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Law's Sentiments

Robin West

What is the relation of law, in liberal legal societies such as our own, to what Adam Smith called our “moral sentiments,” by which he meant, our capacity for empathic knowledge of the subjective lives of others, and our sympathetic inclination to take on their subjective suffering as our own?¹ Does our law, and the legal culture it fosters, depend foundationally upon the existence of those moral sentiments, or does it rest, rather, on nothing but our self-regarding instincts, intuitions, and ambitions? And relatedly, does law nullify or dullen moral sentiments, or does it protect or nurture them?

One view of the relation of law and sentiments – one answer or set of answers to those questions – and which I believe is now the dominant view, is that law in liberal legal regimes not only has no need for moral sentiments, but further, that our liberal legalism creates us, or recreates us, as basically unsentimental subjects: un-empathic regarding the inner lives of others and unsympathetic to their suffering. So, according to a central claim of one once-influential strand of the critical legal studies movement, made most pointedly or poignantly by Law Professor Peter Gabel in a near-iconic essay from the early 1980s,² and recently in his new book, *The Desire for Mutual Recognition*,³ the law that grounds contemporary liberal legalism actively alienates us from our moral sentiments: its formalism blunts or kills communitarian feeling, its lean toward objectivity erases

¹ Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Fund, 1984).

² Peter Gabel, “A Critique of Rights: The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves.” *Texas Law Review* 62, no. 8 (May 1984): 1563-1601.

³ Peter Gabel, *The Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self* (London: Routledge, 2018).

subjective and intersubjective life, its individualistic assumptions deny our connections to each other and push each of us to deny them likewise. This antithesis between law and moral sentiment, Gabel makes clear, is monstrous. Others, however, applaud the same antithesis. Thus, according to any number of legal economists, perhaps paradigmatically the young Richard Posner, private law in liberal legal regimes is both premised upon and generative of self-regarding utilitarian individual motivations that have no connection with and no need for Smith-ean moral sentiments.⁴ Posner applauded this disconnect or was unbothered by it, while Gabel despairs, but they shared basically the same descriptive claim: law in liberal legal systems neither requires nor is required by the moral sentiments. Moral sentiment doesn't ground legalism – self-interest does -- and those sentiments don't themselves require the presence of law. Law has various purposes, ambitions, and effects but the nurturance of moral sentiments is not one of them.

This highly unsentimental conception of the relation of law to sentiment in liberal legal regimes – what I will call in short the “unsentimental conception” – which was, again, held explicitly by fairly broad swaths of both the critical legal studies and the law and economics movements of the nineteen eighties and nineties -- did not, however, begin, or end, with either of these late twentieth century academic movements. Rather, the unsentimental conception has dominated American liberal legal discourse at least from the time of the legal realists to the current day. It is particularly pervasive in private law. Contract law, for example, according to devotees of the unsentimental conception from

⁴ Richard A. Posner, “Utilitarianism, Economics, and Social Theory,” in *The Economics of Justice*, (Cambridge: Harvard University Press, 1981), 48-87. Posner’s conception is buttressed by Holmes’s classic depiction of the “bad man” who cares for nothing but himself as the subject of law’s authority, and central to its definition. Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 110, no. 5 (March 1997): 991-1009.

Holmes to Richard Epstein and Randy Barnett, ensures the well-greased fluidity of our bargain economy's mechanisms of productivity and consumption, by incentivizing rational creatures who would otherwise be stuck in the mire of prisoners dilemmas, to fulfill those processes.⁵ It doesn't do so by encouraging us to keep our promises, whether out of a regard for moral principle or out of an empathic regard for the needs of our co-contractors to our performance, or out of a communitarian sense of joint purpose engendered as well as recorded by the contract itself. That would be ridiculously sentimental. Rather, contract law achieves its efficient ends by imposing upon us penalties for breach that are more burdensome than the costs of performing. Tort law likewise, on the unsentimental conception, promotes the ends of industry and individuals by minimizing accident costs, and it does so through the construction of a series of incentives that prompt corporate and individual behavior that conforms to standards themselves designed to increase the joint wealth and efficiency of our shared enterprises.⁶ It doesn't do so by encouraging us more simply to take good care of each other, its moralistic language that seemingly suggests as much notwithstanding. Rather, it defines a legal "duty of care" in a way that is entirely distinct from any conceivable understanding of a moral duty of care: to "care" in tort law, is to engage in potentially accident-causing activities only so long as those activities are more profitable than their expected accident costs.⁷ To take a third and more encompassing example from private law, also with roots in legal realism: tort and contract law both rely

⁵ Richard Epstein, "Unconscionability: A Critical Reappraisal," *Journal of Law & Economics* 18, no. 2 (October 1975): 293-316; Randy E. Barnett, "Contract Is Not Promise; Contract is Consent," in *Philosophical Foundations of Contract Law*, edited by Gregory Klass, George Letsas & Prince Saprai, 42-57. Oxford: Oxford University Press, 2014.

⁶ Holmes, "The Path of the Law," 999-1000.; Richard A. Posner, "Tort Law," in *Economic Analysis of Law*, Eighth Edition (New York: Aspen Publishers, 2011), 213-272.

⁷ Holmes, "The Path of the Law," 993.

and should rely on “objective” rather than “subjective” indicia of duty, care, intent, benefit, damage, injury, promise and so on to prompt contractual and non-contractual behavior that does its bidding, and have done so since Holmes chided us into this cleansing of law’s moral language, at the beginning of the last century. Consequently, and in line with Holmes’s admonitions, neither tort nor contract law touch, nor need they touch, nor should they touch, our subjective moral attitudes, or our felt responsibilities, or our sense of obligations to strangers, or our felt inclinations to treat those with whom we contract or those whom we may by chance encounter, fairly, or kindly, or charitably, in the slightest. Those bodies of law in other words, neither rest on nor expand nor impact nor engage our moral sentiments, or the moral imperatives that might sensibly be thought to follow from those sentiments. And, nor should they. There is surprisingly widespread consensus on all of this. Private law in liberal legal regimes, say its critics, operates toward the ends of capital, not equality or liberty, and if they’re right, then its complete and professed lack of concern for the moral attitudes with which we approach civil life is the least of its failings. Its enthusiasts largely concur that this avoidance of interplay with our interior sentiments is central to private law’s basic function: private law, in liberal legal regimes, motivates our consumption and production, and otherwise leaves our subjective lives of sentiment and sympathy untouched.

