WE DON'T WANT TO HEAR IT: PSYCHOLOGY, LITERATURE AND THE NARRATIVE MODEL OF JUDGING

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The "narrative" model of legal judging argues that legal decision makers both do and should render judgments by assembling sensible stories out of evidence (as opposed to using Bayesian-type, linear models). This model is usually understood to demand that before one may judge a situation, one must give the parties the opportunity to tell their story in a manner that invites, or at least allows, empathy from the judger. This Article refers to this as the "inclusionary approach" to the narrative model of judging. Using psychological research in emotions and perspective taking and the more intuitive techniques of literary criticism, this Article challenges the inclusionary narrative approach, arguing that, in practice, the law gives equal weight to an "exclusionary approach." That is, in order to render sound, legitimate legal judgments, the law deliberately limits the sort of stories parties are allowed to tell—and does so on moral grounds, not, or at least not only, to improve the "accuracy" of the legal judgment. That is, as both a descriptive and normative matter, impoverished narratives can be better than enriched ones in leading decision makers to morally acceptable legal judgments.

"To understand all is to forgive all."

—French proverb

The currently dominant view of how people process evidence and draw conclusions is linear and Bayesian. Dissatisfaction with this model,

as both a descriptive and normative matter, has emerged from across disciplines—especially literature and psychology. One ambition of this Article is to synthesize these criticisms into an alternative model of how people render decisions in legal settings (the "narrative" model of judging). But I seek to do more than synthesize; my other ambition is to construct the narrative model in a way that current critics of the Bayesian models would not likely endorse at first blush. The largest departure the narrative model makes from traditional, Bayesian models of legal decision making is in demanding that judgers (judges, jurors) hear full, rich stories about the people they are judging, and treat as legally relevant the emotional sympathies that hearing them inspires. In this Article, I further modify conventional wisdom by arguing that the narrative model demands that we *refuse* to hear the stories of those being judged when doing so might lead us to exonerate, or even just empathize, when we ought not.

In other words, I argue that the narrative model demands two approaches to evidence: both inclusionary and exclusionary. The "inclusionary" approach was borne largely but not entirely from the "'Other' project" in the law and literature movement.[1] It compellingly argues that before one can pass judgment on someone (say, a criminal defendant), one has to let him tell his story in a way that would at least allow judgers to assemble an account sympathetic to his circumstances. He must be permitted to invite the judgers to both understand and empathize with him. If a piece of evidence could mitigate his guilt, then for the most part he should be allowed to offer it. This does not mean that judgers ultimately have to be moved by his story, of course. Instead, the point is procedural, but with the potential for substantive results: legitimate criminal condemnation demands complete, rich, narrative trials. Trials that offer only impoverished narratives (that is, do not include all of the relevant particulars for judging the case at hand) are undignified, illegitimate, and on top of that, often objectively incorrect.

The "*ex*clusionary" approach—my own contribution to the model—offers the flip side. This approach argues that often, it would be undignified, illegitimate, and lead to incorrect results to invite a complete, rich narrative into a trial. If we are rightly contemptuous of a person's unique perspective, not only is it fine to prevent him from presenting it, but it would even be affirmatively wrong to let him. I argue that deliberate ex-

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1. Rob Atkinson, *What Is It Like to Be Like That? The Progress of Law and Literature's "Other" Project*, *in* 43 STUDIES IN LAW, POLITICS AND SOCIETY 21, 22 (Austin Sarat ed., 2008). Atkinson's term is new and his own, but the movement is not, and is most closely associated with scholars' work such as MARTHA C. NUSSBAUM, POETIC JUSTICE (1995); RICHARD WEISBERG, POETHICS (1992); and ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW (1993). These scholars often focus explicitly on what *lawyers* ought to do, and how they ought to approach their clients. However, their points generalize, and indeed are most useful when used to describe how other actors in the legal world—especially those who render decisions that profoundly affect the lives of "others" by judging them—ought to behave.

clusion fits comfortably within the narrative model of judging—indeed, it is a necessary component of it.

Consider a concrete example from immigration law: Amadu Bah's application for asylum.[2] Amadu is from Sierra Leone, where he deserted the Revolutionary United Front (RUF), a rebel army.[3] He fled to the United States, and there is little doubt that had he been sent back to his home country, he would have been persecuted—probably tortured and killed—by the RUF.[4] Indeed, he knew better than most what the RUF is capable of: as one of its foot soldiers, he had, himself, tortured and killed others.[5] Amadu admitted to shooting a female prisoner[6] and to using a machete to chop off the limbs and even the heads of civilians.[7]

In considering applications for asylum, the United States has a sensible rule: it will not grant asylum from persecution to people who were persecutors themselves.[8] So, in deciding whether to protect Amadu, the immigration judge needed to hear two sets of relevant evidence: the likelihood that Amadu would be persecuted if he returned, *and* whether Amadu himself was a persecutor. Because it would be offensive to our principles of justice to offer sanctuary from persecution to a persecutor, hearing both sets of evidence was necessary to a moral, legitimate evaluation of his case.

Amadu, however, wanted to offer still another set of evidence in his petition. He conceded that as a member of the Rebel army, he had tortured and killed his fellow countrymen.[9] But Amadu was not just any RUF soldier; he was one of the infamous "child soldiers" of Sierra Leone.[10] After watching the RUF light his father on fire and then rape and murder his sister, he had been offered a choice: join our cause or die.[11] Amadu chose to live.

The question posed is stark: should Amadu have been allowed to present evidence that he was coerced as a child into serving in the RUF?

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2. Bah v. Ashcroft, 341 F.3d 348 (5th Cir. 2003).

3. *Id.* at 349–50.

4. *See id.* at 350 (evidence that he was punished for previous escapes); *id.* at 352 (evidence that "RUF members ordered the deaths of suspected RUF deserters on at least two occasions"). The court, however, believed that by the time Amadu's case came up, the danger had actually passed. *See id.* at 352. As discussed below, even if the judge had believed Amadu still actively faced such a risk, Amadu would have lost his petition for asylum.

5. *See id.* at 350–51.

6. *Id.* at 350.

7. *Id.*

8. *See* 8 U.S.C. § 1231(b)(3)(B)(i) (2006) (disallowing the withholding of removal of an alien at risk of persecution if "the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion"); *id.* § 1158(b)(2)(A)(i) (disallowing the granting of an asylum application for the same).

9. *Bah*, 341 F.3d at 350.

10. *See id.* at 349; Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, N.Y. TIMES, May 9, 2002, at A14.

11. *Bah*, 341 F.3d at 349.

If not, he would certainly lose his petition for asylum.[12] A purely inclusionary narrative approach would demand that he be allowed to present his story. This evidence surely would have undermined the state's position that Amadu was himself a persecutor, and would have supported the validity of his petition—but at the expense of justice for his own victims.

Both the Immigration Judge and the Court of Appeals for the Fifth Circuit instead adopted an exclusionary approach in this case.[13] Neither were willing to include the third set of evidence, stating simply that according to the governing statute, "the [persecuting] alien's personal motivation is not relevant"[14]—even if that "motivation" was to avoid his own death. They recognized that *if* Amadu were allowed to tell his complete story, it would surely be relevant to his petition for asylum; but being invited to tell it at all required a prior, exonerating moral evaluation of Amadu. If true, Amadu's story meant that he did not deserve to be considered a persecutor; indeed, it meant that he was more victim than victimizer. Rather than invite this, the judges agreed that he would not be allowed to tell it at all. The Immigration Judge and the Fifth Circuit's decision was not obviously right—but the fact it was not obviously *wrong,* either, is the problem taken up in this Article.

The normative punch of the inclusionary narrative approach depends on the idea that evidence itself can and should tell us what judgment to render. But in this instance, the reverse is true; the evaluation of Amadu's position determined the relevance of the evidence in the first place. In the Immigration Judge and Fifth Circuit Judges' interpretation, Congress made an *ex ante* decision that hearing persecutors' own stories would be illegitimate—no matter how compelling the stories are.[15] There was no way to let the evidence itself render the moral conclusion. Amadu's case shows that more evidence is not, morally speaking, always better, and that the choice of whether to hear a complete story at all is neither easy nor value neutral.

Amadu's example is not isolated. There are many such child soldiers fleeing Africa and seeking asylum, and the circuits had split on how to handle their cases.[16] Indeed, the problem was pervasive enough that the Supreme Court accepted certiorari to decide whether the asylum statute forbids child soldiers from telling how they became persecutors, and held that it does not.[17] It was an extraordinarily hard question not

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12.   *See* 8 U.S.C. § 1101(a)(42)(B).

13.   *See Bah*, 341 F.3d at 351. *But see* Negusie v. Holder, 129 S. Ct. 1159, 1164 (2009).

14.   *Bah*, 341 F.3d at 351.

15.   *See id.*

16.   *See* Singh v. Gonzales, 417 F.3d 736, 740 (7th Cir. 2005) (holding that an alien's personal motivation for actions is irrelevant). *But see* Miranda Alvarado v. Gonzales, 449 F.3d 915, 927 (9th Cir. 2006) (determining assistance in persecution "requires a particularized evaluation of both personal involvement and purposeful assistance in order to ascertain culpability").

17.   *See Negusie*, 129 S. Ct. 1159. The Court found that the statute is ambiguous regarding "whether coercion or duress is relevant in determining if an alien assisted or otherwise participated in persecution." *Id.* at 1164. Because the Court also found that the Board of Immigration Appeals had

only as a moral matter, but as a matter of statutory interpretation and of the unique institutional and legal context of immigration appeals.[18] But this Article is not about child soldiers, or about the intricacies of immigration law.

My target is far more general. The vexing evidentiary question raised by the asylum petitions of child soldiers of Africa applies both to evidence and substantive law generally. Namely, not only may, but sometimes *must* the law refuse to admit relevant evidence that would, if heard, surely mitigate the culpability of the person being judged? Though well-disguised and rarely directly discussed, the answer given by the law is a resounding "yes."

At this point in the Article, it is worth pointing out that the question in *Bah v. Ashcroft* was whether the courts could "hear" the stories of child soldiers in the legal, not literal, sense: that is, to "hear" the story means to allow it to be a factor in their decision. The distinction between legal versus literal hearing is, in some sense, a matter of degree. One must literally hear at least a little bit of a narrative—the general outline, a summary, perhaps even just the topic—before one can decide to refuse to hear it in the legal sense. Presumably, the more complete and literal the hearing, the larger the effects will be on both speaker and listener. Later in the Article I take up the question of what those effects are, but before I do, I will just note generally that though the line between legal and literal hearing is indistinct, the law nevertheless draws it.

The law embraces, as psychologically inevitable and morally legitimate, an exclusionary approach to the narrative model of judging, refusing to hear not just individual stories, but entire classes of them. In defending this position, I propose a serious challenge to those who advocate including diverse viewpoints in the law more generally. Specifically, I argue that the narrative model as it is most often understood makes two large mistakes. The first is to urge inclusiveness towards the "Other" without reservation. I argue that such inclusiveness is a good—but it is certainly not an unmitigated one. Inclusion can have deeply perverse (and empirically demonstrable) consequences, including inviting judgers to trade their commitments to justice for empathy with a wrongdoer. In literature, good narratives do more than enable us to empathize with characters whom we might otherwise have ignored; narratives also consciously (and inevitably) *select* which characters we should respond to in this way—and demand that we ignore the others. Good *legal* narratives do the same: justice is not passively blind; we often must proactively blind her. Put most bluntly, at the same time great literature teaches us to empathize with the deserving, it also teaches us to despise the despica-

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erroneously relied on a prior Supreme Court case in interpreting the statute to forbid persecutors from telling their own stories, the Court remanded the case for the agency to interpret the statue in the first instance. *Id.* at 1162, 1167.

    18.   *See id.* at 1164.

ble. The legal analogue is no less blunt: sometimes, good law demands rules that will cause various decision makers to deliberately ignore structurally relevant—but morally irrelevant—points of view.

This conclusion no doubt will rankle those who think that law (or, for that matter, literature) should never "moralize."[19] But my main ambition is to subvert the mainstream of the narrative judging movement, which embraces the moral dimension of both.[20] Yet as uncomfortable as I hope my arguments are to the inclusionary narrative model, I also hope they are not interpreted as harsh or intolerant. Exclusion provides an inescapable and even desirable opportunity to express the ethical evaluations shared (or aspired to) by a just society.

The second major mistake the inclusionary narrative model makes is failing to distinguish among different types of decision makers and institutional venues in law. The narrative model has borrowed most of its examples from criminal trials, and advocates of the inclusionary approach have usually studied and emphasized its application there.[21] But the inclusionary approach is actually most compelling outside of criminal trials. Because of the inevitability of value judgments in the narrative model, and because logically we must at some point hear the evidence even if just to decide *not* to hear it from then on, we have to be careful about where and when we do so. We know that some institutions and actors are better than others at rendering decisions like this. Often (but by no means always), the more transparent and accountable the decider, the more willing we should be to trust them with the inclusionary approach.

In Part I of this Article, I describe and defend the narrative model of judging more fully, pulling together strands of support from across disciplines, with particular emphasis on empirical psychology and the "law and literature" movement. In Part II, I offer my revision of the model, showing that these same disciplines suggest reasons to be skeptical of the inclusionary approach to it. Here, I challenge the idea that full narratives can simultaneously invite empathy and allow condemnation of individuals being judged. I also show that even if we could achieve this goal of simultaneous empathy/condemnation, it would lead to low-quality evaluation in terms of both accuracy and legitimacy. In Part III, I take these lessons from literature and psychology and apply them directly to the law. Here, I defend the *ex*clusionary approach, and argue that it results in better judging than would a more emphatically inclusionary one. In

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19.   *See, e.g.*, RICHARD A. POSNER, LAW AND LITERATURE 6 (1998).

20.   *See, e.g.*, WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988); NUSSBAUM, *supra* note 1; Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 869–72 (1988) [hereinafter West, *Economic Man and Literary Woman*]; Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 146–47 (1985) [hereinafter West, *Jurisprudence as Narrative*].

21.   *See, e.g.*, Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521 n.9 (1991).

this final Part, I also consider how my revised, exclusionary narrative model applies in different legal and institutional contexts.

I. A BRIEF DESCRIPTION OF THE NARRATIVE MODEL OF JUDGING

The narrative model is a sophisticated amalgamation of law, psychology, and literature—but its adherents in each of these disciplines have not often spoken to one another, or even known when they were speaking about essentially the same thing. As a result, defenses of the narrative model have been piecemeal. This perhaps explains why it has not been taken as seriously as it deserves. My first task is to synthesize the support for the narrative model, defining and defending it with more rigor than has been done to date. There are two parts to the model: one descriptive and the other normative.

Most of the descriptive support has come from cognitive psychology in the form of supplying alternatives to more conventionally Bayesian models of judging.[22] In Bayesian models, the judger comes to a decision by algebraically assessing the probabilities of a conclusion given various pieces of evidence.[23] In a Bayesian model, the order in which one presents evidence should not matter, emotion on the part of decision makers tends to introduce error (because emotion cannot shift the probabilities of objective facts), and decision makers should come to their conclusions by estimating the likelihood of their objective truth. Extensive experimental research casts considerable doubt on whether decision makers really do assess information according to Bayesian principles. This research does not just argue that people make predictable errors in estimating probabilities, given new evidence—although there is plenty of research showing just that.[24] More importantly for my purposes, this line of research shows that rather than estimating probabilities at all, most people process information by assembling it into plausible "stories," and then draw their final conclusions according to which of a set of possible stories makes the most narrative sense.[25]

Consequently, narrative models rely on very different assumptions about how people process information than do Bayesian models. Specifically, the order of presentation of evidence does matter; emotional re-

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22. *See, e.g.*, *id.* at 545–50.

23. *See* Colin Howson, *The Bayesian Approach*, *in* 1 HANDBOOK OF DEFEASIBLE REASONING AND UNCERTAINTY MANAGEMENT SYSTEMS 111, 111–12 (Philippe Smets ed., 1998).

24. *See, e.g.*, Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293 (1983).

25. *See, e.g.*, Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 24 (1999); Pennington & Hastie, *supra* note 21, at 521–23; Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242, 243 (1986); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004).

sponses by the decision maker are not necessarily distorting—indeed, they provide important information to the decision maker;[26] and conclusions cannot always be fully described as more or less "true"—instead, they are often better expressed as more or less *sensible*, not only in terms of accuracy, but also in terms of how well they comport with society's complex notions of causation and blame.[27]

Recent psychological work has focused explicitly on the capacities of decision makers in legal settings. Perhaps the most well-known in this vein has been Nancy Pennington and Reid Hastie's "story model" of jury decision making.[28] Pennington and Hastie systematically show that jurors reach verdicts by assembling the most sensible and easy-to-construct "story" out of the evidence.[29] Consistent with the earlier cognitive psychology research cited above, the order of presentation mattered for their subjects, as did how well a particular story comported with jurors' expectations and experiences outside the courtroom.[30] Just as a literary story becomes more or less comprehensible depending on the order in which the author presents her material, so, too, does a legal story.

In more recent work, Dan Simon has shown that facts and premises are not processed in a vacuum—they play off of each other, leading to conclusions that, contrary to so-called "rationalist" expectations, actually go back and alter people's perceptions of the facts.[31] People process information recursively, not linearly. Simon labels this form of decision making "cognitive coherence."[32] This recursiveness means that the order of presentation of evidence *does* matter.[33] So, too, does the timing of preliminary conclusions, according to work by Barbara O'Brien and Phoebe Ellsworth.[34] They demonstrated that simply being asked to identify a criminal suspect early in an investigation shifts how judgers process sub-

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26. ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 191–96 (1994).

27. *See* Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556 (2000); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 296–97 (1996).

28. *See* Pennington & Hastie, *supra* note 25, at 243; Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189–90 (1992); Nancy Pennington & Reid Hastie, *Explanation-Based Decision Making: Effects of Memory Structure on Judgment*, 14 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 521, 522 (1988) [hereinafter Pennington & Hastie, *Explanation-Based Decision Making*].

29. *See* Pennington & Hastie, *supra* note 21, at 520–29.

30. *See id.* at 524–28, 542; Pennington & Hastie, *Explanation-Based Decision Making*, *supra* note 28, at 529–30; *see also* Regina A. Schuller, Vicki L. Smith & James M. Olson, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCHOL. 316, 332–33 (1994); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 858 (1991); Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507, 532–33 (1993).

31. *See* Simon, *supra* note 25, at 530–31, 583–84.

32. *See id.* at 512–13.

33. *See id.* at 561 n.167 (citing Pennington & Hastie, *Explanation-Based Decision Making*, *supra* note 28).

