these risks will then be underestimated from the point of view of utility maximization. When Calabresi argues that certain groups cannot act in the aggregate according to the standards of a reasonable person, he is offering a sociological critique of policies or decisions based upon a utility-maximizing model (p. 41).

Here, unlike the situation with respect to religious values, however, Calabresi, like the common law,⁶¹ is generally unwilling to alter the

60. Slovic, Fischhoff & Lichtenstein, *Accident Probabilities and Seat Belt Usage: A Psychological Perspective*, 10 ACCIDENT ANALYSIS & PREVENTION 281 (1978). See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 40.

61. "Where cost causing behavior derives from attitudes linked to ethnic or racial status it is generally deemed to be unreasonable at common law, whether in victims or in injurers." P. 43.

standards of reasonable behavior for members of these groups.⁶² There are two reasons for this. First, an individual's inability to act reasonably due to attitudes or values associated with social position is not the type of fundamental impossibility that places behavior beyond the influence of the law. Second, honoring attitudinal and value excuses associated with social position implies a comprehensive accounting. A comprehensive accounting, which adopts a longer view, seems misplaced when the attitudes or values are not themselves particularly worthy of protection or encouragement. From the point of view of a neutral observer, some of these attitudes induce irrational preferences in the sense that the preferences would not persist if the individual had better information or reasoning.⁶³ As Calabresi notes when discussing damages for emotional distress, recognizing such attitudinal excuses would presumably encourage these preferences when in fact the society would prefer to frustrate them.

Since structurally generated attitudes or values are not the type of justification we are generally willing to recognize as an excuse for negligence, and since Calabresi, nevertheless, believes that the attitudes and values that drive this behavior are not easily altered, he is opposed to variations in insurance rate structures which reflect differences in individual or group safety records.⁶⁴ Calabresi trades potential general deterrence, and the reduction of accidents and accident-avoidance costs which might accompany it, for a distributional objective which reflects his hypotheses concerning the unequal distribution of utility-maximizing driving behavior.

This solution leaves us with the question of who should enjoy the subsidy. One answer might be all individuals who hold attitudes and values, produced by their position in the social structure, which cause their behavior to fall below the reasonable-person standard. The attitudes and values of the "poor little rich kid" who drives badly are as worthy of protection as are those of the poor kid. Would we, however,

62. Even when the actor is the victim, Calabresi does not suggest that we consider the actor's values in deciding the reasonableness of his behavior.

63. See G.P. PENZ, *CONSUMER SOVEREIGNTY AND HUMAN INTERESTS* 63-66 (1986).

64. Although Calabresi's primary reason for rejecting rate structures based upon individual driving records reflects his belief that in some sociological sense safer driving is beyond the individual's control, he apparently objects to this type of categorization also because it is not a good predictor of future accidents. The more efficient predictors are precisely those which Calabresi objects to on what K. ABRAHAM, *supra* note 23, calls causality-control grounds. For example, Abraham notes that while all variables in use explained only 22% of accident loss in a 1979 study, the driver's sex, which was the single most efficient variable, accounted for over one-third of the explainable variance. It is unlikely any other substitute variable will do as well. Of course, the very fact that some of the objectionable variables are relatively efficient means that if they are eliminated there will be a substantial change in the rate structure, and thus a substantial shift in the distribution of the burden of insurance. Abraham reports that the same study concluded that, if sex were eliminated as a variable, young female drivers' insurance rates would rise 26% while male rates would drop 6%. (The difference is due to the fact that at the time of the study 76% of all youthful drivers were male.)

choose to equalize insurance premiums if the result were that the poor would subsidize the well-to-do for their careless driving behavior? That many of us would answer "no" suggests that the sociological critique leads us in a different direction than does the psychological critique. The nature of these differing directions may be viewed from the perspective of philosophical objections to utilitarianism.

C. *Philosophical Objections*

Calabresi raises this issue with the following example. When speaking of the evil deity's gift to the society he argues:

Finally, we do care a great deal about who wins and who loses as a result of our acceptances and our rejections of the evil deity's offers. A great increase in life-years for the very rich, achieved at the cost of brutalizing and shortening the lives of the very poor, is not a gain — even if the total of additional life-years comes out "in the black." [p. 11]

An economic model which follows Bentham's utilitarian dictum, "everybody to count for one, nobody for more than one,"⁶⁵ might justify the above trade precisely because it treats each individual's values as equal, and adopts as its premise the formal equality of individuals as rational utility-maximizers.⁶⁶ Utilitarian equality is individual equality.

