THE LAW, FAMILY POLICY AND INDIVIDUAL MORAL RESPONSIBILITY
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Fundamental assumptions

My initial comments regarding the law will reveal that I am not a legal scholar, yet I hope my presentation can spring from a reasoned set of assumptions regarding the intersection of the law, social science, and the moral dimension of human experience. To talk about the law, family policy and individual moral responsibility, I must address the question of what it means to be human. The typical answers to that question reside in philosophy and theory, for observation of human experience can document what is going on, but rarely can unfold the why or the how come of human experience without invoking an interpretive theory or framework that is based on non-empirical assumptions. These assumptions, of course, must be a logical and consistent account of what has been observed. Nevertheless, our explanations of human experience go beyond our descriptions of that experience. Hence, we proceed, in our explanations of human experience, from assumptions that scientists accept on faith.

It should be possible for ordinary people to make sense out of scientific renditions of human experience. If a given theory or philosophy of human being is not linked to the experiences of everyday life, it may not be useful or coherent. Fundamental to my explanation of what it means to be human are the responses of high school students to two simple questions. We asked teachers to ask these questions during our conduct of a federal grant in sixteen school districts spread across California, Arizona, New Mexico and Utah. We made the assumption that character and citizenship education could invite adolescents to live lives of moral responsibility, meaning that they could intelligently and practically make decisions that would not undermine their best interests and thus would promote a quality future for each of them. Already we were assuming that adolescents not only could understand the idea of moral responsibility, but could live in accordance with such understandings. The two questions we asked were as follows:

1. Have you ever been in a situation where you felt or sensed there was something you believed was right to do? In our own questioning of teenagers, and from every teacher we trained to ask this question, virtually 100% of the responses was “yes.” This empirical fact sustained our non-empirical assumption: that teenagers have moral feelings or sensibilities. After getting examples from the students of the various right things they had felt to do, we asked a second question.

2. Have you ever been in a situation where you felt or sensed there was something you believed was right to do, but you simultaneously refused to do it? Again, virtually all the answers to that question were “yes.”

To say yes to these two questions supports the idea that humans—even adolescents—experience moral understanding, a sense of doing right rather than wrong. These two yeses can also be seen as an acknowledgement that humans do not always do what they believe. Humans do not always honor their moral sense in a given situation. In brief, to say yes to these two questions suggests something fundamental about being human. That is, humans can experience moral feelings about their conduct, and can live true or false to their sense of what is right. This idea also makes both the rule of law
(holding people morally accountable or responsible for their actions) and the very idea of moral responsibility legitimate in communities and cultures.

However, neither humans nor communities necessarily organize or live responsibly. Moreover, some philosophies and theories about human experience do not grant individual moral responsibility as fundamental to human understanding or experience. Robinson (1980) documented the mismatch between expectations of moral responsibility (holding people accountable) in the law, and some philosophies of science that see humans as being victims of circumstances that render them incapable of, or not responsible for, destructive acts. One result of this mismatch in philosophies is the possibility that “expert witnesses” from the social sciences can offer conflicting explanations of the same events. Often, the conclusions offered to juries and judges by such witnesses are based on what philosophy or theory of “human being” the witness—or the juries and judges—deem legitimate, even though these philosophies are rarely made explicit on a witness stand.

For example, to make individual moral responsibility fundamental—and then grant exceptions for extenuating or mitigating circumstances—is dramatically and practically distinct from seeing humans fundamentally as not morally responsible merely because they have been subjected to injustices or unfortunate events associated with their upbringing. Virtually all humans must contend with injustice, victimization and immoral treatment by others. Such events may actually sharpen an individual’s sensibility regarding issues of right and wrong, and not obliterate it. This presentation offers a philosophy of social science that sees human moral responsibility in a way that is consistent with the assumptions in the law. That is, humans are regarded generally as being sensible to moral understanding, with an ability to live true or false to their moral sense. This is illustrated particularly in our sense of how to treat others—of how to do right by them. When humans are seen as moral agents—capable of living true or false to their sense of how to treat others—then it is possible to hold individuals legally accountable for their acts that go against the law, and which, through negligence or intent, undermine or destroy the best interests of others. Ideally, court decisions align both legal and moral dimensions of acting in each other’s best interests. This philosophy suggests that the distinction between what is legal and what is moral or ethical may be artificial, or may be a distinction that is neither necessary nor relevant to practice. This blurring of the legal and moral domains is possible and necessary if humans are seen as moral agents, but the grounds for both justice and morality are unavailable if humans themselves are not seen as capable of living true or false to their moral sense or to the demands of the law itself.