Criminal law too, on the unsentimental conception, basically scares us into submission, creating subjects who for the most part obey state commands. It doesn’t concern itself with subjective understandings or subjective desires to live peaceably and cooperatively. Rather, it limits its reach – its sanctions and its rewards -- to the objective lives of its subjects. Public law scholars as well, and across the political spectrum, disown

the need or the existence of any generative connection between even the grand communitarian clauses of the Bill of Rights and our moral sentiments: while constitutional law famously protects the private sphere, within which moral sentiments might mature, constitutional law itself is neither premised upon the existence of those sentiments, nor generative of them. So while law, on the “unsentimental conception,” *may* from time to time enlarge our sympathetic engagement with each it does so only incidentally. It never does so intentionally, much less essentially, or by design.

So, liberal legalism, on this highly regarded and one-century-and-counting-long academic understanding, either actively destroys, or ignores, or has no need for, or constitutionally insulates, private moral sentiments. *Law's subjects* from the realists' era to our own, we might say, are profoundly unsentimental creatures; they're Holmes' proverbial bad men. To whatever degree we are a product of the liberal legal system that subjects us to its rule, we are to that degree unsentimental. We may harbor various moral sentiments, but those sentiments are not engaged, protected or produced by law. The subjects of twentieth and twenty first century law are just not sentimental creatures.

The unsentimental conception also plays a dominant role in literature, both canonical and popular, that directly concerns legal themes, and in two ways. First, and as has long been noticed by any number of participants in the law and literature movement, the western literary- jurisprudential canon is replete with legal characters who are decidedly lacking in moral sentiments, and are so, furthermore, precisely because of their legal identities. Aeschelus's Athena, recall, from *The Oresteia*, paradigmatically loved law, men, and masculinity, and abhorred sentiment, which she found feminine and unworthy, in equal measure. Sophocles' Creon from *Antigone* and Shakespeare's Shylock from *Merchant*

of Venice shared both Athenean inclinations. Melville's Captain Vere in *Billy Budd Sailor* explicitly professed both his allegiance to law and his distaste for moral sentiment, which he too found feminine and unworthy, in the same *sentence*.⁸ Dickens' Gradgrind from *Hard Times* likewise loved law and hated sentiment in equal measure. Twain's *Pudd'nhead Wilson* loved law and legalism and, again, harbored a distaste for sentimentalism, a combination which disastrously produced a Twainian *hero* who ended up quite literally sending an escaped slave down the river. Moving into the late nineteenth, twentieth and twenty first century literary canon, and the time period roughly called liberal legalist by our contemporary legal historians, we again encounter scores -- more likely hundreds -- of un or anti-sentimental legal actors, most times, today, unambiguous villains or fools rather than ambiguous Vere-like heroes, but all of them besotted by law and abhorrent of sentiment. Recall Kafka's nineteenth century legal bureaucrats, Camus's and Kunstler's legal tormentors from our mid-twentieth century canon, John Barth's absurdist litigators from the 1960s, *LA law's* or *The Good Wife's* ruthlessly competent lawyers from the late twentieth and early twenty first century popular era. There are of course some counter-

⁸ From Vere's speech to the drumhead court, arguing for Budd's conviction:

"But the exceptional in the matter moves the hearts within you. Even so too is mine moved. But let not warm hearts betray heads that should be cool. Ashore in a criminal case will an upright judge allow himself off the bench to be waylaid by some tender kinswoman of the accused seeking to touch him with her tearful plea? *Well the heart here denotes the feminine in man is as that piteous woman, and hard tho' it be, she must here be ruled out.*" (emphasis added).

HERMAN MELVILLE, *BILLY BUDD, SAILOR*, 68,
[at https://mseffie.com/assignments/billy_budd/Billy%20Budd%20Text.pdf](https://mseffie.com/assignments/billy_budd/Billy%20Budd%20Text.pdf)

examples. It's worth noting, though, that even the clearest counter-example of an outstanding literary lawyer who is also endowed with rich moral sentiments – Harper Lee's Atticus Finch, from *To Kill a Mockingbird* -- achieved his noblest as well as most sentimental moments when he had the courage to act in accord with his moral sentiments and *against* legal convention, his legal role, and even the dictates of law: first when he protected his client outside the courtroom from a lynch mob, a protection that was facilitated not by force of law, and not by anything he did in his role as his client's lawyer, but rather, by his daughter Scout's empathic and sympathetic engagement with one of the would-be lynchers, who happened to be the father of her classmate, and then secondly, at the end of the novel, when he ignored the law in order to protect his neighbor, who had just saved his son's life, against any risks of exposure that might have come from an unwelcome investigation and legal process into the events of that calamitous evening in Malcombe. But, let's leave poor old bruised and battered Atticus out of it for now. My point is simply that the first way canonical narrative literature has entrenched the unsentimental conception of law over the course of liberal legalism's reign is through the depiction of scores of either villainous or heroic legal actors, lawyers, judges and sovereigns, all of whom love law and disparage moral sentiment, and all of whom recognize the antithetical relation of moral sentiment with legal command.

There is though a second way narrative literature underscores or promulgates the unsentimental conception of law which is less direct, but there's if anything more of it. Narrative literature presents us not only with unsentimental legal actors – whether heroes or villains -- but also with a large cast of characters who do enjoy rich morally sentimental subjective lives, but who do so while living *outside* law. Those rich moral sentiments, in

fact, as these plots unfold, clearly depend upon their escape from law's clutches. Thus, we find in the literary canon not only scores of un or anti-sentimental lawyers and judges, but also scores of highly moral sentimental characters who are so precisely because they live outside of law. So, we find in narrative literature scores of morally sentimental outlaws untouched by the dictates of criminal law, dropouts in alternative spontaneous communities unfazed by the formalizing strictures of contract law and the obligations it imposes, lovers who enjoy lawless romances, outside the confines of a coercive family law of marriage, divorce, prenuptial agreements and child support payments, and, of course, many, many children – untouched, Rousseau-styled, by the legal mine and thine, and who build fantastic lives for themselves, sometimes imagined, sometimes real, in the territories, or in natural woodlands outside their homes and neighborhoods, or in imaginary castles built in their parents' living rooms from sheets and chairs. Just recall Twain's iconic depiction of moral sentiment and the absence of law on Huck and Finn's raft, or the sweet and lawless worlds created by Robert Louis Stevenson's poetry, or the outlaws in Hollywood's *Butch Cassidy and the Sundance Kid* bicycling nonsensically to the tune of *Raindrops Keep Falling on my Head*, or the beatniks in Kerouac's *On the Road*, or the strikebreakers in Ken Kesey's *Sometimes a Great Notion* or the vilification of law and rationality both in the same author's *One Flew Over the Cuckoo's Nest* or Wolfe's depiction of Ken Kesey and Mountain Girl and all the rest of the Merry Pranksters in the *Electric Koolaid Acid Test*, or Widerburg's lovers in *Elvira Madigan* or Brooke Shields' depiction of a teenaged mother in *The Blue Lagoon*. Across all their differences, these works all depict subjects who have escaped or been ejected from law's empire, and who live instead in morally sentimental but lawless worlds. Law, in this literature, is a threat – seemingly the

