Symposium

Legal Scholarship in the Humanities: The View from Inside the Quadrangle†

Law and the Moral Life

Jean Bethke Elshtain*

Let me begin with a story from the trenches. On a public radio call-in program in the thick of the Clinton impeachment imbroglio, I found myself being bombarded with denunciations from irate citizens. Most callers seemed to believe I was either a member of the “Christian Right” or part of a “vast right-wing conspiracy” because I claimed that there had been just a bit wanting in the President’s behavior as President in the conduct of the Lewinsky scandal. Most importantly, from an ethical perspective, the President made ill use of so many people: His secretary, staff, Cabinet officers, trusted

† Papers Delivered at a panel organized by Professor Andrew Kull, Emory University, at the 1999 AALS conference in New Orleans, Louisiana.
* Laura Spelman Rockefeller Professor of Social and Political Ethics at the University of Chicago.
advisers, and even his wife were all called upon to lie on his behalf and in the interest of such a low matter. Clearly, something interesting had happened in the body politic when activities of this sort, occurring in the most public place in the country—the White House—and in the office “part” (not the residence “part”), are covered automatically by a claim to “privacy.” “Our laws protect privacy,” one riled-up citizen proclaimed, “and what you want to do would legislate morality. You are talking about morality, not law. Law and morality need to be kept separate.” Wishing I had never agreed to be a part of what had turned into an over-the-airwaves drubbing, I queried: “Well, what, then is morality to you?” Answer: “It has to do with whatever people think is right or wrong.” Ah-ha, think I, he’s got himself tangled up on this one, and I shot back: “So law and morality have nothing to do with one another. The law never speaks to moral questions. Would you like to try making that case to Dr. Martin Luther King?” Initial silence from caller, then a heated “Why don’t you let me finish?” At that point the referee, otherwise known as the host, jumped in and did one of those above-the-fray type of riffs: “Well, now, Professor Elshtain, the caller certainly does have a point. Are we really in the business of legislating morality?” Says I: “We do it all the time.”

I didn’t go on to point out to my radio-land interlocutor the fact that there are presently dominant schools and tendencies within American legal scholarship whose practitioners share the caller’s view of the matter. The reactions run from outright cynicism and denunciation of rule by law as nothing but a “cover” for naked power relations, to a view of the law as purely instrumental, which is a different sort of radical “devaluing” of law. Such trends and tendencies have been around for a long time. For those of us who came of age in the 1960s, blasting law as “nothing but” a cover for privilege or a sexist tool or some other awful thing was common everyday sport. Today, those everyday bits and pieces of ideology have coalesced into several powerful strands in contemporary legal thinking and jurisprudence: the law and economics school and the feminist school.

We do it all the time. But do we? This is a controversial claim whether in or out of law schools, in a day and age in which we are invited to bracket moral claims by seeing them as entirely subjective, not open to reasoned defense or adjudication. I don’t have in mind a strenuous Kantianism; rather, I approach these matters from a realist epistemology. This involves the conviction that there are truths to be discerned, to be made known and manifest, and to be honored insofar as frail human beings can live up to certain standards. These truths help to constitute norms that may themselves be overridden or violated under certain conditions. The moral realist recognizes that
truth as embodied in human institutions—and the law is one such institution—can never achieve perfection. Such perfection will always elude us, given that the way we come to know the truth and try to write it into law is bound to be epistemically flawed, as our minds are imperfect instruments. The implication of this latter recognition is that laws are not writ in stone but alterable over time as new recognitions dawn that either deepen prior normative commitments or put pressure upon them. A given law might not reflect as it should upon the truths we have come to understand about human beings, the sorts of creatures they are, and the kind of treatment that should be theirs simply by virtue of their humanness.¹

With these all-too-brief comments, I simply want to get across the notion that the law always imbeds a philosophy within itself and that philosophy, in turn, exudes moral norms, truths, or values. To describe the law professor as an ethical and moral philosopher of sorts is to state a fact-of-the-matter if one operates from the beginning point of moral realism. From that starting point, law is never “merely” procedural, because one cannot devise neutral rules about how people are to live together, by which I mean procedures that are themselves neutral and neutral as to outcome. From the “proceduralist” view, studied indifference to, or acquiescence in, whatever derives from the extant framework provided by rules that are more or less neutral is no intrinsic problem. That’s just the way the cookie crumbles. Procedural norms are not to be violated. But that “not” is not itself a moral claim, or the legal embodiment of one; it is merely a practical requirement when groups of people live together who are not guided by any prior and binding sets of moral or ethical requirements. It follows, on this view, that it is not the business of law to evaluate the good life or to make judgments as between more or less desirable ways of life. The law professor as philosopher and ethicist in this framework does not have much heavy lifting to do. Perhaps he or she would be called upon from time to time to engage in a bit of frenetic sifting and winnowing of the “fair” procedures from possibly unfair ones that violate the commitment to neutrality. But beyond that there is not much work to do.

Many both inside and outside the law find this an incoherent way to go about things. Why? Because, they argue, procedures themselves exude a normative content: They can never be merely

¹ This gestures to what might be called the “anthropological turn” in social and political and ethical thought, namely, the dual recognition that one cannot bracket ontological commitments indefinitely, as the epistemological turn would have it, and that the so-called linguistic turn, in its many forms of representation, has finally pretty much exhausted itself. We are back to consideration of the human itself. For a recent example of the “anthropological turn” in law, see MICHAEL PERRY, THE IDEA OF HUMAN RIGHTS (1998).
neutral. Because law is by definition a moral force, one can rightly put ethical and moral questions to the law and expect ethical and moral answers. This means that law is inevitably implicated in what philosopher Charles Taylor calls a particular “value slope.” You don’t have to be committed to a strong version of natural law or natural right to make this argument and to hold this view. If this is the tack one takes, it becomes exigent to evaluate the “real world” outcomes that particular laws either make possible or foreclose. Tricky questions follow: Does my approach entail an attempt to blanket the social, political, and economic world with dense normativity under cover of law? Or is there a normative framework within which we (and the law) operate that leaves open many multiple and plural possibilities?

My challenge is to respond to these and other vital queries. I will do so by arguing on behalf of the law as a form of moral thinking, with the basic “stuff” of law—the much-derided (presently, at any rate) basic facts and data, or descriptions of the world—serving as the very heart of the law’s moral and philosophical enterprise, an enterprise the law professor as philosopher is in the best position to respect and to transmit as a certain habit of thinking. Part of what is involved in this perspective is the vital importance of upholding humble truths.

What does it say about a society that prides itself on being a “nation of laws” yet tells lawyer jokes relentlessly—jokes that make the lawyer look like a vicious, untrustworthy, ambitious Machiavel who will stop at nothing to get a client “off the hook,” whether the hook is premeditated double-homicide or a parking ticket. (Law professors probably wouldn’t be that much higher on the scale in the minds of Jane and John Q. Public.)

A second report from the trenches: In 1992, I was in Czechoslovakia with a small group of political philosophers, and we had the opportunity to meet with President Václav Havel. It was just at the point that the two republics were about to divide: Slovakia had already proclaimed its separation, and the Czech parliament was about to vote on a measure that would make the division final. Despite all of this, no constitution was being drafted. Havel told us, with a note of both frustration and humor, that he had a plan to lock a group of constitutional lawyers up somewhere and to tell them they couldn’t get out before they had a draft of a workable document. It

---

3. When I speak of “facts” here I do not have in mind those bits and pieces of social science information generated by mainstream empiricist practices and assumptions—“brute-data identifiable” in Charles Taylor's words. CHARLES TAYLOR, Interpretation and the Sciences of Man, in 2 PHILOSOPHICAL PAPERS 58, 58 (1985).
was amusing, but from the American perspective, it was a terrifying prospect indeed. Trust lawyers with a constitution? Whoever heard of such a shocking possibility?