Moreover, family members, in numerous cultures, historically have been granted special privileges under the law—privileges not granted in the same way to individuals. Given the family’s stature as the basic unit of community and society, such legal privileges are seen as having a moral purpose, as serving the best interests of the community. In the application of family law where members of a family are exercising competing moral claims (child custody hearings; adoption proceedings; divorce grounded in abuse and threat), it is proposed that the focus of decisions be on the best interests of the most vulnerable or at-risk person in the situation. For example, in adoption proceedings, the best interests of the child would be the prime feature of legal decisions, rather than such decisions moving forward by granting equal standing (legal or moral) to
all claims of persons in the situation. A child, once adopted, can be subject, years later, to legal challenges to the original adoption proceedings. Now, as a four year old, what will become of that child in the courts? Whatever the procedural grounds for an adoption challenge, the moral dimension of the “best interests” of the child must inform any such proceedings. If there were legal oversights or errors in the original documents or decisions, they must be grave indeed to overturn the world the child is now inescapably immersed in. If there really is a distinction between the legal and the moral as some have argued, it is an unfortunate one. The legal, procedural realities and moral best interests of the child must be in alignment. Whatever the procedural or technical starting points in which the law is grounded, the practical application of decisions in family law cases can not proceed to achieve either justice or morality if those two worlds are kept separate. In the real world, they are inextricably bound up. An act can be immoral without being illegal, but in an ideal world, the law should never legally require that which is immoral or unethical.

The individual, the moral and the law

To see humans as moral agents, then, is essential for the rule of law to operate. This is so because if I am not morally responsible for acts that do harm or that are against the law, how can a legal system that enforces consequences for disobedience be considered moral? The function of the law when people are seen as not responsible would be little different from blaming corn for not growing tall enough. The law would be assessing the legitimacy of things interacting with things, rather than as humans with a moral sensibility relating to each other and who, in every moment, can live responsibly or irresponsibly. If the law is not regulating consequences on the basis of whether a person is responsible or irresponsible, it is merely defining the difference between how regrettable or beneficial the interaction of things happens to be. Of course, both the law and social science theories generally recognize the difference between adults and children—hence, in this country, the presence of juvenile courts, where the young are deemed not fully accountable, and where adjustments are made so those who are not yet morally responsible do not have to bear the full weight of legal sanctions. The law then, functions with the assumption that individuals are morally responsible, even while granting limited exceptions, given the context and circumstances at issue.

Implications of being a moral agent

We have suggested humans can experience life as moral agents and be held accountable for whether they live true or false to their moral feelings. When humans violate their moral feelings, they are not necessarily subject to the law of a given community, but there are consequences to when we go against or betray our moral sense in a given context. Perhaps some sample situations will illustrate the point.

1. My colleague, Craig Israelsen, tells of a traveler seated by the window on an airplane with open seating, who sees a rather large man making his way down the aisle, looking for an empty seat. The window passenger immediately has a feeling to offer the middle seat to the man. But instead of doing so, he moves a briefcase from the floor to the middle seat to make it appear occupied, and then averts his eyes from the passenger to a book he hastily opens. Five minutes later, the window passenger realizes he can’t
remember a thing he has read in the book, because he can’t get his mind off the passenger looking for an unoccupied seat.

2. A father is watching a soccer match on television when his 15 year-old daughter (who he knows has been doing algebra homework) comes down the stairs. The dad senses that she is about to ask him for help in math. Instantly, he has a very human feeling. It is that he ought to help her with the request she is about to make. But when she does ask, he complains about being interrupted and notes that if he does the work for her, she will never learn it for herself. He turns back to the soccer match, and although he seems to be concentrating on the screen, he realizes at half-time that, from the time his daughter interrupted him, he can’t remember a thing that happened on the screen (Warner & Olson, 1981).