34. Barbara O'Brien & Phoebe C. Ellsworth, Confirmation Bias in Criminal Investigations 22 (Sept. 19, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=913357.

sequent evidence in a case.[35] For instance, making a preliminary guess about which of a set of suspects is the actual culprit renders judgers more likely to discount subsequently learned exonerating evidence about that suspect and also to discount inculpatory evidence about alternative suspects.[36]

Moreover, a narrative format enables a decision maker to process information effectively in a way that contributes to the objective quality of a judgment. For instance, people remember facts better when they are presented to them as a story rather than as a disembodied list.[37] They also remember (and understand) information better when they "elaborate" on it, which involves associating the new material with other material, including personal experiences or anecdotes.[38] In other words, people have a hard time understanding information when it is removed from its context. But when context—especially sensible narrative—is supplied, they are actually quite capable and efficient at recalling it and giving it its appropriate weight.

The narrative model has particular implications for how the law of evidence should be structured. For instance, a Bayesian approach would say that if a piece of evidence does not shift the probabilities of a conclusion (like "the defendant is guilty"), then it is irrelevant and ought not be admitted. Consider the classic example of "heartstrings and gore" evidence: prototypically, graphic and upsetting photos of a murder crime scene. The main argument for admitting such photos is that they demonstrate the requisite *mens rea* of the killer; whoever committed the murders did not do it by accident, but coldly, viciously, and deliberately. But what if the defendant's argument is that this is a case of mistaken identity, and she is not the killer at all? In such a case, the defendant is more than willing to stipulate that the victim was murdered and that whoever killed him possessed the requisite *mens rea* for conviction. Should the prosecutor nevertheless be allowed to present the photos of the crime scene? Courts virtually never bar prosecutors from presenting such "heartstrings and gore" evidence (though they might limit it somewhat, allowing prosecutors to present some but not all of a set of crime scene photos).[39] Bayesian justifications for this common practice are strained at best, because the photographs cannot improve the accuracy of the judger's conclusion about the *identity* of the killer. But the narrative model has no problem with it at all. The photographs contribute to the

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35.   *See id.* at 3, 5.

36.   *See id.* at 6.

37.   *See* Pennington & Hastie, *supra* note 21, at 523–24. Such presentation can also impede memory, though, in the sense of leading subjects to fill in gaps with false information that is consistent with the story. JOHN D. BRANSFORD, HUMAN COGNITION: LEARNING, UNDERSTANDING AND REMEMBERING 156 (1979).

38.   *See* Pennington & Hastie, *supra* note 21, at 523–25; Cynthia S. Symons & Blair T. Johnson, *The Self-Reference Effect in Memory: A Meta-Analysis*, 121 PSYCHOL. BULL. 371, 372, 392 (1997).

39.   D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force"—Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 429–31 (1998).

story of the crime, enabling judgers to make full sense of what happened and what is at stake, so that they can better focus on what is genuinely in dispute. This narrative view of evidence was explained and explicitly endorsed by the Supreme Court in *Old Chief v. United States*:

> The "fair and legitimate weight" of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. . . . Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.[40]

On this view, enabling and enriching legal narratives will improve not only the objective quality of people's judgments, but also their moral quality. Empirical social psychology offers some support for this normative defense. For instance, inducing individuals to engage in "perspective taking" of a "target" other has been associated with more advanced levels of moral reasoning[41] and greater altruism,[42] and leads to lower levels of aggression towards[43] and stereotyping of[44] the target. Support has also come from the restorative justice movement, which argues that the best way to render a judgment of a criminal wrongdoer is to invite all "stakeholders" (defendant, victim, or anyone else with an interest, such as community members and leaders) to a meeting where, prototypically, both the victim and the offender are given the opportunity to tell their side of the story, and, importantly, the other is made to listen.[45] The point is not just to offer up a full set of facts, it is to present them in a particular, open procedure, where the stakeholders are invited to see each other as humans in a rich context, not as abstract figures providing dry testimony.[46]

Though psychology does suggest some normative reasons to endorse a narrative approach to judging in the law, the law and literature

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40. 519 U.S. 172, 187 (1997).

41. *See* Lawrence Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach*, *in* MORAL DEVELOPMENT AND BEHAVIOR 31, 32, 49 (Thomas Lickona ed., 1976).

42. *See* C. DANIEL BATSON, THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER 83–84, 89 (1991); Nancy Eisenberg & Paul A. Miller, *The Relation of Empathy to Prosocial and Related Behaviors*, 101 PSYCHOL. BULL. 91, 91–92 (1987).

43. *See* Norma Deitch Feshbach, *Studies of Empathic Behavior in Children*, *in* 8 PROGRESS IN EXPERIMENTAL PERSONALITY RESEARCH 1, 29–31 (Brendan A. Maher ed., 1978); Deborah R. Richardson et al., *Empathy as a Cognitive Inhibitor of Interpersonal Aggression*, 20 AGGRESSIVE BEHAV. 275, 287 (1994).

44. *See* Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708, 708 (2000).

45. *See* Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1246–48 (2004) (describing the different formats that restorative justice "mediations" have taken).

46. *See id.* at 1246–51.

movement has supplied the most visible and developed home for the model. The law and literature movement, of course, is multifaceted. One branch of it focuses on methods: that is, some law and literature scholars borrow the sophisticated techniques of literary criticism to suggest improvements in how the law should interpret its own texts.[47] Another group—not entirely distinct from the first—approaches the study of literature as a way to understand the substance and value of laws, legal structures, and whole legal cultures.[48] At risk of oversimplifying its distinctiveness from these other branches, I direct my aim instead on those who focus on how literature's "ways of knowing" and moral evaluation differ from how classical approaches to law do the same.

This approach argues that the law can learn a great deal from literature; indeed, that those areas of the law which depart furthest from the narrative model of knowing and judging are the most prone to normative errors. The best judging stems from a sort of empathic immersion—exactly the sort of experience one gets from reading literature. People are not collections of facts; they are creatures embedded inside rich contexts. Before one can accurately or legitimately judge people (or situations), one must understand their condition as a reader understands a literary character. The approach is captured by statements such as, "This is the one vital lesson that the literary person, and hence the literary analysis of law, can uniquely teach us: she can teach us how to empathize in the hard case. It is for this teaching that the law and literature movement is singularly significant."[49] Taking a more arm's length approach has certain advantages that narrative proponents would readily acknowledge, such as making it easier to avoid generalizations that trade on prejudice, inaccurate stereotypes, or favoritism. Still, not only does the more mathematical Bayesian world not come naturally to us, the lessons of law and literature have pointed out that in many ways it is also not as ethically appealing.

The narrative movement has been gaining in influence and has spawned a growing scholarship.[50] This scholarship has occasionally been

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47. *See, e.g.*, INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 37–42 (Sanford Levinson & Steven Mailloux eds., 1988); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 277–81 (1980); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 551–52 (1982); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739–40 (1982).

48. *See, e.g.*, BROOK THOMAS, CROSS-EXAMINATIONS OF LAW AND LITERATURE: COOPER, HAWTHORNE, STOWE, AND MELVILLE 4–7 (1987); RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION xi–xiv (1984); JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 8–10 (1984).

49. West, *Economic Man and Literary Woman*, *supra* note 20, at 874.

50. *See, e.g.*, LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996); NUSSBAUM, *supra* note 1; WEST, *supra* note 1; Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes,*

misunderstood, or even caricatured, as an argument that the law can be edified by listening to the voices of the oppressed,[51] or as a wooden admonition that judges should read or cite more literature in their opinions.[52] It is, of course, far more sophisticated than that: it offers an argument about how judgers actually do, and should be invited to, process information. It further cautions that if citizens cannot make narrative sense out of a legal conclusion (such as a verdict), they are less likely to perceive it as either legitimate or acceptable—and such failures of legitimacy have consequences.[53] If we want judgers to perform their task well, the narrative model argues, we must offer them the full panoply of evidence that will enable them to construct a cognitively and emotionally satisfying, and legitimizing, story.

The emphasis on inclusion is understandable. Humans do not generally need to be reminded to condemn the contemptible, but they do often need to have their views challenged about what is contemptible in the first place. Truly adopting the perspective of another person takes effort; research reveals our default setting to be quite self-centered.[54] The narrative model, then, can be understood as a method for ensuring that all *relevant* evidence be presented to judgers in a format they can process. Moreover, it is a device for reminding judgers of their obligations toward those they judge. The law has a tendency, by declaring certain behaviors to be illicit or even criminal, to create categories of the "Other."[55] The inclusionary emphasis in the narrative model pushes against this tendency.

But if one cannot judge a person before hearing all relevant information about him and his situation, and in a manner that invites the judger to understand him, then the narrative model risks turning into a one-way ratchet towards the inclusion of more and more perspectives.

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and Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511 (1992); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Richard O. Lempert, *Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research*, 21 ST. LOUIS U. PUB. L. REV. 15 (2002); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). The movement is also recognizable in Foundation Press's popular "Law Stories" series, now thirty-two volumes strong, which tells the behind-the-law details of famous legal cases (in fields as diverse and surprising as business tax, legal ethics, and antitrust), with the ambition of supplementing the usual, more narrow pedagogy of the case method. Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405, 406–08 (2002).

51. *See* POSNER, *supra* note 19, at 345–77. To be fair, Posner offers a far more sophisticated challenge to the law and literature movement at 305–44.

52. *See* M. Todd Henderson, *Citing Fiction*, 11 GREEN BAG 2D 171, 171–72 (2008).

53. *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1390–91 (1985).

54. *See* Mark H. Davis et al., *Effect of Perspective Taking on the Cognitive Representation of Persons: A Merging of Self and Other*, 70 J. PERSONALITY & SOC. PSYCHOL. 713, 721–22 (1996); Nancy Eisenberg et al., *Empathy-Related Responding and Cognition: A "Chicken and the Egg" Dilemma*, *in* 2 HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT: RESEARCH 63, 65–70 (William M. Kurtines & Jacob L. Gewirtz eds., 1991); Martin L. Hoffman, *Interaction of Affect and Cognition in Empathy*, *in* EMOTIONS, COGNITION, AND BEHAVIOR 103, 104–07 (Carroll E. Izard, Jerome Kagan & Robert B. Zajonc eds., 1984).

55. For a brief overview of the "Other project" in law and literature, see Atkinson, *supra* note 1.

And no serious advocate of the inclusionary narrative model would support the position that defendants have an unlimited right to present every bit of evidence that they feel is necessary to win their case. But the exclusions acceptable to the inclusionary advocates differ from the narrative model that I defend in this Article, both in degree and in kind. In my own approach to the narrative model, we do not have an unfettered obligation to understand the "Other"—or at any rate, if we do, that obligation is limited to narrow settings, and almost never in a trial court. Moreover, I defend the use of exclusion on explicitly *moral*, rather than merely structural or neutral coherence-based grounds. In my narrative model, we can exclude perspectives *because* they are "Other." I argue that inclusion of the perspective of the "Other" is inherently dangerous business; the law recognizes it as such and acts accordingly.

II. A LITERARY AND PSYCHOLOGICAL CRITIQUE OF THE NARRATIVE MODEL

At first cut, it looks like the formal rules of evidence side with the inclusionary narrative model. Under Federal Rule of Evidence 401, evidence is relevant (and presumptively admissible) if it would change our estimate of the odds that a fact "of consequence to the determination of the action" is true.[56] The definition is self-consciously broad, and reflects the commonsense notion that "more evidence is better," if the evidence would improve a judger's accuracy in determining the merits of a case.

But no sooner do the Rules give than they begin relentlessly taking away. Virtually every other Rule carves away what can be shown to juries, *despite* its relevance. The most intuitively appealing justification for any particular exclusion is that the excluded evidence would not improve the accuracy of the final judgment. But this defense just does not hold up to scrutiny. Many of the rules forbid evidence for policy reasons alone, often to advance goals completely unrelated to the case at hand. Consider, for example, Rule 407, which forbids introduction of evidence of subsequent remedial measures taken after an accident on the theory that the Rules should not discourage tortfeasors from fixing dangerous conditions for fear of it being used against them in court;[57] or Rule 412, which generally excludes the sexual history of rape victims largely on the theory that "putting victims on trial" not only deters victims from coming forward, but is also simply an offensive and humiliating practice.[58] This much stingier spirit of admissibility is embodied by the catch-all Rule 403 (on which, arguably, all of the other rules are merely a gloss): "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

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56. FED. R. EVID. 401.
57. *Id.* 407 advisory committee's note.
58. *Id.* 412 advisory committee's note.

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[59]

This idea that the law excludes evidence even when it is relevant and even when it would, if given its appropriate weight, improve the accuracy of the final judgment causes rebellion in the hearts of defendants, law students, and even many lawyers, policy makers, and academics. Worse still is the notion that the exclusions can happen for obviously moral reasons—that is, when the exclusions are designed to reinforce or even shape notions of the good society. Nevertheless, evidence law allows for exclusion on these grounds, even if sometimes the moral basis for the exclusion is well disguised. It is not just evidence law, though. The substantive law underlying it often excludes what many or even most would consider to be "relevant" evidence, if the task is assessing the culpability of certain conduct.[60]

Consider, for example, statutory rape. The defendant's lack of actual knowledge about the age of the victim will not supply a defense to the crime.[61] This means that information about a defendant's lack of *mens rea* on this element cannot be supplied to the jury—Rule 401 would bar any evidence to that effect as irrelevant. The substantive law has drawn, *ex ante*, an unambiguously moral conclusion about the crime of statutory rape: a man's lack of knowledge about his victim's age is (morally) irrelevant to his guilt, and therefore he is not entitled to tell his story about any misconception he had about it. He simply will not be heard. Similarly, at least a couple of states do not allow a defendant to claim a mistake of fact with regard to consent in a rape case, even if such a mistake is reasonable. That is, he will not be allowed to introduce evidence that he *thought* that the victim consented, even if she actually did not.[62] More prosaically (and less controversially), a defendant accused of theft ordinarily would not be allowed to present evidence that he desperately needed what he stole. We would not even let him introduce evidence that after he stole, he felt guilty and put it back. "Not needing it" or "keeping it" are not legal elements of the crime.[63]

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59. *Id.* 403.

60. Indeed, the generosity of Rule 401 is something of an illusion, because even if no other rule existed, vast swaths of germane evidence would still be excluded on its own terms. Rule 401 only considers evidence "relevant" if it is "of consequence to the determination of the action," which means that the evidence must either build up or tear down the legal elements of a cause of action or criminal charge. *Id.* 401. If it does not, the evidence will fail Rule 401's test and be excluded in court, no matter how pertinent it might be to a dinner-conversation evaluation of the blameworthiness or liability of the defendant.

61. *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 656 (2003) (noting that the "traditional approach . . . has been to view the crime of statutory rape as of the strict liability variety with respect to [the age of the victim], so that the defendant had no defense because of his mistaken belief as to age").

62. *See, e.g.*, State v. Reed, 479 A.2d 1291, 1295–96 (Me. 1984); Commonwealth v. Ascolillo, 541 N.E.2d 570, 574–75 (Mass. 1989); Commonwealth v. Simcock, 575 N.E.2d 1137, 1140–42 (Mass. App. Ct. 1991).

63. *See* MODEL PENAL CODE § 223.2 (1980).

The idea that we hamstring parties for moral reasons is somewhat upsetting to those committed to a liberal (in the classic, tolerant sense) system of government, and is anathema to the spirit that animates the inclusionary narrative model. It is fairly easy to fool ourselves that exclusions exist only to improve the "accuracy" of a verdict, not to advance a moral agenda; indeed, it usually takes a semester of relentless pressing by evidence professors to get students to see it, at least fleetingly. Nevertheless, examples like this—of the law's refusal to hear stories that, in common parlance, would affect culpability—are legion, particularly in the criminal arena.

In the next two Sections, I argue that this reality is neither regrettable nor avoidable. To the extent the narrative model of judging reflects a respect for the requirements of good literature, then we should turn to that discipline's approach to see what it demands of judgers (and of the legal system more generally). I start with literature as my first Section because the most forceful and convincing challengers to exclusion in law have come from literary critics, who argue that the inclusionary approach embodied in literature would be profitably employed in the legal arena. To the contrary, I argue that literature actually has no such bias towards greater inclusion; literature, just like law, relentlessly excludes narratives based on a moral rejection of certain perspectives. In the Section after that, I turn to psychology. Again, to the extent that the narrative model of judging reflects a more sophisticated understanding of human cognitive habits and abilities than do its alternatives, it makes sense to see whether psychology can support a normative move toward greater inclusion of evidence. I argue that it probably cannot.

A.   Literature

Recall again the assertion that "[t]his is the one vital lesson that the literary person, and hence the literary analysis of law, can uniquely teach us: she can teach us how to empathize in the hard case. It is for this teaching that the law and literature movement is singularly significant."[64] Appealing and compelling as this sounds, as a normative matter the statement is incomplete, and as a descriptive matter it is simply incorrect, either for law *or* literature.

To see why, consider the following (admittedly exaggerated) summary of how the inclusionary narrative model might evaluate Thomas Keneally's Booker Prize-winning novel *Schindler's List*.[65] Using the model, we would have to conclude that the novel (and the film adaptation that followed it) is morally defective. A central character, Amon

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64. West, *Economic Man and Literary Woman*, *supra* note 20, at 874; *see also supra* note 49 and accompanying text.

65. THOMAS KENEALLY, SCHINDLER'S LIST (1982); *see also* SCHINDLER'S LIST (Universal Pictures 1993). The film won Oscars for Best Film, Best Director, and Best Adapted Screenplay, among others. *The 1994 Oscar Winners*, N.Y. TIMES, Mar. 22, 1994, at C18.

Goeth, the commandant of the Plaszów labor camp, is relentlessly de-picted as a "stereotyped, villainous 'other[],'"[66] whom the reader has not been invited to understand or connect with. Yet Goeth is as human as you and me, indeed, as human as Oskar Schindler and the Jews he res-cues.[67] Author Thomas Keneally took great pains to help us empathize with Schindler and the self-named *Schindlerjuden*.[68] But when it comes to Goeth, in contrast, Keneally suffers from "empathic impotence,"[69] for the literary ideal demands compassion "where such empathic knowledge is most difficult: of the person with the different racial heritage, the dif-ferent family history, the different intelligence, or the different ambi-tions, goals, happiness, and sorrow"[70]—or, I might add, of the person with tragically misguided opinions about Jews. A good novel recognizes that "seeing others as similarly and fully human entails seeing them as individuals with their own stories to tell."[71] This one did not, and because of this, Keneally's novel was a failure and indeed, should be morally crit-icized. Similarly, before we could appropriately condemn Goeth in real life (say, in a court of law for his war crimes), we would need to appre-ciate his family history, any limits to his cognitive or emotional capaci-ties, *everything*, in fact, that would be relevant to understanding why he did what he did. Condemn him, yes—but to do so with any legitimacy, we must understand him first.