greatest threat -- to our moral and loving inner lives. In each of them, law opposes, or kills, moral sentiment. If you want friendship, empathy, love, sympathy, or community, according to Huck Finn, Butch Cassidy, the Sundance Kid, Ken Kesey, Robert Louis Stevenson's gentle children, Mountain Girl, Elvira Madigan and Brooke Shields don't go to Law's Empire, to use Dworkin's evocative phrase. If you crave law's empire, on the other hand, don't look to empathize or sympathize with others, or seek community. The realms are mutually exclusive. Thus, the unsentimental conception of law.

Against this tide in both jurisprudence and literature, I want to offer the counter-suggestion that a well-functioning, healthy, and liberal system of law is an absolutely necessary condition of our moral sentiments – the feelings of empathy and sympathy that are essential for equality, community, and intimacy – and is therefore one of law's unheralded virtues. That is, I want to offer an account of the moral sentiments that are generated by law itself, and in fact require law for their flowering. Moral sentiments, contrary to the teachings of both the legal realists in our jurisprudence and the anti-legalist narratives in our canonical literature referenced above, are, partly, dependent upon law, they won't exist without it. When that's not so – when law ceases to produce moral sentiment, and when moral sentiment can only flourish outside law's domain – it's because both law and sentiment have become sick, and need tending. Furthermore, I want to use narrative fiction to help bolster the point. Thus, I hope to make the counter-intuitive point that law is a precondition of decent moral sentiment, and the counter-canonical point that at least some of our literature points us toward this conclusion, although it is rarely read or understood as such.

The rest of this chapter consists of two parts. In the first, I make a jurisprudential objection to the unsentimental conception: what the unsentimental conception of liberal legalism misses about the essential nature of law. In the second and major part I will suggest the existence of a body of literature that suggests that it is oftentimes the *absence* of law's protection, rather than the presence of malignant or overbearing law, that stunts moral sentiments. This is a body of work not much studied or taught within the field of "law and literature," which for obvious reasons has tended to look at literature that centers on legal heroes and villains, and the operation of law in those stories. That movement in other words has focused on law's *presence* and its impact of law's subjects. I want to focus attention instead on a few pieces of literature in which law is absent – not because the characters have chosen to absent themselves, Elvira Madigan-like, but rather, because the law has failed or refused to extend its protection to their lives. In these stories, I want to suggest, we can find some depictions of the impact of the protection of law on sentiment by looking at the lives of those who are not granted law's protections. Their lives are not only nasty, brutish and short, they are also unsentimental, and all the worse for it. In my conclusion I'll try to state affirmatively and without the literary crutch the nature of the connection between liberal legalism and healthy moral sentiment.

Law's Coercion, Law's Protection

Jurisprudentially, enthusiasts of the unsentimental conception of law implicitly – although in the case of Holmes and Posner, quite explicitly -- embrace a classically legal-positivist understanding of law: law is a series of commands, aimed at assuring compliance. Law is fundamentally coercive. Law is what emanates from the power of the sword. That's

plenty unsentimental, and it is also, I think, plenty-enough true. Legal commands are most assuredly not one bit sentimental – Cover was right about that -- and they insure compliance through the unsentimental methods of penalties, fines, orders, damage remedies, attachments, executions, stays of execution, and the like.⁹

The unsentimental conception then proceeds, however, from this positivist premise to the inference that *because* law is coercive, law's *empire*, again to use Dworkin's phrase – the liberal legal world of norms, statutes, case law, constitutions and so forth – does not, and perhaps cannot, engender, trigger, meaningfully engage, or rest upon our Smith-ean moral sentiments in any even remotely positive way. They might of course impact our moral sentiments in a negative way: totalitarian regimes, for example, terrorize their subjects into submission, and terror does not easily live side by side with sympathetic sentiments. But even well-functioning liberal legal orders, according to proponents of the unsentimental conception, do not fundamentally engage our moral-sentimental lives. Rather, while they unquestionably create incentives to which our outer selves duly and predictably respond, our inner lives – including our emotional and moral sentiments -- are untouched by it. Law, after all, is essentially coercive, in liberal no less than authoritarian regimes. And coercion does not well abide moral sentiment.

The problem with this quick inference from law's coercive essence to its anti-sentimentality is simply that the positivist definition of law – law coerces -- while true, is not a complete account of either the essence or purpose of law, at least of law in liberal legal regimes. What the unsentimental conception of law misses, is that law not only coerces, but it also *protects*, and what it protects us against, fundamentally, is the violence

⁹ Robert Cover, "Violence and the Word," *Yale Law Journal* 95, no. 8 (July 1986): 1601-1630.

and exploitation of others. In a well-functioning liberal legal system, furthermore, it does so essentially; that law protects us against the potential violence of others is as much a definitional aspect of law in liberal states, as that law coerces. It is, for instance, explicitly referenced in the Equal Protection Clause of the 14th Amendment: “No State shall... deny to any person within its jurisdiction the equal protection of the laws.”¹⁰ That clause commands the states to protect, as well as to protect equally, although the command directed toward states to protect is generally overlooked by constitutionalists, perhaps because of the blinding effect of the clarion call to equality in that understandably beloved clause. *That law must protect us* might be the forgotten mandate of the Equal Protection Clause,¹¹ and the forgotten point of our beleaguered civil rights movements likewise.¹² More generally, though, we overlook the centrality of law’s protective purpose, when we focus on law’s coercive core. But we shouldn’t. Central to law’s mission, point, and *raison d’être*, in liberal societies, is that it protect us against a particular set of evils: Law protects us, is meant to protect us, is designed to protect us, promises to protect us, from the deprivations of private violence and exploitation, even as it does so through coercion. It does much else besides – but it minimally must do that.

