Tea at the Palaz of Hoon: The Human Voice in Legal Rules

Mark G. Yudof

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs

Recommended Citation
“Tea at the Palaz of Hoon”: The Human Voice in Legal Rules

Mark G. Yudof*

Not less because in purple I descended
The western day through what you called
The loneliest air, not less was I myself.¹

—Wallace Stevens

Professor Getman, like the character in Wallace Stevens’s poem “Tea at the Palaz of Hoon,”² is not any less himself for his descent into the lonely air of legal scholarship.³ Eminent humanist and gifted scholar that he is, he employs his own powerful voice to lament the suppression of human voice in law schools, a voice overwhelmed by a cacophony of professional, critical, and scholarly voices. His plea deserves scrupulous attention because Getman himself is the master of many voices.

Professor Getman argues that a good lawyer “often must use her capacity for empathy” and that good advocacy means “being able to convey the client’s sense of injury, needs, values, and feelings in a way that elicits understanding and empathy . . . .”⁴ He recalls negotiations on behalf of a police union in which his case “rested on the incidents of horror, sadness, and vulnerability” that individual officers had described to him.⁵ He relies on an excellent and moving work on rape by Professor Susan Estrich, which begins with an unforgettable sentence: “Eleven years ago, a man held an ice pick to my throat and said: ‘Push over, shut up, or I’ll kill you.’”⁶ He is saddened by brilliant legal scholars who subject Brown v. Board of Education⁷ to every sort of creative analytic scrutiny, blind only to the simple truths about purposeful segregation.

* Dean and James A. Elkins Centennial Chair in Law, The University of Texas School of Law. B.A. 1965; LL.B. 1968, University of Pennsylvania. I wish to express my gratitude for many helpful criticisms and comments from Philip Bobbitt, Harold Bruff, Douglas Laycock, Michael Sharlot, David Robertson, John Robertson, Calvin Johnson, Sanford Levinson, and Zipporah Wise-man. I particularly wish to thank Bill Powers, who inspired me to write on this subject and who gave generously of his time and insights.

2. Id.
4. Id. at 582-83.
5. Id. at 583.
that are known to every ten-year-old black child.\textsuperscript{8} Could any thinking and sensitive person dissent from Professor Getman's humanist manifesto, decrying the suffocation of the "vulnerable human voice of the victims, the smug professional voice of the courts, and the patronizing voice of the commentators"?\textsuperscript{9} Perhaps not. Nonetheless, I wish to register a partial dissent.

I do not defend the scholar's hubris, the false claims of objective reason, the elitism, or the arguable imbalance in legal education among rhetorical styles and competing values. Nor do I embrace the sometimes ornamental language of the law or a false scientific creed that ignores the perspectives of the ordinary person, whether victim or perpetrator. But, as Professor Getman's many examples demonstrate, the human voice can influence the legal process and judicial decisions in a variety of ways, and some of those ways give me great concern. Perhaps my unease begins with my conceptions of what lawyers and the law should strive to accomplish, what a community should seek to achieve in and through a legal system, and what the process of resolving disputes through law is about.

In order to have law, a polity needs lawyers, people who "do" law. Law is not theology or philosophy; it has its own internal coherence. Law constitutes a distinct context for human knowing. I do not believe that legal concepts block our understanding of the world or that they wrongly eviscerate our human sensitivities. Quite to the contrary, rules and doctrines are themselves the order; they are not the shadows of an obscured reality on the walls of the cave. A major purpose of legal education—and certainly the primary task of law and lawyers operating within the framework of a legal system—is to recognize some order in the disparate human voices in any legal controversy. That recognition is necessary if disputes are to be settled in accordance with principles that transcend individual cases. It enables society to treat people equally, to treat like cases alike, and to avoid rampant favoritism—in short, to achieve formal justice.\textsuperscript{10}

Any particular legal ordering spun from the human imagination may be just or unjust. But the ordering itself determines what facts are necessary to adjudication and thus the relevance of particular human voices. First, the human voice is critical to the application of law to discrete disputes because it illuminates the facts necessary to adjudication.

\textsuperscript{8} See Getman, \textit{supra} note 3, at 584-85.
\textsuperscript{9} Id. at 586.
\textsuperscript{10} See generally J. Finnis, \textit{Natural Law and Natural Rights} 270-73 (1984) (discussing that rules of law are virtuous because personal freedom is enjoyed within defined parameters); L. Fuller, \textit{The Morality of Law} 105-18 (1969) (defining the relationship between morality and the law).
Second, the human voice, as well as the scholarly and critical voices, may reveal normative choices and the responsiveness or unresponsiveness of the legal rules or doctrines to the community's values and the underlying human condition. Voices other than the professional voice are essential to the ongoing process of examining the justification for legal rules because they enhance critical reflection on the rightness of the legal order. This process is all to the good in the pursuit of justice in a world of changing circumstances and normative commitments.

But the dynamic of justification suggests only that human voice, in the sense that Professor Getman uses that phrase, can provide an external critique of legal doctrines; it does not suggest an internal critique that would permit individualized exceptions to static legal rules. By challenging the efficacy of all general statements of legal norms, the internal critique is tantamount to an attack on the legitimacy of the enterprise of law itself—it denies the viability of law as a context for knowing.

In brief, I agree that the just application of law requires careful attention to human voices as factual context. I also agree that neglected human voices may be blended and fashioned into new and better rules as part of the process of reexamination, justification, and change. I do not agree, however, that they should establish a form of substantive justice for individuals that undermines the very idea of formal justice for all. Karl Llewellyn once said that "beyond rules lie effects." But beyond effects lies something deeper: "Under no circumstance can one honor as Grand Manner [of law] the deciding of any case without either a rule or an effort to work toward one." These are complex matters, and this Essay is devoted to an elaboration of these themes.

I.

In seeking to amplify the human voice within legal decisional processes, Professor Getman asks much of law, for he appears to juxtapose "understanding and empathy" with "relevant rules." His root assumptions are 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. Indeed, from this perspective, law is mechanistic and often stands in the way of expressing

and acting on humanistic concerns. Getman insists that law students be alerted to the fact that our system of formal justice may be at war with our inner, deeper, more sympathetic natures. Thus, in his view, too much emphasis on adherence to rules and on their elaboration and too much toil on the professional voice may be counterproductive in human terms. Too much exposure to formal justice corrupts substantive justice.

I begin with rather a different set of assumptions, as I believe that the urge to conceptualize and to generalize is as "natural" as the urge to be concrete and to speak in ordinary human terms. Every parent understands this. A child seeking justice will relate the blow-by-blow details of her fight with her brother—what game they were playing, who "started it," who screamed first, who hit first (or hit back first). She will seek justice from her parents through the human voice, emphasizing the concrete facts that resulted in the injustice. But suppose that her older brother is permitted to cross the street, and she is not. Faced with this injustice, she quickly will invoke the general principle that they should be treated equally: if the parents do not love him more, if they have any sense of fairness, they will treat their two children with equal respect. Just as quickly, however, her older brother will urge that he was not permitted to cross the street at her age and that equality requires that she not be afforded a privilege denied to him when he was similarly situated. Otherwise, the parents love her more, favor girls, think she has better judgment, or are acting arbitrarily.¹⁵

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. To illustrate these points, permit me to invoke the poetry of Wallace Stevens, the author of "Tea at the Palaz of Hoon."¹⁶ Stevens was not only a poet but also a lawyer—and a pretty good one, according to his biographer.¹⁷ Perhaps reflecting both his human and professional voices, his poetry evidences a fascination for the ordering of ordinary and everyday occurrences in a world filled with a multitude of phenomena. For Stevens there is much to be explained about the world in which one lives and perceives and experiences:

What was the ointment sprinkled on my beard?
What were the hymns that buzzed beside my ears?
What was the sea whose tide swept through me here?¹⁸

But how does one explain such mysteries; where is the compass that

¹⁶. W. Stevens, supra note 1, at 65.
¹⁸. W. Stevens, supra note 1, at 65.
guides one to the origin of the hymns and tides? Stevens answers that the human mind itself is that compass:

Out of my mind the golden ointment rained,
And my ears made the blowing hymns they heard.
I was myself the compass of that sea. 19

"Out of my mind" (a double entendre?) came the artificial reckoning of the compass, a human invention that imposes order only so long as there is a community of understanding about the meaning of north and south, east and west. There is no preternatural human voice; no single, unerring way of looking at or structuring experience; no pure human voice once the "artificial" voices are silenced. We have many perspectives on human interaction available to us, and we must choose among them. The only alternatives are silence or Babel.