This outcome is not acceptable to Calabresi. He, like many, does not approve of all outcomes that are justified by a utilitarian principle of the greatest good for the greatest number. What is unclear in Calabresi's analysis is exactly why this outcome is unacceptable. Is the outcome (brutalized and shortened lives for some) objectionable because it is the poor whose lives are brutalized and shortened? Would the objection disappear if the positions of rich and poor were reversed in this hypothetical? Is it the distributional consequences or the interpersonal trade-offs per se which are unacceptable? These two fundamental objections to the equal utility-maximizing model spring from the sociological and psychological critiques, and they in turn may conflict with each other.

The philosophical objection which finds its roots in the sociological critique focuses upon the utilitarian model's distributional assumptions. It attacks the premise that there is equal freedom of choice for any decision rule. By attacking the micro-assumption of equal utility maximization, the critique also casts doubt on the argument that existing distributions are the result of a set of free exchanges in society

65. J.S. MILL, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 77 (E.P. Dutton & Co. ed. 1951) (quoting J. Bentham).

66. It is, however, easy to straw-man utilitarianism here. The fundamental assumption that marginal utility declines with increasing income would constrain the likelihood that the transaction in the text would be approved. Of course, if the gain to the advantaged were sufficiently large, it would be justified. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 264 (1980).

and, therefore, are *prima facie* entitled to the presumption that they are efficient.

Many distributional arguments go further and call for some vision of social justice which would require reallocation of resources even if the reallocation is not efficient in the wealth-maximizing sense.⁶⁷ As such they do not object to utilitarianism's concern with the general welfare, or its willingness to sacrifice the welfare of some in the effort to achieve this goal. Rather, they object to the way individuals are counted in the calculus. They reject the individual equality of the economic model, and in its place substitute the idea of equality in a community. People are not to count as one in calculating just distributions. From this point of view, what is wrong with the exchange in Calabresi's example is that the *disadvantaged* are sacrificed for the common good.⁶⁸

The second philosophical objection to utilitarianism is from the "rights" tradition which argues that the individual's status and position are not to be sacrificed for any social good, whether it be increased efficiency, aggregate social wealth, or some other vision of the just society. If the distributional objective finds its roots in the social critique, the rights-based objection more clearly finds roots in the psychological critique. Especially when we deal with things like values for which there is neither an agreed-upon metric nor an agreed-upon level of accounting (minimal, topical, or comprehensive), any utility-maximizing calculation is arbitrary. Because judges and juries may apply standards that fail to reflect the same value considerations that motivated the actor, individuals need protection against reallocative decisions. The individual has rights which trump both efficiency and distributional goals.⁶⁹ From this perspective, what is wrong in Calabresi's example is not that the disadvantaged are sacrificed, but that *anyone* is sacrificed to the general good.

In its policy suggestions, *Ideals* is a complex and sometimes confusing mix of both rights-based and distributional-based objections to the utilitarian, economic efficiency model. In a rather remarkable passage near the end of the book, Calabresi creates a complex and pur-

67. John Rawls' difference principle is a call for such a rule, J. RAWLS, A THEORY OF JUSTICE (1971), as is Ackerman's call for undominated equality, B. ACKERMAN, *supra* note 66, at 28.

68. Cost-benefit analyses can incorporate distributional considerations into their analyses by adding such things as a welfare function, to be inserted into each equation when assessing the gains and losses of various reallocations. M. THOMPSON, BENEFIT-COST ANALYSIS FOR PROGRAM EVALUATION (1980).

69. See generally Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1986). The rights tradition includes both contract and libertarian theorists such as John Rawls, Robert Nozick, Richard Epstein, and Ronald Dworkin. Note that Rawls, like many others, is on both sides of this argument: unwilling to allow utilitarian notions to determine the distributional question, and also unwilling to allow any type of distributional objective to trump all individual rights.

posefully unreal hypothetical of some individuals who would have to go through life wearing a lead tunic to protect neonates from a certain sexually transmitted disease. Calabresi argues that if the carriers of the disease came from a recognizable ethnic group, laws requiring them to wear tunics would be invalid, whereas such a law would "surely be upheld" if the individuals who carried this disease "came from all groups in society, or only from groups which traditionally dominated the society and which suffered no invidious discrimination."⁷⁰ In this passage the individual equality of utilitarianism is rejected for some type of calculus which weighs the effect of each decision on community inequality. If every group is affected equally, then the lead-vested individuals may be sacrificed for the common good because their impediment will have no effect on group inequalities; and if the disease is concentrated among elites, it is permissible to add an extra burden to their lives, perhaps on the basis of a calculus which weighs comparative advantage in the community and allows burdens which create greater aggregate equality.