The above paragraph should strike anyone, I hope, as unsettling—even ridiculous—either as a principle of good literature or good law. Goeth was a sadist, a casual murderer whom Keneally had no obligation to paint in a sensitive way despite our sharing a common humanity with him. Literature is rife with similar examples of villains painted with brushes of untempered evil: *Othello*'s Iago,[72] *Billy Budd*'s John Clag-gart,[73] *The Executioner's Song*'s Gary Gilmore,[74] and the list goes on. In each one, the author's depiction heightens our pity for some characters (the *Schindlerjuden*, Desdemona, Billy Budd, Gilmore's two murder vic-tims) by refusing to allow sympathy for their tormentors. Though not every novel does—or should—engage this technique, that some very good ones do, and do it well, is clear.

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66.   BOOTH, *supra* note 20, at 203.
67.   Goeth, in fact, was not just "human" in the sense that he was a fictional character whom we are told is human. As the reader most likely knows, *Schindler's List* is a true story; Goeth was a living, breathing person and the atrocities he performed, as detailed by Keneally, really happened. *See* KENEALLY, *supra* note 65, at 10 (explaining that the author chose to "use the texture and devices of a novel to tell a true story").
68.   *See id.* at 9–11.
69.   West, *Economic Man and Literary Woman*, *supra* note 20, at 869.
70.   *Id.* at 872.
71.   NUSSBAUM, *supra* note 1, at 96.
72.   WILLIAM SHAKESPEARE, OTHELLO; *see also* John Dover Wilson, *Introduction* to WILLIAM SHAKESPEARE, OTHELLO i, xxiv–xxx (Alice Walker & John Dover Wilson eds., Cambridge Univ. Press 1960).
73.   HERMAN MELVILLE, BILLY BUDD (Wash. Square Press 1972) (1924).
74.   NORMAN MAILER, THE EXECUTIONER'S SONG (Little, Brown & Co. 4th prtg. 1979).

The less exaggerated, and far more difficult, legal analogue to the example of Amon Goeth is Amadu Bah. Do we paint him as persecutor, or invite the image of him as victim? It is a far harder call whether we would be morally entitled, perhaps even compelled, to include his background as a child soldier when we are judging his particular case. But both examples demonstrate why and how the choice to exclude an Other's perspective can be both descriptively and normatively compelling. Indeed, the choice of whether to include his own story is the choice of whether to *make* him an Other in the first place—and it is not *obviously* wrong to use exclusion to do so.

An inclusionary approach to literature demands a rich portrayal of context: a narrative fullness that essentially defines what we mean when we call something "literature," as opposed to something that is mere description or argument.[75] Nevertheless, too much context results in something equally unidentifiable as literature. To some degree this is because the human mind can hold only so much detail. But this is only part, and really the less interesting part, of the story: even were we able to process the voluminous (even endless) amount of descriptive detail a writer could deploy in generating a narrative, we would not want to do so.

Start with what it would look like to aim *not* to lead the reader along a single, fixed narrative, and to instead entertain all possibilities and supply unlimited context. This is literature that strives to achieve complete "openness"; that is, the quality of serving up "questions" to the reader, rather than "answers."[76] The ostensible goal of "open" literature is to leave everything untold, so that the reader is left acutely aware of the myriad possibilities and boundless diversity of life.[77] In his important work *The Company We Keep: An Ethics of Fiction*, Wayne C. Booth pokes fun at this genre of literature, demonstrating that regardless of whether a certain measure of "openness" is desirable, a pure devotion to it is impossible.[78] Every word and phrase selected serves to displace another, which would have had a slightly (or radically) different meaning.[79] The author could simply continue to add "or" clauses to "open" possibilities of interpretation. But even if the author could in this way actually arrive at, as Booth puts it, "The Great Inane," he surely "could tell no stories there."[80]

One can make a corollary observation about the impossibility and undesirability of attempts to do the reverse: to include the complete set of particulars in a work of literature, *closing* all loopholes, instead of en-

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75. *See* POSNER, *supra* note 19, at 214 ("Literature . . . is not even trying to convey concepts in the most economical manner possible (in contrast, say, to an 'executive summary')." (emphasis omitted)).

76. *See* BOOTH, *supra* note 20, at 61.

77. *See id.*

78. *Id.* at 62–65.

79. *Id.* at 62.

80. *Id.* at 65.

suring that all remain open. Such a work would include a total accounting of every detail and every minor player, for fear that something important might have been left out.[81] Martha Nussbaum, in the introduction to her *Love's Knowledge: Essays on Philosophy and Literature*, suggests the weaknesses of any book written that way, when she observes that literature is valuable as a kind of filtering device for life.[82] While "much of actual life goes by without . . . heightened awareness," literature serves as "a close and careful interpretative description," which "giv[es] the reader experience that is deeper, sharper, and more precise than much of what takes place in life."[83] Without that filtering, a novel would be an uninteresting, unreflective chronology of the mundane details of everyday living. A reader would do better to toss such an overly descriptive "novel" aside and simply live his own life.

In other words, good, useful, readable literature demands that the author select which details are important, relentlessly paring away the relevant from the irrelevant. Failure to do so means no story has been told at all. We can draw an analogy here to common criticisms of economic modeling. Detractors frequently argue that economic models are too spare, that they ignore vast and important swaths of human experience, rendering their models suspect as either explanations or predictors of the real world.[84] Economists, rightly, respond that a model that is too enriched loses its value as a tool for crystallizing and clarifying all the messy variables in play.[85] Indeed, a "model" that includes every variable that might explain the world is not a model at all; it is just "data." The whole point of a model is to condense and weed out the irrelevant and unilluminating. A perfectly specified economic model is similar to Lewis Carroll's fictional 1:1 scaled map—a device useless to the task for which a map is designed, which is, to model, not reproduce, the real world.[86] In a similar way, a novel is a pared-down "model" for life, not an unfiltered replication of it.

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81. The stronger view of this is that one adds detail not only out of fear that important bits might be left out, but because everything actually *is* important to a full and rich telling of the story.

82. MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 47–48 (1990).

83. *Id.*

84. *See, e.g.*, Daniel R. Cahoy & Min Ding, *Using Experimental Economics to Peek into the "Black Box" of Jury Behavior: A Proposal for Jury Research Reform*, 14 S. CAL. INTERDISC. L.J. 31, 53 (2004) (indicating that fields that study jury behavior, particularly psychology, view "economic models used to predict and define human cognition [as] overly simplistic and incomplete in view of the complex behavior that is known to underlie real human decisionmaking").

85. *See, e.g.*, Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 715 ("The constant effort to bring to the fore every bit of psychological and behavioral ambiguity results in the use of models that are too nuanced and too complex for their own good."); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 853 (2003) (critiquing overly complex economic models in the context of contract law).

86. Eventually, the characters simply begin to "use the country itself, as its own map," assuring us that "it does nearly as well." LEWIS CARROLL, SYLVIE AND BRUNO CONCLUDED 169 (London, MacMillan 1893).

Either over- or under-specified literature can be worse than a waste of the reader's time; that is, worse than being simply structurally flawed, uninteresting, and unhelpful. Giving *too few* particulars risks excluding morally relevant ones. It might fail to invite sympathy where sympathy is due. And drawing attention to *too many* particulars has the necessary consequence of drawing our attention to at least some of the *wrong* particulars, resulting in a piece of work that gives a morally incorrect account of its subject. We reject a book (or at least so much of it) that delivers what we consider to be an offensive message, or that we feel has uncritically painted a repugnant picture of the world. We expect the author to draw our attention to the *right* particulars—not too many, and not too few—and ethical critics will justly hold her accountable for failures to do this.

Though authors can err in either direction, most critics who accept the ethical obligations of fiction prefer to focus on the under-specification trap. Booth provides at least one example when he explains the literary failures of the pop-fiction novel *Jaws*.[87] He argues that the author—deliberately—did not humanize the victims of the primary antagonist in the book, a great white shark.[88] The characters are drawn as mere fodder for a sensationalist and base desire in his readers for gore. In short, the characters are fish food.[89] The author's failure to portray them to us as real people cons us into "enjoying the prospect of bloody death for those who don't matter"[90]—a sort of murderous complicity with which Booth is, and we should be, uncomfortable.[91] It is this under-specification that makes *Jaws* a morally "bad" novel, whatever its more structural failings may be as well.

But is this really fair? Is it reasonable to expect an author to include a full fleshing out of every character who appears in her novel? The answer, of course, is no. As Booth himself hints without directly saying, an author need only personalize those who "matter."[92] Booth's main complaint about *Jaws* is that the reader is left thinking almost no one matters at all.[93] But when does a character matter? When making her decision whether to paint in vivid colors or a flat gray, part of an author's consideration is whether the character is necessary to drive her story along in a comprehensible manner. This is the structural sense of "matters." Following it, we might find that by failing to flesh out certain characters, the author has left us with a confusing, cursory, or uninteresting story. Com-

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87.   *See* BOOTH, *supra* note 20, at 202–04; *see also* PETER BENCHLEY, JAWS (1974).
88.   *See* BOOTH, *supra* note 20, at 202–04.
89.   *See id.*
90.   *Id.* at 202–03.
91.   *See id.* at 202–04.
92.   *See id.* at 202–03.
93.   *See id.* ("I am both fearing spectacular bloodshed and desiring it, enjoying the prospect of death for those who don't matter, hoping for (and fully expecting) final safety for the good guys (who don't matter much more) . . . .").

pare this sense of mattering with the question of when evidence is "relevant" in a trial—structural mattering is, loosely, like evidence being relevant when it improves accuracy or comprehensibility.

The other sense of "matters," though, is when creating a rich sense of a particular character is morally necessary for the story.[94] The author must, in other words, three-dimensionalize certain characters not just so that her narrative remains interesting, comprehensible, and digestible but also because she wants to maintain a positive relationship with the decent reader. It is this latter sense of a character's mattering that is at the heart of ethical criticism. Some perspectives simply ought to be included, not as a structural matter (to make the story engaging or comprehensible), but as a moral matter (to make the story ennobling, or at least not degrading).   Full engagement with the narrative involves assessing whether the author has made good choices in this regard. Compare this, again, to whether evidence is "relevant" in a trial—moral mattering is like evidence being relevant according to whether it is consistent with, or even advances, broader goals. Naturally, one might disagree with the author's decision about who matters enough to warrant full inclusion. But in any event, just as only some characters "matter" in the structural sense, only some characters "matter" in the moral sense, too, such that we would criticize the author if she failed to include them.

Even though ethical critics do tend to focus on the under-specification trap, the over-specification trap can be just as bad. The necessity of *in*cluding a fleshing out of certain characters has the obvious, but generally ignored, flip side: we must also pointedly *ex*clude others, and for exactly the same reasons. The author must make the decision that some characters do *not* "matter" to the story. And again, one way characters might not matter is in the structural sense—telling their story would be stylistically confusing, or including them would be superfluous and lead to a flabby tale. Just as excluding evidence on accuracy grounds generates little excitement, literary exclusion on structural grounds is not especially controversial, because an author needs to create a tight, interesting narrative. But characters also might not matter in the moral sense; that is, including their points of view would be ethically troubling. Even if an author could write a sensible, engaging novel by including the perspectives of some characters (that is, we can think of no plausible structural grounds for exclusion), she should exclude them anyway if including them would demonstrate empathy toward their situation that they do not deserve. Even more so, she should exclude them if including their perspective would disable proper empathy towards characters who *do*

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94.   I recognize that the two are usually related in practice. For instance, if we were to exclude a character's point of view for moral reasons, we are not likely to find that his or her inclusion nevertheless would have been structurally desirable. The concepts, however, are analytically, and importantly, distinct.

matter. This reason for exclusion deserves much more careful attention than it has received in either ethical literary criticism or in law.

The example from *Schindler's List* illuminates both the inclusionary and exclusionary points. Much of the power of the novel (and to a much lesser extent, the movie) comes from its success in humanizing and particularizing people who in less successful portrayals—and in history books—have been woodenly displayed in a tragic "lump" of "Holocaust survivors." Had Keneally failed to paint the *Schindlerjuden* as vividly as he did in his novel, he would have created a cartoonish, superhero melodrama about Schindler himself, limited in its ability to make us engage with the *Schindlerjuden* and empathize with their circumstances. The *Schindlerjuden* would have remained distinctly "Other," and not only would Keneally's novel have felt incomplete and perhaps even beside the point (what is Schindler, after all, without the *Schindlerjuden* he saves?), but worse, Keneally's opportunity to expand our moral capacities by recognizing and even befriending the *Schindlerjuden* would have been lost.[95] Had Keneally not richly described the *Schindlerjuden*, he would have been vulnerable to the under-specification criticism; he would have failed to include the perspectives of characters who matter in a structural sense, yes, but in a moral sense as well.

A decision to exclude a rich portrayal of the *Schindlerjuden* would have made for an uncompelling novel, and perhaps even an offensive one. But now consider Keneally's deliberate decision to exclude a full understanding of Goeth. We know nothing about the inner workings of Goeth's mind; we do not know why he takes pleasure in routinely "stepp[ing] out his front door and murder[ing] a prisoner at random."[96] The few up-close glimpses we do get of him, far from completing and humanizing his point of view, serve to *reinforce* our notion of him as a monster, a creature whose moral core has been completely rotted out. But still, from the perspective of *structure*, Goeth is an important, even central, figure. Many of the novel's most compelling moments focus on him. We cannot dismiss him as a minor character. As both an important character and as a human being, shouldn't Keneally have offered Goeth the respect of a sensitive portrayal of his circumstances?

To answer this, imagine that Keneally had realized the "error" of his ways. Before sending his manuscript off for publication, he determined that such an important (indeed, central) figure as Goeth deserved

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95. In fact, to the extent its "cast of thousands" *did* limit our ability to become entangled more completely with a subset of the *Schindlerjuden*, his novel was not as morally effective as it could have been. *Cf.* KENEALLY, *supra* note 65, at 196–97; Bernard Weinraub, *Steven Spielberg Faces the Holocaust*, N.Y. TIMES, Dec. 12, 1993, at 1 (describing the film as having "a cast of thousands"). I contrast it in my own mind with ANNE FRANK, THE DIARY OF A YOUNG GIRL (1952), which did not display as vividly the horrors of the extermination of the Jews by Nazi Germany, yet nevertheless is a far more moving and powerful work. I attribute its success to completely immersing us in the thoughts and lives of Anne and her family, so that our relationship with her was far more personal and connected than with Keneally's *Schindlerjuden*.

96. KENEALLY, *supra* note 65, at 192.

a more complete drawing, and transformed him from a caricature into a genuine character. Imagine Keneally sensitively reworking Goeth, explaining his motivations in a compelling way (his parents were rabid anti-Semites who drilled the subhumanity of Jews into his head from an early age, his schooling was drenched with similar hateful lessons which all but ensured his transformation into the man he became, etc.). To the extent he was successful in truly creating a thorough and insightful treatment of Goeth, we would be disabled from hating him. We might find his actions wrong, and his character, now explicable, nevertheless rotten. Still, if the portrayal is truly sensitive and convincing, we could not really *blame* Goeth for his character. Being willing to really hear his story entails slipping into his skin and creating a relationship (even a sort of friendship, as Booth would say[97]) that is incompatible with hating him. Of this, at the very least, we can be sure: had Keneally so written *Schindler's List*, it would be a very, very different work than it is now—and vulnerable to harsh ethical criticism.

Keneally did not write that alternative novel, but others have proposed creating something similar. In 2003, CBS television aired a miniseries on the early life of Hitler.[98] No sooner was the project announced than it was condemned by Jewish leaders.[99] Their concern was that by depicting Hitler's childhood and early adulthood, the miniseries would inevitably humanize him.[100] The head of the Anti-Defamation League stated that it was "distressing that people would spend talent, time and money to make this man human."[101] As reported by the *New York Times*,

> Critics of the project said that whatever its intentions, a movie dealing with a young Hitler is bound to create a certain sense of sympathy . . . . Even in a film like 'Silence of the Lambs,' the Oscar-winning performance of Anthony Hopkins as a cannibalistic killer was so captivating that audiences were alternately revolted and charmed by him.[102]

In the face of the objections, CBS ended up gutting their script, ignoring most of Hitler's youngest years and focusing instead on his life after the age of thirty.[103] Instead of any kind of sensitive portrayal, Hitler was depicted as "evil from day one." "At various times in the show, Hitler is sweating, drooling, spitting food, and gushing maniacally about his passion for hatred. He is humorless and he seems to have no personal

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97. BOOTH, *supra* note 20, at 170.

98. *Hitler: The Rise of Evil* (CBS television broadcast May 18, 2003, May 20, 2003).

99. *Jewish Leader Praises CBS Series on Hitler*, CHI. TRIB. (Redeye Edition), May 6, 2003, at 29.

100. *Id.*

101. *Id.*

102. Bernard Weinraub, *Planned Mini-Series on Hitler's Early Life Brings Criticism*, N.Y. TIMES, Aug. 20, 2002, at E1.

103. *See* Rob Owen, *Hitler Miniseries Better than Average*, PITTSBURGH POST-GAZETTE, May 18, 2003, at TV-5.

magnetism at all."[104] Thus, instead of making an ethically repugnant miniseries, executives at CBS chose instead to make a bad one. The concession did satisfy its harshest moral critics, however. The Anti-Defamation League issued a statement after it aired:

> "Hitler: The Rise of Evil" teaches a significant lesson of history in a powerful way. Not only does the brilliant portrayal by Robert Carlyle show Hitler for the monster that he was, but the film shows how many times he could have been challenged and wasn't. It makes us understand how fragile democracy is and how potent evil is.
>
> . . . . We commend CBS and Alliance Atlantis for this important program.[105]

At this point, one could object that it can *never* be morally correct to consciously marginalize another human being, no matter how awful he might seem. That is, the critics who objected to CBS's originally planned version of Hitler's life story are just as wrong as any critics of my alternate version of *Schindler's List*. While exclusion of certain otherwise-relevant points of view for stylistic reasons cannot be helped, we ought never be told that these points of view do not morally *matter*. If Goeth's point of view could have been included in a stylistically effective manner, it ought to have been. If a three-dimensional Hitler was necessary to a literarily as well as morally effective version of his life's story, then we should have been open to it. A skilled author is capable of creating a *sensitive* portrayal of evil that is nevertheless not *sympathetic*, and an attentive reader should be capable of evaluating the information fairly and of coming to a morally correct conclusion on her own, without the author needing to parboil the text. And *this* is the lesson that literature offers law: the moral inclusionary task might be hard, but it is mandatory.

One answer to this criticism is that it is overconfident in the ability of a text, let alone a legal system, to be value neutral—a point that has been made forcefully by numerous scholars. Every word chosen has the author's meta-intention imbedded within it; even the choice to use one word involves the choice *not* to use another. As explained by literary-deconstructionist-cum-law-professor Stanley Fish, "Words are intelligible only within the assumption of some context of intentional production, some already-in-place predecision as to what kind of person, with what kind of purposes, in relation to what specific goals in a particular situation, is speaking or writing."[106] These embedded intentions necessarily reveal (at least to the attentive reader) the values expressed by the writer, for which his work and sometimes even he himself may be judged.