Let me bring this full circle to moral sentiments. When law coerces, it can terrify. But when law protects us, it creates space for the development of moral sentiments and in a number of ways. The protection of law against private violence or exploitation, for example, conveys full ownership to each of us of our own body, which in turn, is the

¹⁰ U.S. Constitution, Amendment XIV, Section 1.

¹¹ Steven J. Heyman, “The First Duty of Government: Protection, Liberty and the Fourteenth Amendment,” *Duke Law Journal* 41, no. 3 (December 1991): 507-571.

¹² Robin L. West, *Reconstructing Civil Rights* (Cambridge: Cambridge University Press, forthcoming).

condition for healthy self-regard, moral integrity and healthy moral connections with others. Those who live outside the protection of law might be free of law's coerciveness, but they also lack the benefit of that protection. And because of that they are less likely to possess the capacities for integrity, love, empathy, sympathy and community.

Therefore, and contrary to the unsentimental conception, the equal protection of law promised explicitly by the Fourteenth Amendment and implicitly by the Rule of Law, creates subjects who can enjoy a subjective life of self-awareness and self-ownership and self-regard, and consequently a life of connection, love and empathic regard for others – a subjective life enriched by moral sentiments, community and an appreciation of self all. Integrity and moral connectivity is inconsistent, then, not only with pernicious or intrusive or discriminatory law, but also, with law's absence – by which I mean both the lack of law altogether, or the presence of a law that fails to protect or protect equally. Law is clearly not a sufficient condition for the development of moral sentiment – we also need loving and decent parents and a healthy planet and meaningful work. But the protection of law, and the ownership and sense of ownership of one's body that it can generate, is absolutely a necessary condition to the generation of moral sentiment.

This is not an aspect of law's virtue that is often emphasized, or even noted, by law's enthusiasts, who tend to overwhelmingly focus on either individual liberty, substantive equality, or the maximization of utility, all measured through external indicia, of legalism's value. And it is an aspect of law's virtue that is flatly denied by liberal legalism's critics, whether those coming from a literary sensibility or elsewhere, where first the unmasking and then the critique of law's coerciveness rather than praise for the protection it provides is the order of the day. But it is important that we understand the value of the protection

of law, and the value of the flowering of sentiments, both moral and otherwise, that the equal protection of law facilitates. It is not the only aspect, but it is decidedly one aspect of law's virtue that is threatened by our current anti-legalist politics: threatened, that is, by calls for deregulation, for sovereign pluralism and for rule by referenda, by attacks on the necessity of civil rights and their protections, and in general by the rise of a charismatic politics un beholden to law, and uncommitted to the protections law can bestow, as well as increasingly unconstrained by its mandates.

Narrative Depictions of Law's Absence

As suggested above, the legal-literary canon is replete with depictions of the stunting impact of pernicious, intrusive, or formalistic law on the human spirit. That canon, I believe, has become the bread and butter of law and literature course syllabi. Less recognized, or at least less taught, is the existence of a canon of narrative literature that portrays the terrorizing impact of law's *absence* on the human spirit, and particularly on moral sentiments. There are two exceptions: *Beloved*,¹³ and *Jury of her Peers*,¹⁴ both much taught and studied. First, think of Toni Morrison's character Sethe and her doomed daughter Beloved, both of whom are subjected to the violence of slaveholders in slave states and slave catchers in purportedly free ones. Beloved dies as a consequence, killed by her mother's protective hand, while Sethe herself suffers moral as well as physical wounds. In her own words, Sethe's problem is that she doesn't own herself – she doesn't own her body, or her face, or her arms, or her legs, or her back. How, then, can she possibly

¹³ Toni Morrison, *Beloved: A Novel* (New York: Knopf, 1987).

¹⁴ Susan Glaspell, "A Jury of Her Peers," in *Her American: A Jury of Her Peers and Other Stories*, ed. Patricia Bryan & Martha Carpentier (Iowa City: University of Iowa Press, 2010) 81-102.

connect? As the novel progresses, and as the country progresses, and as Sethe struggles toward self-ownership, she also struggles toward meaningful, pleasing and moral human connections, with her lover, her mother, her live daughter, the ghost of her dead daughter, and her community. Think as well of the isolated farmwife in Susan Glaspell's short story from the 1920s, *A Jury of Her Peers*, who is suspected of killing her abusive husband, and then effectively "acquitted" by her female neighbors' conspiracy to hide incriminating evidence against her, while her house is being searched by legal authorities. Minnie Foster loses a great deal by virtue of the patriarchal violence she suffers: first her voice, then her musicality, then her friends, and finally her companionate pet. What she also loses, however, over the course of an adult life lived in a violent marriage outside the protective umbrella of law, is sentimentality, moral and otherwise: pleasure, intimacy, friendship, and community. She has this in common with Sethe; their sentiments of sympathy and pleasure both are undermined by the overwhelming violence they endure at the hands of masters. But note: it was not just violent husbands and slave-catchers, but also the lack of the protection of law against those husbands, slaveholders and slave-catchers, that killed the moral sentiments in both of these women's lives. As a slave, Sethe was denied the protection of the law against murder, assault, rape, and forced labor exacted on her by her owners, and even while and where she was "free," she was denied the protection of law against the kidnapping of herself and her children by slave-catchers, courtesy of the Fugitive Slave Act. As a wife in a patriarchal marriage, Minnie Foster was denied the protection of law against assault and rape by her husband, who by virtue of marital rape exemptions and rules of thumb had license to engage in both. The death of sentiment in

both books, in both women's lives, happened, so to speak, not in the shadow of the law, but in the shadow of the absence of law's protection.

More contemporary works that wittingly or unwittingly portray law's absence – denials of the protections of law – and the impact of that denial on sentiment are less totalizing, and hence more ambiguous, than the denials of equal protection which characterized slavery or patriarchy. So we don't tend to think of them, or teach them, when we teach about law's depiction in literature. The rest of this essay takes up three contemporary works that are notable exemplars of the same dynamic: the film version of Patrick Shanley's script *Doubt: A Parable*, from 2004,¹⁵ Kazuo Ishiguro's novel *The Remains of the Day*, from 1989¹⁶ and George Pelecanos' 2004 short story, *String Music*.¹⁷ In all three, the authors depict subjects notably lacking in sentiment, and in all three, that unsentimentality is portrayed as occurring in the shadow of law's absence. I want to draw a connection between those facts. I'll start with *Doubt*.