Particular compass points, like specific legal rules, are not inevitable or true or necessary in some ontological sense, but some ordering of human voices is necessary if people are to find their way. For Wallace Stevens the poet, just as for Wallace Stevens the lawyer, the organization of experience, the understanding, and indeed the construction of reality itself emerge from the human mind:

I was the world in which I walked, and what I saw
Or heard or felt came not but from myself;
And there I found myself more truly and more strange. 20

Viewed from the perspective of Stevens's poetry, law may be seen as a medium, created by human minds, for perceiving and structuring experience. Inevitably, a community needs to commit itself to standards of behavior, methods of resolving disputes, and limits on state coercion. Legal rules and doctrines represent value choices about such matters by judges, legislators, and others representing the citizenry. As those commitments become embodied in legal rules, however, not all human voices will be honored or heard; some will prevail over others. In that sense, the professional voice and the human voice do not starkly oppose one another, for the professional voice is a manifestation of the community's aspirations and its concrete efforts to bring order to myriad human feel-

19. Id.
20. Id. Similarly, in "Some Friends from Pascagoula," Stevens writes:
Tell me more of the eagle, Cotton,
And you, black sly,
Tell me how he descended
Out of the morning sky.
Describe with deepened voice
And noble imagery
His slowly-falling round
Down to the fishy sea.
Here was a sovereign ... sight...
ings and circumstances. Those involved in the making, application, and articulation of law are the makers of the song that we sing. They provide the idea of order that resolves conflicting empathies and emotions. As Dean Leon Green observed: "Despite their dangers, doctrines must be depended upon for the general administration of law. The theology of the lawyer can[not] be avoided; we can only hope for a better brand."21

II.

Understanding the professional voice as an articulation of human voices suggests some critical distinctions. Human voice simply may refer to the process of presenting facts before a court, the determination of what happened and to whom, before the decision maker applies legal principles and decides the case. Testimony and production of documents are part and parcel of the adjudication process. It certainly matters whether the automobile had defective brakes, whether the driver of the automobile was intoxicated, or whether the child slipped and fell or was abused by her father.22 And, of course, factual matters and legal standards may be intertwined: Did the innocent party engage in commercially reasonable efforts to mitigate the damages that resulted from the other party’s breach of contract? Legal doctrines and rules require such elaborations of human stories. Although this internal, procedural use of the human voice, however inexact, does not appear controversial, I take it that Professor Getman aspires to a greater place for the human voice.

But if human voices other than those embedded in the decisional rules are to be heard, for what purpose should they be recognized? How are they to be selected? What is the standard of relevance? I believe that human voices may be employed legitimately to provide an external critique of legal rules and doctrines that makes the law responsive to ordinary human beings and their normative commitments, wants, needs, and aspirations. If rules and doctrines do not respond, they should be changed. The statute should be amended, the precedent overruled, the administrative rule withdrawn, or a new constitutional provision adopted. If a human voice is wrongly suppressed, the blame lies with our formulation of legal principles.

On the other hand, the human voice also may be used in a way that is destructive of the concept of law. Getman’s notion of the human voice as a particularized, direct informant of the legal system strikes me as very

21. Robertson, The Legal Philosophy of Leon Green, 56 TEXAS L. REV. 393, 421 (1978) (quoting L. GREEN, JUDGE AND JURY 54 (1930); Green, Tort Law Public Law in Disguise II, 38 TEXAS L. REV. 257, 268 (1960)).
Tea at the Palaz of Hoon

risky. There is the danger that the human voice will be employed to ameliorate the application of legal principles, without changing them in any generalizable manner. It may lure us away from formal justice, equal treatment of persons, and legal principles that transcend individual cases. Use of the human voice in this way would, I believe, favor a form of substantive rationality, justice without principles or rules, justice in response to the life stories of each individual. In such a world, the processes of law would be illegitimate, for “doing” law would consist of imposing ordered justice on disordered and disconnected human events.

III.

Professor Getman further argues that the law schools and the legal process sustain an imbalance among voices, an imbalance that favors the professional voice over the human voice.23 My impression is that most lawyers, particularly trial lawyers, are well aware of the need to show the human side of their clients, to arouse sympathy for them in the eyes of judge and jury, and to tell their clients’ stories with compassion and understanding. As one prominent practitioner has commented,

I feel that the human voice has in fact been heard and recorded in the common law for nearly a millennium. At times the voice has been faint, but surely during 500 years of equity practice before 1875, there was concern for particularities in decision making, taking into account not only misbehavior of one side, but even poverty or weakness of the other.

Most lawyers presenting their cases to the judge or jury try to bring out any beneficial idiosyncratic features of their case. . . . [T]he human voice [also] is heard and expressed through our jury system. [The jury] . . . bring[s] a “sense of the community” to decisions and the jury hears human voices that may never be recorded.24

In my experience, even those who represent corporate clients try to make their clients more concrete by focusing on individual officers and stockholders. If I were pressed to make a judgment, I would suggest that good trial lawyers sometimes think that they can ignore legal principles, that human voices (as manifested in the facts) are everything.

Law students come to law school with an array of experiences and perspectives. The purpose of their legal education is not to silence their human voices but to develop their lawyer’s skills, their professional voices. While, according to Professor Getman, law professors may not

be models of compassion and understanding, they presumably were not
chosen for such attributes. Rather, they were selected largely for their
professional, pedagogical, and intellectual talents. Most law students un-
derstand this, and most are suspicious of metamorphic law teachers who
turn themselves into social theorists. Moreover, if the human voice is
indeed the equal of the professional voice in the practice of law, law
schools should emphasize development of the voice that students lack,
the professional voice. Examples taken from the adjudication process do
not necessarily demonstrate a similar imbalance in legal education—nor,
indeed, in the legal system as a whole.

To a considerable extent, the role of the law professor, the lawyer,
and the judge should be to assimilate the human voices that stand apart
from legal doctrine and to articulate the human concerns in a profes-
sional voice. There are good reasons why the bloody knife should not be
shown to the jury, why we seek fair-minded jurors, and why the criminal
defendant’s prior convictions are not introduced into evidence as a mat-
ter of course. The human voice alone carries some risk of bias, prejudice,
and passion. Procedural rules and evidentiary standards are important
offsets to this risk. The unique contribution of the lawyer to the dispensing
of justice (as opposed to the contributions of the average citizen, the
theologian, the social worker, the historian, or the psychologist) lies in
her ability to frame human hurts and controversies in terms of the con-
ventions and language of the law. Law schools should cultivate the pro-
fessional voice, giving students the knowledge to function effectively
within the legal system, while inviting them to test legal principles
against ordinary experience and the truths of other disciplines.

IV.

In order to amplify my primary themes about the nature of profes-
sional voice and its relation to human voice, I ask the reader to consider
Ronald Dworkin’s recent book, Law’s Empire, which, by his own admis-
sion, “centers on formal adjudication.” 25 Dworkin well understands that
some critics may disparage his “narrow” project, for they believe that
we will misunderstand legal process if we pay special attention to
lawyers’ doctrinal arguments about what the law is . . . [because
such] arguments obscure—perhaps they aim to obscure—the im-
portant social function of law as ideological force and witness. A
proper understanding of law as a social phenomenon demands,
these critics say, a more scientific or sociological or historical ap-
proach that pays no attention or little attention to jurisprudential

25. R. DWORKIN, supra note 22, at 12.
puzzles over the correct characterization of legal argument.\textsuperscript{26}

Although Dworkin admits that law is a social phenomenon, in his view critics of the legal system ignore its most distinctive characteristic, "the structure of legal argument."\textsuperscript{27} In a crucial passage, Dworkin distinguishes between an external point of view, one that tests legal principles against historical or sociological realities, and an internal perspective that seeks to marshal legal arguments about what the law does or should require:

Legal practice, unlike many other social phenomena, is \textit{argumentative}. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims.

... We need a social theory of law, but it must be jurisprudential just for that reason. Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective...\textsuperscript{28}

While Professor Getman does not argue that the professional voice should be ignored, he would secure a much greater role for the human voice in these internal workings of the legal system. Dworkin, on the other hand, perceives that other voices are important, but he fears that the hydraulic force of doctrinal and legal argument will be slighted. Getman and Dworkin differ on what the balance among voices is or should be, on the fit between legal doctrines and the human voices that these doctrines purport to embody.