3. A husband has returned from the grocery store late at night when he notices that the gas gauge needle is hovering on empty. Immediately he feels he ought to go back to the store from which he just came and fill up the car. He knows his wife has an appointment in the morning that is 45 minutes away, and this is the car she must use. But he begins to complain in his mind about how his wife doesn’t listen to him when he repeatedly reminds her to keep the gas tank at least half-full all the time. (Warner, 1997)

4. An adoptive couple who has just had a court reaffirm their custody of the 18 month old they have had since his birth, walks to the biological father who had brought the suit challenging the adoption and offers his hand in condolence. The biological father is startled by the gesture, but blurts out, “I guess I know it is in my son’s best interest that he stay with you.” The two fathers talk quietly, and the adoptive father agrees to give the other father an update on the boy’s progress over the years.

5. A corporate officer accuses a manager of creating a problem costly to the company. In fact, the executive so accused is innocent of culpability in the matter, but he listens to the problem and then asks the accuser, “Ma’am, what would you counsel me to do?” The officer then outlines the skeleton of a response to the problem, and the manager says, “Then that is what I will do.”

6. A wife of a graduate student feels her husband is so narrow and relentless in his focus on school that he seems disinterested in spending time with her. She rehearses many accusations of how he doesn’t care about her, is self-serving, loves the laboratory work more than he loves her, and so on. She prepares to let him have all these arguments when he arrives for dinner. As he walks in the door, she suddenly sees the signs of pressure that he has confronted all day. All her accusing thoughts seem to disappear, and she says only two things to him: “I’ve missed you. I sure would like some time with you.” His response: “I’ve been too invisible. Yea, let’s take a break together.”

These six cases illustrate two qualities of response to moral calls humans can experience. The first three, obviously, show people resisting their felt moral call to do right as they see it: Offer a seat on an airplane; give math tutoring to a daughter; fill up the gas tank. The second three examples show the possibility of doing exactly as one feels is right to do: console a father in a time of loss; focus on doing what is right by the company; express an honest desire and interest to a spouse.

The key to understanding these cases is that the first three could have ended in the quality of the second three, and vice versa. That is, the window passenger on the airplane could have honored his sense to offer the empty seat next to him. The soccer fanatic
father could have tutored his daughter. The husband could have simply gone to fill up the gas tank without quibbling.

Each of these stories were told us by people who, in reflecting on what they were “doing” in each incident, recognized later that they had been resisting a moral feeling to act. In the words of Terry Warner and the Arbinger Group, they were betraying themselves (Arbinger, 2000). Self-betrayal is a free act of a morally responsible person. To be in self-betrayal is to go against our own sense of what is right to do. The price of self-betrayal, as you might have guessed from these illustrations, is to rationalize, blame others and in numerous ways shift our own felt responsibility to something or someone else. To rationalize and justify our wrongdoing takes a lot of energy, and, once we are betraying ourselves, we are not at peace psychologically—hence the inability to concentrate on the book, on the soccer game, or on anything other than rationalizing and excusing ourselves for our refusal to live as we felt to.

Similarly, the second set of examples, where each individual—some even in the face of possible ignorant or self-betraying treatment by others, focuses on what the right or responsible task is in the moment, and they do it. The adoptive couple had felt the suit to be unjust and not in the best interests of an infant, yet saw the sorrow of their “antagonist” and set aside their self-protective feelings. The manager sensed the gravity of the problem facing the corporation and attended to that as the first responsible action. Incidentally, someone told the corporate officer he had accused the manager unjustly. The officer sought out the manager and apologized—and then asked him why he hadn’t said anything. The manager responded, “My guilt or innocence was not the problem at hand—it was how to solve the problem.” And finally, the neglected wife abandoned her accusatory feelings and simply stated her honest desires. In these latter three cases, the adoptive couple could have been arrogantly victorious, the manager could have been defensive and resentful about the accusations, and the wife could have berated her husband with all the justifying ammunition she had stored up that day.