In *Doubt*, as you may recall if you saw the film or the play, Sister Aloysius, a catholic nun serving as an assistant principal in a Catholic School in the Bronx in the early 1960s, comes to suspect the head Priest at the school – Father Flynn -- of sexually abusing one of their students -- a 12 or 13 year old scholarship student who is also the school's first and sole African American attendee. The suspected abuse and the aftermath is the subject of the entirety of the play. The accused priest – Father Flynn -- is appealingly modern, post-Vatican II, and sympathetically drawn: he encourages and seemingly enjoys secular

¹⁵ *Doubt*, directed by John Patrick Shanley (Los Angeles: Miramax Films, 2018).

¹⁶ Kazuo Ishiguro, *The Remains of the Day: A Novel* (New York: Knopf, 1989).

¹⁷ George P. Pelecanos, "String Music," in *Martini Shot: A Novella and Stories* (New York: Little, Brown and Company, 2015) 55-81.

Christmas songs and ball point pens, he engages in spontaneous laughter and fun, he delivers his masses in English, he projects as well as defends a loving and non-punitive as well as casual approach to both his pedagogy and his coaching, and he ministers to the whole person in every student, who, he repeatedly stresses, are, after all, children. He is, in effect, moral sentimentality personified. Sister Aloysius, who comes to suspect that he is also sexually abusing students amidst all of this loving playfulness, is a traditionalist: she is harsh, a stern disciplinarian, humorless, shows not the slightest affection for the children or the younger nuns under her leadership, and she lives in a state of perpetual rage over the post-Vatican II reforms that have overturned her life and school. She also has an antipathy for the popular and humanist Father that is deep, unattractive, and seemingly irrational. She is repelled by the moral sentimentality that he embodies and which she so strikingly lacks. She hates his guts. So, once she suspects him of sexually abusing one of the students, she proceeds to prosecute her own vendetta against him, on the basis of very little evidence but very strong suspicions. She doesn't, though, have any clear way to do that. The problem is that there is almost no law, substantive or procedural, and what little law there is, is not on her side in 1964. And, she correctly intuits that no one in the Church hierarchy will be responsive to her charges. There will be no investigation. In the shadow of law's absence, then, Sister Aloysius ultimately uses dishonest subterfuge to entrap the Father into a confession: she sets out to convince him with trumped-up evidence that she can effectuate his removal from the priesthood, and that he should therefore resign voluntarily. Ultimately, she succeeds – he does leave the school – but only to be re-assigned to another school and effectively promoted, an outcome we now know was quite typical of actual priests accused of very real sexual abuse in the forties, fifties and sixties. In the last scene

of the film, Sister Aloysius confesses to Sister James -- a younger nun who has sought to befriend both Sister Aloysius and Father Flynn -- that she is plagued by doubts herself, although she doesn't specify exactly what it is she doubts.

Aloysius' behavior throughout, at least on the surface, is distasteful, unappealing, unethical and utterly unsympathetic, particularly perhaps to lawyers and law students in the audience. It is an entirely extra-legal process by which Aloysius pursues her vengeful persecution of the Father: the evidence is concocted, there are no collaborating witnesses, there are no lawyers and there is no law. There is no procedural fairness. There is also though no state condemnation of the underlying suspected behavior, no recognition by the outside community of the wrongfulness of child abuse, no sanctioned attempt to get to the truth of the matter, and no venue for the resolution of anyone's doubts, either Sister Aloysius's, Sister James's, or the audience's. Nevertheless, despite Aloysius's rigidity, her rage, her lack of "objectivity," and her roughshod and cavalier attitudes toward any due process that may be owed the man she suspects, and ultimately despite even her own expressions of doubt regarding her initial suspicions, most viewers come to the conclusion -- albeit with varying degrees of certainty -- that Aloysius was -- all things considered -- *right* to suspect the priest's sexual abuse of the child. Whether she was right, though, beyond "all reasonable doubt," is itself in doubt, as the title of the play and film suggests.

That, I take it is a fair enough summation of the play's and the film's dominant text, and perhaps of the author's intent likewise. But there's a subtext to all this, and perhaps several subtexts, which might well not have been intended. One way to put it is to revert back to the title: There is, in fact, much else to doubt, about this entire chain of events, well beyond the priest's factual guilt, as the father's first mass -- which was on the subject of

doubt -- suggests. For example, both of the two Sisters at various points in the film doubt not only the father's guilt, but also their faith in God, the Church, the Church hierarchy, the father's wisdom, their own virtue, and the honesty of each other and of their superiors. The abused child's mother, furthermore, doubts that any harm that might have been done to her child by virtue of the father's sexual abuse was so great as to outweigh the manifest benefits her boy is garnering by attending the school: a diploma that could aid his entry into a prestigious high school, the affection of a man that may offset the humiliation and worse he suffers at the hands of his own father who is offended by the boy's apparent homosexuality, and the protection of the Priest who is abusing him from some of his peers' scorn and harassment. The mother doubts, then, that Sister Aloysius should proceed with her "prosecution" of Father Flynn on her boy's behalf. She doesn't think it's worth it. Although he of course never puts this into words, Father Flynn seemingly doubts that his possible sexual advances toward the children is a harm at all, or distinguishable from his emotional love for them: he argues that he, and not the sister, truly loves the children, with the subtle insinuation that physical love, including sexual, is a legitimate part of an ecumenical regard for the wholeness of the human. All of this doubt – doubt toward the seriousness of the harm, doubt that sexual abuse is a harm at all, doubt regarding the Church's moral authority -- plants at least a seed of doubt not only over whether the father is guilty of what the sister suspects, but also over whether the alleged sexual abuse by this priest of this child, even assuming it occurred, is really all that *bad*.

I want to draw attention to one final subtext. We might *also* come to doubt – although this may well be beyond the author's intention – the grounds of all of this doubt. How, exactly, did we all come to doubt the seriousness of the sexual abuse of children by

priests? How did we come to a sex positivity so thorough-going as to encompass the sexual exploitation of minors? Might the Church's steadfast refusal to confront the sex abuse in its ranks over the last half century or longer have played a role in the seeding of that doubt?