I was back in the by-then Czech Republic in 1993 as an "academic guide" and arranged for my group to meet with President Havel's brother, Ivan, to discuss the situation in the fledgling republic. Ivan Havel gave us a splendid run-down of the daunting prospects that lay ahead. And then he said, quite seriously, "What we especially need are lawyers. Many more lawyers." The good people from the United States arrayed before him broke out into semi-hysterical laughter. "Take a bunch of ours," one shouted, "in fact take all of them!" Havel turned to me and I explained that the reputation of lawyers was not high among us and that lawyers were seen as representing many of the worst features of American life: narrowly legalistic; encouraging some to sue at the drop of a hat; trying to get others off the hook by hook and crook; mounting forms of defense that left too few accountable for their actions; charging extortionist fees; and nit-picking each and every issue to death in ways that defy common sense. I told him that, of course, these were exaggerations and stereotypes, but that lawyers had nonetheless come to earn such a reputation as a species or collectivity. He smiled and said, "Well, what I hear tells me I probably don't want your lawyers, then."

How did the reputation of the law fall so low among us? 'Twas not always so. Let's take up, briefly, one very famous example drawn from Alexis de Tocqueville's masterwork, Democracy in America. Tocqueville introduces his comments about juries and the rule of law in -America with his famous discussion of "The Omnipotence of the Majority in the United States and its Effects." He frets at length about a kind of sacralization of majority sentiment, one that goes so far among Americans as to apply the "theory of equality" to brains—as if no person could be wiser, more intelligent, or better informed than any other. This leads to a short political fuse. Americans want their legislators to hold brief terms of office so that representatives are more likely to be dominated not only by the general views held by their constituents but by their "passing passions" as well. The growing omnipotence of the majority heightens the problems inherent in democracies. The "germ of tyranny" lies imbedded in such omnipotence, and may gain "irresistible strength." The results

5. Id. at 246.
6. Id. at 247.
7. Id. at 246.
8. Id. at 252.
are various forms of "despotism" by legislators or even magistrates.\textsuperscript{9} It's a pretty gloomy set of prospects, all in all.

But Tocqueville also believes that there are forces that temper the tyranny of the majority. \textit{Primus inter pares} in this regard is the legal profession, a noble vocation that serves a counterbalancing role to democracy's worst tendencies and most dangerous excesses. Where the majority may want to speak in unison, with no dissenting voice to be heard, there will be the ballast of the legal profession, democracy's own aristocrats and the "strongest barriers against" its faults.\textsuperscript{10} Of course, lawyers may "yield to sudden and temporary impulses," but, on the whole, they are more or less obedient "to constantly recurring instincts natural to them."\textsuperscript{11} And what are these?

A concern with proper order and formalities as a way to achieve a certain distance from the tumult. An "instinctive love for a regular concatenation of ideas" that puts them at odds with revolutionary cataclysms and "the ill-considered passions of democracy" alike.\textsuperscript{12} The lawyer's years of study and special knowledge have bred in him (her now, too, of course) an intimate "feel" for a complex "science" and a responsibility for moving litigants from "blind passions" toward reasonable objectives.\textsuperscript{13}

Lawyers form a kind of epistemic community. They do not agree across the board "but common studies and like methods link their intellects."\textsuperscript{14} It is unsurprising, then, to find them in the leading ranks of all free governments. So the lawyer is simultaneously "one of the people" and, given his learned habits, a kind of aristocrat. He serves therefore as a "natural liaison officer between aristocracy and the people," a "mixture of the legal and democratic minds" without whom democracy cannot last long.\textsuperscript{15} If democracy goes off the deep end in any direction, the special mediating, deliberating, and probing quality of the lawyer's contributions to a well-governed and balanced democratic order will be forfeit. The lawyer taps reasoning powers so that when people "get intoxicated by their passions" lawyers can slow things down.\textsuperscript{16} This is of special, indeed momentous, concern to the American republic because the United States is a society in which sooner or later nearly every political question becomes a judicial one.\textsuperscript{17} Legal language drifts into common speech along with

\begin{itemize}
  \item \textsuperscript{9} Id. at 690.
  \item \textsuperscript{10} Id. at 263.
  \item \textsuperscript{11} Id. at 264.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id. at 266.
  \item \textsuperscript{16} Id. at 268.
  \item \textsuperscript{17} See id. at 270.
\end{itemize}
the deliberative habits (much watered down, of course) that constitute the law.\(^{18}\)

But there are those occasions when a jury is needed, and this affords the opportunity for the jury—above all a political institution representing the sovereignty of the people—to show that its members, too, can embody habits of the judicial mind as they go about their important business. In this way the jury system helps to spread respect for court decisions—a critical element indeed, for “[l]aws are always unsteady when unsupported by mores; mores are the only tough and durable power in a nation.”\(^{19}\) If respect for court decisions diminishes, the idea of right will constrict as well. And were those two elements to be lost altogether, then love of independence becomes just a destructive passion that recognizes no natural barrier. The jury is a

free school which is always open and in which each juror learns his rights, comes into daily contact with the best-educated and most-enlightened members of the upper classes, and is given practical lessons in the law, lessons which the advocate’s efforts, the judge’s advice, and the very passions of the litigants bring within his mental grasp.\(^{20}\)

My undergraduate students find these passages from Tocqueville nearly unintelligible. Jury duty is what you try to get out of. Juries are always swayed by irrational appeals, in part, because it is passions and animus and emotion to which the lawyers play in order to get their clients off or to win huge sums in tort claims or in some other, usually dubious, cause. Lawyers, the aristocrats, helping us to stand somewhat above the fray so that the law might have room to work? You’ve got to be kidding! Lawyers pander to the mob mentality, they don’t oppose it. That’s a pretty fair summary of how things tend to go. But it is incomplete. The students in class who come from recent immigrant backgrounds are far more appreciative of the special role, even nobility, here assigned to law. A few of them come from backgrounds ravaged by lawlessness—whether societies in chaos or societies strangled by an excess of order where law clearly served no purpose other than to help the powerful remain so. These students believe in the rule of law. But they wonder what happened to it if the “American” kids (those whose families have been here several generations, or more) seem so cynical about its operation.

This survey of our discontents has been to a purpose. Over the past several decades, even as law professors have made various

---

18. See id.
19. Id. at 274.
20. Id. at 275.
"turns" (econometric, literary, linguistic, feminist, post-structuralist, post-modern), our mores have been slowly but surely drained of what was, at one time, sturdier content about the rule of law and the fact of law as we understood it then: namely, that no person was either above or below any other in the eyes of the law.21 We once told stories of the law's corruption in hushed or outraged tones: This shouldn't go on, not here in America. The rich shouldn't be able to buy their way out of trouble or have the law bent on their behalf; the poor shouldn't find themselves altogether without its benefits. These things are wrong and should be brought to the attention of the necessary parties, and something should be done about it. There oughta be a law when law isn't working!

At this point a predictable riposte will emerge, something along the lines of reading back through rose-colored lenses and finding a law-governed utopia in the past. In fact, argue contemporary cynics, everything was always pretty much rotten. The difference is that now, armed with sundry comprehensive theories and privileged epistemologies, we're smart enough to realize that the patina surrounding law was always an "emotive" thing, a kind of sentimental attachment. This attachment arises, in part, as a reaction to the increasing inclusion of traditionally excluded groups, a nostalgia for a simpler time before all sorts of folks who don't "think like us" (including women, in some arguments) got "into the system" and began to use it for their purposes just as it had always been used by others. Rather than making an immediate counter-argument, I will frame matters by parsing the classic film Twelve Angry Men22 while Tocqueville's discussion of the law and the jury is still fresh in our minds.

Twelve Angry Men was a product of the liberal consensus that dominated American life at the time. Made in 1957, it was the screen version of a play by Reginald Rose, who, along with director Sidney Lumet and star Henry Fonda, favored left-wing causes. (I mention this because the position the film articulates, if presented "cold," might in fact come under fire as a piece of "conventionalist" propaganda in our present context.) The jurors are locked in. The room is hot. One guy wants to cry "guilty" as soon as possible because he has tickets to the ball game that night. Another begins an

21. It goes without saying that the execution of these principles was all too frequently wanting. But strong commitment to the general normative principles involved remained, at least until the past few decades—decades that have witnessed all manner of upheaval, much of it not to the good, including cynicism as a kind of American growth industry. For a discussion of how law as an institution of civil society fares at present, see COUNCIL ON CIVIL SOCIETY, INSTITUTE FOR AMERICAN VALUES, A CALL TO CIVIL SOCIETY (1997); and NATIONAL COMMISSION ON CIVIL RENEWAL, A NATION OF SPECTATORS (1997).