This leads to \textit{rules} of law, not to mere just or right \textit{decisions}, much less to decisions merely according to any personal equities in individual cases. But it leads toward \textit{good} rules of law and in the main toward flexible ones, so that most cases of a given type can come to be handled not only well but easily, and so that the odd case can normally come in also for a smidgeon of relief.\textsuperscript{29}

Ideally, shared conventions would govern which human voices were "relevant" to the disposition of a case. Decision makers should strive to

\textsuperscript{26} Id.
\textsuperscript{27} Id. at 13.
\textsuperscript{28} Id. at 13-14.
\textsuperscript{29} K. LLEWELLYN, supra note 12, at 402.
articulate law at some meaningful level of generality, a level of generality that is responsive yet cognizant of impartiality and justice beyond the circumstances of individual litigants. Some detachment is both inevitable and desirable in a system of formal justice, and that sense of detachment may deny the efficacy of particular human voices. Defensible legal methods "revalue and devalue such case equities as remain too individual to properly determine or influence decision."\textsuperscript{30}

Professor Bobbitt, in his excellent work on constitutional law, speaks of shared "legal grammar," a typology of arguments appropriate for both judges and legal counsel.\textsuperscript{31} He offers the hypothetical case of a lawyer who argues to the judge that a treaty should be held to be supreme to a state statute "because the judge's brother has a land title that would be validated thereby."\textsuperscript{32} Presumably the brother can articulate his concerns in a human voice: he may have suffered and sacrificed for that parcel of land. A contrary decision may irreparably injure the lifelong companionship of two siblings. A rupture in their relationship may deprive them of the community of their only living relative. But we expect the judge and the lawyers to ignore these human voices because the applicable law does not deem consanguinity to be a compelling factor in the determination of the dispute—"although there have been societies and doubtless still are societies within whose legal cultures such arguments make sense."\textsuperscript{33} Our sense of general fairness, the perceived need for equal treatment of individuals and for principled decision making by the courts, would require the judge to decide against his brother's interests. Conversely, we might expect parents to honor such arguments in making decisions concerning everyday family life because we feel that legal principles should have a limited role within families.\textsuperscript{34}

Given that human voice should have \textit{some} role in legal decision making, Professor Getman's discussion of Professor Estrich's article on rape raises the fascinating question of the proper scope of that role.\textsuperscript{35} In what sense, if any, is her personal story relevant to her legal scholarship? Estrich chose to begin her article with the story of her own rape eleven years earlier, and she notes that one purpose of her decision to talk of her rape, in the article and in other public settings, is to encourage other women to reveal that they too were rape victims, so that she can offer to

\textsuperscript{30.} Id. at 273.
\textsuperscript{31.} P. Bobbitt, Constitutiona l Fate 6 (1982).
\textsuperscript{32.} Id.
\textsuperscript{33.} Id.
\textsuperscript{34.} See generally J. Elshtain, Public Man, Private Woman 157 (1981) (discussing the basis of familial government).
\textsuperscript{35.} Getman, supra note 3, at 586-87.
help them. This purpose, however worthy, stands apart from her immediate scholarly purpose of analyzing the law of rape.

Estrich explains her choice as a way of revealing her own attitudes—she "cannot imagine [herself] writing on rape without disclosing how I learned my first lessons or why I care so much." She then draws an analogy to the need for a scholar writing about prosecutorial discretion to reveal that she was once a prosecutor. This analogy suggests two reasons for her decision to speak in the human voice. Both the rape victim and the prosecutor speak from direct experience, and, for each, disclosure of this fact indicates a deeper and more practical understanding of their scholarly topic, a type of credibility far beyond the standard author's footnote (professorial appointment, undergraduate school, law school).

On the other hand, Professor Estrich may be concerned that some readers will devalue her scholarly work if they subsequently learn that she was a rape victim. Withholding such information, even if entirely motivated by a concern for privacy, may reinforce the view that she cannot write about this heinous crime dispassionately. Her candid revelation of her experience then may disarm the critical reader and bolster her conclusions. If, as Estrich suggests, "we are not at the point where it is appropriate for the law [of rape] to presume nonconsent [to sexual relations] from [the victim's] silence," then her life experience provides a counterpoint to those critics who would suggest that she does not genuinely understand the nature of the crime of rape.

Yet Estrich's diverse uses of the human voice do not contribute much to her elaboration of what the law of rape should be. Her self-defined tasks—"to examine rape within the criminal law tradition" and "to expose fully the sexism of the law"—place her in the mainstream of those who employ a professional voice for their criticisms of legal doctrine from an internal perspective. Defined in her own terms, Estrich's

36. Estrich, supra note 6, at 1089.
37. Id.; see also Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 YALE L.J. 2132, 2132 n.† (1987) ("As a former defendant in a student disciplinary case, I have strong feelings about many of the issues discussed in this Note. I do not deny a degree of bias, but I believe that bias to be more than outweighed by the special insight my experience has given me into these issues.").
38. Estrich, supra note 6, at 1089.
39. Id. at 1105.
40. Id. at 1090. Estrich continues with this description of the article's context: Much that is striking about the crime of rape—and revealing of the sexism of the system—emerges only when rape is examined relative to other crimes, which the feminist literature by and large does not do. For example, rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent.

Id.
article does not support a broad thesis about the incompatibility of legal and professional voices.

Getman illustrates the need to enhance the role of the human voice with another emotionally charged illustration, his classroom discussion of State v. Williams. The problem in that case was whether Native American parents should have been found guilty of negligent homicide for failing to seek out medical attention for a seriously ill child. Professor Getman recalls that his students discussed the case largely in a professional voice, speaking of what reasonable prudence would require under the circumstances. This analytical chain was broken by a black woman student who sought to explain the parents' motives in her own human voice:

She said, "I don't know about Native Americans, but I know why black people in South Carolina often avoid doctors." She then described in moving and personal terms, "the feeling of being treated like an object and looked at as though you aren't human." She said, "Many rural black people end up applying poultices. Maybe they don't do any good medically, but they are applied with love and make you feel better because somebody cared."

Getman had two reactions to her response. First, if the speaker had represented the Native American couple and articulated their human concerns, they would not have been convicted. Second, this classroom experience revealed how little time is spent in law school on teaching the importance of the human voice and how deficient many of his colleagues were in human understanding.

Although this student's human voice may provide some insight into why the parents in Williams acted as they did, this is not necessarily the case. The experiences of a black woman from the rural South may not be identical to those of a family of American Indians, even though all are members of historically mistreated minority groups. The Indian parents may have opposed medical care for religious reasons, they may have carelessly failed to discern the seriousness of the illness, they may have despised doctors, or they may have had an unjustified confidence in their folk remedies. Presumably, there are some loving but grossly negligent Native American parents, just as there are loving and imprudent white and black parents. But let us suppose that Professor Getman and his student are right and that this particular human voice gives us insight into the motivations and thinking of the Williams defendants. Should the parents have been found not guilty of negligent homicide?

41. 4 Wash. App. 908, 484 P.2d 1167 (1971), discussed in Getman, supra note 3, at 583.
42. Getman, supra note 3, at 583.
43. Id.
From the standpoint of the qadi, a judge without precedent or doctrine, excusing the conduct of the parents may be a form of substantive justice. I must confess, however, that I am not entirely convinced. The Indian child is dead, and the parents could have prevented this calamity by ordinary prudence. The available physicians may have been cold and impersonal, treating Indian families as if they were not human, but should that assault on their dignity and pride outweigh the physical harm to the child that came through the lack of medical attention? There are many hurts to endure in life, yet I believe our society properly weighs affrontery against physical harm and should deter parents from allowing those lesser hurts to outweigh the health of their children. Would most citizens support a rule of law which holds that an otherwise negligent homicide is excused whenever defendant parents can demonstrate that inhumanity in the delivery of medical services caused them to refrain from seeking medical care for a deathly sick child? Do we wish, under such circumstances, to shift responsibility from the parents to the medical providers?

Still most of us believe that an advocate should explain the parents' motivations and concerns to the judge and jury, who may wish to consider such arguments in assessing criminal penalties. But should the parents be exonerated completely? Should the local physicians have been the subject of criminal indictment?