Nevertheless, and however broadly we cast the net of what this movie is urging us to doubt – the Father's factual guilt, the seriousness of the harm, or to our doubts with respect to all of that doubt – the play *Doubt* is, unambiguously, all about doubt. But it is also, just as much, all about moral sentiment. And, on first blush, the depiction of the two – moral sentiment and lawlessness – tracks the first and dominant relation I outlined above: law drives out moral sentiment. In this quite unhealthy as well as lawless church-school, healthy emotional and moral sentiments are strongly correlated with doubt, and the lack of healthy emotional and moral sentiments are equally correlated with unwarranted certainty. The Priest and his companions, who confess openly and happily to their various doubts, particularly regarding the Church's moral authority and the authority of tradition, are quite literally besotted with sentiment: they drink fine wine, they laugh freely, they tell risqué stories, and they are openly affectionate with each other and with both the children and the sisters under their tutelage. They are literate, companionate, and communal. They exude moral and emotional warmth, and they allow the latter to guide the former. The sisters, by contrast, whose sole aim in life sometimes seems to be to expunge all doubt, live austere, drink water or milk rather than wine with their dinner, engage in almost no conversation, are utterly humorless, and enjoy almost no warmth whatsoever, either with each other, with the children, or with the fathers. Sister James must struggle to receive permission even to visit her ill brother. Sister Aloysius professes the most unsentimental pedagogy imaginable, refusing to tolerate any conceivable softness toward the school

children in her charge. Her moral sentiments are utterly compromised: as she herself admits, she engages in the sorts of wrongs (manufacturing evidence) which take her further from God, and she refuses to even discuss any case for sympathy toward the father she suspects. Expressing cold certainty until the penultimate scene, she exudes, professes, and lives in an equally cold unsentimental world. It crumbles at the end, when she dissolves in tears in the younger sister's arms, finally accepting human touch and sympathy, while confessing to her own unspecified doubts.

The pre-Vatican II Church, authoritarianism, formalism, and particularly certainty all come off quite badly in all this. The pre-Vatican II Church, after all, represented by Aloysius, was the professor of certainty, of un- and anti-sentimental pedagogy, of excessive austerity, of rules, formalism, and above all, perhaps, rigid opposition to Freud's pleasure principle. The easy lesson to draw from this script, then, is that certainty, along with an insistence on authority, formalism, and its doctrinaire allegiance to rules, kills sentiment, both emotional and moral. The liberal church, anti-authoritarianism, free love and a humanized Catholicism fare much better. They acknowledge and permit sentiment. They facilitate it. They foster not just good feeling, they foster feelings. None of this, though, is entirely straightforward – there is, after all, quite possibly, sexual abuse mixed in with the sentiment, the feelings, the kindness, the love, the liberalism, and the relaxing of rule and doctrine. How do we resolve these tensions, between our response to the doctrinaire, authoritarian, anti-sentimental, unfeeling sister who may be right to suspect the father, who is liberal, kind, and sentimental, of sexual abuse? One possibility that was suggested by Shanley himself in an interview during the Play's initial run, is that the *audience's* doubts about what transpired at the school should dominate what he called the play's "Second

Act”: the conversations and argument after the curtain falls among audience members. The doubt he apparently hoped to instill, however, was somewhat selective: not doubts, so much, about the value of sentiment, liberalization, antiauthoritarianism, or post-Vatican reforms – those are seemingly the script’s lodestar. Rather, the doubt he hoped to instill in the audience, and lauded, concern primarily doubts about the facticity of what is suspected, and quite possibly, if a dose of sexual abuse is the price of liberal reforms, doubt as well about the seriousness of any harm that abuse might inflict.

This is all pretty unsettling – but it is also not a complete description of what transpired at that school. There is another dimension to the interactions between these characters, either wittingly or unwittingly suggested by Shanley’s script but then pretty vividly portrayed by characters. The anti-sentimentality that Sister Aloysius exhibited, professed, and inhabited in that school was not *only* the function of her attitudes of undue certainty, and her unambiguous embrace of unforgiving catholic and religious norms. It was also a function of the absence of any secular *law* in her life, both as an administrator and instructor at this school, and as a sister in a religious hierarchy. Her antisentimentality, in other words, lived, and grew, in the shadow of law’s absence. There was no protection of law, equal or otherwise, in this church-school. The law failed to protect both this child and many others like him against sexual assault, and it failed to protect Sister Aloysius against retaliation for basically blowing the whistle. The Catholic Church still today in substantial part is exempted through various immunities from secular, legal control. (It can still, for example, hire and fire religious leaders without regard to legalistic antidiscrimination norms.) At the time *Doubt* is set, however, the church, we now know, quite actively shielded priests from responsibility for their criminal sexual

assaults.¹⁸ The sexual abuse in *Doubt*, Aloysius's attempt to address it, and Father Flynn's avoidance of responsibility for it, all occurred, to repeat my twist on the metaphor, not in the shadow of law, but in the shadow of law's absence. First, the alleged sexual abuse itself was criminal, but immunities shrouded it. The boy had no effective legal entitlement to the law's protection against sexual abuse by his priest or to civil recourse for the damage he sustained by virtue of the abuse. The investigation and persecution undertaken by Sister Aloysius likewise was unethical and coldly unforgiving, but she too, like the victim, had no secular authority to which to turn. The church and whatever oppressions it visited upon practitioners was insulated entirely from legal process. Nor was there any process within the church that was accessible to her, through which she could process her suspicions. And, she enjoyed no legal protection against whatever retaliation might be coming her way for taking the actions she contemplated. No "whistleblower" statute would ensure that no adverse effects would be visited upon her, should she articulate her suspicions. So, she manufactured evidence to smoke him out. Was this so terrible? What would you have done?

Might law's absence, and not only the church's oppressive presence, be partly to blame for the appalling lack of moral and aesthetic sentiment, specifically in Sister Aloysius's character but also and much more broadly at this school? The child sustained his sexual injuries in silence, as children are wont to do, and we can't know the seriousness of the harms he sustained as a consequence. But that silence itself, we now know, is itself a harm, and it is a harm that touches the sentiments: it stunts emotional development, to be silenced in the face of assault, and it stunts moral development, to have one's physical and

¹⁸ Contrast, *Spotlight*, directed by Tom McCarthy (Los Angeles: Open Road Films: 2015).

emotional integrity so undermined. For Sister Aloysius, the effects of the law's absence were also profound. Aloysius had no felt recourse to secular law, so nowhere to take her suspicions. She could not share the burden of her suspicions with either legal or religious authorities. As a woman in a subsidiary role in the Catholic Church, her worries or beliefs or possible charges were of no consequence. That inconsequentiality diminished her sense of her own importance and agency, and of course her integrity. Her choice was between obtaining evidence fraudulently or permitting a suspected child abuser to remain in a position of authority. She was faced with unpalatable odds from a position of profound subordination. Her powerlessness – itself a product of the law's absence – generated her tragic choice, and it was that choice, as was made clear in the final scene, that generated her anguish.