22. TWELVE ANGRY MEN (MGM 1957).
outraged riff against kids running wild these days. The case is a murder charge against a young man of Hispanic or Puerto Rican background (we don’t hear his name but we do glimpse his frightened face as the jurors leave the courtroom to begin their deliberations.) A straw vote is called for (eleven to one, guilty). Groans. Who is the lone jerk holding out? The drama begins. A foreman is selected and nearly two hours of intense dialogue and deliberation ensue.

What the Fonda character—for he is the holdout—first tries to do is to get his fellow jurors to imagine the defendant’s life. Broken home, filthy neighborhood, beatings every day. His major antagonist screams, we need to slap down a kid who would raise his hand against his father. Fonda listens to everyone else screaming how sure they are of his guilt. Slowly, he begins to raise some doubts. Consider the possibility of error and misjudgment. People can make mistakes in identifying someone. Is the case—the circumstantial case, the trail of evidence—as solid as it appears? If we’re going to send a man to the chair, we’d better be sure that’s where he belongs.

Yeah, well, suppose we let a murderer off, a juror opines. No one wants to do that either, replies Fonda. Another juror, level-headed but voting guilty, argues with the group, many of whom harbor their own doubts, on the grounds of the evidence. He points out, and no one disagrees, that “the facts are at stake, not the kind of boy he is.” And it is finally facts—what could have happened, what could not possibly have happened—that decide the issue: how knives are held in a knife fight; the deep grooves around the bridge of a nose indicating years of eye-spectacle use, hence a key state witness couldn’t possibly have had hers on at the time she claims a positive I.D., and so on. The discussion is set up in such a way that a man who speaks with an accent and is clearly a relative newcomer to our shores talks about “responsibility,” the “remarkable thing about democracy,” and how the “jury is part of that.” Even the man screaming about a “lousy bunch of bleeding hearts and rotten kids” comes around in the end, his bias overcome by the slow, dawning recognition that the defendant could not have killed his father. The circumstantial and physical evidence against him just doesn’t add up.

Of course, the film is a setup: The men we like best are also the best men. That aside, in 1957 this was not only great drama with a great cast, it also embodied the liberal position that the law cannot be swept aside in haste or from prejudice. Patience and deliberation are the heart of the matter, with the facts carrying weight against our prejudices. We should let the argument be borne by what we can determine has happened, or has happened in a certain way, to the very best of our flawed human capacities. *Twelve Angry Men* powerfully reinforces this liberal view. It is a view that needs
defenders again, especially in the institutions that mold those who will be on the front-line of the law—the lawyers.

So let's take a look at two prevalent approaches to the law in order to assess whether or not "the rule of law" is here sustained or in some way (perhaps inadvertently) undermined. I will focus on examples drawn from law and economics and feminist/race/critical legal scholarship—the economicist and feminist "turns." First, however, a caveat: Great insights have been derived from these turns. Long overdue attention has been focused on problems involving women and social justice and probing questions have been raised concerning what the law has generally presumed as average or modal in all circumstances. Similarly, the law and economics movement has shown us the need to grapple with the pervasiveness of human economic activity. Much of law, after all, is about regularizing the ownership and transmission of property in various forms. A problem emerges, however, when a legal scholar offers these turns as comprehensive ideology rather than insights, often cast in the language of very high theory. The presumption seems to be that the law, by not offering a comprehensive ideology itself, must be in need of one. The results, criticized below, show what happens when one or two insights are inflated and taken for the whole.

What is forgotten, in such instances, is the moral standing of the law as practiced every day in America's courtrooms. There are, in other words, arguments to be made that law professors are in an ideal position to make—arguments having to do with the stubborn integrity of relevant facts played out on the ground, so to speak, not on an abstract plane. If they do not undertake this task, who will? The answer, of course, is that the task of defending moral propositions and principles is overtaken increasingly by neo-Kantian philosophers or post-structuralists who aim to undermine the neo-Kantian enterprise. Neither of these approaches, framed in relation to one another, captures the distinctive quality of the moral reasoning imbedded in and constitutive of the law or what we loosely call the rule of law. This, however, is a case that must be made and not merely claimed. Let us move to the economicist turn for illustrative purposes.

I

Law and economics is a powerful force at present, and for good reason. A potent, elegant theory (in its defenders' inevitable terms of encomium) lies behind it: neo-market economics and the whole panoply of curves and laws and formulae that make it up. Echoing Sean Connery from The Untouchables, what does it mean to "do
things the Chicago way?" It means that all of life is viewed through the prism of utility maximization. If we all maximize utility, outcomes will be "optimized" and everybody will benefit, at least somewhat. You may be a loser relative to others but if enough people are winning and the "outcome"—a rather mysterious aggregate—shows a plus on the ledger, then things are better overall, even if each individual might not be better off in any absolute sense. The underlying anthropological presuppositions of the theory are that human beings are isolates driven by preferences. If people ever act "altruistically" (and the only options are "selfish"—or normal—and "altruistic"—or supererogatory) it is because they have made a calculation that such behavior will be to their own benefit.

Bear in mind that money or income isn’t the central objective—maximizing satisfaction is—and every individual is the sole source of his or her own choices. The problem with an overarching theory of the microeconomic sort is that once all is reduced to a market model of the person, other ways of thinking are excluded. This theory includes the belief that consumers maximize perceived utilities—always—although perfect information of the sort that would be necessary to reach the Holy Grail of ideal choice is never literally available. Human beings are about tastes and preferences. All else is reckoned as an "externality." Citizenship fades into consumerism as well, for it is all about maximizing utilities. The paradigm form of such utility maximization has to do with markets, goods, consumables, and so on.

Here is the problem when this mode of reasoning shifts over into the legal realm: It encourages what I will call crude substitution. Some people maximize income. Others may find utility in children so the child is a "substitute" for material things. "If reading the Bible gives you a considerable amount of satisfaction or utility, maximizing utility will include spending time to read the Bible. If going to church gives you utility, you are likely to go to church with some frequency." On and on in this fashion. One can see in all of this a

---

23. THE UNTOUCHABLES (Paramount 1987).
24. The criticisms I make here by no means diminish the accomplishments of the market. Robert Kuttner, in his important book, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1998), marvels at the extraordinary energy unleashed by market economies. Indeed the market’s virtues help to account for why communism failed so miserably. In addition to trampling civil liberties and laughing cynically at political democracy, communism destroyed the price system. Inefficiencies piled up in a grotesque manner. Shoddy goods couldn’t reach desperate consumers. Shortages mounted. Pollution soared. The whole thing finally collapsed of its own weight. But an entirely free market is no day at the beach either.
25. This is a point I owe to Professor D. Gale Johnson, of the Department of Economics at the University of Chicago who, in criticizing my views on econometric theorizing, offered up additional examples that I found grist for the mill. I do not want to associate him in any way with the position I am here taking. I do, however, want to credit him with deepening my understanding of how this all works.
version of utilitarianism which favors reductionisms of a sort that remove the recognition and requirement that much of the moral life is about weighing and sifting goods and establishing priorities of the more and less important.

How we go about prioritizing is inherently complex and turns on the richness of the presuppositions with which we begin. These presuppositions in turn yield descriptions of specific situations. Remember my earlier point: There is no such thing as mere description of any situation. Description is always from a point of view and hence evaluative. We describe situations on the basis of those aspects that we deem relevant or important. In this way, we “always evaluate under a certain description.”26 Econometric ways of thinking, like behaviorism and utilitarianism before it, impoverish the world of description, omitting facts that are morally and, I will later argue, legally relevant.