Many parents, not just rural blacks and Native Americans, may feel that medical care has degenerated to the point that they and their children are treated more like broken machines than suffering human beings. But it is inconceivable to me that all such parents should be excused from the responsibility of obtaining medical treatment for their seriously ill children. Are minority and nonminority parents to receive unequal treatment in the courts in this regard? In some sense, do not all children have an entitlement or right to lifesaving medical care? If so, why should minority children or those living in rural areas be any less entitled to survive? If one purpose of negligent homicide laws is to encourage parents to seek out desperately needed medical assistance for their children, if legislatures seek to discourage and deter grossly imprudent parental behavior, if judges and juries are charged with enforcing the law, then we may reasonably fear that a verdict of "not guilty," in response to a genuine but wrongheaded human voice, may destroy our legal principles and the realization of the compelling policy reasons behind them.

If one approaches Williams from the standpoint of formal justice, Getman's observations are equally hard to defend; he seems to have the problem exactly backwards. He makes no effort to argue that the part-
ents' attitudes toward physicians have any bearing on the factual issues associated with their alleged negligence. What then is left? The problem is not just to do justice in this particular case by taking account of sympathetic human voices; the problem is to articulate a legal standard that transcends the particular case and to examine the particular circumstances of the defendants within the context of that standard.

A related problem for Professor Getman and his efforts to raise the volume of the human voice is that, as Wallace Stevens intimates, there is no prenatural human voice, no inevitable way of looking at or structuring the facts and events that give rise to legal disputes. Professor Getman's examples involve the plight of the rape victim, the indignity of racial discrimination, the criminal prosecution of grieving minority parents. But these examples are one-sided. The human voice will not always elicit sympathy.

What if, for example, a convicted rapist and Harvard Law School graduate, teaching at a prominent law school, had written an article in his own human voice, from the rapist's perspective. If the rape victim has emotions, needs, insecurities, a life story, feelings of pain and victimization, so too may the perpetrator. The rapist may be unemployed, addicted to drugs, and terribly frustrated with his life. He may have been sexually abused as a child and have found it impossible to establish a meaningful and loving relationship with a woman. He may have been influenced by pornographic films that made it appear that women "enjoy" rape, that they only "pretend" to resist, that the violence and abuse of the rape ultimately add to their "thrill." The rapist's voice is human, though much less compelling. It adds to our understanding of his motives, gives us greater insight into the complexity of the crime, and may even provoke empathy. But what should the judge and jury make of this perverse but human voice? Very little. The rape victim's human voice does and should drown out the compassionately related story of the rapist.

Both State v. Williams and the example of the rapist's human voice tell us a great deal about the pitfalls of moving too far from the professional voice. Wallace Stevens saw clearly the multitude of human voices; his work provides many perspectives on particular human interactions, yet offers no natural or predetermined perspective that would enable us to pick among those voices. Our laws represent these same choices as made by the polity, for the law is an ordering of facts and events. It embodies decisions about which human voices count more—the rapist or the rape victim, the negligent parents or the dead child, the recently hired minority worker or the white worker with seniority. Within the
framework of the legal system, these judgments may be wrong or right, persuasive or unpersuasive. We may criticize them in the light of normative commitments, concepts of justice, and social, political, economic, and psychological realities. But the law and the professional voice also must accommodate, however imperfectly, the concerns of ordinary persons and their human voices. There is no reason to assume that they fail in this accommodation, that legal rules and doctrines ignore or are antithetical to genuine human voices, or that their articulation overlooks and trivializes basic human needs and values.

The asserted imbalance of voices in legal education may suggest that the human voice is most useful as an antidote to the poison of requiring people to conform to legal rules, that a compelling human story trumps personal responsibility for violating rules. This suggestion is troublesome. If the human story is indeed so compelling, why cannot the legal doctrine be reshaped to take it into account in all future cases? For example, if a breaching party to a contract argues that it was impossible for her to perform the contract under the circumstances (the theater burned down, the horse died, oil prices collapsed), is it not better to articulate some carefully crafted principle that excuses performance of a contract for impossibility, rather than to treat impossibility as a human concern that exists apart from the articulated rule of law? If decision makers hesitate to reformulate the rule or find it impossible to do so, does this not suggest that the legal system might better serve the public interest by not creating an ad hoc exception? Perhaps there are extraordinary cases in which the exception cannot be incorporated into a refashioned rule, but a majority of exceptions would only destroy the efficacy of law.

The human voice, almost invariably, will favor those who are near at hand, those present before the decision makers and advocates. The embezzler's irresistible urge to steal may elicit sympathy for him and his family, but the affected stockholders and their families usually must be represented vicariously before judge and jury. Ford Madox Ford, in his great novel *The Good Soldier*, captures this curious relationship between forgiveness and proximity in describing Edward Ashburnham, the seducer of the narrator's wife:

> I suppose that that was the most monstrously wicked thing that Edward Ashburnham ever did in his life [attempting to corrupt a young girl just out of a convent]. And yet I am so near to all these people that I cannot think any of them wicked. It is impossible of me to think of Edward Ashburnham as anything but straight, upright, and honorable. That, I mean, is, in spite of everything, my permanent view of him. I try at times by dwelling on some of the things that he did to push the image of him away . . . . But it
always comes back—the memory of his innumerable acts of kindness, of his efficiency, of his unspiteful tongue. He was such a fine fellow.\textsuperscript{44}

By way of further example, consider \textit{Booth v. Maryland,}\textsuperscript{45} a capital murder case recently decided by the Supreme Court. The facts of the \textit{Booth} case are painful. In 1983 Irvin Bronstein, age seventy-eight, and his wife Rose, age seventy-five, were robbed and murdered in their home by John Booth and another man. Booth was a neighbor, and, knowing that the victims could identify him, he bound and gagged them and “stabbed them repeatedly with a kitchen knife.”\textsuperscript{46} Booth was found guilty of first-degree murder, and the prosecution requested the death penalty. Under Maryland law the state was entitled to submit a “victim impact statement at the sentencing phase” that would describe to the jury the effects of the murder on the victims and their family.\textsuperscript{47} The legislature’s purpose, in part, as described by Justice Scalia in dissent, was to cure an imbalance in human voices:

Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced—which (and not moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.\textsuperscript{48}

The victim impact statement was read to the jury, and it graphically depicted the horror of the murder and its impact on the Bronstein family. The victims had been married for fifty-three years, and the father had worked hard all his life and had been retired for eight years. The mother was described as “young at heart” and as a self-starter even at her advanced age. They were “amazing people,” loved by their family and many devout friends. The son had found the bodies himself, and the horror has made it difficult for him to sleep. He is unable to drive by his parents’ home. He “sees” them at the synagogue and elsewhere. He is fearful for the first time in his life, and “his children are scared for him and concerned for his health.” The victims’ daughter “thinks a part of her died too when her parents were killed.” She “doesn’t find much joy in anything and her powers of concentration aren’t good.” She is fearful and suspicious of people. The granddaughter panics if her husband

\textsuperscript{44} F. FORD, \textit{THE GOOD SOLDIER} 113 (Vintage ed. 1983).
\textsuperscript{45} 107 S. Ct. 2529 (1987).
\textsuperscript{46} \textit{Id.} at 2530-31.
\textsuperscript{47} \textit{Id.} The statement consisted of information supplied by members of the victims’ family—“interviews with the Bronsteins’ son, daughter, son-in-law, and granddaughter.” \textit{Id.} at 2531.
\textsuperscript{48} \textit{Id.} at 2542 (Scalia, J., dissenting).
Tea at the Palaz of Hoon

comes home late; she is depressed, and she has a tendency to leave the lights on all night in her home. She saw a counselor but decided that no one could help her.⁴⁹

Although the human voices of the Bronstein family are genuine and deeply affecting, a majority of the Justices held that the introduction of the victim impact statement violated the defendant’s constitutional rights. The majority felt that this human story was not relevant to the defendant’s moral culpability—he probably did not know the life circumstances of his victims, and the majority feared that the jury would be inflamed.⁵⁰ The dissenters felt that the majority had adopted the wrong constitutional rule, that individual moral culpability was not the only issue, and that the degree of harm to the family could be taken into account at the punishment phase.⁵¹ In other words, in the light of their pronounced disagreement over constitutional doctrine, the Justices disputed which human voices should be heard, which should have priority, and which would prejudice unnecessarily the determination of the defendant’s punishment. No Justice was inattentive to human voices, but their disparate views of the appropriate legal standards caused them to attend to different voices.