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104. Debra Neff Nathans, *Hitler Miniseries Cautious*, CAP. TIMES (Madison, Wis.), May 20, 2003, at 1D.

105. Press Release, Anti-Defamation League, ADL Statement on the CBS Miniseries "Hitler: The Rise of Evil" (May 5, 2003), *available at* www.adl.org/PresRele/HolNa_52/4258_52.asp.

106. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 295 (1989).

If there is one thing the deconstructionists have made us sure of, it is that had Keneally tried to write a value-neutral (as to Goeth) alternative text, he could not have been truly unbiased in his execution, even putting to one side the fact that the very choice to include Goeth's motivations in the first place would have been a value-laden one.[107] It is a good guess that the words in our alternate-universe version of *Schindler's List* would have scorned Goeth's motivations, even if subtly so. To the extent they were damning at all, the text would not have succeeded in painting a genuinely sensitive picture of him. If instead his words were (equally subtly) condoning, ethical readers would be justified in criticizing the text for it.

Even if a genuinely neutral portrayal could be written, it certainly could not be written by many. Consider Vladimir Nabokov, one of the best writers of the twentieth century, who was unable to pull it off in his novel *Lolita*, about a man's sexual relationship with a young teenaged girl.[108] Nabokov's purported ambition—if one takes at face value the words of the "psychologist" in the fictional foreword—was not to generate any sympathy for the protagonist, Humbert Humbert. The "psychologist" writes:

> I have no intention to glorify "H.H." No doubt, he is horrible, he is abject, he is a shining example of moral leprosy, a mixture of ferocity and jocularity that betrays supreme misery perhaps, but is not conducive to attractiveness. He is ponderously capricious. Many of his casual opinions on the people and scenery of this country are ludicrous. A desperate honesty that throbs through his confession does not absolve him from sins of diabolical cunning. He is abnormal. He is not a gentleman. But how magically his singing violin can conjure up a tendresse, a compassion for Lolita that makes us entranced with the book while abhorring its author![109]

Despite this declaration, it is very hard to leave the novel without feeling sorry for Humbert Humbert, and blaming Lolita and her mother at least in part for their consent/complicity. Even the "psychologist" admits this, with his statement immediately following the above:

> As a case history, "Lolita" will become, no doubt, a classic in psychiatric circles. As a work of art, it transcends its expiatory aspects; and still more important to us than scientific significance and literary worth, is the ethical impact the book should have on the serious reader; for in this poignant personal study there lurks a general lesson; the wayward child, the egotistic mother, the panting

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107. The point has been equally forcefully made, throughout the twentieth century, about equal inability of the structures of the law to be truly value neutral. *See, e.g.*, Fiss, *supra* note 47; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). *But see* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

108. VLADIMIR NABOKOV, LOLITA (Random House, Inc. 1997) (1955).

109. *Id.* at 5.

maniac—these are not only vivid characters in a unique story: they warn us of dangerous trends; they point out potent evils. "Lolita" should make all of us—parents, social workers, educators—apply ourselves with still greater vigilance and vision to the task of bring-ing up a better generation in a safer world.[110]

And so the victims are not spared, after all. As the foreword presages, throughout the novel one cannot escape ruminating on whether this "wayward child" with the "egotistic mother" was really "victimized" at all.[111] Had Lolita been better brought up—by her mother, by all of us— Humbert would not have been exposed to such "tendresse" (a word so close to "temptress"—surely no accident in a writer as skilled as Nabo-kov.)[112]

Yet this, perhaps, is Nabokov's ugly game: to slowly reveal to the reader that despite her high-minded contempt at the outset, she, too, can be made to empathize with a pedophile and feel scorn for his victim, even against her will.[113] Not all writers are so sadistic; some authors ge-nuinely do desire to inspire a deserved compassion for an outcast, while retaining a full sense of outrage at the mistreatment of his victims. This type of author supplies the final argument for why we ought never use literature (and certainly not law) to create or even just accept the status of some people as "Other." This final argument is the most important in the inclusionary approach's arsenal, and it is the one I will address the most carefully. I have labeled it the dual-compassion argument.

It says that there is no reason we cannot be sympathetic to *both* Goeth with his sad childhood *and* to the victims of his adult brutality; *both* to Humbert Humbert *and* to Lolita. If Goeth and Humbert matter structurally as figures central to the telling of the stories, and they also matter in the moral sense just by virtue of being human, then there are no ethical problems with sympathizing with their plights. Their view-points should be included, with any error in the telling in favor of sympa-thy, in honor of our common humanity. To use the more compelling, and tougher, case of Amadu Bah, the judges in his case—and in all cases like it—*must* invite themselves to sympathize with Bah by hearing and weighing his complete story. He is the central figure in his asylum hear-ing, and his plight deserves at least the invitation to sympathy. His entire narrative must be considered before he can be legitimately, legally judged. We can empathize with Bah-the-child-soldier *as well as* with the victims of Bah-the-monstrous-revolutionary.

The dual-compassion argument ultimately misfires because it fails to recognize that our attentions and sympathies are a scarce commodity.

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110.   *Id.* at 5–6.
111.   *Id.* at 5.
112.   *See id.* at 5–6.
113.   It is this very forced complicity that has led many readers—myself included—to find the nov-el repellent.

The point is not merely quantitative, that we do not have the time or mental capacity to feel sorry for everyone—although this is certainly true and is a real problem for the inclusionary approach. More fundamentally, alignment with one set of interests *precludes* our ability to align with another set, because they may be—as with Goeth and the *Schindlerjuden*, or with Humbert and Lolita—simply incompatible. Why? Seeing someone as having been wronged necessitates the recognition that they have been wronged *by someone*, or more precisely, by someone responsible. Victimization invites—indeed, fully depends on—blame. Otherwise, the harm suffered is either deserved, or even just bad luck, in which case we might pity the person who has been hurt, but to feel that he has been *wronged* would be strange. As the philosopher Jean Hampton said, "However much we may sorrow over our bad fortune, when the same damage is threatened or produced by natural forces or by accidents, we do not experience that special anger that comes from having been *insulted.*"[114]

When one person wrongs another, in addition to inflicting any objective harm on the victim, it sends a message that says "'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.'"[115] If we were to feel sorry for the wrongdoer, that itself adds its own nasty message to the one the wrongdoer himself sent.[116] This lesson is learned early in human development. Imagine a school yard bully shoves another child, and the teacher mediating the dispute informs the injured child that the bully "didn't really mean it." If the bully didn't really mean it, then there was no insult, and the child knows that there is no reason at all to be angry.[117] But what if the bully did mean it, and the teacher instead explains that "he just can't help picking on other children"? The victim has learned the same lesson—the bully really cannot be blamed and so the victim is not justified in feeling wronged. Outrage at the aggressor is a way of recognizing the victim *as* a victim. Being angry with the bully engages an alliance with the victim; being an apologist betrays an alliance with the aggressor.[118]

To the extent that we are disabled from seeing Humbert as a dangerous and culpable predator, we are in the position of seeing Lolita as

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114. Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY 35, 43–44 (Jeffrie G. Murphy & Jean Hampton eds., 1988); *see also* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 164–73 (1958).

115. Jeffrie Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 114, at 14, 25.

116. *See* Kenworthey Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1088 (2007) ("A failure to punish indicates something less—perhaps indifference toward the victim, perhaps even disdain.").

117. Piaget showed that children understand the meaning, and the import, of intent very early in their development. *See generally* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932). For a review of the voluminous experimental literature on the developmental trajectory of moral sensibilities, see John M. Darley & Thomas R. Shultz, *Moral Rules: Their Content and Acquisition*, 41 ANN. REV. PSYCHOL. 525 (1990).

118. *See* Bilz, *supra* note 116, at 1089.

having brought his sexual attentions onto herself. (Or perhaps, as the "psychologist" suggests, both Humbert and Lolita are victims of socie-ty's—that is, *our*—failure to exercise adequate "vigilance and vision to the task of bringing up a better generation in a safer world."[119]) To the extent that we are disabled from seeing Goeth as the culpable cause of the suffering of the inmates of the Plaszów camp, we are disabled from seeing them as having been fully wronged—with that special empathy that comes with such recognition—by him at all. Simply finding some other party to blame is no solution. Should we decide that higher rank-ing officials in the Third Reich really are to blame for what happened at Plaszów, then the dual-compassion approach would demand their per-spective be fully considered before judging them. Or should, perhaps, Goeth's parents really be considered culpable (as was, Nabokov suggests, Lolita's mother) because they raised a monster like Goeth, then the con-cerned reader/judger is entitled to a sensitive (and potentially exonerat-ing) portrayal of *them*.[120] And so on.

After all the dominoes have fallen, and everyone is revealed to be innocent because he himself is a victim, we come to one of two conclu-sions. Either no one is to blame (or maybe it is "God's fault"), a result unsatisfying to anyone with a respect for individual autonomy and agen-cy; or, everyone is to blame (it is "society's fault"). Because, however, everyone is a part of society and so equally both victim and aggressor, victims are as much to blame for their plight as anyone else. Under this analysis, the Plaszów inmates were just as capable (or more accurately, incapable) of stopping the violence against themselves as was Goeth. Under either the no-one-is-to-blame or the everyone-is-to-blame view, we are disabled from the particular type of compassion for the camp in-mates that goes alongside identifying them as victims of a blameworthy wrong—that is, of having been hurt by a culpable *someone*. And again, the moral reader would rightly feel indignant about such a bottom line.

Some literature, true enough, is designed as a "portrait of evil."[121] It is written to show the ways in which a soul can become corrupted, and sometimes—unlike the producers of *Hitler: The Rise of Evil*—the author manages to do this job quite well. Instead of making us empathize with the "protagonist," however, the point of this kind of literature seems to be merely to give the reader the perverse thrill of seeing evil up close, as in the case of Bret Easton Ellis's *American Psycho*[122] or Norman Mailer's

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119. NABOKOV, *supra* note 108, at 6.

120. Assuming, of course, that the inclusion would make stylistic sense. Again, omission of points of view for structural reasons is not controversial. Yet I should think that blaming Goeth's parents for the horrors of the Holocaust would stylistically, as well as morally, necessitate an explanation. It is important not to let moral exclusions hide behind structural ones—this is easy to do.

121. *See, e.g.*, WILLIAM SHAKESPEARE, MACBETH.

122. BRET EASTON ELLIS, AMERICAN PSYCHO (1991) (chronicling the criminal acts of a fictitious serial killer in Manhattan).

The Executioner's Song,[123] both of which detail the lives of serial killers (the first fiction, the second deeply fictionalized). But this type of depiction is unhelpful to the dual-compassion argument, as their subjects are not detailed in a way that makes us humanize and understand their personalities. Their stories are structurally full, but not morally full; we are not invited to sympathize. On the contrary, the point of the exercise, as appreciated by the Anti-Defamation League in evaluating CBS's later, lesser miniseries,[124] seems to be to further alienate the reader from the subject, in much the same way that looking at a bug under a magnifying glass can serve to enhance, not diminish, our horror.

Equally unhelpful to the dual-compassion argument is the type of novel in which no one is a wrongdoer, but everyone seems to be a "victim"—of fate, or circumstances, or the frailties of the human condition. Kurt Vonnegut, Jr. is a master of this species of novel; a talent he acknowledged in his preface to *Slaughterhouse-Five* by noting his own father's accusation that "'you never wrote a story with a villain in it.'"[125] But again, these novels do not prove the point that we can feel acutely sorry for both victims and wrongdoers. Again, Vonnegut's characters do not really seem like victims at all, because without someone to blame, we never have a sense of outrage at the misadventures that befall them. If anything, this sort of novel gives evidence for the point that the human psyche is incapable of feeling sharply that a person has been wronged if it is presented with the assumption that *everyone* has been wronged. Pity or exasperation, yes; but indignation and deep compassion, no.

There *is* a type of novel that at first glance appears like it could validate the dual-compassion argument. These novels are a cross between the above two types, in that they genuinely attempt to show a wrongdoer who is depraved, yet is nevertheless worthy of our sympathy. (The first CBS version of Hitler's life story aspired to be this; we cannot know how it would have turned out.) These kinds of novels require impressive literary chops on the part of the author, as their ambition is to make us simultaneously feel contempt and empathy towards the primary protagonist. This list might include Emily Brontë's *Wuthering Heights* (Heathcliff),[126] Patricia Highsmith's *The Talented Mr. Ripley* (Tom Ripley),[127] Mary Shelley's *Frankenstein* (the Monster),[128] and Shakespeare's *Macbeth* (Macbeth).[129]

To preface the application of this type of novel to the law, the dual-compassion model would say that we must invite a jury to feel both com-

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123.   MAILER, *supra* note 74.

124.   Press Release, *supra* note 105.

125.   KURT VONNEGUT, SLAUGHTERHOUSE-FIVE 8 (Dell Publ'g 1991) (1969).

126.   EMILY BRONTË, WUTHERING HEIGHTS (Doubleday, Page & Co. 1907) (1847).

127.   PATRICIA HIGHSMITH, THE TALENTED MR. RIPLEY (1955).

128.   MARY WOLLSTONECRAFT SHELLEY, FRANKENSTEIN: OR, THE MODERN PROMETHEUS (James Rieger ed., Univ. of Chi. Press 1982) (1818).

129.   SHAKESPEARE, *supra* note 121.

passion and contempt toward the defendant in a criminal trial. The defendant is unambiguously the "protagonist" of the criminal trial: he is accused of behaving in a deeply antisocial fashion and is faced with the judgment of, prototypically but obviously not always, a jury of his peers (whose analogue is the readers). How should the trial be "written"? The inclusionary, dual-compassion model would suggest that for a verdict to be legitimate—or in Justice Souter's words, "honest"[130]—the presentation must allow those who would pass judgment to fairly understand the defendant, even though it might also condemn him. Think again of Amadu Bah. The fact that he was a child soldier would unambiguously be relevant, but the judger would be free to still deny him asylum on the grounds of his own persecutory acts.

One of the most sincere, self-conscious examples of this kind of novel is Richard Wright's *Native Son*.[131] In it, a young man named Bigger Thomas kills two women: first he accidentally kills the daughter of his employer, and later he kills his girlfriend in cold blood.[132] The novel focuses on Bigger's abduction and trial for these crimes, and, along the way, details the indignities of his life in Chicago's appallingly segregated South Side ghetto.[133] The reader is invited to empathize with his circumstances and understand the forces that made him into the twisted human he has become. Wright wanted to make Bigger despicable, but nevertheless explicable given his background as a victim of poverty and racism: "'I didn't want to kill!' Bigger shouted. 'But what I killed for, I *am*! It must've been pretty deep in me to make me kill!'"[134]

The issue is not, of course, whether these sorts of novels can be attempted, it is whether they can be pulled off in a way that holds lessons for the law. Did Wright—a careful, intelligent, talented writer—achieve his goal? He does succeed in making us feel ambivalent, at the very least, toward Bigger. Bigger is a monster, but he is also a pathetic creature who has been twisted from having suffered many wrongs himself. But Wright's task cannot be so easy as making us feel sorry for Bigger in one instance and angry at him in another. We must feel these emotions at the same time. Ultimately, Wright achieves the confusion he is seeking in his readers only through a bit of sleight-of-hand. We feel sorry for Bigger in his first "murder," which Wright paints as accidental.[135] Quite

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130. Old Chief v. United States, 519 U.S. 172, 187 (1997).
131. RICHARD WRIGHT, NATIVE SON (HarperCollins Publishers 1998) (1940). I do not mean to imply that Wright tried to hamhandedly produce some sort of blunt, moral cautionary tale to White America—the book would not be worthy of its status as a great work of literature if so. For the complex motivations and ambitions of Wright in producing the novel, see his essay, *How Bigger Was Born*, *id.* at 431–62.
132. *Id.* at 85–87, 234–37.
133. *See id.* at 264–430.
134. *Id.* at 429.
135. *Id.* at 85–87.

apart from that, we despise him for his second, passionless murder of Bessie, his girlfriend.[136]

Wright makes it crystal clear that Bigger did not intend to murder Mary, his white employer's daughter.[137] He had covered her mouth with a pillow to stifle her drunken articulations, so that her blind mother, who had just entered the bedroom, would not hear them.[138] Had he been discovered in her room (and he was only there because she was incapable of getting there herself, as drunk as she was), all hell would have broken loose.[139] In fact, Bigger does not even discover that he has killed her until he checks to see if she is all right after her mother leaves.[140]

Panicked, Bigger covers up his crime by disposing of Mary's body in a clumsy way, and allows Mary's boyfriend to take the blame for her disappearance.[141] His behavior after Mary's death is far from laudable, but throughout, the reader never feels as though Bigger is *contemptible* for these acts. In fact, while the reader might feel sorry that Mary is dead, the reader does not feel sharply that she has been *wronged*. Not only was her death an accident, but she and her foolishly idealistic boyfriend Jan had, after all, forced Bigger to come along in their late-night alcoholic escapade. As a brand-new, black servant, Bigger was in no position to disobey their orders.[142] Moreover, her drunkenness put Bigger in the even more impossible position of having to cart her home and put her into bed after Jan disappeared. Bigger was not being unreasonable in his fear of the consequences should Mary's mother have discovered him in her (inebriated) daughter's bedroom. Stifling her noises with a pillow seems at worst a very careless act by a panicked man in a dangerous situation. Mary's death seems as much her own fault as Bigger's—probably even more so. The reader's empathy with Bigger at this point in the novel remains untainted by the sense that he has committed a grave wrong, or that either Jan or Mary have been *victimized*. What happened up to this point was all a tragic accident.

Perhaps realizing this, Wright then tips the balance so that the reader will not leave the novel with the feeling that Bigger has merely been the unfortunate victim of vicious circumstance. His goal, again, is to make us sympathize with Bigger *despite* being outraged by him. Once the "truth" of Mary's demise comes out (the real truth, of course, we know would never have been believed), Bigger flees.[143] While on the lam, he brutally rapes and murders his black girlfriend, Bessie, because he feels that she will be a liability to him in his escape, and may even give

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136. *Id.* at 234–37.
137. *Id.* at 85–87.
138. *Id.* at 85.
139. *Id.* at 81–87.
140. *Id.* at 87.
141. *Id.* at 85–93.
142. *Id.* at 66–71.
143. *Id.* at 218–21.

him away.[144] At this point, the reader is presented with a perfectly unredeeming, calculating Bigger, who murders in a spectacularly gory and painful way, for a vanishingly small gain to himself (with the rape thrown in seemingly for no other reason than to underscore the senselessness of the crime). We are outraged and disgusted at Bigger now, and our sympathy for Bessie is complete and unmitigated by any sense of just deserts—unlike with Mary.