For example: Robert Kuttner, in his book Everything for Sale, cites an article by Guido Calabresi and A. Douglas Melamed that indicts slavery by branding it economically inefficient.27 Slavery, for the article’s authors, was inefficient not only for slaves but also for observers of slavery who suffered from economists describe as “uncompensated third party effects,” and this latter is reckoned as an “externality” that weighs against slavery as an institution.28 Note well that any feelings of sadness, moral outrage, or even moral queasiness, get lumped together as “uncompensated third party effect[s].” Given this description, the course that follows is to claim that, at some point, the costs—the inefficiencies—mount up and slavery must collapse. One doesn’t have to be William Lloyd Garrison to find something suspect about this description of slavery. The problem is not external to economistic theory, but at its very core—the inability of thinkers operating within the “econometric paradigm” to get certain basic facts right, to try to look at all the relevant features of a situation. In other words, the theory fails to describe complex phenomena adequately and accurately—a task that I believe is a first responsibility of that mode of reasoning I wish to associate with the law.29

26. JULIUS KOVESI, MORAL NOTIONS 151 (1967).
27. See KUTTNER, supra note 24, at 50, (citing Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability, 85 Harv. L. Rev. 1089 (1972)).
28. See Calabresi & Melamed, supra note 27, at 1112.
29. And, I should add, with moral thinking in general. Moral thinking is a mode of practical reason, not simply or merely a technique. To embrace it does not commit one to a strong version of, say, Aristotelian “virtue” theory, although it does involve some attunement to habituation in a more Augustinian sense. Augustine has a far more compelling and powerful theory of akrasia, or weakness of the will, than Aristotle. Why is this important? Precisely to avoid moral rigorism and narrow moralisms. See JEAN BETHKE ELSHTAIN, AUGUSTINE AND THE LIMITS OF POLITICS 49 (1996).
Let me clarify by drawing on examples from a related enterprise—political science—a discipline that has been profoundly affected by "rational choice" theory. The way for the economistic turn in the study of politics was paved by the earlier triumph of a mode of reasoning called "behaviorism." Behaviorism began with the conviction that human behavior was a relatively reliable variable that could be worked up into a scientific hypothesis. The idea was that an aggregate of human beings, exposed to a particular external force, would react and behave in more or less predictable ways. The explicit aim was not to offer the richest and thickest possible description of what was actually going on in a complex political situation, but to strip away all the apparent complexities so that one might engage in a search for the underlying laws or regularities at work. Resonant themes and issues that didn't fit within the frame of the analysis were either expunged from view or incorporated so as to fit within the explanation.

Here we get to the heart of the matter: Within the epistemological presumptions of behaviorist political science, to describe and to evaluate—to state what is and what ought to be—are two entirely separable activities. Those who mix the two are fuzzy-minded, impressionistic, incapable of rigorous analysis. The behaviorist presents us with one sort of entity, a brute fact to which the analyst, if she so chooses, can append evaluation, defined as values, biases, attitudes, and emotional preferences or subjective dimensions. In this schema, a fact is what Charles Taylor calls brute-data identifiable behavior. For example, putting an X in a square next to a name on a sheet of paper that is then put into a box and later counted along with all other such papers is something we call voting. Imprecisions, ambiguities, and ambivalences are ruled out in advance. More importantly, complex descriptions of any given human activity are eliminated as the activity, reduced to behavior, is shorn of all "inessentials," including the historic, political, and social situation in which it takes place. When one is forced to describe events in this way, much of what is called a fact, including that which helps to constitute the fact (as opposed to some "subjective" appendage to the fact) is eliminated. When this happens, facts are reduced to brute data and can no longer serve as a source of

30. For a full discussion of behaviorism through representative thinkers and claims, see JEAN BETHKE ELSHTAIN, Methodological Sophistication and Conceptual Confusion, in REAL POLITICS AT THE CENTER OF EVERYDAY LIFE 12 (1997).
31. See TAYLOR, supra note 3, at 58.
32. The theory of meaning at work here is that the relationship that pertains between subject and predicate, which has been established via correlations, exhausts meaning. See, for example, the work of Charles Taylor that helped break the methodological logjam in the social sciences. See Charles Taylor, Interpretation and the Sciences of Man, 26 REV. METAPHYSICS 4 (1971); Taylor, supra note 2.
necessary moral and ethical information.

Let’s return to the favorite example of one generation of political scientists devoted to the utilitarian/positivist framework: the vote. A vote, according to those who embraced this view, is a physical piece of behavior that eventuates in an aggregate outcome that allows one interest to take precedence over another. But suppose I am voting in an election in which one candidate has clearly stated his racist views, intentions, and plans. His party’s platform claims that Jews are a blight on the purity of the body politic and would, if he and his party were victorious, be eliminated by any means necessary. Opposition parties attack this proposition with various degrees of vigor, some because such a plan of elimination is impracticable even if desirable; others because such anti-Semitism violates fundamental norms of human decency and respect for the dignity of persons that they would agree must ground any political order that aspires to decency. This relevant information distinguishes this campaign from a run-of-the-mill election. What was construed loosely as a citizen’s responsibility (by most civic thinkers, as opposed to behaviorists, who would talk of maximizing interests or utility) now rises to a higher level, a different plateau. We ask: What are the relevant facts that make this situation morally different? To answer this, one would have to look at the alternatives, the stakes, the principles that are in peril, and so on.

The point for now is that this situation could either be described from a moral point of view or not, and that this point of view turns on what are construed as the relevant facts. I suspect that for many, a citizen’s obligation to vote would be greater since the situation I have described here turns this act of voting into a moral, legal, and political decision of the greatest possible moment.33 In the words of Julius Kovesi:

Situations are not out there in the world, existing independently of us, so that human beings could just step in and out of them. Situations are not like puddles that we can step in and out of; to be in a situation is to be related to other human beings in a certain way.34

At this point, we can assume a fundamental commitment to a set of presuppositions about the nature of persons as creatures who are not to be tortured, wantonly slaughtered, or eliminated by any means necessary. Otherwise, voting in the situation I described would not

33. The notion of a “situation” I draw from Julius Kovesi. See Kolvesi, supra note 26, at 120. Note that this insistent attunement to context is not an invitation to legal, moral, or political relativism. It is, however, a recognition of situatedness: We can never leap out of our skins. Each situation, however, can and should be evaluated from a moral (realist) point of view, which means there will be perduring concerns across cultures and over time.
34. Id. at 119.
constitute a moral dilemma. To undermine the basic commitment to the dignity of persons and their good, the “eliminationist party” would likely need to undermine the above anthropological presuppositions in the case of Jews. They would need to show that Jews, as a group, lie outside of this category of concern and respect. That would be a preliminary step toward creating a situation in which the moral urgency entailed would be quite different from that which I have thus described. The aim of the contesting parties would be to control the description of the situation, aware that an evaluation is imbedded in that description and that this would, in turn, determine how people vote.

Let’s return to law and economics, no longer through the lens of its most famous practitioners but through the analyses of two friendly critics. My goal here is to show how partial absorption of economistic categories and presuppositions blunts the edge of critical description from a moral point of view. This, in turn, undermines law as a form of practical moral reasoning, or so I shall claim. I begin with my distinguished, prolific colleague at the University of Chicago Law School, Cass Sunstein. In Free Markets and Social Justice, Sunstein describes law and economics as the most influential of the many trends and developments in legal education in the last hundred years, and he sees many advantages flowing from the economic study of law.35 But he does have reservations, beginning with the presuppositions about the nature of human rationality central to the law and economics school. Sunstein queries whether or not people can always be said to be utility-maximizers: “Sometimes people do not seem at all rational. Sometimes they are ignorant and sometimes they seem to defeat their own goals.”36 Thus, misunderstanding begets “irrationality.” But why offer “irrationality” here as an alternative to the rationality so cherished by econometric theory? Cannot one rationally go against utility maximization? Doesn’t the use of “irrationality” here concede more than Sunstein may want to concede to those he is challenging? Doesn’t this unnecessarily narrow the descriptive options?

This difficulty is compounded when Sunstein, in common with the maximization theorists, deploys the language of preference throughout the essays collected in his book. This creates problems when it comes to articulating a vision of political and social life that is separate from and much more than aggregations of preferences. He refines the language of preference, talking of both “exogenous” and “endogenous” preferences, but stronger terms slip through the

36. Id. at 4.
cracks.\textsuperscript{37} Think, for example, of what would happen to Dr. Martin Luther King's great speech if he had cried not "I have a dream," but "I have a preference." The choice of a descriptive term bears within it an alternative vision of human possibility. King's vision of an essentially pacific democratic society, a "beloved community," was not simply his "preference." No, that was his dream. If you try to pack everything King covered under the rubric of "dream" into "preference" you do damage to his ethical politics.