The lack of a determinant, natural human voice underscores this dilemma. The more decision makers try to listen to every human voice, the more they try to see events from the perspective of every participant, the more they seek a complete understanding of the human condition and perfect justice, the more difficult they will find it to apply legal rules and to assign responsibility. Recall the cliché that to understand all is to forgive all. In The Good Soldier the narrator meticulously explains everything that went before “from the several points of view that were necessary”—that of his adultress wife, that of his friend with whom she liad the affair, as well as his own.⁵² But his quest for understanding destroys his ability to judge those who hurt him, for he concludes that “there is not even any villain in the story.”⁵³ Of his wife he says: “[P]oor thing, is it for me to condemn her—and what did it matter in the end?”⁵⁴

The essence of the legal process is decision making, settling disputes, and regulating the state’s coercive powers. The risk of particularization and individual complexities is that they will paralyze decision making. I

⁴⁹. See id. app. at 2536-39.
⁵⁰. Id. at 2534.
⁵¹. Id. at 2539 (White, J., dissenting).
⁵². F. FORD, supra note 44, at 184.
⁵³. Id. at 165.
⁵⁴. Id. at 185.
am vividly reminded of Rubashov's realization of this point in *Darkness at Noon*:

The old disease, thought Rubashov. Revolutionaries should not think through other people's minds. 
Or, perhaps they should? Or even ought to? 
How can one change the world if one identifies oneself with everybody? 
How else can one change it? 
He who understands and forgives—where would he find a motive to act? 
Where would he not?55

I fear that the human voice, when used primarily to ameliorate legal doctrines in individual cases rather than to criticize the doctrines externally, may undermine the idea of law and formal justice in a modern legal system. While Professor Getman may not intend that result, I am apprehensive that too great a reliance on the human voice may lead to a brand of act utilitarianism, a calculus that includes the consequences for specific persons on one occasion but omits reference to the doctrine or rule that most advances utility or justice for society.56 Even for critical legal theorists, who may characterize the law of the liberal state as indeterminant and inconsistent from within and unjust and lacking in defensible human values from without, the idea of the qadi dispensing substantive justice to individuals without reference to general principles may not be appealing. Anyone who supports the idea of the rule of law should feel the same discomfort, because human and governmental conduct may not be regulated equitably without reference to principles that transcend the individual case.

V.

In his recent characterization of "rival conceptions of law,"57 Professor Dworkin implicitly embraces this critique of human voice. He identifies three such conceptions: "conventionalism," "legal pragmatism," and "law as integrity."58 Conventionalism, which in Dworkin's view "seems initially to reflect the ordinary citizen's understanding of law,"59 seeks to portray law as precisely grounded only in past decisions: "a right or responsibility flows from past decisions only if it is explicit within them or can be made explicit through methods or techniques con-

55. A. KOESTLER, DARKNESS AT NOON 24 (1940).
57. R. DWORLIN, supra note 22, at 94.
58. Id.
59. Id.
Tea at the Palaz of Hoon

ventionally accepted by the legal profession as a whole.” Legal pragmatism, on the other hand, commands “that judges do and should make whatever decisions seem to them best for the community’s future, not counting any form of consistency with the past as valuable for its own sake.” Law as integrity, Dworkin’s preferred conception of law, supposes that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does . . . [Law as integrity] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification.

While I do not intend to defend Dworkin’s preferred conception of law, my point is that all three conceptions reject any form of act utilitarianism as a legitimate expression of law. Conventionalism appears to value consistency with precedent above all else by requiring that general principles of justice and adjudication flow more or less directly from prior decisions. Legal pragmatism focuses on what is best for the community in a specific case, rather than what is best as a general matter, and thereby devalues the need for consistency. Even here, however, Dworkin urges that such unbridled act utilitarianism in the name of the community, “strictly speaking, reject[s] the idea of law and legal right . . . .” Law as integrity seeks something of a middle ground by broadening the account of prior decisions, so as to be cognizant of underlying personal and political morality. In its own way it also promotes the idea of rules and doctrines that transcend the individual case and seeks consistency with prior practice. Dworkin does not even dignify the idea of a pragmatism that focuses primarily on the human voice and substantive justice in particular cases as a rival conception of law.

As a means of preserving the idea of law and the integrity of legal institutions and their decision making, the human voice is weakest when it is invoked to bring justice only to individual litigants, whatever the compulsion to treat them with empathy and mercy. Human voice is most powerful as an alternative to the professional voice when used to

60. Id. at 95.
61. Id.
62. Id. at 95-96; see also id. at 225-27.
63. I find telling some of Professor Christie’s criticisms of his work. Christie, Dworkin’s “Empire” (Book Review), 1987 DUKE L.J. 157.
64. R. DWORKIN, supra note 22, at 95.
demonstrate that a legal principle or decision is wrong, that it does not flow from past decisions, and that it needs to be changed through the appropriate institutional mechanisms. I view Professor Getman’s example of Charles Black’s brilliant article *The Lawfulness of the Segregation Decisions* in this light.

Professor Black relates the experiences of blacks and whites under Jim Crow laws to argue that *Brown v. Board of Education* was rightly decided, despite the contemporary assaults on it by politicians and academic critics. But the structure of Black’s argument makes it clear that he uses the human voice in support of two propositions and not as a way of arguing that the wooden application of separate-but-equal rule should be mitigated by the plight of the particular black plaintiffs in *Brown*. First, Black asserts that when the equal protection clause is properly understood in its historical setting, it stands for the simple proposition that the states may not enact laws that significantly disadvantage blacks. Second, he argues that, whatever a majority of the Supreme Court thought at the time of *Plessy v. Ferguson*, any thinking person acquainted with the reality of purposefully segregated schools must conclude that school segregation violates this principle and discriminates against black children and parents.

Professor Black’s point addresses the principle rather than the particularity: the separate-but-equal doctrine is wrong or at least inapposite and, further, the application of the correct constitutional principle to known facts is relatively easy in the context of purposeful school segregation. Professor Dworkin agrees:

> The participant’s point of view envelops the historian’s when some claim of law depends on a matter of historical fact: when the question whether segregation is illegal, for example, turns on the motives either of the statesmen who wrote the Constitution or of those who segregated the schools. The historian’s perspective includes the participant’s more pervasively, because the historian cannot understand law as an argumentative social practice . . . until he has a participant’s understanding, until he has his own sense of what counts as a good or bad argument within that practice.

Dworkin then concludes that the arguments in and over *Brown* "were

---

66. See id. at 424-27.
67. *Id.* at 421.
68. 163 U.S. 537 (1896).
70. *Id.* at 422.
71. *Id.* at 428-29.
arguments about the proper grounds of constitutional law.” 73 In the last analysis, Brown was “fought over the question of law. Or so it seems from the opinion, and so it seemed to those who fought it.” 74

VI.

Professor Getman also relies on the interesting literary example of Huck Finn, 75 who, after much hesitation and debate, decides not to turn Jim in to the authorities. 76 Getman urges that “[w]hen Huck thinks of Jim’s situation in terms of legal concepts such as ‘obedience to authority’ or the judicially enforceable claims of property owners, he knows that he must turn Jim in.” 77 Huck rejects this conclusion “[o]nly when he responds to his own more human expressions of empathy, friendship, and loyalty . . . .” 78 For Getman, Huck thereby demonstrates two things: the conflict between the human and professional voices and the elitism in elevating the professional voice over the human voice. 79

The story of Huck and Jim, as one would expect of Mark Twain, is rich and complex. Huck hears not only Jim’s human voice, but also the human voice of Miss Watson, Jim’s owner:

What had poor Miss Watson done to you that you could see her nigger go off right under your eyes and never say one single word? What did that poor old woman do to you that you could treat her so mean? Why, she tried to learn you your book, she tried to learn you your manners, she tried to be good to you every way she knowed how. That’s what she done. 80

Part of Huck’s dilemma is that he hears many human voices. This chorus of competing voices and the necessity of choice are the same elements of the puzzle we see in Wallace Stevens’s poetry. 81 If Huck turns Jim in, he has hurt a friend and companion. If he does not, he has victimized “poor Miss Watson,” who also will have a sad story to tell. On what basis should he prefer one friend over another?