It is only at this point that our confusion gels. Bigger is an object of our sympathy for the first death; he is loathsome for the second. Yet just because we feel two ways about Bigger does not prove the argument Wright set out to demonstrate, or that the inclusionary, dual-compassion approach urges. We might feel sorry for a man who is murdered, but *not* sorry for him for murdering his own wife the night before. Wright has not proved that one can feel sorry for both the victim and wrongdoer at the same time, in reference to the same crime, and it is not clear that anyone can. If anything, *Native Son* undermines the dual-compassion point, because it shows that we were disabled from feeling real anger toward Bigger until his second murder. Perhaps partly because he realized that he had been too successful in making us hate Bigger for what he did to Bessie, in the extended trial scenes at the end of the novel, Wright barely gives her a mention.[145] By once again shifting our picture of the victim, we are left unsettled in our sympathies.

But this unsettling is more mirage than truth. To the extent he is successful in making us hate Bigger, we feel sorry for his victims. But when Wright instead makes us feel sorry for Bigger, we are no longer angry at him and even feel anger towards his "victims" for putting him in such a position.[146] Even a novel as masterful and ambitious as *Native Son* does not manage to make the reader feel both pity and outrage towards the same person at the same time. With more time, I believe I could analyze Brontë, Highsmith, Shelley, and even Shakespeare along the same lines. Perhaps the reader will disagree and be able to find successful literary examples of the dual-compassion argument. But I am very confident that if they do exist, they are rare. If it is this hard to accomplish in literature, can it really be a lesson we should demand the law adopt, at a retail level, in delivering its own moral judgments? If the trial is a novel, and the judgers are the readers, can we demand that the authors (lawyers, judges, even procedural and substantive legal rules) all be Shakes-

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144. *Id.* at 233–39.

145. Of course another reason Wright leaves out much mention of Bessie at the trial is to reflect the social reality that an impoverished, black rape-murder victim simply will not get the criminal justice system's attention in the way a wealthy, white victim will. *Cf.* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY 140–87 (1990).

146. I am not the first to note that Wright's novel exploits emotional vacillation to make its point. As Harold Bloom wrote, "Either Bigger Thomas is a responsible consciousness, and so profoundly culpable, or else only the white world is responsible and culpable. . . . Wright . . . was not able to choose . . . ." Harold Bloom, *Introduction* to MODERN CRITICAL INTERPRETATIONS: RICHARD WRIGHT'S NATIVE SON 4 (Harold Bloom ed., 1988).

peares? But before I try to answer that, the next Section suggests even more problems for the inclusionary narrative model.

B. Psychology

Succeeding at the dual-compassion task is not just difficult as a literary matter, but as a psychological matter as well. The ambition of the inclusionary narrative model is not, per se, to stop us from condemning a wrongdoer or his wrongdoing—unless a fuller appreciation of him and his circumstances makes such mitigation warranted—but instead to give him, and ourselves, the dignity of allowing him to tell his story in its entirety. Again, it is a procedural point, with the potential for substantive results. The value of painting a complete picture of the one being judged is that we might "hate the sin, love the sinner,"[147] or perhaps, more aptly, "hate what is detestable in the sinner, love or at least tolerate the rest." Or, avoiding such religious overtones, the argument is simply that it is illegitimate to condemn someone without at least trying to fully understand him. This mandate arguably applies even more in the legal setting than in the literary, because judgments there inflict immediate, concrete, and devastating consequences, especially for criminal defendants.

The question, then, is whether and in what circumstances it is actually possible to both fully condemn and fully comprehend. The inclusionary approach to the narrative model can be divided into two separate claims: (1) that doing so is possible, and (2) that it is desirable.

The first claim finds some support in psychological research on attitudes. Attitudes describe our positive and negative evaluations of various objects, persons, things, situations, and the like, which are known as "attitude objects."[148] (I focus only on persons as attitude objects here.) Attitudes are composed of, and explained by, underlying emotions (how I feel towards the person), cognitions (what I believe to be true about the person), and even behaviors (how I behave toward him or her).[149] The study of attitudes, both how they are structured and how they change, is enormously complex and has generated a spectacular amount of research in social psychology.[150] For purposes of the inclusionary approach, however, the most relevant subset of this research concerns *ambivalent attitudes*.

In theory, one could add up all of one's cognitions, emotions, and behaviors toward a person and measure it as a composite "attitude" on a

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147. MOHANDAS K. GANDHI, AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 242 (1983) ("'Hate the sin and not the sinner' is a precept which, though easy to understand, is rarely practised . . . .").

148. Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 269, 269 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

149. Richard E. Petty & Duane T. Wegener, *Attitude Change: Multiple Roles for Persuasion Variables*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 148, at 323, 323.

150. For excellent reviews, see Eagly & Chaiken, *supra* note 148, and Petty & Wegener, *supra* note 149.

unipolar scale from positive to negative. In other words, when considering it as a whole, one could feel positively toward a person, or negatively toward him, or something in between.[151] Indeed, attitudes are usually measured in this way, as, for instance, when pollsters have respondents indicate where they would place themselves on a "feeling thermometer" toward a certain politician. But what does it mean when the summary evaluation about a person is neither hot nor cold, but lukewarm? Interpreting that attitude is ambiguous. It could mean the perceiver is neutral or even indifferent, but it could also mean that she "feels two ways about" him. This is the precise psychological meaning of ambivalence: one might dislike a person intensely on one dimension, but simultaneously feel some affection for her on another, and vice versa.[152] Ambivalence can occur within or across different attitudinal classes: I might have positively valenced *emotions* toward a person but negatively valenced *cognitions* (as an example, loving a partner despite knowing that she is unfaithful). Or, I might have both negatively and positively valenced cognitions (I believe my spouse is faithful but also believe that he is not a good parent). Or, I might have both negatively and positively valenced emotions toward the same person (I love a friend but am also embarrassed by him).[153]

Ambivalent attitudes toward entire social groups are ubiquitous, even universal.[154] And of course, we also frequently feel ambivalent about single, particular persons. Still, while ambivalent attitudes are common, normally they stay under the radar of a person's conscious-

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151. *See* Klaus Jonas, Philip Broemer & Michael Diehl, *Attitudinal Ambivalence*, 11 EUR. REV. SOC. PSYCHOL. 35, 35–36 (2000).

152. *See id.* at 41.

153. *See id.* at 41–42.

154. *See* Susan T. Fiske & Amy J.C. Cuddy, *Stereotype Content Across Cultures as a Function of Group Status*, *in* SOCIAL COMPARISON AND SOCIAL PSYCHOLOGY: UNDERSTANDING COGNITION, INTERGROUP RELATIONS, AND CULTURE 249 (Serge Guimond ed., 2006). For instance, people often have ambivalent attitudes toward particular racial or ethnic groups. Irwin Katz & R. Glen Hass, *Racial Ambivalence and American Value Conflict: Correlational and Priming Studies of Dual Cognitive Structures*, 55 J. PERSONALITY & SOC. PSYCHOL. 893, 902–04 (1988). Men often have well-documented ambivalent attitudes toward women. Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491, 494–95 (1996). People generally have ambivalent attitudes toward the elderly, Amy J.C. Cuddy & Susan T. Fiske, *Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons*, *in* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS 3, 17 (Todd D. Nelson ed., 2002); working mothers, Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 705–07, 714–15 (2004); the disabled, Irwin Katz, R. Glen Hass & Joan Bailey, *Attitudinal Ambivalence and Behavior Toward People with Disabilities*, *in* ATTITUDES TOWARD PERSONS WITH DISABILITIES 47, 47–57 (Harold E. Yuker ed., 1988); and others. Some individuals, however, are more likely to feel ambivalent attitudes more strongly and more often than others. *See* Megan M. Thompson & Mark P. Zanna, *The Conflicted Individual: Personality-Based and Domain-Specific Antecedents of Ambivalent Social Attitudes*, 63 J. PERSONALITY 259, 278–79 (1995). And, some may be more bothered by the feelings than others. *See* Ian R. Newby-Clark, Ian McGregor & Mark P. Zanna, *Thinking and Caring About Cognitive Inconsistency: When and for Whom Does Attitudinal Ambivalence Feel Uncomfortable?*, 82 J. PERSONALITY & SOC. PSYCHOL. 157, 163–65 (2002).

ness.[155] Even where people hold beliefs that are evaluatively inconsistent with one another, the inconsistency is usually of little consequence because they remain unaware of it unless explicitly confronted with an event or situation (such as the need to make a decision) that brings the inconsistency to the forefront.

In the context of the law, the inclusionary approach would purposely make attitudinal ambivalence salient to the judger. The approach invites, and even urges, us to be open to the possibility of experiencing ambivalence in our attitudes toward anyone we legally judge. It tells us that we can and ought to feel both outrage about the wrong and empathy for the wrongdoer. Those passing judgment *should* be confronted with the panoply of relevant information about a wrongdoer, even where it is conflicting, inviting compassion "where such empathic knowledge is most difficult."[156] It is only by "seeing them as individuals with their own stories to tell" that we can see the wrongdoer as "similarly and fully human."[157] This would entail "experienced" ambivalence, where the person holding the evaluative attitude is made subjectively aware of the conflicts it embodies.[158]

Evidence demonstrating ambivalent attitudes generally supports the inclusionary narrative model. Yet it is still not easy to say that ambivalence is possible in the way the model describes. For one thing, advocates of the inclusionary approach have not been particularly clear about just what sort of ambivalence they are inviting. There are several possibilities, which can be organized across the response classes already described: cognitive and emotional.[159] The least problematic form of ambi-

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155. It is still possible to measure ambivalent attitudes that are below the surface of awareness. *See* Bertram Gawronski & Galen V. Bodenhausen, *What Do We Know About Implicit Attitude Measures and What Do We Have to Learn?*, *in* IMPLICIT MEASURES OF ATTITUDES 265 (Bernd Wittenbrink & Norbert Schwarz eds., 2007). One such technique to measure them that has received considerable attention is the Implicit Association Test, which measures the speed with which one associates groups (say, women versus men) with particular positive versus negative terms. *See* Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV—What We Know (So Far) About the Method*, *in* IMPLICIT MEASURES OF ATTITUDES, *supra*, at 59, 59–61. Though the techniques for measuring implicit attitudes, and opinions about what, exactly, they are measuring, remain somewhat controversial. *See* Brian A. Nosek et al., *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS 265, 266 (John A. Bargh ed., 2007); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1030–34 (2006). The existence of implicit attitudes themselves is not.

156. West, *Economic Man and Literary Woman*, *supra* note 20, at 872.

157. NUSSBAUM, *supra* note 1, at 96.

158. Jonas, Broemer & Diehl, *supra* note 151, at 55.

159. I am skipping the third category for now: behavior. It is true that behaviors toward an attitude object can make up part of one's composite attitude, but in the context of the inclusionary approach in law, normally one does not consider how one has behaved in the past toward a person being judged in assessing how one feels toward the person as a whole. Judgers typically have never met those they are judging, let alone behave in any particular way towards them. That one's own behavior *can* shape one's attitude, though, is the main insight of Bem's "self-perception theory," which shows that sometimes we look to our behaviors to assess our attitudes because our cognitions might be opaque even to ourselves. Daryl J. Bem, *Self-Perception Theory*, *in* 6 ADVANCES IN EXPERIMENTAL PSYCHOLOGY 1, 2 (Leonard Berkowitz ed., 1972). Behavior does come into play with the inclusionary

valence is purely cognitive. One might know two competing facts about a person, but depending on the relative magnitude of importance of those facts, the ambivalence is easy enough to resolve into a single decision.[160] For instance, the burglar who carefully and politely picks the lock is still a blameworthy thief, even if we evaluate him slightly more positively than the burglar who kicks the door off its hinges to gain entry. Our knowledge that he is polite enough to minimize gratuitous damage is inconsistent with our knowledge that he is a thief, but because the latter is more important than the former, the summation of the inconsistent cognitions into a unipolar attitude is easy enough to do.

The goal of the inclusionary approach, though, demands something different: a form of *emotional* ambivalence. The idea is not just to make judgers aware of the inconsistent "facts" they must process in rendering a legal evaluation of a wrongdoer (that he hurt the victim, but also, say, that he himself was abused as a child), but to translate those cognitions into *sympathy* coupled with *outrage* towards him. But purely emotional ambivalence is far more elusive than the purely cognitive variety. Many social psychological researchers do not believe that inconsistent emotions can be held simultaneously at all.[161] Even those who do accept the possibility do not believe that *all* emotions can be bi-dimensional—some truly are mutually exclusive, such as calm/tense.[162] The evidence that does support the possibility of bi-dimensional emotions has focused only on the happy/sad pair;[163] no one has examined whether sympathy/outrage is another exception to the usual mutual-exclusivity rule.

Moreover, even in the rare instances where conflicting emotions can be active at the same time in the same person (such as, probably, happy/sad), the result is "a poor guide for behavior and is therefore posited to be unpleasant, unstable, and often short-lived."[164] Not as elusive, but more complex, are ambivalent attitudes where cognitions conflict with emotions. This is the sensation of one's "heart and mind" pulling in different directions. This, too, might be what the inclusionary approach urges: knowing that someone engaged in sanctionable behavior, yet nevertheless feeling empathy for the reasons he did it. As with purely emo-

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approach—but as a *response* to the attitude, not, primarily, a component of it. That is, judgers must render a decision—such as a verdict or a sentence.

160. This process is described in part by Ajzen's classic expectancy-value model, which describes attitudes as a composite function of the various subjective values for the attributes a person associates with an attitude object, multiplied by the strength of those associations. Icek Ajzen, *Nature and Operation of Attitudes*, 52 ANN. REV. PSYCHOL. 27, 30–32 (2001).

161. *See* James A. Russell, *Core Affect and the Psychological Construction of Emotion*, 110 PSYCHOL. REV. 145, 148 (2003); James A. Russell & James M. Carroll, *On the Bipolarity of Positive and Negative Affect*, 125 PSYCHOL. BULL. 3, 25 (1999).

162. Jeff T. Larsen, A. Peter McGraw & John T. Cacioppo, *Can People Feel Happy and Sad at the Same Time?*, 81 J. PERSONALITY & SOC. PSYCHOL. 684, 692–95 (2001).

163. *See, e.g.*, *id.* at 684.

164. *Id.* at 692; *see also* John T. Cacioppo & Gary G. Berntson, *Relationship Between Attitudes and Evaluative Space: A Critical Review, with Emphasis on the Separability of Positive and Negative Substrates*, 115 PSYCHOL. BULL. 401, 403 (1994).

tional ambivalence, however, this kind of ambivalence tends to feel unpleasant to the one actively experiencing it,[165] and leads to attitudes that are not particularly stable over time.[166]

But perhaps this is good enough. If a judger can be made to appreciate the complexity of moral evaluation by experiencing vacillating emotions, even if only fleetingly, then the first part of the inclusionary thesis (that people *can* simultaneously condemn and sympathize) is at least weakly supported by psychology, just as the rapidly vacillating emotions induced by reading *Native Son* at least weakly supports it, too. Yet there is another claim to be dealt with, and that is the notion that if a judger *can* be made to empathize with a wrongdoer, he *ought* to be.

The inclusionary approach must first address the problem that only some of the properties of experienced ambivalence are good. Attitudinal ambivalence, as already mentioned, is unpleasant ("aversive"), and as such people are motivated to reduce it. One way they attempt to do so seems at first cut like a very strong point in favor of the inclusionary approach: they carefully attend to the inconsistent information, expending more cognitive resources to make their ultimate judgment than they otherwise would.[167] Better still, this increased attention leads them to be more persuaded by strong arguments and more impervious to weak ones.[168]

Unfortunately, other features of ambivalent attitudes are far more troubling. For one, ambivalent attitudes often become polarized, resulting in exaggerated positive attitudes if exposed to positive information about the person, and exaggerated negative attitudes when exposed to negative information.[169] Worse, more than just attitudes may get exaggerated. Ambivalent attitudes may also trigger an impulse to engage in extreme behavior, either positive or negative, toward the object of ambiva-

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165.   *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 2 (1957); HEIDER, *supra* note 114, at 204. Some have argued that it is not the dissonance itself that is aversive, but the implications of it (such as to one's self-concept). *See, e.g.*, Claude M. Steele, *The Psychology of Self-Affirmation: Sustaining the Integrity of the Self*, *in* 21 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 261, 262 (Leonard Berkowitz ed., 1988). For my purposes, however, this is a distinction without a difference, because for whatever the reason, the experience of dissonance motivates the one experiencing it to reduce it.

166.   Jonas, Broemer & Diehl, *supra* note 151, at 59–60; Klaus Jonas, Philip Broemer & Michael Diehl, *Experienced Ambivalence as a Moderator of the Consistency Between Attitudes and Behaviors*, 31 ZEITSCHRIFT FÜR SOZIALPSYCHOLOGIE 153, 162 (2000).

167.   *See* Philip Broemer et al., *Effects of Evaluative (In-)Consistency and Perceived Self-Efficacy on Attitude Formation*, 59 SWISS J. PSYCHOL. 183, 191–92 (2000); Gregory R. Maio et al., *Ambivalence and Persuasion: The Processing of Messages About Immigrant Groups*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 513, 514, 528 (1996).

168.   Maio et al., *supra* note 167, at 515, 528–31.

169.   *See* R. Glen Hass et al., *Cross-Racial Appraisal as Related to Attitude Ambivalence and Cognitive Complexity*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 83, 89–91 (1991); Patricia W. Linville & Edward E. Jones, *Polarized Appraisals of Out-Group Members*, 38 J. PERSONALITY & SOC. PSYCHOL. 689, 689–90, 701 (1980).

lence (which here, of course, is the individual being judged).[170] This phenomenon, known as "response amplification," is a robust finding for how people respond to ambivalence—namely, they behaviorally buttress either the positive information they have about the target, or the negative, in order to reduce their sensation of ambivalence.[171] (Those familiar with the classic phenomenon of cognitive dissonance reduction in psychology will recognize this move.[172]) Another way people attempt to reduce ambivalence is to turn to their peers to decide how to view the attitude object.[173] Again, the desire to eliminate unpleasant inconsistency can cause people to turn to methods governed not by the merits of the issue, but by ease and expediency. Advocates of the inclusionary approach would not take much comfort in the idea that people resolve complex, mixed feelings about a wrongdoer by simply recalibrating their attitudes to comport with those of their peers.

Even if the ambivalence could be actively maintained instead of quickly collapsing into either a (possibly exaggerated) positive or negative view of the target, *legal* judgers are not asked to form an attitude about the person being judged, they are asked to engage in a *behavior*; namely, making a decision in the form of rendering a verdict, delivering a sentence, or fixing damages. The inclusionary approach implicitly relies on the belief that complexity in judgers' attitudes will lead to higher-quality (or at least not lower-quality) decision behaviors. Unfortunately, research does not support this belief.