Let's take a second example from Sunstein's piece \textit{Social Norms and Social Roles}.\textsuperscript{38} His basic point—that behavior is importantly a function of social norms and that changes in norms might be the best way to improve individual and social well being—is unexceptionable. But, when he characterizes government's possible role as "norm management,"\textsuperscript{39} the civic and ethical dimension of norms start to leak away. We are drawn away from thinking about what sorts of action government might encourage as worthy or discourage as unworthy, toward dealing solely with how government manages existing norms. But the key civic question (also, necessarily, a moral one) is how we evaluate what government is affecting and to what ends and purposes. And this evaluation will flow from how we describe a given situation and a government's role, or possible role, in it.

Sunstein characterizes the meaning that people attribute to their conduct as an "expressive dimension" of behavior.\textsuperscript{40} But expressivism of this sort turns on emotivism of the epistemological sort. This is not the way to mount a powerful account of moral notions as having a rationally defensible cognitive base and content. So a well-functioning society, in Sunstein's formulation, is one with many norms that "make it rational for people, acting in their self-interest, to solve collective action problems."\textsuperscript{41} The problem here is that collective action itself is a problem given the premises from which anyone indebted to the econometric school is forced to begin, namely, the Prisoner's Dilemma, much beloved in rational choice and utility maximizing circles. The Dilemma is a highly abstract and extreme description of human behavior and motivation, one in which the presupposition that we are beings driven by short-term, egoistic thinking controls the description of the situation and militates against any and all alternatives to such thinking. Those who know there are alternatives—as Sunstein does—are always playing a game of catch-up that invites overly anemic alternatives.

\textsuperscript{37} \textit{Id.} at 18.
\textsuperscript{38} CASS SUNSTEIN, \textit{Social Norms and Social Roles}, in \textit{FREE MARKETS AND SOCIAL JUSTICE}, \textit{supra} note 35, at 32.
\textsuperscript{39} \textit{Id.} at 34.
\textsuperscript{40} \textit{Id.} at 45.
\textsuperscript{41} \textit{Id.} at 61.
Trying to put back in much of what econometrism takes out on the descriptive level, Sunstein, in a "note on tragedy," describes "tragedy" as an "individual good because it accompanies and makes possible certain relationships and attitudes that are an important part of a good life."\(^4\) But this sounds more like a support group than a definition of tragedy. Tragedy is, well, tragic: a rotting, unburied corpse and Antigone locked in mortal combat with Creon. Pity and terror. But this sounds "irrational" from the preference-maximizing point of view, leading one to water down one's own alternatives. The presuppositions of law and economics have bled out robust alternatives at their very starting point. It sounds wacky to say Antigone is maximizing utility when she throws dirt over the rotting corpse of her brother, Polynoeices. But isn't that what econometrism, strictly construed, would require one to say? Or, rather, that this was an act of utter irrationality that flew in the face of any normal range of utility maximization? Aren't these the two controlling frameworks for describing the tragic situation with which Sophocles's Antigone opens?\(^3\)

A second example of the weakening of more robust ethical-legal thinking through concession to econometrism can be seen in Margaret Jane Radin's recent book, *Contested Commodities.*\(^4\) Radin ties herself up in conceptual knots as she both affirms and contests the claims of commodifiers. She begins energetically: It simply is not the case that everything has a price.\(^5\) So excessive or "universal" commodification must be resisted in favor of a more pragmatic approach to contested commodities, especially those related to basic matters touching how we think about human life itself.\(^6\) This is a tricky business, she insists, because commodification, like everything else, is a "social construction."\(^7\) She puts Karl Marx at one end and Gary Becker and Richard Posner at the other. How to decide? She wants a middle way, but one that does not look like traditional liberalism because it is problematic to claim, as some traditional liberals have done, that there are spheres of life that should be

---


43. There are more points one could make, of course, including a discussion of why efficiency is such a good thing. In urging greater democratization through law, for example, Sunstein insists that American government could be "more effective, more efficient, and more democratic" all at once. *Id.* at 318. But I have a hunch that these aims are in tension with one another. There is no more reason, on principle, why "democratic" and "efficient" should march in tandem than there is that markets and democracy should, if the current Chinese system tells us anything.


45. *Id.* at 9.

46. *See id.* at 2-6.

47. *Id.* at xi.
entirely off-limits to commodification. To her credit, Radin resists the fungible and universally commensurable world of the commodifiers because it cannot capture and may well "debase the way humans value things important to human personhood." But, given that all value is constructed by human beings, there is nothing that simply "has value," nothing in which value inheres. So we are in an exclusively anthropocentric universe: No value exists apart from, or outside of, humans placing it upon objects or concepts. This means we are unable to say that there are things, like babies, that should never be treated as commodities.

Radin frets about selling "infants and sperm, eggs, embryos, blood, human organs, human sexuality, human pain, human labor." But some organs can be sold some of the time. Here Radin takes up arguments against "desperate exchange," like selling a kidney because one is poor. But a ban on such exchanges may be contrary to "respect for persons" under certain circumstances. One example would be the sale of a kidney in a desperate situation. To prohibit such sales entirely might add insult to injury. Why? Because we might then cause the starvation of, for example, a Bangladeshi mother who would have been able to feed her child had she been able to sell her kidney to a wealthy purchaser in London. This is a strange way to describe what is going on. If we say that selling organs is a terrible but legally permissible form of commodification under situations of desperate exchange—in effect normalizing them—we lose the power to control the description of the situation from a moral point of view. Instead, we are in a world of trade-offs that would make it more difficult down the road to take a strong stand against the need for poor women to sell their kidneys, because we have now legitimated these sales through law.

Surely the strongest way to keep the moral point intact is to say that it is wrong—dreadful—for kidneys in Bangladesh to go to wealthy purchasers in the West. We must never legalize this sort of thing. That doesn’t mean we punish the desperate seller. It does mean we would, if possible, punish mercenaries who trade in organs for profit, something we could never do if this were a legalized set of

48. Radin does not explain in any detail what might be at stake for these "traditional liberals" in opposing commodification in some areas of life. Radin singles out Michael Walzer for criticism because she fears that his views, articulated in Spheres of Justice, don't suit feminism very well. See id. at 46-49; Michael Walzer, Spheres of Justice (1983). But what is her understanding of personhood such that commodification some of the time and non-commodification some of the time are both problematic? The answer: just another social construction; hence, more or less arbitrary.

49. Id. at 9.

50. Id. at 21.

51. Id. at 154.

52. See id. at 159.
transactions. If we say we can do no such thing because, being decent people, we are worried about "maldistribution of wealth" (Radin's explicitly stated overarching concern) throughout the world and not just about commodification, we tacitly promote the view that, although we are worried about maldistribution in general, we are willing to put aside our concerns in particular, concrete situations and proclaim: Let them sell kidneys! This certainly isn't an outcome Radin wants, but it is one that inevitably arises when the regime of incomplete commodification is built on such a slippery slope that grotesque activities are normalized descriptively and gradually lose their capacity to shock. To say that we cannot worry about any one thing unless we worry about everything is to fall into the excessive universalisms associated with a kind of neo-Kantianism, the dominant, but by no means the only, alternative to a regime of thorough-going utilitarian reductionism.

One final example of the economistic turn and its seepage into the discourse of even those observers who set themselves up as "critics" occurs with the problem of baby selling. Suppose you have a poor woman who wishes to sell a "baby on the black market" (the example is Radin's) even as she may "wish to sell sexual services, perhaps to provide adequately for other children or family members." What is wrong with these activities? For Radin, sexual services can be commodified to a certain extent: Nothing is inherently wrong with selling your body. But there is a problem with baby selling because babies are not "choosing" for themselves. Baby-selling seems like slavery for this very reason. But if this is in fact the case, and if the heart of the matter is that babies can't choose, then how do we justify adoption? Here babies are given away—released for adoption—even without their consent. So, Radin continues, if we forbid baby-selling maybe we should forbid adoption, too. If parents are "morally entitled to give up a child," and if we are opposed to slavery because that is trading in human flesh, why shouldn't we forbid all exchanges, whether commodified or not?