When humans are moral agents, they can always behave differently, in moral matters, than they actually do. When self-betrayal also involves going against the law one believes in sustaining, the psychological consequences are the same as described above, but legal consequences are added to the mix. This illustrates the inescapable intersection of psychology and the law. Individuals can live true or false to their own moral sense and to their beliefs about sustaining the law. When we live false to either, we act as if we are victims instead of agents. The law and our quality of being human can be congruent. Levinas (1969, 1987) notes that fundamental to human being is how I treat other people. It may be what should also be fundamental to family law, where there seem to be competing legal claims to be resolved, is the moral dimension of how society sustains how we treat each other.

**Self-betrayal and how we treat others**

So, in moral terms, humans can be seen as capable of living true or living false to their personally held moral beliefs. If there is anything universal about such feelings, it may be in our sense of how to treat others. Here is an extended example of human moral being in a group setting that did not involve legal action, but which was a moral issue from start to finish. A teacher we had been training had taught about four days worth of our citizenship curriculum. She had already introduced the two questions I referred to
earlier, about having a moral feeling and then living true or false to that feeling. Then our teacher, Bertha, was ill. The substitute teacher did well for the morning class periods. Things fell apart after lunch. It seems that at the school cafeteria that day, numerous students had been given—but had not eaten—raisins, which were in individual small boxes. The substitute teacher would turn to write on the black board. Students saw her bouffant hairdo, remembered they had raisins, and invented a game on the spot: 1 point if you hit the teacher with a raisin and 3 points if it sticks in her hair.

The teacher could tell something was going on in the class, but no matter how quickly she turned around to catch what was happening, the students, just as quickly, feigned innocence and stifled the soft giggles that had alerted her in the first place. Eventually, however, she happened to run her fingers through her hair, and came away with about nine points worth of raisins. She lost it. She berated the class and stomped out of the room. She told the school principal of the reprehensible behavior of the students and stalked out of the school. The principal came down and gave the students a tongue-lashing.

When Bertha returned the next day, she found in her faculty box a note from the principal with the whole story written out in a spirit of anger she had never witnessed in him, even in person. She immediately felt to follow the examples of the substitute and the principal and scream at the afternoon class for being so callous. She had thoughts of, “How dare they do this, especially after what we have been learning about self-betrayal and about the moral meaning of how we treat others.” Her attitude was one of resentment and revenge. She said later that it was a good thing she wouldn’t see the offending class until after lunch. The morning classes afforded her the opportunity to either stew about the problem and increase her resentment, or to ponder the moral question about the whole incident. She asked herself, “Of all the things I could do in this situation, what do I believe is right to do?” She didn’t ever get a clear answer to that question, but she did have the sense that whatever she did, it could not be a verbal version of raisin throwing. She knew she could throw barbs as well as students could throw raisins, but it was obvious to her that to do so would be to do to the students what they had done to the teacher—at least the attitude and atmosphere in the classroom would be the same as if raisins were being thrown.

The afternoon class came. Bertha walked into the room at the ringing of the bell to begin class. The students, seeing she was there, fell silent. It was as if they knew this was the hour of judgment. The teacher let the silence work for a few moments. Then a question came into her mind. She asked it: “Who is willing to tell me that what you did yesterday was the right thing to do?” Silence. “Then” she continued, I assume your silence means you are admitting it was the wrong thing to do.” A student finally said, “Well, she was boring.” Bertha quickly challenged the justification. “Are you saying that normally it is wrong to throw raisins—unless the teacher is boring?” The student response was seductive: “YOU’RE not boring.”

Bertha sidestepped the manipulative comment. “What if the substitute teacher had been boring, but also your mother?” The student stuttered for a moment and then blurted out, “Well, that’s different.” Bertha challenged, “Explain to me how that is different.” Silence. Finally, the student engaged in this exchange said, “O.K., so it was wrong to throw the raisins.”
Bertha asked the class if everyone agreed that raisin throwing was wrong. There was a murmur of assent. To be sure, some students were agreeing just to get Bertha off their backs. They were going through the motions of agreement. Bertha delivered the next question: “As you admit that what you did was wrong, does any other moral feeling come to you as to what should be done now?” One student suggested inviting the teacher back and apologize to her. Some students groaned in dissent. Another student suggested they each write a letter of apology. This seemed to be a compromise students accepted. Bertha then indicated they could take a few minutes right now and each write a note.