First, ambivalent attitudes do not predict behaviors well at all.[174] The inclusionary approach, by inducing ambivalence in judgers, introduces "noise" into decisions. This means, for instance, that similar cases are less likely to be treated alike across trials: in one hearing, being a child soldier might lead to a ruling for asylum; in another, even with an identical story and even with an identical judge, it might not.

Second, while ambivalent attitudes introduce variance, they also introduce some bias. As already discussed, inducing empathy in an individual predictably inspires an emotional response of sympathy and compassion.[175] Systematically, sympathy toward a target will tend to produce

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170.   David W. Bell & Victoria M. Esses, *Ambivalence and Response Amplification: A Motivational Perspective*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1143, 1144–45 (2002).

171.   *Id.* at 1143; *see also* Irwin Katz, Joyce Wackenhut & R. Glen Hass, *Racial Ambivalence, Value Duality, and Behavior*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 35, 44–45 (John F. Dovidio & Samuel L. Gaertner eds., 1986); Katz & Hass, *supra* note 154, at 903.

172.   For the classic treatise on the phenomenon, see FESTINGER, *supra* note 165. For a brief, and relatively recent, review of the phenomenon, see Petty & Wegener, *supra* note 149, at 335–37. Where one's beliefs are inconsistent with one's actions, one can eliminate the inconsistency by changing either the belief or the behavior. *Id.* at 336.

173.   Gordon Hodson, Gregory R. Maio & Victoria M. Esses, *The Role of Attitudinal Ambivalence in Susceptibility to Consensus Information*, 23 BASIC & APPLIED SOC. PSYCHOL. 197, 204 (2001).

174.   Mark Conner et al., *Moderating Role of Attitudinal Ambivalence Within the Theory of Planned Behaviour*, 42 BRIT. J. SOC. PSYCHOL. 75, 87–90 (2003).

175.   C. Daniel Batson et al., *Negative-State Relief and the Empathy-Altruism Hypothesis*, 56 J. PERSONALITY & SOC. PSYCHOL. 922, 924, 931 (1989); Mark H. Davis, *Measuring Individual Differ-*

more behaviors favoring that target than would have otherwise occurred.[176] Again, advocates of the inclusionary approach might not object: where the story of the person being judged *should* mitigate the desire to punish him, the model is doing exactly what we would want it to do. The problem is that the model is a blunt instrument. It will not, of course, always be the case that telling the full narrative (like Goeth's hypothetical sad childhood or Amadu's own painfully real history) will result in the judger exonerating them, but telling it does put a thumb on the scale. At the margin, we would expect not only that *some* who would otherwise be found guilty would go free, but also that still others, not as close to the line, would be judged less culpable, even if not fully exonerated.

This softening of attitudes toward the wrongdoer would also have real consequences. Research in psychology cannot, of course, prove (or even disprove) the point that inducing empathy is good, because such a claim is distinctly normative. But research does describe what happens when such empathy occurs, and this research describes yet another practical problem that the inclusionary approach must face. In this vein, I next describe how studies on "perspective taking" illustrate the promise of empathy towards others, but also hint at the potential perils of empathy should the target "Other" be someone who actually deserves contempt.

From the outset, note that in order to induce a judger to take the perspective of another (such as a criminal defendant), the judger must be instructed to imagine the other's point of view. In the setting of a psychology experiment, this is generally achieved in a straightforward manner. For example, the experimenter might instruct the participant to "imagine how the person . . . feels about what has happened and how it has affected his or her life,"[177] or perhaps "imagine a day in the life of this individual as if you were that person, looking at the world through his eyes and walking through the world in his shoes."[178] In a novel, the perspective-taking "manipulation" happens organically, as the reader is immersed in the rich details of the character's feelings, experiences, and circumstances. In a legal setting, perspective taking can be induced in either way: a lawyer (or judge) could explicitly urge the judger to consider the perspective of the defendant before rendering a decision, or perspec-

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ences in Empathy: Evidence for a Multidimensional Approach, 44 J. PERSONALITY & SOC. PSYCHOL. 113, 113–14 (1983).

176. *See* Davis, *supra* note 175, at 120–21.

177. C. Daniel Batson, Shannon Early & Giovanni Salvarani, *Perspective Taking: Imagining How Another Feels Versus Imagining How You Would Feel*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 751, 753 (1997) (emphasis omitted).

178. Galinsky & Moskowitz, *supra* note 44, at 711 (internal quotation marks omitted).

tive taking could be induced more organically through offering rich evidence from which the judger can draw narrative sense.[179]

Urging people to take the perspective of another normally yields many positive consequences. Emotionally, it induces compassion and sympathy in the perspective taker.[180] This has profoundly beneficial effects for the sympathizer; fMRI studies reveal that the brains of some of the world's best-trained compassionate thinkers—Buddhist monks, who spend tens of thousands of hours throughout their lifetime engaging in "compassion meditation"—strongly exhibit patterns linked with happiness.[181] The tendency to take the perspective of others has also been positively associated with self-esteem and social competence on the perspective taker.[182]

It benefits the receiver of sympathy as well. Empathy towards another induces acts of altruism, leading to a reallocation of resources (in experiments, these have included raffle tickets,[183] better jobs,[184] volunteering time,[185] and the like) towards the source of empathy.[186] Empathizers are also less likely to respond aggressively against the target other,[187] even in the face of attack.[188] When describing the object of empathy, moreover, perspective taking causes perceivers to engage in less stereotyping, an effect that persists beyond the initial task where the perceiver is asked to take the target's perspective.[189] Finally, perspective takers are

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179. *Cf.* Pennington & Hastie, *supra* note 21, at 521–23; Pennington & Hastie, *supra* note 25, at 243–44.

180. *See* Batson, Early & Salvarani, *supra* note 177, at 757.

181. Antoine Lutz et al., *Regulation of the Neural Circuitry of Emotion by Compassion Meditation: Effects of Meditative Expertise*, PLOS ONE, Mar. 2008, at 4–7, *available at* http://www.plosone.org/article/fetchArticle.action?articleURI=info:doi/10.1371/journal.pone.0001897.

182. Davis, *supra* note 175, at 119.

183. C. Daniel Batson et al., *Empathy and the Collective Good: Caring for One of the Others in a Social Dilemma*, 68 J. PERSONALITY & SOC. PSYCHOL. 619, 626 (1995).

184. C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 1042, 1045 (1995).

185. Patricia A. Oswald, *Does the Interpersonal Reactivity Index Perspective-Taking Scale Predict Who Will Volunteer Time to Counsel Adults Entering College?*, 97 PERCEPTUAL & MOTOR SKILLS 1184, 1185–86 (2003).

186. BATSON, *supra* note 42, at 89; Eisenberg & Miller, *supra* note 42, at 91–92. This benevolence is particularly acute when the target is individuated, rather than a member of an abstract class. Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 5–6 (2003).

187. Kaj Björkqvist, Karin Österman & Ari Kaukiainen, *Social Intelligence – Empathy = Aggression?*, 5 AGGRESSION & VIOLENT BEHAV. 191, 196–97 (2000); Erratum, 5 AGGRESSION & VIOLENT BEHAV. 429 (2000) (including corrected table for Björkqvist et al. article); Richardson et al., *supra* note 43, at 287.

188. Deborah R. Richardson et al., *The Relationship Between Perspective-Taking and Nonaggressive Responding in the Face of an Attack*, 66 J. PERSONALITY 235, 252 (1998).

189. *See* Galinsky & Moskowitz, *supra* note 44, at 721–22. In contrast, admonishing the perceiver not to stereotype results in "rebound effects," where post-task, the perceiver stereotypes the target *more* than if given no instructions at all. *Id.* at 710, 721; *see also* Adam D. Galinsky & Gordon B. Moskowitz, *Further Ironies of Suppression: Stereotype and Counterstereotype Accessibility*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 833, 834, 839 (2007).

less likely to suffer from "correspondence bias,"[190] a cognitive error in which we assume that others' behaviors are a product of immutable personality traits rather than of their circumstances, while at the same time giving ourselves the benefit of the doubt for our own behaviors (that is, believing our own actions are governed by the situations we find ourselves in, rather than because we are "that kind of person"). Perspective takers, in other words, are more likely to offer the same kind of generous explanations for others' behavior that they would have offered for themselves.[191]

That is the upside of perspective taking and empathy. But research has also hinted at a disturbing downside. For one thing, empathizers will sometimes behave altruistically towards a target not only when doing so interferes with their own self-interest,[192] but even when doing so reduces the collective good of other group members.[193] Indeed, empathizers will do this even when self-consciously acknowledging that their partiality violates principles of fairness and justice.[194] In this context, the inclusionary approach would urge benevolence (toward the offender) at the expense of justice (toward the victim and the community).

Trading away justice doesn't happen automatically. C. Daniel Batson, perhaps one of the most prominent researchers in the psychology of altruism, and his colleagues have detailed the four conditions under which individuals induced to empathize with an other *might* behave altruistically towards him at the expense of their own moral principles:

(a) The person is required to perform behavior for which a personally held moral principle, such as a principle of justice, is clearly relevant; (b) empathy is felt for one or more of the individuals affected by the behavior; (c) the individual or individuals for whom empathy is felt are not the only ones in need; and (d) not everyone's need can be met. In such a situation, empathy-induced altruism should motivate the person to show partiality toward the individual(s) for whom empathy is felt, even if doing so violates the person's moral principles. If the altruistic motive is stronger than the moral motive, the person should act immorally.[195]

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190. Daniel T. Gilbert, *Ordinary Personology*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 148, at 89, 131–34. This is also known as the "fundamental attribution error." Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 184 (Leonard Berkowitz ed., 1977).

191. Ruth Ellen Galper, *Turning Observers into Actors: Differential Causal Attributions as a Function of "Empathy,"* 10 J. RESEARCH PERSONALITY 328, 330–35 (1976); Dennis T. Regan & Judith Totten, *Empathy and Attribution: Turning Observers into Actors*, 32 J. PERSONALITY & SOC. PSYCHOL. 850, 856 (1975).

192. C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner's Dilemma II: What if the Target of Empathy Has Defected?*, 31 EUR. J. SOC. PSYCHOL. 25, 34 (2001).

193. Batson et al., *supra* note 183, at 626, 628–29. In these experiments, the sympathetic "other" was a fellow group member.

194. Batson et al., *supra* note 184, at 1046–47, 1050–51.

195. *Id.* at 1043.

These conditions can be present in the inclusionary approach of passing judgment on a criminal wrongdoer. First, the judger is asked to apply a principle of justice—rendering a verdict on the basis of actual guilt or innocence. Second, the judger is invited, by hearing the full story of the criminal defendant in all its narrative richness, to feel empathy towards the one on whom she must pass judgment. Third, the criminal defendant is not the only individual "in need"—indeed, the whole purpose of a criminal trial is to gain vindication for victims, and peace, resolution, and order for a community. And fourth, one cannot pass judgment on the wrongdoer without also making a statement about the value of the victim's and community's claims against the defendant.[196] It is generally a zero-sum game—either the victim and the community are vindicated, or the defendant is. Of course, Batson and his colleagues do not say that feeling empathy will *always* result in altruistic behavior towards the one at the expense of justice towards the other—this will only happen "[i]f the altruistic motive is stronger than the moral motive."[197] But this qualification should not make us sanguine—for one thing, it implies that in close cases, a judger *would* tip the balance in favor of the defendant at the expense of justice.

If this was the worst possible consequence of the inclusionary approach, it might be a price worth paying. Unfortunately, occasional injustice towards victims and communities in favor of altruism towards offenders is not the only consequence the inclusionary approach must contend with. Perspective taking also has cognitive consequences for those who engage in it.[198] Why does perspective taking lead to altruism, less aggression, a greater willingness to give the benefit-of-the-doubt, and reduced reliance on stereotyping? Because by putting oneself in another's shoes, in a very real psychological sense, one *becomes* that other person—our cognitive representation of our self gets merged with our representation of the other.[199] Simply put, perspective taking makes us perceive the other as more similar to ourselves.[200]

What are the consequences of an increased perception of similarity? One answer to this question comes from asking how jurors respond to defendants who share demographic characteristics with them. A long line of research on juries (and sometimes judges) shows that juries are less likely to convict, or are more reluctant to punish harshly, defendants they perceive as similar to themselves. The similarity effect has been

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196.   Bilz, *supra* note 116, at 1086–91.

197.   Batson et al., *supra* note 184, at 1043.

198.   *See* Davis et al., *supra* note 54, at 713, 725.

199.   *See id.* at 713–14; Galinsky & Moskowitz, *supra* note 44, at 715–16. *But see* C. Daniel Batson et al., *Is Empathy-Induced Helping Due to Self-Other Merging?*, 73 J. PERSONALITY & SOC. PSYCHOL. 495, 497, 508 (1997) (arguing that true altruism, which is not egoistically motivated to reduce the giver's own distress, requires cognitive separation with the object of empathy).

200.   John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 232–33 (1996); Davis et al., *supra* note 54, at 713–14; Galinsky & Moskowitz, *supra* note 44, at 709.

studied for judgers sharing the same race,[201] gender,[202] and socioeconomic status as the defendant.[203] Another perverse feature of the similarity bias is that it really only occurs when the evidence against the defendant is weak. When the evidence against the defendant is strong, similarity with the defendant leads jurors to be *more* harsh toward him.[204] In other words, the inclusionary approach is most likely to tip the scale in favor of the defendant in close cases—which is exactly when we would want judgers to be least affected by any sort of bias, because any "tipping" at all in a close case is the most likely to cause an out-and-out reversal of the outcome relative to what it would be without the tip. In contrast, when evidence against the defendant is very strong, similarity effects simply introduce a piling-on effect against the defendant—this is known as the "black sheep effect" in psychology.[205] While such piling on is not good, there is at least the comfort that it's not likely to matter to the outcome.

Of course, in the cases discussed in this Article, the perceived similarity is not a result of *actually* shared demographic features. Instead, it is an induced consequence of perspective taking. Why does perspective taking lead to a perception of similarity? Perspective takers tend to describe themselves and the target as sharing personality traits; that is, they "confuse" the representation of the "self" with the representation of the "other."[206] This self-other confusion could occur in two directions. Features of the self could be misattributed to the other—that is, if I see myself as funny, intelligent, helpful, disorganized, and fearful, I will ascribe those characteristics to the other more than I would have without having taken his perspective.[207] But it could also go the other way: if I thought that the other was funny, intelligent, helpful, disorganized, and fearful, then after taking his perspective, I am more likely to ascribe those traits to myself.[208]

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201. Derek Chadee, *Race, Trial Evidence and Jury Decision Making*, CARIBBEAN J. CRIMINOLOGY & SOC. PSYCHOL., Jan. 1996, at 59, 77; Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL. 317, 317–22, 331 (1999); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82–85 (1993); Ramsey McGowen & Glen D. King, *Effects of Authoritarian, Anti-Authoritarian, and Egalitarian Legal Attitudes on Mock Juror and Jury Decisions*, 51 PSYCHOL. REPS. 1067, 1072–73 (1982).

202. *See* Gloria J. Fischer, *Gender Effects on Individual Verdicts and on Mock Jury Verdicts in a Simulated Acquaintance Rape Trial*, 36 SEX ROLES 491, 499 (1997); Stuart Nagel & Lenore J. Weitzman, *Double Standard of American Justice*, SOCIETY, Mar. 1972, at 18, 25, 62.

203. Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. REV. L. & SOC. CHANGE 1, 4–5, 10 (1973).

204. Chadee, *supra* note 201, at 74–75; Norbert L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545, 561–62 (1995).

205. *See* José M. Marques, Vincent Y. Yzerbyt & Jacques-Philippe Leyens, *The 'Black Sheep Effect': Extremity of Judgments Towards Ingroup Members as a Function of Group Identification*, 18 EUR. J. SOC. PSYCHOL. 1, 4–5 (1988).

206. Davis et al., *supra* note 54, at 713–14; Galinsky & Moskowitz, *supra* note 44, at 709.

207. Davis et al., *supra* note 54, at 723; Galinsky & Moskowitz, *supra* note 44, at 709.

208. Arthur Aron et al., *Close Relationships as Including Other in the Self*, 60 J. PERSONALITY & SOC. PSYCHOL. 241, 242 (1991); *cf.* Bargh, Chen & Burrows, *supra* note 200, at 239–40.

It is unclear under what conditions one process or the other will dominate,[209] but no matter which process is in play, both are potentially disturbing in the context of the criminal law. If judgers perceive the targets to have similar—generally positive[210]—personality traits to their own, then *if* defendants on the whole *do not* share the features of the average person, then defendants are being perceived more positively than is accurate. Perhaps one of the points of the inclusionary approach is that people—even members of despised outgroups—*are* more like us than different. When the outgroup in question are African Americans, or the elderly, or even some outgroup about which we know almost nothing,[211] this is a safe and benevolent assumption; a positive correction for inaccurate (and negative) stereotypes. But this generosity of spirit seems less benevolent when we are talking about criminal defendants who, if guilty, have behaved in often deeply antisocial ways.

This point is even sharper to the extent the judger misattributes the target's features as his own. This is because confusion of other with self, as a consequence of perspective taking, has actually been shown in laboratory experiments to affect perspective takers own actual behavior. Specifically, perspective taking of a target other leads perceivers to behave *like* that other—for both well and ill. In a fascinating—and disturbing—set of experiments by Adam Galinsky and his colleagues,[212] participants were asked to take the perspective of multiple stereotyped "others," and then were given various tasks. For instance, participants were asked to take the perspectives of a professor or a cheerleader.[213] In a later, seemingly unrelated task (answering some LSAT questions), the "professor" perspective takers answered more questions correctly than the "cheerleader" perspective takers, relative to controls.[214] Participants asked to take the perspective of an elderly person later performed more cooperatively than controls in a game that tested aggressiveness; those asked to take the perspective of an African American male performed more aggressively than controls.[215] The authors finally show that this effect is driven by the perceivers' cognitively bringing the "other" into the "self."[216] This is just one study, and admittedly taking the perspective of

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209. Some guesses have been made; namely, the longer one knows the "other" and the more integrated into one's life the "other" is, the more merging should result. Aron et al., *supra* note 208, at 246–47; Davis et al., *supra* note 54, at 714.

210. Davis et al., *supra* note 54, at 722. People are generally biased toward positive traits when describing themselves. *See* Mark D. Alicke, *Global Self-Evaluation as Determined by the Desirability and Controllability of Trait Adjectives*, 49 J. PERSONALITY & SOC. PSYCHOL. 1621, 1626 (1985); Vera Hoorens, *Self-Favoring Biases, Self-Presentation, and the Self-Other Asymmetry in Social Comparisons*, 63 J. PERSONALITY 793, 810 (1995).