Having knotted herself up in this way by setting up "choice" as the word that does all of the descriptive (hence evaluative) work, Radin goes on to hint that there may be one reason that adoption is preferable to baby selling. Adoption remains lodged in a "nonmarket version of human beings," an idea that comes under tremendous pressure whenever market discourse triumphs utterly. This is a pretty snarled way to suggest that baby-selling is not such a

53. Id. at 154.
54. RADIN, supra note 44, at 137.
55. Id. at 139.
56. Id. at 140.
hot idea. But the primary outcome of Radin's discussion is to cast a pall of descriptive suspicion over adoption: It gets assimilated conceptually to baby-selling through her use of the word "choose." Babies cannot choose. But babies can languish, suffer from inattention, and grow lethargic from insufficient stimulation. In other words, babies can suffer from a well-known and named malaise that carries all sorts of ill effects with it: non-attachment. The loving adoption of a child is an old, tried and true way of offering homes to children who face the prospect of no home and no family. The basis of adoption historically was not the notion of some sort of exchange but the notion of a gift. These are fundamentally different ways of construing giving and receiving—one based in commodification, the other not. This distinction is lost in Radin's discussion as she accepts the fundamental, overriding term of liberal contractarianism and econometrism: choice or, as the econometricians would say, preference.

We object to baby-selling not because babies aren't exercising full choice over the transaction but because this is a practical example of the theory of crude substitution. Babies become just another commodity for sale in a transnational market. Once one spells out the difference between baby-selling and adoption in a clear way, the lack of symmetry between them becomes overwhelmingly apparent. Radin fuses them with the language of choice. Babies don't choose to be burnt with cigarettes, beaten to death, or starved either. But we wouldn't say these things are bad because the baby didn't "choose" them. We would say these things are bad, indeed viciously criminal, because babies are persons in the most vulnerable stage of their lives. An offense on such a person is an assault of such an egregious sort that we will extract severe penalties for those who commit crimes against infants. That is the way to make the point from a moral point of view and it is a way that draws the law and ethics together in a shared description of an event or events that has built into it by definition a penalty. Now let's make another turn, a feminist one.

II

As with the law and economics school, much that is engaging and insightful has emerged with the bursting-in of feminist issues upon the academy in general, and the law in particular ways. A few preliminary words of introduction are needed. Feminism in the West has always been of at least two minds about the nature of male and female identity. Egalitarian feminists hold that there is a single

57. See id. at 137.
human being. People may, of course, differ in temperament, abilities, and power, but such differences must be assessed by a universal standard. What is excellent in a man, they argue, is excellent in a woman, and vice versa. A nefarious deed is nefarious no matter who commits it. The problem for women historically is that men were the paradigmatic exemplars of humanity. Most feminists insisted that women too shared in the excellences wrongly deemed “masculine;” hence women could not fairly be denied access to education, property, the vote, and other civic rights. These early debates still haunt feminism. Nearly everyone now acknowledges some notion of difference. But difference with reference to what? The differences being claimed or embraced, whether for purposes of sex parity or sex privilege, do not exist “out there” as free-floating emphemera but always involve some sort of concrete claim.

This egalitarian feminism was always challenged by an argument from women who subscribed to a standard of “difference.” Why accept a single human standard—and a male one at that? Is it not only possible but even desirable that there are many human virtues, and that women may more likely serve as exemplars of some even as men stand for others? Perhaps valor is, in some sense, masculine even as compassion is, in some sense, feminine. The problem for women is that the qualities most linked to women have been devalued overall, and male virtues were rewarded while female virtues were ranked lower in the overall scheme of things. Such observations offer a helpful corrective. But something problematic happens when one moves from often keen and perceptive insights to a thorough-going, overarching ideological agenda.

Taken to an extreme, difference begins to blot out equality and to lay claim to privilege. It also challenges all the cumbersome rules and regulations aimed at achieving fair play. Fairness itself comes to seem a paltry thing by contrast with empowerment. Difference becomes a principle, designed to trump all other principles, and difference thus deployed is popping up everywhere. As I indicated, one area where the argument from difference has made major inroads is in feminist jurisprudence. But the debate has escaped the hothouse of the law classroom and academic journals and made its way into the courtroom, often in troubling forms that reflect one side of a “will to power” coin. As Nietzsche himself observed, the flip side of an urge to dominate is an urge to submit and then to construe victimization as a claim to privilege.

58. See Jean Bethke Elshtain, Battered Reason, in Real Politics: At the Center of Everyday Life 270, 271-73 (1997).
59. See, for example, the text that was central to re-opening this old debate, Carol Gilligan, in A Different Voice (1982).
60. See, e.g., Friedrich Nietzsche, Essay I, On the Genealogy of Morals, in On the
In the social world of radical feminist theory, women are routinely portrayed as debased, victimized, deformed, and mutilated.61 By construing herself as an ur-victim, the woman, in this scheme of things, seeks to attain a paradoxical power through depictions of her victimization. The presumption is that the victim speaks in the most reliable voice. (And bear in mind that in this world there are only two kinds of people: victims and oppressors.) The voice of the victim not only gains privilege but also aspires to hegemony. Ur-victim status is frequently part and parcel of a power play. Moreover, this ascribed status may come to serve as one feature of a strategy of exculpation, including evasion of responsibility for a situation or outcome.

Consider a concrete instance, then, in which a woman is cast as both victim and victimizer. How did the difference argument—which seeks to preserve her victim status while simultaneously denying that she could, as well, be held accountable for abusing or victimizing others—play out? The primary point, for our purposes, is the power of the descriptive language to alter or distort what we used to call the relevant “facts” of a case. Take a 1992 case in Nashville, Tennessee. The facts are not in dispute but the relevant descriptive schema is. Summoned to an apartment by a man named Michael Bordis whose infant son had “stopped breathing,” metro police confronted a horrific scene.62 They found a thirteen-week-old baby boy in the early stages of decomposition.63 The room occupied by the decomposing baby and his four-year-old half-brother smelled strongly of excrement. Trash was strewn everywhere and there were smears of feces on the walls and furniture. The filthy four-year-old was himself hungry and underweight. It appeared he fed himself from leavings in the refrigerator and had been left alone with the starving infant.64

Police arrested Bordis and his wife, Claudette. She went on trial first. According to her defense attorneys, she was the real victim. They mounted a defense based on the “battered woman syndrome,” an exculpatory strategy not in principle available to a male defendant.65 Claudette Bordis could in no way be “held accountable” for the death of her child.66 Why not? Because she was in thrall to her

---

61. For a full discussion of the ur-texts of radical feminist theory (including Brownmiller, Daly, Firestone, and others), see JANE BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMEN 201-228 (1992).
63. See id. at 218.
64. See id. at 217.
66. Id.
domineering husband. Although the husband was away at work all
day, she had been so bedeviled by her subjugated status that it didn’t
occur to her to feed her infant. So, the defense attorney opined, to
hold her responsible for her deeds was either a “male deal or a
prosecution deal or a society deal, but some people just don’t get
it.” He then called one of the small army of psychologists-for-hire
available in such cases. The psychologist testified that Bordis was
“numbed out” and that this explained the fact that she neglected to
feed her son. It also accounted for why she dressed like a prostitute
and accompanied her husband to bars, leaving the dying infant and
the four-year-old alone, in order to pick up men for three-way sexual
encounters. The final point made by the psychologist was that “our
society has conditioned women to accept that they’re there to serve
men.” On this the defense rested. As a victim, Bordis’s human
responsibilities collapsed. As a result, this diminished entity could
scarcely be held accountable for victimizing another.

The prosecutors didn’t buy this, of course, and they offered a
distinction between extenuating circumstances and exculpatory
conditions. Bordis may well be a disturbed woman; indeed, evidence
suggested she was troubled long before she married her creepy
husband. But this didn’t inhibit her ability to distinguish right from
wrong. She had the baby throughout the day and chose not to feed
him. Moreover, the defense’s claim about Bordis’s lack of agency
was an “insult to women in the community who are battered.” The
prosecutor told the jury that Bordis could have asked others to care
for her infant. She could have called her family. She had choices and
she opted, on some level, to destroy her infant. The jury found
Bordis guilty of first-degree murder.

