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# Storytelling and Legal Scholarship

Richard A. Matasar
*IIT Chicago-Kent College of Law*

# STORYTELLING AND LEGAL SCHOLARSHIP

RICHARD A. MATASAR*

Traditional legal scholarship is characterized by a pseudo-scientific neutral voice. Yet beneath the surface, this scholarship bubbles with stories of real people with real problems that cannot be solved solely through rational discourse. Despite claims of objectivity, legal scholars rarely are scientists who deal with abstractions and who have no stake in any particular outcome. The very purpose of legal scholarship is to take a position—one shaped by unique, personal concerns—and vigorously argue its merits.

I describe below the gradual transition of my scholarly writing from supposed "objectivity" to an admittedly subjective approach. I reflect on how bloodless discussions of law in the classroom and legal scholarship undermine effective communication. I argue for making personal experience, ideology, and values explicit in scholarship and teaching. I end with a call for including narratives, both one's own and those of others, to make legal scholarship more interesting, relevant, and valuable to students of the law.

Although legal scholarship has never really been objective, although narrative has never been entirely absent from legal conversations, and although personal value choices have always been a significant part of the legal academy, I begin with an overdrawn cartoon of legal education and scholarship. The picture is distorted, but its basic features are recognizable as familiar characteristics of the legal scholarly model in which most of us currently in the academy were trained.

Traditional legal studies rest on a scientific, positive model. Statutes, regulations, and other written rules create principles that are applied deductively to factual situations. Cases build upon one another and the law they create is found through inductive reasoning. Once the case law rules are discovered, they become principles that can be applied deductively, as if they were statutes. Whenever a novel situation is encountered, cases and statutes are applied by analogy to govern the new case.

In this regime, law teaching appears to be applied science—induction to find principles and deduction to apply them. Yet even this science

* Dean and Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; B.A. 1974, J.D. 1977, University of Pennsylvania.

is qualified, for students must use judgment to form the analogies that provide tentative answers to new hypothetical situations. Similarly, although legal scholars write with a formal, scientific patina—they form hypotheses about what the law is (or ought to be), test the hypotheses by researching the raw data (cases, statutes, other scholarly commentary), and form conclusions that prove or disprove their hypotheses—they, too, ultimately must make choices among competing plausible readings of the law to form their conclusions.

This approach purports to be objective. The law is an entity to be dissected, reviewed, criticized, and applied; but it is an object, disassociated from the outcomes it produces. Thus, students often are not asked whether the result of a decision is just or fair, but only if the result is accurate or consistent with the law. Fairness, if it is addressed, is examined prospectively—through law reform. Or, conjuring the magic of the legal method, a teacher can reveal how the law itself cures unfairness. By rereading cases and statutes or bringing in new information that might distinguish one situation from another, legal sorcerers make apparent defects disappear and demonstrate that technically correct law is often "good" law. Lawyers then can stand back from the results of cases, use the methods of the law, and manage to see justice done as a by-product of "good lawyering."

Law professors also write with a cultivated objective voice about "the state of the law," what "research reveals," what "law demands," and what "articles will show," as if their written work just happens by itself, with no input from its author. Scholars distance themselves from the conclusions they reach by calling the results "inexorable," "natural consequences," or the one "correct" application of law. As abhorrent as a legal principle might be, it is treated as a fact that cannot be avoided or seen as contingent. Moreover, even when moving to the prescriptive level, the reform-minded scholar offers two objective justifications for avoiding "bad" law. The first is entirely internal to the legal science. It is based on revealing the false turns taken by the law, the errors of courts and others in misapplying true principles, and the faulty reasoning of legal players. The scholar then can argue for reform, objectively—it is required by the law itself. The second justification is external to the law. It admits that the law does injustice and then argues to change the law. Yet, even such external arguments can be masked as objective, by relying on social science or some body of authority to rationalize the author's vision of what the law ought to be.