211. Galinsky & Moskowitz, *supra* note 44, at 716.

212. Adam D. Galinsky, Cynthia S. Wang & Gillian Ku, *Perspective-Takers Behave More Stereotypically*, 95 J. PERSONALITY & SOC. PSYCHOL. 404 (2008).

213. *Id.* at 406–08.

214. *Id.* at 411–12.

215. *Id.* at 413–14.

216. *Id.* at 415–16.

professors, cheerleaders, the elderly, and African Americans is importantly different than taking the perspective of someone as (if guilty) antisocial as a criminal defendant. Perhaps we have more protective walls up for that kind of cognitive encounter. But the study at least suggests the possibility that perspective taking of a target other can lead the perceiver to behave in ways similar to how they perceive the target would behave—even when those behaviors are not good.[217]

The point does not even have to be as dramatic as worrying that empathy with thieves, rapists, and murderers will generate (at the margins, naturally!) more thieves, rapists, and murderers—an admittedly highly unlikely prospect. The point still has force when we consider that if the target is a lawbreaker, then the consequence might be that it becomes easier for judgers to imagine themselves behaving in more minor and less antisocial, but still unlawful, ways. Dan Kahan has written about this phenomenon by arguing that a primary reason individuals obey the law is that they perceive that others like them obey it, too.[218] When they believe that similar others do *not* follow the rules, they become less likely to do so themselves in order to avoid feeling like a "chump."[219] To the extent a criminal lawbreaker seems less like a distinct, dissimilar "other," the more her behavior will appear to be normal, or even sensible. Consider the findings of the Minnesota Tax Experiment—the largest predictor of tax compliance versus cheating was not perceived penalties or the likelihood of getting caught, but whether the taxpayer thought that other citizens in his or her bracket were also taking unjustified deductions.[220]

There is one more consequence of perspective taking worth noting: perceivers actually *like* the target more than if they had not engaged in perspective taking.[221] Again, proponents of the inclusionary approach might argue that this is not an unfortunate side effect but one of the very points in its favor. And if liking the defendant more does not decrease the probability that judgers will appropriately condemn a wrongdoer, then at least from a behavioral point of view there is little reason to criticize the inclusionary approach on this ground. From an expressive point of view, however, making judgers relatively fonder of the object of their condemnation seems problematic. Even engaging in the reciprocal

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217. For additional theoretical explanations for why perceivers might do this, see Adam D. Galinsky, Gillian Ku & Cynthia S. Wang, *Perspective-Taking and Self-Other Overlap: Fostering Social Bonds and Facilitating Social Coordination*, 8 GROUP PROCESSES & INTERGROUP REL. 109 (2005).

218. Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 103 (2003).

219. *Id.* at 85.

220. *See* Marsha Blumenthal, Charles Christian & Joel Slemrod, *Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota*, 54 NAT'L TAX J. 125, 130–35 (2001); Joel Slemrod, Marsha Blumenthal & Charles Christian, *Taxpayer Response to an Increased Probability of Audit: Evidence From a Controlled Experiment in Minnesota*, 79 J. PUB. ECON. 455, 464–65, 474–81 (2001); *see also* STEPHEN COLEMAN, MINN. DEP'T OF REVENUE, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS 18–19, 25 (1996), http://www.taxes.state.mn.us/legal_policy/research_reports/content/complnce.pdf.

221. Davis et al., *supra* note 54, at 713, 724; Galinsky & Moskowitz, *supra* note 44, at 709.

relationship that exists between "author" (defendant) and "reader" (judger) invites a kind of friendship—albeit a temporary one, in much the same way reading a book fashions a brief friendship with the characters in the novel—that should perhaps make us uncomfortable.[222]

The arguments I have presented so far do not say that the inclusionary approach to the narrative model is *wrong*. Instead, I have made two substantial modifications to it. The first is to lay out more precisely what the model demands of judgers, and the benefits it actually promises. The second is to offer skepticism that the positive cognitive and emotional effects of inclusion will happen consistently and in the way proponents would like, and to warn of the possible perverse effects that will often accompany inclusion. That is, my own version of the narrative model demands equal respect for its exclusionary components. I turn now to applying this modified narrative model to the law itself.

III. EXCLUSION IN LAW

Those who would have us apply narrative thinking to the task of judging should not lose the exclusionary lessons of literature and psychology. As in literature, good judging is a process of filtration. Some information deserves a judger's consideration, but some may be irrelevant to, or even *preclude*, a just resolution of a case.

The law currently embraces a relatively exclusionary model of judging, requiring that judgers actively enable filtering mechanisms in their decision making. I have already mentioned the most vivid example of this: the role judges have in barring evidence from the view of jurors at trial. This bar may apply not only to exculpatory evidence (like Rule 412 typically does),[223] but also to inculpatory evidence (such as the oft-evaded ban on "past bad acts" evidence offered to show that a party has a character-based propensity to engage in bad behavior).[224] Many—perhaps most—of the categorical exclusion rules function as legitimacy-enhancing, rather than simply accuracy-enhancing, bars.

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222. The idea of reading as forming a sort of friendship with the implied author comes from Wayne Booth. But as already mentioned, Booth focuses on why we should invite such friendships, with some minor qualifications suggesting there might be times we reject them—but seemingly not without giving them a try first. This is consistent with the inclusionary approach, in which camp Booth is solidly at home. BOOTH, *supra* note 20, at 201–23.

223. FED. R. EVID. 412.

224. *Id.* 404 (codifying an old common-law rule). Again, the point of exclusion is not plausibly to improve accuracy; if one were laying bets on the likelihood that a bank robber who had committed fifteen bank robberies in the past was likely the real culprit in a trial for a sixteenth, one would certainly as a matter of simple probabilities like to know his history. *See* Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 526–33 (1991); *cf.* United States v. Danzey, 594 F.2d 905, 910–15 (2d Cir. 1979); Rex v. Smith, (1915) 11 Crim. App. 229, 229–30, 236–37.

As Laurence Tribe has written,

It would be a terrible mistake to forget that a typical lawsuit, whether civil or criminal, is only in part an objective search for historical truth. It is also, and no less importantly, a ritual—a complex pattern of gestures comprising what Henry Hart and John McNaughton once called "society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts."

One element, at least, of that ritual of conflict-settlement is the presence and functioning of the jury—a cumbersome and imperfect institution, to be sure, but an institution well calculated, at least potentially, to mediate between "the law" in the abstract and the human needs of those affected by it.[225]

In a similar vein, Charles Nesson argued,

[T]he goal of generating acceptable verdicts is not met simply by choosing the verdict that is most probably accurate. Acceptable verdicts and probable verdicts might appear to coincide, given that one obvious way to gain public acceptance is to search for truth. But the correlation between probability and acceptability is not exact: a probable verdict may not be acceptable, and an acceptable verdict may not be probable.[226]

In this Part I wish to further explore this observation about the acceptability of exclusion as it is already practiced in law right now. I start with an example drawn from case law that serves as a real-life parallel to the morally motivated exclusion practiced by Thomas Keneally in *Schindler's List*. I then address objections to this example, which focus on the idea that the world of literature is and should be different from the world of law when it comes to exclusion. In this Section, I argue that the inclusionary approach does not apply with equal force across all legal actors and institutions; some are better equipped than others to take an inclusionary approach. Finally, I discuss what is perhaps the deepest challenge to my endorsement of an exclusionary approach to the law: capital sentencing.

A.   An Example from Case Law

Dan Kahan and Martha Nussbaum, in *Two Conceptions of Emotion in Criminal Law*, relate the case of *Commonwealth v. Carr*.[227] A man, accused of shooting two lesbians he observed engaging in sex, was denied the right to introduce psychiatric evidence that would have demonstrated that he had experienced an uncontrollable urge to kill stemming from his

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225. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) (footnote omitted).

226. Nesson, *supra* note 53, at 1378 (footnote omitted).

227. Kahan & Nussbaum, *supra* note 27, at 272 (discussing Commonwealth v. Carr, 580 A.2d 1362 (Pa. Super. Ct. 1990)).

deep, clinical homophobia.[228] Carr's story is a legal parallel to Goeth's. If the inclusionary approach is taken at face value, then just as with Goeth, it would *seem* as though we should demand that Carr's story be told. Again, Carr, for all his deadly homophobia, is as human as you and me; and recognizing him as such demands that his "hard case" be heard.

But this cannot be right. Just as we could not fully empathize with both Goeth and the *Schindlerjuden*, our sympathies for both Carr and his two victims are simply incompatible. And just as with Goeth in *Schindler's List*, we cannot hide behind the notion that Carr's backstory is "structurally" unnecessary. Kahan and Nussbaum argue convincingly that the basis for this exclusion was not that the evidence was *irrelevant* to determining whether or not Carr was genuinely provoked to kill; it assuredly was. Carr wanted the jury to have the option of finding him guilty of the lesser charge of manslaughter rather than murder.[229] The difference is that the manslaughter defense requires proof that the defendant, "at the time of the killing . . . is acting under a sudden and intense passion resulting from serious provocation . . . ."[230] The judge refused, ruling that admitting the exonerating psychiatric evidence was legally unsupportable because "[a] reasonable person would simply have discontinued his observation and left the scene."[231] Carr's behavior was not the result of anything the law would recognize as provocation, but instead the result of a morally outrageous view of the world that the law would simply not entertain.[232]

But as Kahan and Nussbaum point out, at the same time we reject Carr's inclusion of his psychiatric evidence for clearly moralistic reasons, we *might* include another defendant's psychiatric evidence of provocation on a different set of facts.[233] For instance, we might let a man who kills his wife to introduce evidence that she was pregnant with his stepbrother's child,[234] or allow a woman to present evidence that she killed her batterer after years of abuse.[235] The difference is not in the degree of reliability of the evidence in demonstrating that a defendant's self-control had been sapped. The difference is in our moral evaluation of the emotional response to the particular "provocation"—*ought* the defendant's will have been sapped by the victim's actions? Carr's psychiatric evidence, evidence of a wife's infidelity with another family member, battered woman's syndrome—Kahan and Nussbaum convincingly argue that all of it, if the court were truly value neutral, would be relevant to

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228. *Carr*, 580 A.2d at 1363–64; Kahan & Nussbaum, *supra* note 27, at 272.
229. *Carr*, 580 A.2d at 1363–65.
230. 18 PA. CONS. STAT. ANN. § 2503(a) (West 1998).
231. *Carr*, 580 A.2d at 1364.
232. *See* Kahan & Nussbaum, *supra* note 27, at 310.
233. *Id.* at 311.
234. Commonwealth v. McCusker, 292 A.2d 286, 289–90, 293 (Pa. 1972).
235. Commonwealth v. Stonehouse, 555 A.2d 772, 774–80, 782 (Pa. 1989).

whether the defendant was, in an objective sense, legally provoked.[236] The standard, though, is whether a "reasonable person" would have been so provoked, and we cannot assess the reasonableness of a response without rendering a value judgment of the behavior that provoked it. If the defendant's reaction is not "reasonable," and does not comport with morally acceptable emotional responses, the defendant's story of provocation will be excluded. The jury will not be invited to empathize with his tale.

B. Objections to the Exclusionary Narrative Model in Law

Of course, just because this is the way the law currently is, does not mean this is how it should be. Even if morally based filtering makes for better reading and more ethically sound literature, it doesn't follow that it also makes for better law. One ought not take the comparison of law to literature too far, this argument goes, because the consequences of encountering a bad book are pretty limited (wasting a few hours that could have been spent doing something else), whereas the consequences of bad criminal judging are dangerous in the extreme. Just because good literature cannot exist without a fair balance between inclusion and exclusion does not mean that good *law* ever demands the same.

There are two types of critics who might object to applying the exclusionary model apparent in literature to the law. I will dismiss the first rather summarily. He is the anti-moralist critic, who rejects the notion that the law (unlike, perhaps, literature) should pay any attention at all to "moral" or expressive considerations. Judge Richard Posner is the most clear-cut modern critic in this camp.[237] Maybe this is an admirable aspiration for the law (although I can't say I would agree), but even this morally agnostic group would agree that it is hard even to conceive of law absent a sense of morality. They might argue, in line with the legal realists, that this "morality" is, knowingly or not, a front for simple power politics.[238] But convincing this critic is not my ambition.

The second type of critic, though, is square within my line of fire. This critic agrees that the law does and ought to pay attention to moral considerations, but she rejects the propriety of any legal actor categorically, and especially *ex ante*, judging any particular point of view as without value. She holds a strict inclusionary view in *law*, irrespective of what literature or psychology might suggest, because the law has distinctive concerns. That is, literature and psychology have very different goals than the law. Literature is aspirational, evocative, and provoking—its very essence is choosing sides, and it stands ready to be judged for the

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236. Kahan & Nussbaum, *supra* note 27, at 306–12, 361–62.
237. *See, e.g.*, POSNER, *supra* note 19. Indeed, he argues that as much as possible neither law *nor* literature should "moralize." *Id.* at 305–07.
238. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Hale, *supra* note 107; Llewellyn, *supra* note 107.

choices it makes. As for psychology, perhaps it is very, very hard for in-dividuals to simultaneously and fully condemn and comprehend, and perhaps taking the view of a criminal offender has effects that can be po-tentially corrupting to the perspective taker and to other goals of the criminal justice system—but this does not end the discussion. Science cannot tell the criminal justice system what it ought to do, it can only tell it what the potential costs are.

Unlike either literature or psychology, the law must judge. Verdicts do not just have expressive consequences, or cognitive consequences, they have *actual* consequences for real human beings. While literature and psychology can offer insight into what the law does and how, they cannot ultimately answer the normative question of what the law should do. This type of critic has essentially three concerns about exclusion in the law, which I will call her fundamental, institutional, and structural doubts. I address each in turn.

1. Fundamental Doubts

The first objection takes up the perspective of dual compassion. It holds that we are obliged to sympathize with all victims, even the ones who, as a result of their past misfortune, become victimizers themselves. In other words, if Carr's homophobia is a product of his own victimiza-tion, specifically, "a history of constant rejection by women, including his mother who may have been involved in a lesbian relationship, sexual abuse while in prison in Florida, inability to hold a job, and retreat to the mountains to avoid further rejection,"[239] then we are duty bound to at least invite the possibility of dual compassion for both him and his two victims. Accordingly, limits on his ability to tell the stories which might trigger that compassion should be highly suspect. If they are based on a moral distaste for his perspective, such limits are illegitimate.

I have already reviewed the evidence about the psychological diffi-culties of dual compassion. Often, sympathies are just mutually incom-patible. That is, if it is possible at all, it is at a minimum extremely hard to feel sympathy for both a wrongdoer and his victim at the same time and in reference to the same crime and still maintain a sharp sense of the moral divide between the two. Does this mean, though, that the law must concede the point? The answer must turn on whether the law can legitimately demand the psychologically difficult, or even the psychologi-cally impossible. Certainly the law requires that citizens do, or refrain from doing, many things that are psychologically very tough. Some of these are technical, such as essentially impossible jury instructions to consider evidence for one purpose but not another.[240] Others are more

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239. Commonwealth v. Carr, 580 A.2d 1362, 1363–64 (Pa. Super. Ct. 1990).

240. For instance, because an employee is an agent of the employer but not vice-versa, a jury may be instructed that an employer's hearsay admission that his employee was negligent can be used to

profound. In no state, for instance, is one allowed to use physical force to answer even the deepest insult.[241] Though juries sometimes let off defendants who attack in the face of such insults,[242] this does not undermine the point—the law formally condemns and punishes it, and as difficult as it might be to resist the temptation to lash back, the law does not allow physical "self defense" to insults, even if *everyone* in a particular jurisdiction would endorse it. Thus, the fact that dual compassion is psychologically difficult—in some cases, perhaps even impossible—does not necessarily mean that the law cannot demand it anyway.

But if it does so, it needs a good reason. The inclusionary approach is grounded in an appeal to legitimacy—to the extent the law indulges the base desire to exclude the full perspective of wrongdoers and refuses to treat them as human beings with stories to tell, the law loses its moral authority. This in turn should lead to disrespect for the law's proclamations, and even its institutions. But this cuts both ways: failing to fully condemn, when full condemnation is deserved, *also* contributes to ill-regard for the law. In addition, demanding that judgers engage in tasks that they find difficult or even impossible to do makes the perception of illegitimacy even worse. Because the law is damned if it does allow wrongdoers a full narrative voice, and also damned if it does not, this fundamental objection to the moral exclusionary view is a philosophical wash.

2. *Institutional Doubts*

Even if she accepts the fundamental point about incompatible sympathies, the anti-exclusionary critic might still make an institutional argument. She might object strongly to *judges* being the ones to choose among those competing sympathies. For instance, in the *Carr* example, Kahan and Nussbaum freely admit there is nothing in their account that dictates that evidence about homophobia will always be excluded, while more morally acceptable evidence (like, depending on your views, expert testimony on battered women's syndrome) will be included.[243] What looks like a sensible moral exclusion to one could be characterized as idiosyncratic lawlessness to another. This critic has a good point.

This critic might argue, contrary to Kahan and Nussbaum, that the institution best suited to draw moral bottom lines is the one that has been given the authority to be the ultimate fact finder; in Carr's case, the

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prove the employer's vicarious liability, but not the employee's own negligence that triggers the vicarious liability. *See* FED. R. EVID. 801(d)(2); Mahlandt v. Wild Canid Survival & Research Ctr., Inc., 588 F.2d 626, 631 (8th Cir. 1978).

241. *See, e.g.*, 720 ILL. COMP. STAT. 5/7-1(a) (2008); LAFAVE, *supra* note 61, at 407.

242. Consider, for example, a Southern juror's words during deliberations for a man who was tried for murder after shooting three other men who had verbally taunted him: "Good God Almighty, bub . . . . He ain't guilty. He wouldn't of been much of a man if he hadn't shot them fellows." HODDING CARTER, SOUTHERN LEGACY 50 (1950).

243. Kahan & Nussbaum, *supra* note 27, at 362.

jury. If a particular narrative is truly morally irrelevant (Carr's clinical homophobia), then let the final decision maker be the one to decide so *after* hearing it. One enormous advantage of this position is that the jury is the representative of the community. Our use of juries stems not from a conviction that they are more "accurate" than other decision makers, but from our commitment to democratic principles. The judge is just one person—and not an especially representative one at that. The jury, in contrast, embodies the norms and sensitivities of the public at large. Moreover, to the extent we would like to condemn homophobia, it is a more powerful expression to have the representatives of the community express it via a conviction, than for a single judge to do so by excluding evidence of it *ex ante.*

One part of this criticism is a point well taken: we should pay attention not just to what stories get told, but where, when, and to whom. Some institutions are able to process full narratives in a way that is less likely to lead to the perverse expressive consequences I have outlined—a point I take up later. The jury, though, is probably not one of them—and this is not (just) because juries might make moral mistakes, too.