Huck then demonstrates some insensitivity to Jim’s human voice as Jim dreams about life in a free state and how he would buy back his wife and buy back—or steal—his two children. 82 But this speculation elicits

73. Id. at 30.
74. Id.
75. Getman, supra note 3, at 587-88.
77. Getman, supra note 3, at 587.
78. Id.
79. Id. at 587-88.
80. M. TWAIN, supra note 76, at 124.
82. M. TWAIN, supra note 76, at 124.
only horror and not empathy from Huck:

It most froze me to hear such talk. He wouldn’t ever dared to talk such talk in his life before. Just see what a difference it made in him the minute he judged he was about free. It was according to the old saying “Give a nigger an inch and he’ll take an ell.” Thinks I, this is what comes of my not thinking. Here was this nigger, which I had as good as helped to run away, coming right out flat-footed and saying he would steal his children—children that belonged to a man I didn’t even know; a man that hadn’t ever done me no harm.83

Here Huck imagines the human voice of a man he “didn’t even know, . . . a man that hadn’t ever done [him] no harm.”84 It is not the property rights of Miss Watson and the unknown man that concern him; it is the human harm that he will inflict on them if he does not stop Jim. Huck’s anguish comes of empathy rather than as a conflict between legal principles and a single, determinant human voice.

Jim declares how happy he is that he is a free man and expresses his gratitude to Huck. Huck then decides to turn in Jim anyway, but as Huck paddles off to do so, he begins to feel “sick.” Jim says to him: “Dah you goes, de ole true Huck; de on’y white genleman dat ever kep’ his promise to ole Jim.”85 Jim’s remarks once again appeal to Huck’s human side, for Jim is relating his happiness at his freedom and his sorry experience with his white masters. But Jim also evokes principles, however embedded in his life experiences, with both legal and moral overtones. The principles are those of liberty and, in a loose sense, contract, for people should keep their promises to other people, though the promisor is a white boy and the promisee is a black slave. The legal principle of slave ownership is not the only principle to command Huck’s attention.

Finally, Huck encounters two white men on a skiff who are looking for runaway slaves, and, despite a “law and order” lecture from them (or perhaps because of it), he decides that he cannot turn in his friend Jim.86 But why does he not do so? The answer is not clear. Liberty and promise, which are themselves legal and moral principles, conflict with property rights. The human voices also conflict with each other and with the principles. Huck concludes that he has “done wrong” but that he cannot “do right”:

They went off and I got aboard the raft, feeling bad and low, be-

83. Id.
84. Id.
85. Id. at 125.
86. Id. at 125-27.
cause I knowed very well I had done wrong, and I see it warn't no use for me to try to learn to do right; a body that don't get started right when he's little ain't got no show—when the pinch comes there ain't nothing to back him up and keep him to his work, and so he gets beat. Then I thought a minute, and says to myself, hold on; s'pose you'd 'a' done right and give Jim up would you felt better than what you do now? No, says I, I'd feel bad—I'd feel just the same way I do now. Well, then, says I, what's the use you learning to do right when it's troublesome to do right and ain't no trouble to do wrong, and the wages is just the same? I was stuck. I couldn't answer that. So I reckoned I wouldn't bother no more about it, but after this always do whichever come handiest at the time.\textsuperscript{87}

In the contrast between “right” and “wrong,” it may be that Huck's human sensitivities trump his concept of what law requires.\textsuperscript{88} But Huck is not a legal decision maker, though his view of the law is entitled to respect, and this observation may suggest only that he has decided to engage in civil disobedience. Perhaps Huck believes that his friend Jim presents a special case, a unique exception to the rule that slaves are property. But in Twain's portrayal of Jim as a thinking, feeling human being with aspirations of freedom, love for his family, and gratitude to his friend, my impression is that Twain is attacking the institution of slavery itself. Through Twain's portrayal of Huck and Jim's relationship, the reader should realize that laws permitting slavery are wrong, that those laws need to be changed, that they do not comport with a just ordering of human voices. But Huck's statements that doing the right thing can be “troublesome” and that he would always “do whichever come handiest at the time” are disturbingly ambiguous. They hardly announce a clear victory of the human spirit over evil laws and in fact suggest a deep cynicism. It may feel right or be handy for Huck to murder Miss Watson to gain more of her property or to assault Jim for his “uppity” talk, but few would honor those human impulses against formal legal principles.

VII.

I do not understand Professor Getman, in his example from Mark Twain or in the remainder of his essay, to deny the efficacy and need for rules in the law. I believe he is concerned about the rightful place of the human voice in law and legal education. By the same token I trust that my analysis does not appear to advocate disconnecting legal rules from

\textsuperscript{87} Id. at 127-28.

\textsuperscript{88} See Getman, supra note 3, at 587; see also J. NOONAN, supra note 81, at 11-12 (discussing Twain's satire of a legal system that could make "a person a nonperson").
the individuals and communities that they are meant to serve, from their human circumstances. I too am concerned, as I hope I have made clear, about the relationship between human voices and legal rules. Professor Getman and I differ on the appropriate conceptualization of the problem. In this regard, it may be useful to consider Judge Noonan’s classic work, *Persons and Masks of the Law,* a work in which he, like Professor Getman, attacks the assertedly excessive rule orientation of the law and the purported conflict between legal rules and human voices.

Judge Noonan begins his analysis with the observation that “rules, not persons, are the ordinary subject matter of legal study.” Legal reasoning focuses on reasoning by analogy, determining when cases are alike or different, as a predicate to applying legal doctrines. The cases are classified by the rules they exemplify rather than by the peculiarities of their facts. Noonan, like Getman, decries this “abstract indifference” to the plight of individuals: “Little or no attention is given to the persons in whose minds and in whose interaction the rules have lived—to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it.” Actually, apart from family law, casebooks give little attention to the impact of the rule upon the individual lives of the litigants. These casebooks instead reflect the “play of social interests” and a concern with social policy.

So far so good, though I fear that Judge (then Professor) Noonan has visited in classrooms very different from those that I have encountered. My impression is that most law professors devote a good deal of attention to the “impact of the rule upon the individual lives of the litigants,” though their overriding purpose may be to enable students to evaluate the overall utility or wisdom of the rules under consideration. In any event, Noonan argues that his book constitutes an attempt to address the imbalance between persons and masks, human voices and legal rules, though it would be a “travesty of what I believe to suppose that law could exist without rules.”

---

90. *Id.* at 6.
91. *Id.*
92. *Id.* at 7.
93. *Id.* at 6.
94. *Id.* at 7.
95. *Id.*
96. *Id.*
97. *Id.* at 19.
Judge Noonan then rehearses the justifications for legal rules, justifications that are quite similar to those that I have proffered. First, legal rules are indispensable to social control and social construction because of the limitations inherent in the legal system: it cannot respond afresh to each new situation, and rule makers cannot anticipate all of the human circumstances in which rules will be applied. Further, we require impersonal and unambiguous rules in order to avoid bias and favoritism in the legal process. Like cases must be treated alike in order to adhere to communal purposes “beyond the individual” and achieve equal treatment of persons under the law.

What then is Noonan’s problem with legal rules? The problem is that equal treatment is not the only purpose of the law, and the law should concern itself with justice to individual litigants. “Rules are formalized repetition. They enforce a conformity which may be merciless and inhuman.” The law classifies “individual human beings so that their humanity is hidden and disavowed.” Hence his conclusion: “Abandonment of the rules produces monsters; so does neglect of persons. Which monsters are the worse I will not argue.” But how do rules neglect persons or human voices, and what are the “monsters” produced by that neglect? Judge Noonan does not focus only on the tensions between formalism and informalism in the law, the rhythms in the history of dispute resolution documented by legal historians such as Bruce Mann. Nor does he address only the tensions between abstractness and concreteness in legal doctrines. The problem for Noonan, as for Professor Getman, lurks in the nature of legal rules. For him, legal rules are suspect because they do not reflect the concerns of genuine persons. They denigrate human beings and their concerns by hiding their humanity behind masks that suppress “the humanity of a participant in the process.” Thus, Judge Noonan’s criticism of these masks and Professor Getman’s criticism of professional voice are identical.