Too many judgment calls take place, too many choices between competing values are made to allow us to take the cartoon version of

legal scholarship drawn above too seriously. The truth is: we don't. However, many, if not most, legal scholars do take seriously that version's rhetoric. We act as if law is objective, write with a scientific paradigm in mind, distance ourselves and others from the action, and all the while understand that the entire enterprise rests on a subjective foundation.

Legal scholarship that relies on this pseudo-objective and falsely scientific rhetoric doubly distorts: it abstracts legal problems from the real people who have those problems and it pretends that law provides answers to problems without reference to the particular social context in which any given legal problem arises. The language of neutral principles, rationales, and holdings may be perceived as a cover for actual reasoning, the influence of culture, and the hold of ideology. Thus, today many legal scholars are searching for a new rhetoric that more candidly reveals the myriad ways that law is a reflection of very personal matters.

Legal questions, no matter how technical, are really about giving benefits to some people or taking them away from others. For example, whether a court may exercise personal jurisdiction over a defendant *is* a central matter in judicial management, distribution of business among the courts, and the allocation of scarce resources, but is not merely a technical question. It calls for deciding whether the plaintiff may secure a favorable court and whether the defendant will be forced, against her will, to answer charges in a distant forum. Similarly, whether a party to litigation must disclose information during discovery is critical to the sensible management of lawsuits. Nonetheless, discovery frequently requires someone to disgorge private thoughts, embarrassing information, and other secrets that would never be shared without the compulsion of law that forces disclosure.

Thus, while questions of jurisdiction or discovery seem mere bookkeeping matters, purely internal to legal management, courts never really decide jurisdiction and discovery disputes without regard to underlying equities or context. Is it irrelevant that the plaintiff is grievously injured, has young children, or has been deprived of mobility? Or that the defendant is a multi-national corporation? Or that if the case is forced to another forum, the law will be hostile to the plaintiff?

Few judges can ignore the reality of human misery that rests below the surface of "technical" rules. Even if judges could ignore context or equities, should students or scholars of the law, whose mission it is to understand legal rules and evaluate their justness, bury their heads? Our role has no institutional requirement of neutrality. We bear no obliga-

tion to ignore the harm that blind adherence to morally sterile rules may cause. We always at least implicitly address the question of whether law can be "good" or "accurate" when it produces injustice as a by-product. Thus, it comes as no shock that even those scholars who relegate these "soft" matters to secondary discussions use "policy" to influence the resolution of ambiguity and the choice among possible conceivable legal readings.

Treating law as a closed system, one that requires objective, dispassionate discourse, robs the law of its value. Very few enter the law because of its promise of logic. Unlike the Vulcan Spock of *Star Trek* fame, people who become law students, and even lawyers, teachers, and scholars are driven by another promise—that of helping people resolve their problems. Compassion and the desire to serve require bringing the individual, and her problems, to the forefront. Law serves people. Helping people provides the law's justification. Without the stories of those who are harmed and benefitted, law makes no sense. A legal culture or training that alienates people from the rules designed to help them is abstract and unreal.

Legal scholars, judges, lawyers, and teachers often want to know THE LAW. But there is no just LAW without narrative. Personal jurisdiction or discovery as objective concepts, having no reference to the stories of those hurt and those accused, are hollow. Hours spent reading and writing about such concepts would be wasted without also seeing the stakes involved. The choice of the rule, its distinction in different cases, the analogies one might make, are dependent on how the rule will be used in any given case. The law, therefore, requires subjectivity—it is intimately tied to the people behind the doctrine.

Of course everyone understands that in some sense law *is* very subjective and personal. Lawyers are advocates who make fact-specific arguments tailored to particular (and some might say distorted) stories of particular people—clients. No one denies this fact; traditionalists suggest only that students, scholars, or judges ought to be neutral in this battle between the advocates and let the law be their guide to resolving the human problems involved in the dispute.

This distanced perspective is troublesome. First, it attempts to displace the visceral reactions of the student, scholar, or judge. Such a stance is contrary to human nature. Horror, disgust, and identification can be disguised or consciously covered up, but should they be? Should students of the law sublimate the very things that make them human, or that drew them to the law in the first place? Worse yet, would submerg-

ing their human reactions do anything other than create an illusion of neutrality?