Much more quickly, on Pelecanos' *String Music*, and then Ishiguro's *Remains of the Day*. I'll start with *String Music*, a short story written by George Pelecanos, who is best known for his work on *The Wire*,¹⁹ and which is now collected in his recent collection of short stories titled *Martini Shot*.²⁰ As is true of the characters in *The Wire*, many of Pelecanos' characters in the stories collected in *Martini Shot* live in violent communities, and they seek to find meaning and value in the interstices, so to speak, of that violence, usually by reference to their sentimental ties to others: their girlfriends, their aging fathers, their younger siblings, their children. But in *String Music*, more vividly than in the other stories, what Pelecanos shows is that what violence deadens, above all, is sentiment. In the

¹⁹ *The Wire*, created by David Simon, written by David Simon, Ed Burns, David Mills, Richard Price, Dennis Lehane, George Pelecanos, William F-Zorzi & Chris Collins (New York City: HBO, June 2, 2002-March 9, 2008).

²⁰ George P. Pelecanos, *Martini Shot: A Novella and Short Stories* (New York: Little, Brown and Company, 2015).

last scene, Tonio, who very much wants to live, disorientedly contemplates what he knows are likely to be his last minutes, while dribbling a ball on a basketball court in a pickup game, while his killer circles the block in a black Maxima van. Antonio is trapped on that asphalt court, he knows he has no exit. He will very likely die when the game ends, violently and imminently, in an act of senseless retribution. So what does he do? He shortens his expectations, sour-grapes style. He focuses on his next shot, his next block, his next pass, his dribble. There is, in those last moments, only basketball. There's no upcoming SAT test, no babysitting obligations, no plans to make. There is no future. And, there is no sentiment – Tonio's life in this scene becomes "nasty," to recall Hobbes's description of life without law. For Tonio, there is no prospect for attachment, no commitment to thine or mine, no community, no intimacy, no friendship, no pleasure, no sense of self or purpose, no "vision of the good life," when that van is circling and death is imminent. It's a gripping depiction of a sickeningly unsentimental way to live in the moment.

As in *Doubt*, in this story of deadened sentiments and shortened life spans, law is striking for its absence. There is no capable police force providing Antonio with the equal protection of law. There is a police presence – an honorable and caring cop – but not so capable as to be truly protective. Tonio is trapped, not just by the Van, and the violence it represents, but also by the lack of competent legal protection against it. The absence of the protection of law, and not just the lethal violence against which legal protection is constitutionally owed, kills Tonio's capacity for sentiment.

Finally, and most briefly, *The Remains of the Day*.²¹ This modern classic from the 1990s centers on the interior life of a butler who serves a British aristocrat in London during the 1920s to 1930s – an employer who eventually is revealed to the butler and reader both as a Nazi sympathizer, and possibly a Nazi collaborator. The butler remains loyal to him throughout, willfully blind to his employer’s increasingly obvious and noxious political sympathies. The Butler’s loyalty is embedded within an ethic of professionalism that is all consuming (and which, as any number of commentators have suggested, bears a more than passing resemblance to legal professionalism) and which a good bit of the novel, and the butler, explore: the butler relies on stories, common law style, to help his readers better understand the demands of that ethic, as he and his colleagues debate the meaning of professionalism, and what it means to be a “good” butler. The loyalty the butler shows his employer, and the professionalism which requires it, the reader is led to realize, comes with a price: it has almost thoroughly numbed Mr. Stevens’ emotional life. He has no love in his life and very little capacity for it. He is loyal to his own father, but unable to express affection or to treat him decently as he lay dying, because of his conflicting loyalty to his employer. He cannot express or even properly understand his own affection for the Housekeeper in the household, and as a consequence he loses what could have been a sustaining and intimate bond. His moral sentiments fare no better. He doesn’t shy away from presenting himself on multiple occasions as someone he is not, a gentleman on an excursion through the countryside, rather than the employee of one. He cannot see, much less call out, the wrongness of firing two young Jewish maids solely for the offense of being Jewish, nor can he sympathize with the housekeeper’s moral anguish when he, at his

²¹ Ishiguro, *The Remains of the Day: A Novel*.

employer's insistence, does so. Most consequential, he cannot see, much less respond to, his employer's political loyalties, his anti-Semitism, or his micro-cruelties, some of which are directed at him.

So professionalism comes off badly in this story of the English Butler, just as the Church comes off badly in *Doubt*, and community comes off badly in *String Music*. Here again, though, it is not simply the veneer of professionalism that is oppressive, or that takes such a toll on the Butler's sentiments. It is also the shadow of law's absence. There is no law regulating this employment relation between Butler and Master – the relationship which throughout the book is the subject of the Butler's ruminations. There was of course no civil rights regime forbidding the firing of the maids for being Jewish. But there was also no employment law requiring fair terms or standards, or limiting the employer's powers to whimsically hire and fire the Butler himself. In its stead – in the shadow of law's absence – there was a professional code for butlers, and a cluster of shared norms defining something called "professionalism." But there was no contractual relation between them that was regulated even by contract law, much less by civil rights. There was instead a power relation, regulated by nothing but norms of civility and a Code of professionalism – in effect the gilded glove covering the subordinating effects of law's absence from the field.

One casualty of the cruel arrangement in this story – one casualty of law's absence and of the ethic of "professionalism" that displaced it – was the butler's moral sense. Loyalty and affection for his employer come to exhaust the butler's moral reasoning. Sentiments that might have splintered that loyalty would be risky, or dangerous, whether they be the pull of romantic or erotic attachment, or the pull of the qualms of conscience, or the pull of the allure of community. But again, note: the butler's undying loyalty and his

otherwise stunted moral sense was owing not just to the oppressive presence of professionalism, but also to the absence of law: he had no recourse to a regulatory regime that might have couched his employment, no legal protection against his own abuse, and no sense that law would protect those under him from his abusive relation toward them. By virtue of law's absence -- and not just Professionalism -- he was driven to that totalizing loyalty, which in turn incapacitated him from love, from an honest conversation with a community of equals, and from a responsible and moral regard for the maids that worked under him on his staff. He lacked moral as well as emotional sentiments, in short, and the absence of law, no less than the oppressive presence of professionalism, was responsible.