It is at this point in their analysis that I must forsake Judge Noonan

98. Id. at 14-16.
99. Id. at 15.
100. Id. at 18.
101. Id. at 19.
102. Id.
103. Id. at 18. Wallace Stevens already has seen and conquered Noonan’s monster:
That I may reduce the monster to
Myself, and then may be myself
In face of the monster . . . .
“The Man with the Blue Guitar,” in W. STEVENS, supra note 1, at 52.
105. J. NOONAN, supra note 81, at 20.
and Professor Getman. Rules do not neglect persons, persons neglect persons. If particular rules embody undesirable human fictions, if, in their application, they are "merciless and inhuman," then the rules need to be changed to reflect more genuine human voices and to embody more appropriate norms. Noonan appears to subscribe to the view that masks inhere in the nature of rules and that the conflict between human voices and rules is inevitable. Professor Getman characterizes legal rules as contrivances, artifices; only persons and their experiences are natural; alas, the law frequently neglects these persons.

I cannot agree with Judge Noonan’s abstractness (dare I say, reification?) and humanist ambiguity when he seeks to identify the monsters of the masks. Why should students learn which lawyers tried a case, the biography of the judge, or the family circumstances of the litigants? These facts may be relevant to an understanding of legal rules and their application, but the interesting questions are how and when they are relevant. Would contracts casebooks yield more insight into law and the human condition if cases were grouped according to the subjects of the contracts—say wheat, coal, and steel contracts versus contracts to provide medical or legal services? Or should there be separate chapters depending on the personal characteristics of the parties, for example, short and tall persons, slim and obese, rich and poor, married and unmarried? What sorts of human voices and characteristics count and for what purposes? Noonan listens only to the voices of mercy and humanity, values from which no one can dissent at such a high level of abstraction. His operating hypothesis is virtually indisputable: conformity to rules in the name of equal treatment of all persons often conflicts with justice to the individual persons involved in a litigation.

Judge Noonan errs in equating mercy and humanity with exemption from legal rules. He does not limit his argument to the proposition that when legal rules are unresponsive to genuine human voices, if not to utility and fairness, they ought to be abandoned or modified. Quite to the contrary, his view of rules as masks that detach their formal statement from their underlying human justifications invites only substantive justice, justice as to the parties before the court irrespective of justice beyond the individual and her case.

I take it as a strength of the common law that rules are modified in the light of experience. A rule may be tempered or overturned to afford justice to an individual litigant, but this change is made on principle, in a

106. Id. at 19.
107. Id. at 18.
way that transcends the individual case and is effective prospectively for all persons. If a judge believes that it is fundamentally unfair to hold an inexperienced buyer to the fine print and legalese of a warranty disclaimer in a contract for the purchase of furniture, a legal rule may be crafted that is more responsive to the plight of consumers. But is it appropriate or desirable to maintain the rule and to let one consumer off the hook out of a concern for losses—and his losses only?

If fundamental fairness demands that the single parent, with four children and without much formal education, be protected from warranty disclaimers, why cannot a principle of exemption be fashioned that transcends the individual case? For example, one rule might be that consumers may avoid the disclaimer when it is not intelligible to an average person or when the consequences of the clause have not clearly been called to the attention of the buyer. If the rule cannot or should not be refashioned, or if, in the balance of utility, the judge fears that furniture stores will charge more for furniture if they must warrant its merchantability or fitness, thereby depriving many poorer persons of the ability to purchase furniture, why should an individual litigant be excused from the rule in a way that will undermine its overall social purpose? Is this not unmerciful and inhumane to others? In deciding such questions, the problem is not that rules and justice to individuals clash or that rules do not embody human voices; the problem is that human voices conflict.

Perhaps Judge Noonan's most famous amplification of his thesis on persons and masks occurs in his chapter on Palsgraf v. Long Island Railroad Co., decided by the New York Court of Appeals in 1928 in a celebrated opinion by Judge Benjamin Cardozo.108 Noonan chastises Judge Cardozo for his impersonal statement of the facts:109

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents.

The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.110

Judge Cardozo did not reveal the plaintiff’s age, marital status, or maternal responsibilities.111 He did not describe her injuries or trauma or the date on which they were incurred, and he did not reveal what damages she had sought or that the jury returned a verdict in her favor.112 The good judge made no reference “to the lawyers who had conducted the litigation . . . their training, their competence, their presentation of the evidence, their relationship to their clients,”113 and he said nothing about the judges themselves—“their own income and investments, their marital and parental status, their professional experience, their personal experience of New York commuter trains, their own study or debate of the case.”114 Nonetheless, and despite the suppression of the human aspects of the case, Judge Cardozo held that Helen Palsgraf was not entitled to a recovery.115 Judge Noonan describes the holding in the following terms:

No negligence to her by the railroad had been shown. “The risk reasonably to be perceived,” Cardozo wrote, “defines the risk to be avoided, and risk imports relation; it is risk to another or others within the range of apprehension.” When the guard pushed the passenger with a package, he could not have apprehended that the plaintiff was endangered by his action. In his action he did not relate to her. As to her he could not have been negligent.116

Noonan’s point is not simply that Judge Cardozo applied the wrong rule and thus reached the wrong result. Far from it. Judge Andrews made this point in his dissent.117 Professor Ehrenzweig said as much thirteen years after the Palsgraf decision, urging, in Noonan’s words, that “liability in the case of accident to a customer should not be decided on the basis of perceived risk but should be allocated to the enterprise which generated the risk of accident; accidents caused by a business should be treated as a cost of the enterprise.”118 But Ehrenzweig’s proposition was

110. 248 N.Y. at 340-41, 162 N.E. at 99, quoted in J. NOONAN, supra note 81, at 111-12.
111. J. NOONAN, supra note 81, at 113.
112. Id. Noonan also noted that Judge Andrews’s dissenting opinion was “superior in impersonality.” Id. at 112.
113. Id. at 113.
114. Id. at 114.
116. J. NOONAN, supra note 81, at 112.
118. J. NOONAN, supra note 81, at 116 (paraphrasing Note, Loss Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 U. CHI. L. REV. 729, 737 (1941) (authored by now Professor Ehrenzweig)).

616
"general," and he did not add facts to those given by Cardozo. And therein lies the problem for Noonan. The human voices were suppressed by Cardozo, and this suppression, with rare exception, was continued in the decades after the decision in the law review comments on *Palsgraf*; through torts casebooks, the *Restatement of Torts*, and, presumably, in law school classrooms. The conflict between an impersonal legal rule and the voices of sympathy thus was papered over by the omission of the human circumstances of the litigation.

Judge Noonan goes on to detail the facts of *Palsgraf* and describes the participants' personal circumstances that had been studiously avoided for so many years. Helen Palsgraf was a forty-three-year-old Brooklyn janitress and housewife, who was accompanied by her daughters, ages fifteen and twelve on the date of the accident, August 24, 1924 (the date was not July fourth). The day was hot, and she had decided upon a seaside excursion. The two men running for the train were Italians, and it was not clear whether the explosion had knocked over the "ordinary penny scale" or whether the crowd knocked it over when it ran from the platform. At the moment of the explosion, Mrs. Palsgraf testified that "all I can remember is, I had my mind on my daughter [Lilian], and I could hear her holler, 'I want my mama!'—the little one." Apart from her physical injuries, Mrs. Palsgraf suffered from hysteria, and her physician testified that the near three-year delay in getting the case to trial contributed to the continuation of this condition. "[S]he had suffered . . . affront to the personality—traumatized, she had a sense of unrequited injury."

Judge Noonan also tells us about the defendant. The Long Island Railroad, a subsidiary of the Pennsylvania Railroad, operated 366 miles of track in New York State. Its president, Samuel Rea, also was president of the Pennsylvania Railroad. During 1924, railroads in the United States had injured 143,739 persons and killed 6617 others. Most of those killed or injured were trespassers, but Mrs. Palsgraf was among the 6822 passengers injured that year.