Most students pulled out a sheet of paper, and in various attitudes of contrition or masked rebellion, began writing an apology. Two students didn’t respond. Bertha looked at them and asked them a question with her eyes. One student looked back at Bertha and protested, “Hey, we weren’t doin’ nothin’ that day!” Bertha asked, “And are you telling me, that while the raisins were being thrown that doing nothing was the right thing to do?” Both students paused, then each pulled out paper and also began writing.

Now, the substitute teacher in this incident did not sue the school district. I do not have a report of her response to the written apology letters. We know, from the idea of humans being capable of self-betrayal, that she could have accepted or rejected the students’ offering. We are asserting that in every moment, the way we treat others reflects more about our living true or false to our own moral sensibility about how to treat others, than it reflects how others have treated us. Our culture suggests the opposite, I know. As a community we may feel certain inhumane acts are defensible, if the individual so behaving has been mistreated. But then we as a culture are collaborating in excusing bad behavior because of others’ bad behavior. If the law is to operate as a moral force in a culture, it must grant that humans are morally accountable for doing the right thing, for living true to conscience, even when subjected to irresponsible and immoral actions of others. If this is not so, then we should all be able to excuse ourselves from obedience to law on the grounds that someone else was irresponsible or unlawful. Undoubtedly, people have believed and acted as if such an idea were true—or at least defensible, or understandable, or even justified. As long as we grant that humans are morally responsible and experience feelings of conscience, then the defensibility of violating conscience is itself a rationalization of wrongdoing. If we understand that self-betrayal is possible, then irresponsible behavior is understandable, but still not justified. That is, just because we can explain where self-justifications and excuses come from, and just because we can empirically document certain self-betraying attitudes and actions, it does not follow that such behaviors are justified.

**The law, self-betrayal and self-deception**

It is in this very intersection of human being with legal boundaries that the concept of individual moral responsibility is essential. Without it neither law nor moral action is possible, likely, or definable. Yet, one more characteristic of humans who violate conscience or betray themselves is basic to the possibilities being proposed here. It is a concept that the law would generally be blind to, for in a way, only a person who has given up a given self-betrayal would recognize the difference between living true and living false. When we are betraying ourselves, the rationalizations and justifications we offer for not doing the right as we see it seem absolutely real and valid to us. We are deceived about at least two features of life when we are betraying conscience. First, we
actually believe the wrong we are doing is right—or at least justified. Our rationalizations seem to us like legitimate reasons to be doing what we are doing. Second, we are troubled about our attitudes and we are defensive when people challenge our motives or our actions. This prompts further and more intense justifications from us in our own defense. We are troubled, but just as we are blind to the falseness of our justifications we are also blind to the fact that it is our own act of self-betrayal which has produced our troubles in the first place, including our irritable, accusatory emotions, and the rationalizations and justifications themselves. That is why, when we are betraying ourselves, no amount or intensity of justifications ever leaves us feeling justified. To see the truth of our predicament, we must give up our self-betrayal. Then and only then are we capable of seeing the truth of what has been going on. While in self-betrayal, we do not see the truth of the situation, and the truth of the situation includes that we are responsible for being blind to the truth. We are self-deceived. As the philosopher Berkeley once noted, it is possible as humans “...to have raised the dust and then complain we cannot see.” (Luce & Jessop, 1949, p. 26). Warner has applied this notion to the concept of self-deception, where the moral agent has, by refusing to honor conscience, ‘raised the dust’ and subsequently, complains he cannot see, being self-deceived about the source of his blindness (Warner, 1997).