What do we make of all this, and how does it connect to the heated
debate over difference? The Bordis case demonstrates how
pernicious the difference argument can become when taken to
exculpatory extremes. Instead of opening up certain areas for
examination and subjecting certain claims to critical scrutiny, the
difference argument seems here to have done the opposite. If she is a
victim, in her own definition, she cannot be held responsible. Irresponsibly, the argument that women are not fully responsible human
agents resurfaces in this case with a feminist gloss: The terrible facts
of the case are diminished in favor of a claim that is an artifact of a
theory that has become ideology. Once again, women seem wanting

67. Kirk Loggins, Mother Gets 15 Years For Not Protecting Sons, TENNESSEAN (Nashville),
July 9, 1992, at 5B.
69. Loggins, supra note 67, at 5B.
70. Id.
71. Id.
in what Aristotle called the deliberative faculty.72 Although the Nashville jury didn't buy it, other juries have bought a variety of exculpatory strategies which has been used to clear women of charges including driving to endanger, assault, child abuse, and even murder.73 Surely, however, women cannot indefinitely have it both ways. It is terrible to believe you are under someone's thumb. But for a twenty-three-year-old woman with a range of options still open to her, despite her participation in a wretched relationship, to starve an infant to death is more terrible yet.

Notice, in light of the overriding concerns of this essay, that those who wish to use difference as exculpation must try to control the description of events in such a way that no space for agency, hence accountability, remains. The perpetrator becomes a paradigmatic victim. The second aspect of this process is to draw attention away from the actual victim of the crime to the victim who did the deed but who cannot be seen as morally responsible or legally culpable. So attention must shift from a reeking, urine- and feces-strewn room where an unfed infant body lies decomposing and his four-year-old brother is left to fend for himself. That description evokes real pity, even terror—a palpable moral shock. In an effort to block out the power of moral intuitions and their open expression, we are called to shift our attention away from that bedroom to the story of Claudette Bordis caught in a marriage with a demanding, bossy low-life: She is the real victim. As she sat on a couch with her decomposing infant in the next room, the police asked her whether they could do anything at all for her. The fact that this "victim" said, well, yeah, she'd like a hamburger with french fries, either becomes evidence of her moral turpitude or her "numbed out" state (or some combination thereof, of course).

Let's move from an actual court case where certain jurisprudential strategies and claims drawn from one version of feminism played a key role, to a far more abstract and theoretical treatment of a strategy of exculpation based on gender and race. Here I will parse portions from an intensely subjective book on the law by Patricia Williams, The Alchemy of Race and Rights.74 Williams is an enthusiastic proponent of the so-called subject position school many feminists and "crit" theorists in general have embraced. Roughly put,

---

73. See Anne M. Coughlin, Excusing Women, 82 CALIF. L. REV. 1, 55 & n.274; see generally WOMEN'S FREEDOM NETWORK, FROM DATA TO PUBLIC POLICY: AFFIRMATIVE ACTION, SEXUAL HARASSMENT, DOMESTIC VIOLENCE, AND SOCIAL WELFARE (Rita J. Simon ed., 1996).
subject position thinkers hold that everything looks as it does to me due to my "subject position." The same holds for you and everybody else. One winds up with "You have your truth, and I've got mine." By definition this school is hostile to the aspirations of law itself as "a distinct context for human knowing." For Williams, "[the] subject position is everything," and there is nothing distinctive at all about the law. Those who operate from the subject position school embrace, whether openly or tacitly, a thesis of incommensurability. Therefore, it is unsurprising that Williams treats those who disagree with her as racial and political suspects; disagreement can only arrive via the dubious transport of narrow interest or false-consciousness. The upshot is that authentic exchange and dialogue become impossible and that any text, or exchange, or encounter, or piece of evidence means whatever Williams takes it to mean. Unsurprisingly, she takes a sledgehammer to tests of reasonableness and the burden of proof in the law.

For Williams, Anglo-American jurisprudence is cold and abstract, dominated by the "hypostatization of exclusive categories and definitional polarities" and by the "existence of transcendent, acontextual, universal legal truths or pure procedures." By contrast she offers first-person privilege—my experience, my subject position—as if that in itself yielded the indisputable truth of the matter. Men are charged with particular sins of emotionlessness and impersonality, of something called "men's ways of knowing." Williams's subject position is apparently not pierced by the irony that dividing knowing into male and female approaches is one of the crudest bipolarities or dichotomies one could possibly imagine. Most interesting for our purposes are Williams's attacks on the law from the "difference" standpoint. She begins with a particularly ugly ideology: All whites despise all blacks, consciously or not. So the very "essence" of blackness is to be defamed, to be a victim. From this, she goes on to discuss a number of cases, including the Tawana Brawley incident. In her discussion, Williams ignores or dismisses the empirical realities and evidence of this case.

Let's recall the facts. In 1987, Tawana Brawley, a fifteen-year-old

76. Williams, supra note 74, at 3.
77. Id. at 8.
78. Id. at 13.
79. The fact that Martin Luther King, John Stuart Mill, and Adolf Hitler and Mahatma Gandhi were all men and each seems to have reasoned rather differently doesn't compute in Williams's universe.
80. See Williams, supra note 74, at 169-78.
81. For a full discussion of the intricacies of this case drawn from contemporary news accounts, interviews with the protagonists, and other primary materials, see Jim Sleeper, The
black girl, claimed she had been kidnapped and raped by a white gang.\textsuperscript{82} She alleged that some members of the gang had been law enforcement officers, including Dutchess County Assistant District Attorney Steven Pagones, who recently was vindicated in a lawsuit against his chief tormenters.\textsuperscript{83} The charges turned out to be part of an elaborate hoax. Brawley appears to have started the story itself to cover up, or to avoid, a messy personal and family situation. Her story was taken up by militants and turned into a symbolic affair that was somehow "true" even if the story was a hoax and the specific charges were entirely false.\textsuperscript{84} In her discussion of the Brawley case, Williams does acknowledge the manipulation of Brawley by her handlers. But she cannot bring herself to admit the depth of the hoax and the extent of real harm (including an apparent suicide) that was suffered by those falsely and cynically accused. For Williams, the facts literally can be damned. Even if Brawley fabricated the whole story and injured herself, "her condition was clearly the expression of some crime against her, some tremendous violence, some great violation that challenges comprehension. And this is much that I grieve about."\textsuperscript{85} Brawley may not have been an actual victim of real men who actually did the things alleged in the hoax. Nonetheless, Williams claims that Brawley was the victim of a "metarape."\textsuperscript{86} This is a pernicious argument. Should we send men to jail for "meta-crimes" because they presumably harbor the animus Williams claims lurks in the hearts of every non-black? This is reminiscent of the old Marxist canard concerning "objective class enemies": One needn't have done anything wrong to be slated for punishment, even elimination. Williams seems untroubled by her conclusion that even if no particular person has done any concrete harm to any particular African-American, on the basis of all the evidence, they are nonetheless guilty on the "meta" level.

For Williams, evidentiary rules are merely one way those engaged in turf wars mark their territory. After all, the need for proof is very burdensome. Of course, the entire tradition of "innocent until proven guilty" assumes that proof must be burdensome to prevent hasty convictions. The burden of proof is designed to protect those who lack coercive power from the caprice of those who have it and are prepared to use it. Williams dismisses this pesky feature of the common law tradition by declaring that "social life is based primarily
on the imaginary” in any case. Instead, we must place our faith in a true self, rather than rules, procedures, and standards of fair play. All standards are nothing but “socially accepted subjective preferences.” Here Williams’s form of subject position/feminist/post-modern/difference discourse shakes hands with law and economics by reducing human choices to preferences. Whatever “feels” true (like meta-rapes, presumably) is treated as true. For example, Williams supports affirmative action because it is a “mystical and beyond-the-self” sort of thing. Mystical? Beyond-the-self? It is a public policy. How can one even begin to discuss it intelligibly if it is “beyond-the-self”?

Williams, in a particularly extreme way, shares a widespread and generalized tendency in feminist legal discourse to contrast rules and laws with the assumption that “the human voice is natural and genuine—the ‘real thing’—and that formal rules and doctrines are contrived, artificial, and heedless of the human experience of the parties.” But as Mark Yudof insists,

[the] urge to conceptualize and to generalize is as “natural” as the urge to be concrete and to speak in ordinary human terms... I believe that conceptualization and ordering are natural, indeed inherent in the human voice, which can be heard or can exist only through a mental structuring of experience.