The railroad retained Joseph F. Keany and William McNamara as counsel. Both had offices in Pennsylvania Station; Keany was General Solicitor for the Long Island Railroad. The actual trial was conducted by McNamara, a recent graduate of the New York Law School. McNa-
Mara introduced no witnesses, limiting himself to cross-examination of Mrs. Palsgraf and the witnesses called in her behalf. Matthew W. Wood, a solo practitioner in New York City, represented Mrs. Palsgraf. Wood, who studied at New York Law School and graduated from Yale Law School, was from upstate New York. He lived to be ninety-seven.\footnote{125}

Noonan then recounts three important facts about Judge Cardozo. First, he neither married nor had children, and thus lacked "the experience of conjugality and the experience of fatherhood."\footnote{126} Second, he was the son of Albert Cardozo, a judge connected with Tammany Hall and Boss Tweed who resigned after a legislative committee recommended his impeachment for corruption. There was a tremendous distance between the father, tainted by charges of favoritism and impropriety, and the son, a renowned scholar and eminent jurist. Finally, "Cardozo had ambitions, although they were of the most exalted character."\footnote{127} He aspired to be a legal philosopher for his age and worked to that end within the American Law Institute. Indeed, during the pendency of the \textit{Palsgraf} case, Cardozo had attended a meeting of the ALI on the \textit{Restatement of Torts}. He was impressed with Professor Bohlen's argument that there should be no duty to take care with respect to anyone not foreseeably threatened by one's conduct. He then wrote Bohlen's formulation into the \textit{Palsgraf} decision, thereby giving weight to the historical charge that he favored a rigid conceptualization of tort duty over the need to respond to the practicalities of Mrs. Palsgraf's situation.\footnote{128} According to Noonan, as a result of these facts, the distinguished son took "no interest in the identity of the contestants before him."\footnote{129}

No doubt these facts are as interesting to the reader as they are to me. But what is their significance? Even Noonan asks: "Why are Helen Palsgraf's children relevant to the judgment any more than the color of her hat?"\footnote{130} He denies that he wants new rules of tort liability for hot days or "very poor persons."\footnote{131} But his resolution is not very persuasive: "Facts which cannot be shown to be crucial to the disposition of a case are important in grasping how person affected person; Mrs. Palsgraf's children, Cardozo's preeminence, and others I have stated are among them."\footnote{132} But what has this "importance," the grasping of these effects,
to do with the inhumanity of legal rules and the teaching of law in law schools? Why is their importance not limited to legal historians, biographers of Mrs. Palsgraf, novelists, and sociologists? For Noonan, the answer apparently lies in an understanding of legal process and not in the development of the law:

But when, in writing the history of *Palsgraf*, I call attention to the facts known to the judge and not considered relevant by him, my purpose is not to offer a new rule but to increase our understanding of the legal process. My concern is what a legal historian should record, what a legal philosopher should explain, what a law professor should teach. Only indirectly do these matters suggest how a judge should judge.\(^{133}\)

Judge Noonan’s explanation of the power and utility of his case study is pretty weak stuff. In what sense are the facts deemed irrelevant by Cardozo actually relevant to the judicial process if Noonan believes they are irrelevant to the disposition of the case? The revelation of Mrs. Palsgraf’s terrible plight cries out for rectification, but even Noonan cannot bring himself to advocate an individualized exemption for her. What is left?

We teach law students what every lawyer knows—an appellate court’s rendition of the facts is partial, truncated, and incomplete. Even for the judiciary, space and time are limited; the judge may seek a rhetorical advantage by regurgitating only those facts thought to be necessary to the legal conclusions. If that is the lesson of Noonan’s study of *Palsgraf*, it is a quite ordinary one. But what happened to the grand philosophical claim that legal rules ignore persons and human voices, that equal justice conflicts with justice to individual persons? Judge Noonan, for the most part, gives up the conceptual turf. Even in the *Palsgraf* example, he is hesitant to say that facts amassed about persons should influence the ways in which judges decide cases.\(^{134}\) He removes the mask of detachment only to demonstrate that it can be removed. Apart from showing that accidents produce great human suffering for individuals and their families, and that the law captures only an incomplete snapshot of that harsh reality, why should a first-year torts professor assign Judge Noonan’s chapter on *Palsgraf*?

I think that Judge Noonan, for all his facts, adds little to Professor Ehrenzweig’s observations. Mrs. Palsgraf was badly injured and traumatized by her injuries, and those injuries and their effects on her and her family lasted many years.\(^{135}\) Under such circumstances, it may not seem

---

133. *Id.* at 142.
134. *Id.*
135. *Id.* at 127.
unreasonable to allocate the risk of those injuries to the enterprise that caused them, allowing for the spreading of the risk and the alleviation of considerable human suffering. The plight of the enterprise and its employees in not being able to appreciate fully and to plan for and to avoid the consequences of particular negligent actions may be outweighed by such concerns. But this is only to state what we knew before the mask was removed.

In the last analysis, the worst criticism one can make of Cardozo's opinion is that he was wrong, that Professor Ehrenzweig's rule of law is better than Cardozo's because it appears more responsive to human concerns and perhaps more consistent with precedent. If Mrs. Palsgraf was entitled to recover, a general rule should have been formulated that would have protected her and others in similar circumstances. Judge Noonan simply has not shown an inherent contradiction between legal rules and a concern for persons. His effort to examine the human dimension in its entirety, with exquisite attention to each life story, has the ring of theology, not law. But even the Court of Appeals of New York is not charged with assessing human souls, nor is it likely to preside on Judgment Day.

VIII.

While I have labored, at great length if not mightily, to demonstrate that there is no inherent inconsistency between legal rules and the voices of human experience, suffering, and needs, I am under no illusion that I will strike a responsive chord in all of my readers. If, on the one hand, it is natural to think conceptually and abstractly, to aspire to universal truths beyond one's immediate circumstances, and if, on the other, it is natural to view reality in terms of one's own concrete experiences, it also appears natural for persons to assume that abstract rules and human experience inevitably will conflict. In part this assumption may reflect the place that practical experience has in our culture, the feeling that "book learning" is to be distrusted and discounted. In part it may reflect our own sense of uniqueness, that the rules do not capture our real selves and life experiences. I am reminded of the adage among school administrators that parents seek enforcement of the disciplinary rules for other people's children and fairness for their own.

But the dichotomy between rules and ordinary experience reflects other factors as well. When one's own world view and human voice lose out in the competition of norms and commitments in the legal process, there is a temptation to engage in a sort of cognitive dissonance: one's views were not rejected on the merits—the decision maker is misguided,
failed to listen to compelling human voices, and is a victim of a false consciousness. The failure to effect an outcome is not a failure of the persuasive power of one's vision but a failure of process, a failure of communication. Judge Cardozo ignored the human circumstances of the injured Mrs. Palsgraf; the legal scholars were ignorant of the social and political context of segregated schools, the jury was never made aware of the perceptions of Native American parents. Oddly, the losers in the process feel better if they find villains in indifferent rules and deaf judges. Recognition that one's perspective was appropriately considered and deliberately rejected by a decision maker threatens the integrity of one's beliefs and experiences—and one's self-esteem.

The perception of conflict between rules and human voices also comports with widely held beliefs about equality. Every person has a human voice, and in this sense we are all equal. This equality is refreshing in a world often dominated by professionals, experts, and hierarchical arrangements. While the trained lawyer, judge, philosopher, or psychologist may have a great advantage in articulating through a professional voice, "ordinary" humans, untutored though they may be, are all equal with respect to the human voice. Each of us has lived our own unique life, experiencing its pains and joys. Each of us has our own soul. Each of us has something to contribute in terms of the human voice, no matter our lack of proficiency in the law. To assume that rules do not embody human voices elevates ordinary experience and holds forth the prospect that the elitism of the professional voice can be conquered.

Finally, the human voice shared by others similarly situated reinforces a sense of community. Hence it is natural to articulate a female voice, a Jewish voice, a student voice, or a taxpayer voice. If these voices are not heard or are rejected, the disaffected can reduce their sense of alienation by taking comfort in their solidarity with others. In that sense, the articulation of a shared voice, even one that does not fare well in law and politics, is a way of constituting community in the face of adversity.

Wallace Stevens described the human condition beautifully and accurately in "The Idea of Order at Key West." Stevens suggests that we are the makers of our own order in the world:
She sang beyond the genius of the sea. . . .
The sea was not a mask. No more was she.
The song and water were not medleyed sound
Even if what she sang was what she heard,
Since what she sang was uttered word by word.
It may be that in all her phrases stirred
The grinding water and the grasping wind;
But it was she and not the sea we heard.

For she was the maker of the song she sang . . . .

. . . .

It was her voice that made
The sky acutest at its vanishing.
She measured to the hour its solitude.
She was the single artificer of the world
In which she sang. And when she sang, the sea,
Whatever self it had, became the self
That was her song, for she was the maker.136

The law is no more a mask than is the human voice. The mask lies in the perception that the impulse to order is not human or authenticating, that only the individual's concrete experiences are genuine. That mask is all the more difficult to remove if one accepts that the rule of law inevitably is impersonal and must conflict with the claims of persons for empathy and mercy.

136. W. Stevens, supra note 1, at 128-29.