What is the law to do with such a concept? Unless a witness in the matter under litigation were to give up his or her self-betrayal and thus be able to say, “I was self-deceived,” the law must rely on other evidences of either intent or ignorance to draw a conclusion about moral culpability. This is exactly the limit of the law that requires that expert witnesses on human behavior be brought in to explain what the law cannot always see. If the philosophical or theoretical possibilities accepted by the expert witness only include seeing humans as victims of circumstances, upbringing or human frailties, those acts of self-betrayal engaged in while self-deceived may be unnoticed. Some theories acknowledge that defensiveness and rationalizations suggest something is amiss, but they rarely include the idea that people so afflicted are deceived about the source of the afflictions. A common feature of people explaining their past self-deceptions is their admitting they saw themselves as victims rather than agents. Only when they gave up their self-betrayal did they see their own moral responsibility. Such is the experience of coming out of self-betrayal and self-deception. The difference between seeing the possibility of being a moral agent as compared to feeling one is trapped by victimizing forces beyond his or her control is relevant to how the law functions and to whether expert testimony about human responsibility accounts for self-deception as a source of feelings of helplessness or accountability. Symptoms of self-justification and defensiveness may be signs of self-deception rather than indicators of really being not morally accountable.

**Competing moral claims, family policy and the law**

On the assumption that the law tries to do right by family members (the moral call) when confronted by competing moral claims, that task is made easier when the special privileges of family members under the law is continued. This is primarily because no other social unit has demonstrated a general commitment across time and even across generations toward its members. Not surprisingly, quality family living is best demonstrated when the family lives by a relational moral philosophy rather than an
individualistic one. That is, following Levinas (1987), Warner (1997) and others such as Knapp (2000), when humans are for the other person their identity and quality of relationships is experienced positively. When individualistic philosophies operate in the family—meaning each individual is focused on their self-interests rather than each family member’s best interests—the quality of relationships suffers. Notice that one of the differences between living in self-betrayal and the authentic alternative is that in the latter condition, humans retain their moral concern for the well-being of others. Being self-deceived, is after all, characteristically self-concerned and self-justifying. It is significant that when individuals honor their felt moral sense toward others, they are neither particularly self-concerned nor self-justifying. Living in either of these ways—morally responsible or immorally irresponsible—is possible in any societal structure, but the more permanent commitment among family members makes it the most lasting and most intense version of heaven (or hell) most people are likely to experience. Where the greatest benefit can be can appear the greatest liability. The law intervenes in families when the members fail to be for each other and treat them accordingly. It is then that the law must proceed with an understanding of the possibility of responsible or irresponsible conduct—of family members being for the others’ best interests, or living in a counterfeit, self-betraying alternative—where relationships can become destructive of each other’s best interests. The family policy guiding legal action should then be to intervene in ways that would seem to ensure or promote the best interests of the competing parties. But a relational rendition of intervention would place the best interests of the weakest, most vulnerable family members as the prime criterion of any legal decisions. Fortunately, seeing humans as moral agents, and therefore capable of compassionate action or self-betrayal aligns the goals and purposes of the law with the real possibility of encouraging mutual morally responsible living.

These assumptions imply that the debate about family law and policy must begin with attempts to define and determine best interests. Both in a moral and a legal sense, such debates are meaningless without seeing humans as capable of living true or false to their felt moral imperatives.

Summary

For the law to operate in ways that strengthen the quality of family life and which nurture moral responsibility, the following assumptions are relevant:

1. Individuals are accountable for their actions that are destructive of others’ legal (and presumed “best”) interests. Exceptions are possible. Extenuating and mitigating circumstances can be relevant, but these must be grounded in the context or situation itself, and not in a blanket assumption that all humans in all such contexts are not accountable for their actions.

2. Seeing humans as moral agents includes the assumptions that it is possible for humans to have a moral sense, and to live true or false to what they feel is right. While, in theory, some moral sensibilities may be unique, the fundamentals of how we believe we should treat others are universal and transcend even cultural practices.

3. Cultures and governments can either promote or undermine the best interests of their citizens. When the government or the law coerces living destructively, it can be expected that the culture itself is undermining the best interests of the individual.
4. When cultures undermine the best interests of the family, they are undermining the best interests of the individual.

5. The ideal relationship of the law and individual moral responsibility is realized when the best interests of the individual, the family and the society are in alignment.

References