What is striking about this example is that it is contrary to what I perceive to be the primary thrust of the book, which is, ultimately, a rights-based objection to utilitarian-based efficiency analysis. Miss Friedman should recover for injuries sustained in jumping from the ski lift because her ideals and beliefs are part of that bundle of "rights"⁷¹ not to be trampled for some larger social virtue, including the virtues of having a single standard of reasonable behavior and a common core of cultural and religious values.⁷²

The tension indicated by the lead vest example exists because of Calabresi's focus upon the road signs of human ideals, beliefs, and values and their complex position in society and the legal system. Ideals

70. P. 108. By this line of analysis Calabresi tries to explain the Supreme Court opinion upholding compulsory draft registration laws which apply solely to men. *Rostker v. Goldberg*, 453 U.S. 57 (1981). Men are not a discriminated-against group, and thus the law does not violate the equal protection clause. One might ask, however, whether it is reasonable to say that seventeen-year-old boys are a privileged group in our society.

71. In this regard Calabresi's position is perhaps closest to that of Dworkin, whose central idea is that each individual is entitled to equal dignity and respect from others and the government. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1977). A "rights" theory based upon the right to equal dignity and respect must perforce give great weight to an individual's values and beliefs, and to the actions the individual takes in furtherance of those values and beliefs.

72. Through much of the book Calabresi attempts to downplay the importance of this conflict by premising his argument on the assumption that cultural diversity is almost always a social (distributional) good. Of course the strongest expression of this position is with respect to religious values where the societal goal is no established religions. When we move beyond religious values the truth of this assertion is less obvious. There are, needless to say, those who question the value of unlimited cultural pluralism and ethnic identification. See Hirschman, *America's Melting Pot Reconsidered*, 9 ANN. REV. SOC. 397 (1983); S. STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* (1981); R. ALBA, *ITALIAN AMERICANS: INTO THE TWILIGHT OF ETHNICITY* (1985). Alba, for example, argues, "Ethnicity . . . does not stand on its own but stands because it is draped over the skeletal structure of inequality." *Id.* at 12.

and beliefs, more than most other aspects of our lives and personalities, indicate the limits of a cost-benefit, utilitarian analysis.

Examining attitudes and beliefs causes us to focus upon the irrational or at least indeterminate nature of much of our behavior. Absent (indeed, even considering) her religious beliefs, Miss Friedman's behavior would be called irrational by some. The same may be said of the driving behavior Calabresi hypothetically attributes to some groups. Yet when beliefs are considered, the calculation — if not the idea — of the cost-benefit equation becomes indeterminate. Thus the focus on attitudes and beliefs forces us to consider the ways in which individuals are unable to engage in utility-maximizing behavior, as well as the indeterminacy of any utility-maximizing equation.

Not only does the focus on attitudes and beliefs highlight the limitations of an economic analysis of legal rules, it also reveals our uncertainty as to how to proceed in the face of these challenges. Since the values and beliefs are important premises in any efficiency calculus, to accept majoritarian, middle-class values as a given is to insure the perpetuation of existing definitions of rational utility-maximization. To do so is to fail to respond to the sociological critique of utilitarianism.

On the other hand, ideals, beliefs, and attitudes are not automobiles, or even broken legs as a result of automobile accidents. Within each individual they are incorporeal and fragile. A person's beliefs are, as Calabresi wisely notes, all too easily altered by legal rules. When behavior which was illegal becomes legal, or that which was legal becomes illegal, individual judgments, attitudes, and beliefs about the moral worth of the behavior or the worth of the values underlying it are changed (p. 82). Because attitudes and beliefs have value in themselves, and because they are easily destroyed, they deserve protection beyond that afforded by an economic analysis based upon a minimal accounting. A focus on beliefs forces us to ask what aspects of an autonomous individual require protection from considerations of utility maximization.⁷³

Unfortunately, while *Ideals* recognizes the limitations of an economic efficiency analysis, it does not provide a consistent vision of exactly how justice considerations should interact with and constrain efficiency and distributional concerns. The book does contain pieces of such a vision. Justice constraints may be found in the gravitational pull of constitutional provisions. Cultural pluralism is an important goal in American society. Activities which are necessary for full participation in society deserve special protection. To move beyond these hints about the nature of the justice-veto, Calabresi must, however, move past the examination of road signs and develop more systematically the content of justice goals and the constraints these goals pose

73. Schroeder, *supra* note 69, at 516.

for both efficiency and distribution. If he can be encouraged to do so, *Ideals, Beliefs, Attitudes, and the Law* will become a stepping stone in the most important single individual effort to describe the role of economic analysis in tort law, and indeed in the general legal order.