To summarize: In *Doubt*, it is religious political authority, not so much religious norms, that oppress: it is embodied religious authorities that permit and then shield sexual abuse, that incapacitate and disempower while exploiting women, that provide little or no process for the expression of dissent, suspicion, or concern among various church functionaries, such as school administrators, and that people a regime that is anti-democratic and unequal from bottom to top. In *String Music*, it is the political authority of a violent community that does all of this: the political authority of gangs that incapacitate, provide no avenue for dissent, and exercise full social control. In *Remains of the Day*, it is the employer's political authority and the "professionalism" that encodes it: the fully embodied employer incapacitates, and provides no avenue for dissent, suspicion or concern, for those who have moral misgivings. In all three of these nondemocratic and political realms --the domain of religious authority, of gang life, and of professionalism -- *sentiment*, both moral and emotional, takes a hit, and it is the peculiar capacity of narrative fiction to reveal that truth. In *Doubt*, the religious underlings in these churches and

church schools – children and women – have stunted emotional and moral lives, in *String Music*, the hollowed-out interiority of those ruled by violence is exposed, and the barrenness of the employees' inner lives in *Remains of the Day* – the Butler, the housekeeper, and the lower-level maids all – are painfully depicted on every page: they either numb themselves to their moral and emotional lives, as did the Butler, or they get out, if they yearn for lives of sentimental richness, as did the housekeeper, or they get expelled and get killed, as did, most likely, the Jewish maids who were “let go.”

And, in all three narratives, these regimes and the authorities that created them act as miniaturized sovereign states: religious authorities in schools, gang leaders in violent neighborhoods, and employers in homes and factories exercise power, and it is by virtue of the exercise of that power that the lives of those subordinated to them are bereft of sentiment. It is not, however, only the presence of an oppressive regime – religion, community violence, or employment -- that kills sentiment. Private sovereigns emerge, exist and thrive in the shadow of law's absence. Religious authority – not only over belief or practice, but also over bodies and lives and communities -- is insulated by a broadly shared sense of their immunity from challenge. The violent authority of unchecked gangs – not gang culture but the political authority of violent gangs over the bodies and lives and communities they terrorize – is given reign by the absence of competent law enforcement that protects rather than targets neighborhoods. An employer's political authority – not over the work itself, but the over bodies, lives and futures of employees – is facilitated by a hiring at will regime that removes law and legal regulation from the outer structures as well as the inner lives of those impacted.

Conclusions: Law's Presence, Law's Sentiments

These are all grim portrayals of life outside of the protection of law. They expose the deadening of moral sentiment in lives lived in the shadow of law's absence, as well as the self-evident lack of equality. As such, they collectively counter the more familiar flood of narrative depictions of the rich sentimentality of life outside law: the familiar strain of popular fiction that constructs characters whose moral and sentimental lives are only sparked through being set apart from the constraints and censorial compulsions of legal authorities. The drumbeat of those narratives drowns out an equally important narrative canon that conveys a very different moral: outside the protection of law, the narrative arc of life is Hobbesian. Minnie Foster, who lacked not just a jury of her peers but also the protection of law against domestic violence, *Sethe* and *Beloved*, who lack the protection of law against the assaults, rapes, murders, and kidnapping of slave holders and slave catchers, Sister Aloysius, who lacked not just recourse within the church to voice her suspicions, but also the protection of law against retaliation for doing so, Father Flynn's student, who lacked the protection of law against the sexual abuse itself, the butlers, housekeepers, maids and cooks in *The Remains of The Day*, all of whom lacked the law's protections against their employer's mercurial will, and Tonio, in *String Music*, who lacked the law's protection against a violent community, all bear witness. These characters lived in lawless regimes of enslavement, patriarchy, violence, employment, professionalism and religious piety, and they were governed by authorities who were in turn insulated and protected by law's absence: by legal immunities, norms of privacy, rules of thumb, police indifference. For some, their lives were shortened. But for all, their moral sentiments were

near-annihilated. Where law's absence was totalizing and behind us – slavery, violently patriarchal marriages -- we can now see this clearly. Where the absence of law is less total and still present – in the form of immunities given to churches for various crimes and breaches, or an “at will” regime in employment, or underfunded or badly motivated police forces in violent neighborhoods – that relation is much harder to see. Narrative fiction can help, at least if we can first shake off the habits of the dominant narrative – a narrative that vilifies law and sentimentalizes law's absence.

Law creates conditions for equality, in part, by regulating private regimes, and the way it does so is by protecting us against the abuses of the stronger parties within them. “Equal protection of the law” means at its core that we should be protected by law equally against the otherwise despotic powers of employers or fathers or husbands or priests or slavecatchers to threaten us with their lethal firings, beatings, assaults and kidnappings. With law, employment at will can be constrained by norms of fair dealing, gang violence by decent policing, and “religious authority” limited to the sphere of belief and practice requisite for spiritual life to thrive, leaving practitioners no less than other citizens to enjoy protection against abuse and exploitation. With law, some measure of equality within these separate spheres is at least conceivable. With law, we are protected against private sovereign power that is sometimes of course benign, or loving, but sometimes oppressive, and on occasion lethal.

It should not be surprising, if this is right, that the protection of law is a condition of moral sentiments. When law protects us, there is more room not only for equality but also for a fully moral human life, enriched by passion, attachment, intimacy, and community. We should not let romantic accounts of life on rafts, in territories, and on imagined desert

islands, or of believers in separatist religious communities, or noble laborers in romanticized conceptions of honorable “professions” in service to benign and loving employers, blind us to that, any more than we should have in the past allowed romanticized conceptions of happy slaves or contented housewives seduce us into false beliefs about slavery and patriarchy. If we value the attachments of intimacy and community that excite and enlarge our capacity for empathy, we should resist the allure of legal “immunities,” and “cultural defenses,” and deregulatory movements, and we should resist the allure of narratives that romanticize life within those de-legalized realms. Equality is inconsistent with legal immunities – with law’s absence. But so likewise are the moral and emotional sentiments that both color and structure our inner lives, from which our outer actions originate, and in which our aspirations and ambitions and moral foundations, as well as those of our children, take root.

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