As an institutional matter, when deciding where and when (rather than whether) narratives ought to be restricted, one consideration is transparency. If we simply left it to the jury, the message of condemnation for Carr's homophobia is ambiguous: does a conviction mean that the jury rejected the idea that his homophobia was mitigating? Or does it simply mean that though mitigating, the other evidence supporting first degree murder overwhelmed it? Because the jury does not have to give reasons for its decisions, the weight they give any piece of evidence remains hidden. Contrast this with a judge, who, when deciding that Carr's homophobia cannot be admitted, does so explicitly.[244] The opinion in *Carr* made it clear, because it had to, that the judge was excluding the evidence because he had found it legally irrelevant (and morally repugnant).[245] Unlike juries, judges typically explain why they rule as they do. Moreover, if either the judge or the jury can make a mistake by excluding what are in fact morally relevant points of view (such as, perhaps, evidence of battered woman's syndrome), then it makes sense to assign the task of deciding which is which to the institution capable of having its decision second-guessed, either on appeal or via the court of public opinion; namely, the judge.[246] The jury's decision, in contrast, is not only opaque, it is sacrosanct.

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244. *See Carr*, 580 A.2d at 1364–65.

245. *See id.*

246. Kahan and Nussbaum give a telling example of exactly this happening. In Texas in 1988, a state judge gave only a slap on the wrist to a murderer whose victims were two homosexual men who had solicited the defendant for sex, saying "I put prostitutes and gays at about the same level, and I'd be hard put to give somebody life for killing a prostitute." Kahan & Nussbaum, *supra* note 27, at 364 (citation omitted). In response to a public outcry, three things happened, each more remarkable than

The judge and jury, however, are not the only two possible loci for this decision, and trials are not the only place where the law must take a stand on whose moral worldviews will be recognized as legitimate, and whose will be rejected.[247] Whichever institution performs the story-filtering function, it must be done with the awareness that this filtering undeniably entails moral evaluation. Moral decisions are political, and arguably should be made with a maximum of deliberation and under close scrutiny. If we can see the filtering happen, we can repair it if it is done badly.[248] The "black box" of the American jury, by contrast and by design, is completely obscure and unaccountable.[249] It is therefore the *least* desirable place to vest power to decide whether to include or exclude a narrative on explicitly moral grounds. Judges are more transparent (and correctible) than juries in this regard.[250] But political actors are more visible still: it is clear when legislators are excluding (or including) a moral narrative, and we can repair any mistaken choices they make through legislative or political intervention.[251]

In deciding where to locate the filter, we also must ask whether the very act of telling will have offensive implications to the other "characters" in the story if told in one setting that it might not have if told in another. If a trial is very much like a novel, then there are protagonists and antagonists, and which is which is determined by whose story gets the richest telling. In a trial, when the offender tells the narrative of how he came to do what he did, this invites empathy for him. When the victim gets a richer telling, this invites sympathy for *her*. Indeed, the usual criticism of typical criminal trials is not that offenders get too little opportunity to tell their stories, but that *victims* do. It was this very concern, indeed, that led the Supreme Court, after some resistance, to allow victim impact statements in capital sentencing hearings.[252] American trials are fundamentally adversarial—when one side fares well in an evidentiary ruling, the other side fares accordingly worse. In a trial, the very act of telling or excluding a narrative means taking a side. By contrast, when the *legislature* makes the decisions about the filters, the tragic trade-off between sympathy for victims and sympathy for the wrongdoer is, if not absent, at least more muted.

As Kahan and Nussbaum demonstrate, legislatures pass categorical rules, regulations, or laws of exclusion or inclusion frequently.[253] The legislatures' actions can take the form of modifying the formal evidence

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the last: first, the judge was censured; second, citizens voted him out of office; and third, the legislature passed a law increasing the penalties for crimes motivated by hate. In Texas! *See id.*

247. Kenworthey Bilz & Janice Nadler, *Law, Psychology, and Morality*, *in* 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 101, 119–23 (Daniel M. Bartels et al. eds., 2009).

248. *See* Kahan & Nussbaum, *supra* note 27, at 362, 364.

249. Simon, *supra* note 25, at 511.

250. Kahan & Nussbaum, *supra* note 27, at 365.

251. *See id.* at 364–65.

252. *See* Payne v. Tennessee, 501 U.S. 808, 822, 826–27 (1991).

253. *See* Kahan & Nussbaum, *supra* note 27, at 364–65.

rules (like the Federal Rules of Evidence in the federal system, and the equivalents in each state),[254] or simply writing substantive statutes in a way that makes particular narratives relevant or not (such as whether knowledge of the victim's age would be a defense to statutory rape, or whether being conscripted as a child into a militia could negate the usual rule that those who persecute will be denied asylum). Indeed, one could even think about entire substantive laws as either endorsing or rejecting the legitimacy of different perspectives: legalizing gay marriage is an expression of the value of homosexuals' intimate lives; illegalizing certain abortion procedures (or refusing to pay for them for poor women) is a way of rejecting the notion that childbearing in certain circumstances is a hardship worth legal recognition; and the list goes on.[255] When debating such rules or laws, legislatures can and do apply a fairly unadulterated version of the inclusionary approach: they typically invite stakeholders from across the spectrum to present their views (and often, as in the case of hearings, their personal stories).[256] Even for changes that are spearheaded not by Congress directly, but by rulemaking agencies, suggestions are vetted using notice-and-comment procedures, which include a period during which any and all are invited to express their concerns and, if they like, tell their own stories.[257]

Before making profoundly important decisions that will mark out individuals, or especially, entire classes of people, as "other," it is impossible to deny that their dignity and our legitimacy demand, at a minimum, that they be allowed to offer their stories *somewhere* in the process. The argument has pragmatic force as well: if we were to categorically and always close ourselves off from hearing certain stories, we would be inviting stagnation. Moreover, the argument has force as a matter of simple logic: before we decide not to "hear" a narrative in a legal sense, someone must hear at least some of it—even if an abbreviated, condensed version—in a literal sense in order to know whether to reject it. Finally, decisions to hear or not hear narratives by one institution can engender resistance by others.

This can get very complicated. But a proper reading of the narrative model nevertheless demands subtlety and complexity with regard to whether, where, and how narratives will be heard. The narrative model does not have to insist that narratives always be available at the retail, trial level to have value. The goals of respectful, humane treatment of

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254. As "procedural" rules go, the process for amending rules of evidence "has become increasingly removed from the judicial sphere and into the hurly-burly of the political process"—a result unsurprising given that these rules determine the fraught questions whose narratives will be heard, and whose not. Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking,"* 53 HASTINGS L.J. 843, 854 (2002).

255. Bilz & Nadler, *supra* note 247, at 119–20.

256. *See, e.g.*, H.R. REP. NO. 103-489 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820 (citing testimony including expert reports and personal stories).

257. 5 U.S.C. § 553 (2006).

criminal defendants, and dignity of the legal system, can be achieved at the wholesale, legislative level instead. We could give legislatures and administrative agencies, rather than judges or juries, the primary role of vetting moral narratives. We can accept the inclusionary approach, without accepting that it applies with equal force in every legal setting. The next Section discusses another way that the scope of the inclusionary approach might be limited, in order to save it overall.

3.   Structural Doubts

The final argument against the propriety of moral exclusion in law is also the most intriguing. This view tries to save the dual-compassion perspective by structuring the law in a way that completely separates the message vindicating the victim from the punishment of the offender. After all, there is no reason that *punishment* has to be the exclusive medium to communicate our message of valuing the victim. The state could implement a dual procedure that would both forcefully assert a sense that the victim genuinely has been hurt, but also independently recognize limits the wrongdoer might have faced in deciding whether to commit the crime. That is, we can institutionally separate out vindication for the victim from punishment of the offender. This would resolve the problem of mutually incompatible sympathies, such as between Goeth and the *Schindlerjuden*, Bigger and Bessie, Carr and the lesbians he shot, and Amadu Bah and the civilians he tortured. How could this be done? Arguably, in the United States we already do it. As Kahan and Nussbaum emphasize, we first try, and then in a separate hearing, we sentence criminal defendants.[258] We can both condemn fully in the guilt phase of the trial and then offer mercy at the sentencing phase.

But this cure demonstrates a misdiagnosis of the disease. The problem here is not institutional, but psychological. The human mind does not separate, in the normal course of things, condemnation from punishment. Going back to literature, it would be as if Keneally had written another, completely separate, novel after *Schindler's List*, called perhaps *Goeth's Demons*. We could read the first and sympathize fully with the Jews, then put the book down. We would then read the second, and to the extent we felt compelled by the tale, sympathize with Goeth, and then put *it* down. In this way, Kahan and Nussbaum are effectively arguing, we would not have to compromise our compassion for anyone, for Keneally would have conveyed two different, equally valid and uncontradictory messages.

Kahan and Nussbaum claim that mercy does not necessarily or even usually mitigate blame,[259] but do not give much explanation for why they

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258.   Kahan & Nussbaum, *supra* note 27, at 368.

259.   *Id.* at 369 (noting that "mercy (like forgiveness) is a kind of leniency that presupposes fault").

assume this. The authors merely assert that a light sentence does not un-
dermine the message of condemnation of wrongful behavior, but instead
is just an exercise of "forgiveness" that maintains the pronouncement of
wrongdoing made in the guilt stage of the trial.[260] Citing Jeffrie Murphy,
they argue that "[t]o *forgive* a friend's inattention . . . is not to take back
the initial *condemnation* of her behavior; on the contrary, the convention
of forgiveness presupposes blame, for if the offending conduct were no
longer recognized as wrong, there would be nothing to forgive,"[261] and
they then apply this observation to the criminal justice system.

While Kahan and Nussbaum are right that we may forgive trans-
gressors privately, they misstep in asserting that this ability for private
forgiveness translates neatly into criminal mercy. Kahan and Nussbaum
argue that in the first, condemning stage, "we are largely unconcerned
with issues of responsibility for character; we are concerned only to ap-
praise the act for what it is—either good or bad, beautiful or ugly."[262] It
is only at the punishment phase that "we are intensely interested in the
offending party's responsibility."[263] But so conceived, are these really
two steps? A criminal act is not so ugly if it is done by an irresponsible
person—it lacks that element of insult which Murphy was so careful to
describe. A judge does not grant *mercy* in mitigating the sentence of an
offending party who was not morally responsible for his acts. Instead the
judge is merely meting out appropriate *justice*—those who are not (as)
responsible are not (as) guilty.

Once this notion of mercy is disentangled from that of plain justice,
Kahan and Nussbaum's dual scheme becomes as unhelpful as *Goeth's
Demons*. To the extent that leniency in sentencing reflects the require-
ments of justice, people will naturally have no complaint about the con-
ceptual "separation" of the two. But to the extent that a judge's leniency
reflects true "mercy" of the gratuitous, personal sort experienced when
one friend forgives another, victims—and the public—should complain,
and complain loudly.

Kahan and Nussbaum recognize the instability of their bifurcated
procedure, noting that "nothing prevents assessments made at [the sen-
tencing phase] from colliding with and completely undermining assess-
ments made in the adjudication of guilt."[264] But their use of the word
"colliding" is telling. The word connotes a certain randomness and in-

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260. *Id.*
261. *Id.* at 368 (citing Murphy, *supra* note 115, at 14, 20–25).
262. *Id.* at 367.
263. *Id.*
264. *Id.* at 371. Indeed, with the publication of his article, *What Do Alternative Sanctions Mean?*,
Professor Kahan seems to have abandoned the idea that the line between condemnation and punish-
ment can reliably be drawn. That entire article is an elaboration of the notion "that when society deli-
berately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing
his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless
in the eyes of the law." Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591,
598 (1996).

frequency. Think of traffic: cars on the road for the most part do not "collide" either predictably or often. (If they collided predictably, the problem could be systematically fixed; if they collided frequently, no one would drive.) Their use of the term here implies that an act of leniency that undermined the message of condemnation would be a rare event, like a chance automobile collision.

On the contrary, I would argue that the "collision" between the guilt phase and the punishment phase is the norm, not the exception. "Token" punishments are seen by the public in one of two ways: either as a correct expression that the crime itself was no crime, or not much of one, at all; or, as evidence of renegade judges or juries imposing their own twisted sense of justice in contravention of acceptable norms. Examples of the former are the routine slaps on the wrist North Dakota gave to speeders in the days of federally mandated 55 m.p.h. laws,[265] and the increasingly small penalties judges are imposing for small-fry possessors of marijuana.[266] Light "punishments" are a tacit admission that these infractions are genuinely minor—and perhaps ought not be outlawed at all. As for examples of the public interpreting inappropriate punishments as evidence of renegade, lawless judges, Kahan and Nussbaum offer examples themselves. They mention the case of a judge who inspired the outrage of a community by lightly sentencing the murderer of a homosexual male.[267] In another piece, Kahan describes an outpouring of feminist anger after a light sentencing for the gang rape of a mentally handicapped girl.[268] Tellingly, Kahan and Nussbaum offer no examples of cases where a community accepted a lenient sentence as nevertheless fully condemning the criminal. Why? Probably because such cases are few and far between, if they exist at all. Occasional promising examples will generally deconstruct into sentiments that the wrongdoer was not guilty in the first place, either because the law itself is unjust, or that the wrongdoer was not entirely responsible.

The sentiment seems to be fundamental: justice requires a punishment equal to the degree of our condemnation. Naturally, a society is not *obliged* to match its punishment to its condemnation. Concerns of utility, politics, or even simple decency might dictate leniency. Sometimes justice simply has to take a back seat to other values—but this does not in any way dilute the fact that justice has been compromised to advance other concerns in such cases. Contrary to the hopes of Kahan and

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265. *See* Scott Kraft, *Some Cut Penalties: Rural States Chafe at 55 Speed Limit*, L.A. TIMES, Apr. 14, 1986, at B1.

266. In California, for instance, one judge even ordered the police to return sixty pounds of marijuana confiscated during a traffic stop, on the defendant's objection that California's "medical marijuana" law allowed him to transport his ware. Gerrick Kennedy, *CHP Told to Return 60 Pounds of Pot*, L.A. TIMES, Jan. 9, 2010, at A4.

267. Kahan & Nussbaum, *supra* note 27, at 364, 371.

268. Kahan, *supra* note 264, at 598–99 n.28.

Nussbaum, we cannot write two novels in each criminal trial; the public will read it as one.

C.   Is Death Different?

Easily the most difficult challenge to my thesis is the death penalty. My view, obviously, could be taken to imply that we should not hear the backstories of Goeth or Carr even in a capital case. Of course, this goes directly against legal precedent. The Supreme Court itself, in the famous case of *Lockett v. Ohio*,[269] expressly demanded that sentencers must not be denied access to any structurally relevant information that might cause them to mitigate a capital sentence.[270] In *Lockett* and elsewhere, the Supreme Court has held that the death penalty is "qualitatively different" than the more standard punishments such as prison, and so subject to different procedural requirements before we may impose it.[271]

Should that difference turn a narrative, which would be morally irrelevant in a noncapital case, relevant simply because the death penalty might be imposed? Does the specter of execution alter our judgment about what stories are morally relevant? And if so, why does that revision not reach back through the sentencing decision, and into the question of guilt itself? If a defendant were less culpable at the punishing stage because of his homophobia, why should he not be entitled to use that mitigating information in his case-in-chief? On the other hand, if his homophobia did *not* make him less guilty, why should we allow him to bring it up in the sentencing of a capital case? And again, if I am right that the sentence reflects the same moral evaluation, in practical effect, as the conviction itself, does it make sense to bar the defense when it can do the most good (by helping to avoid a conviction on a serious charge in the first place), and only allow it after the worst of the damage has already been done (he has been declared guilty)?

These are questions without good answers. None of the psychological or literary problems with including morally offensive narratives disappear just because they are being offered in a capital sentencing hearing. There does not seem to be any principled way to treat capital cases differently than other cases in this respect: if the information is repugnant in one arena, it is equally so in another. And yet, there is the pull that death is different—it is just not clear why. Perhaps the strong intuition we feel (grounded, maybe, in the qualitatively different sanction to be applied) is enough to give the defendant every benefit of the doubt— though again, this "generosity" is somewhat of a cold comfort given how late it comes; the defendant is given no more such concessions than is a noncapital defendant at the guilt phase. Eliminating the death penalty

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269.   438 U.S. 586 (1978).
270.   *Id.* at 605.
271.   *Id.* at 604 (citation omitted).

altogether would eliminate this essentially insupportable inconsistency, of course—but until there is enough political will to do that, perhaps the right to present any and all structurally relevant narratives to reduce the number of times it is imposed would be a distant second-best solution.

IV. CONCLUSION

The narrative model of legal judging has garnered considerable attention and respect not only from scholars, but increasingly from the courts. This Article offers systematic support for the model from empirical psychology and literature. In short, people process information better in narrative formats, and evidence presented in this way has both moral and psychological advantages for both the teller and the hearer. Narratives lead the hearer toward empathy with the subject. This is good where empathy is deserved, but deeply problematic where it is not. I have therefore argued for a version of the narrative model that pays respect not only to the need to include morally relevant narratives, but to deliberately and firmly *ex*clude perspectives that are morally irrelevant.

The law, in fact, already practices the more exclusionary version of the narrative model. Both procedural and substantive legal rules relentlessly filter out narratives, choosing *which* stories legal decision makers will be allowed to hear. Disabling this filter, demanding a more emphatically inclusionary approach to the narrative model, would not leave the law in a morally neutral position. Instead, it would mean that the law has indulged sympathy for one viewpoint as the expense of sympathy for another. To maintain legitimacy, the law cannot simply stop filtering; it must instead take care that it is listening to the right side.

The Article is not a condemnation of the inclusionary narrative approach to legal judging. The inclusionary approach is deeply important in making us aware that some outcast perspectives should be invited into the law. At the same time, though, the *ex*clusionary approach reminds us that some perspectives have been rightly banished.

Which is which? There is no neat or uncontroversial way to select, and one certainly cannot assume that the narratives themselves can tell us. It helps somewhat to locate the decision within the most democratically accountable institutions available. But even that is not close to a complete solution—what if the polity is simply wrong about which narratives should be included, and which exiled? The Civil Rights Era in the 1960s, if it taught us nothing else, showed that democracy can get it wrong, and sometimes we must rely on the *least* democratically accountable institutions for justice. Yet these difficulties are no excuse for failing to acknowledge that applying the narrative model requires a careful, deliberate approach to deciding which stories are morally relevant to judging. Nor are they an excuse for failing to take on the challenge of continually reevaluating them.

Indeed, not only ought the problem be faced squarely, it should be welcomed. Doing so puts our moral evaluations out in the open, where they belong, to be debated and altered as our understandings of the ethical universe changes. The result will be frank discussions of issues of essential importance to our polity, and over time, justice can only improve as a consequence.

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