This contrast between a feeling, intuitive, and therefore authentic self and cold mechanisms or “formal” structures is not only wrong as a characterization of human mental activities, but also politically pernicious and legally dangerous. If we strip away rules and evidence and the “burden of proof,” we are left with caprice, which creates openings for more, not less, coercive and naked force. If difference is deployed to destroy moral agency and create epistemological—even ontological—incoerçibility, we may as well slam shut the law books.

III

I will end with a further elaboration and defense of law’s intrinsic moral features that can (as we have seen) be obliterated by the construction of comprehensive theories and ideological claims. Law concerns people in their concreteness. It speaks to this moment, that event, that body, that person holding a gun. It also speaks to our highest aspirations for human decency and right, concepts that

87. Id. at 63.
88. Id. at 99.
89. Id. at 50.
90. Yudof, supra note 75, at 519.
91. Id. at 592.
concern not metaphorical persons but the flesh and blood human beings with whom we share this fragile globe. Human rights is about blood and bones and rotting corpses. Theories of human rights should speak directly to such realities and identify ways to prevent them. Particular events and general principles and commitments need stitching together.

I propose that this is most effectively achieved through our description of a situation. For example, suppose a group of persons is gathered around listening to a description of a brutal event in which young children are systematically tortured by sadistic adults. The account is replete with details of the desperate implorings of the children and the impervious cruelty of their torturers. One listener is devoted to a sharp bifurcation between description and evaluation. He turns to the group and says, “Well now, how should we think about whether we approve or not of the actions of these torturers?” This is a completely unnecessary question. The description I just offered includes all that is necessary for a condemnation—brutal, sadistic torturers and suffering children. The description of events constitutes an evaluation from a moral point of view. (And, needless to say, legal implications flow directly from this description framed from the moral point of view.) A person devoid of a moral perspective would have described these events in different language. To repeat: There is simply no such thing as a “neutral” language of description; rather, we evaluate the world through our descriptions of it. In Julius Kvesi’s words, “moral notions describe the world of evaluation.”

This helps us to understand why nations and armies and others in power strive so mightily to control the description of what is going on, especially in situations of conflict. The judgments internal to acts of moral evaluation turn precisely on what one considers the relevant facts of a situation.

So the law remains a primary area within which description from a moral point of view goes forward, with the additional burden that the description must meet certain standards of believability, reasonableness, and so on. One’s descriptions are never unconstrained. One can’t just unleash them willy-nilly. The obligation of law as a form of moral reasoning is to take up all the relevant facts (insofar as these can possibly be known), which in turn will always be imbedded in some evaluative framework or another. And this framework isn’t articulated on a meta-level but imbedded within the choice of a language of description. The relevant facts and the evaluations that flow from them “not only have to be formed from the point of view of anyone, but they also have to be about

92. Kvesi, supra note 26, at 161.
those features of our lives that can be the features of anyone’s life.\footnote{Id. at 148.} Here a reminder about my example of the relevance of situatedness—that voting in a by-year election in a well-off, peaceful, civically well-run republic dominated by interest group politics, and voting in a situation in which one of the parties is dedicated to the wholesale elimination of an entire class of human beings will carry quite different moral meanings. Moreover, these different moral meanings will be borne along by the description of the situation.

This isn’t nearly so mysterious as it may seem at first blush. My final example will be drawn from the great film classic, \\textit{To Kill a Mockingbird}.\footnote{To \textit{Kill a Mockingbird} (Universal 1962).} I will assume some familiarity with Harper Lee’s story. We are now in the courtroom for the trial of Tom Robinson, a good man, but a good black man. His blackness, his being, is the only relevant factor for the prosecution by those we unkindly call “white trash”—a poor, uneducated, roughed-up young woman and her foul-mouthed, heavy-drinking father. Atticus Finch, assigned to defend Tom Robinson, is doing so to the best of his ability by ferreting out all the relevant facts in the case: circumstantial evidence, character evidence (is this behavior in any way consistent with what we know about this man?) and so on. The female accuser’s testimony is pitted against Finch’s attempt to impeach it. It is established beyond a reasonable doubt that the female accuser was beaten severely on the right side of her head and over her right eye. She also was gagged around her neck, with finger imprints on both sides of the back of her throat.

Finch, in a quiet gesture, asks the violent father of the accuser to write out his name, thereby establishing that he writes using his left hand; indeed, that he leads with his left. By contrast, when Finch throws an empty drinking glass in Tom Robinson’s direction, he can only catch it with his good right arm, as his withered left arm had been caught in a cotton gin when he was a child. Whoever beat up the accuser led with his left. That eliminates the accused and makes the father the prime suspect. Robinson’s own testimony is rich in detail, helping us to appreciate the entire train of events that led up to this dreadful moment in court: He is following his oath to tell the whole truth as he knows it. Finch, in his closing remarks to the jury, insists that this is a case that should never have been brought to trial, as not one iota of corroborative evidence that the crime ever happened has been proffered.

Recall now the perspective I have been developing. Recall that one of the most pressing of all moral acts is deciding what is to count as a relevant fact in any situation. In everyday discussion, outside this
courtroom situation, the fact that Robinson cannot use his left arm might be a matter of concern, pity, or curiosity. In this courtroom context, it is a fact of the most profoundly and deeply moral sort: The body cannot lie. One arm is usable, the other not. The arm that is useless is the arm that, on another man, harmed the accused. Knowing these descriptive facts, along with others that exculpate the defendant, yields an evaluation: not guilty.95

In his closing comments to the jury, Finch calls it an evil assumption that all Negroes lie, that Negro men cannot be trusted with white women, and so on. He is trying to counter those evil assumptions with a few basic, humble facts that add up to a moral point of view and, in this, he insists that the courts are our great levelers. This, he concludes, is no ideal, but rather a living, breathing reality. I submit that we would not want to live in a world in which Robinson’s withered left arm lacked compelling force within the context of a courtroom in which it is precisely that physical fact that carries the moral and legal argument. The jurors in To Kill a Mockingbird know they are overriding a moral fact in favor of conformity to a tradition dictating that everything a white person says overrides anything a black person says, even if one is obviously lying and the other telling the truth.

If we determine that Robinson’s arm is without compelling force, we are left to adjudicate between two sets of subjective claims that we accept or not depending on our subject position. The implications of a tendency to favor self-replicating and self-generating constructions over palpable material evidence is dire. As Hannah Arendt puts it in her great work, The Origins of Totalitarianism, “[t]he ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction... and the distinction between true and false... no longer exist.”96 Coming to articulate the moral forcefulness of the left arm is part of a moral transformation through which persons are capable of moving and, in so doing, drawing closer to the truths that moral realism discloses to us or insists can, in principle, be revealed. I realize, of course, that the analytic burden of this paper has been primarily, if not exclusively, deconstructive rather than constructive. Were I to build on this piece, having cleared some brush (so to speak), it would be necessary for me to grapple with some tough cases that would further illustrate the clarity and power of moral realism as a basis for legal thought and

95. Tom is found guilty in the film, of course, given the South of that time and the racial prejudice that prevailed. Atticus predicts they have a good chance on appeal with the facts in their favor, but Tom is killed trying to escape before the appeal can proceed.

action. This constructive task cannot be an abstract one in which I conjure up "tough cases" for myself; rather, it must stay close to the ground of law as practiced. It would be a terrible irony if an argument calling for recognition of the moral force of relevant facts became so abstract that what one wanted to elucidate one had, in fact, obscured.

If racial, sexual, gender, or other generic categories are deployed to obfuscate rather than illuminate the fact of the matter, one falls into the "evil system" Finch denounces. No matter whose ox is being gored. No matter whose interest is being served. No matter what "Big Picture" may be at stake. That is the moral power of the law as a form of reason and as a practice. So we can say something more about the jurors in To Kill a Mockingbird. We can say that if they had accepted the truth of Robinson's withered arm, that truth would have set them free. If we run an alternative ending to the story—a not-guilty verdict—we can discern its electrifying and transformative potential. For in the recognition of that humble fact lay freedom. That the jurors refused this freedom is, perhaps, no surprise. But it is a refusal. They declined an invitation to live in the truth.97

97. This turn of phrase is associated with the life and work of President Václav Havel. See, e.g., VÁCLAV HAVEL, LIVING IN TRUTH (1987).