Objectification of the results of legal decisions suggests false simplicity. Legal decisionmaking is complex. Legal problems usually do not have one correct answer. Who wins and who loses depends on the resolution of numerous judgment calls—the characterization of facts, the scope of the legal rules, the proper analogy—each of which is indelibly affected by stories. Case results matter and may unmistakably alter the way that succeeding winners and losers will be determined. Thus, while adhering strictly to some narrow conception of law and disregarding context in any single case might have only a small impact on a just society, constant reinforcement of that approach can cause lasting harm.

Law, therefore, should not be seen as an abstract science, but as a deadly serious business that afflicts some and brings rewards to others. For those who are legal actors—lawyers, clients, and even judges—law can never be totally objective and scientific; it always is personal.

Legal scholars might well acknowledge all of the above. In fact many would not only acknowledge the account, but would recognize it as the catalyst for their academic careers. Withdrawal from the world of real people with real problems is an attractive feature of what is, after all, an ACADEMIC job. However, the academy is no refuge from people with problems (and I don't just mean one's colleagues!). Legal scholarship can buttress or undermine rules that matter in actual cases concerning real people.

But, there is more: most scholars understand well that their work presents an objective facade covering very personal work. Legal scholarship repackages old thoughts and applies them to recurring problems. The legal scholar who writes to expose a TRUTH is a false prophet, easily displaced by the next TRUTH-teller. Furthermore, when pushed, no more than a handful of legal scholars would even claim soothsaying ability. Legal scholars write not to reveal TRUTH, though their rhetoric often suggests otherwise. Legal scholars advocate positions. They rely on law as an instrument for social reorganization. They use scholarship to push an agenda. And that they do so has nothing to do with science or objectivity. The legal scholar is a social actor using all available rhetorical tools to achieve a desired result.

It is, therefore, an ironic twist that the very scholars whose work is seen as non-traditional—those who use narratives as the core of their work or who rely on the stories to make a point—may have greater fidelity to scholarly ideals than many of their colleagues who rely on cold,

objective, and neutral stances. The scholar who exposes the very personal side of her ideas allows others to see the context of the scholarship. Revealing the author as a political actor allows the outsider to evaluate the views and subject them to further review. Far from being non-intellectual, the scholarly storyteller moves ideas forward by inviting critical evaluations that are grounded in context and by promoting counter-stories based on the reviewer's experiences.

Which, after a long introduction, brings me to the very personal point of this Essay. I am a law teacher and occasionally a legal scholar. I've never been neutral in the classroom or in writing; nor have I ever thought that anyone else was either. Yet from the beginning of my career until the last few years, I have been a prime practitioner of law's objective rhetoric. I taught with dispassion, without regard to the people involved, at least until that fuzzy part of the discussion turned to the question of what social policy ought to be. I wrote with distance, carefully analyzing each historical tidbit, each case, each statute, and every scholar's prior word. Boring! Worse yet, what a lie! And—like virtually every other law teacher—I knew it.

But maturity, tenure, and especially deanships can work wonders. Over the last few years, I have taken the first tentative steps in altering my teaching and writing voice, and feel liberated (somewhat). *I* (white, liberal, big-city, Jewish) am present in *my* teaching and scholarship. *My* biases help me to resolve the ambiguities in law and find the stories of those involved that resonate as true or valid or important. But I recognize the contingency of my choices. Others may cut the material differently or see other human stories as more valid or important. It is the recognition of those other stories, and their coexistence with my picture of the world that makes the study of the law worthwhile and useful. The narrative, the human problem, dictates the resolution of the legal problem.

The human stakes involved in legal problems dictate my reasons for writing and teaching. The very subject matters that interest me flow from the important events in my life as a student, as a lawyer, as a client, as a person. These events color my views of legal institutions like the state (an evil place called Chicago, Illinois when I was growing up), the federal government (the good guys of Camelot, the Great Society, and the War on Poverty, who were not to be trusted when it came to war-making), and the courts (other good guys, at least if federal; they brought us desegregation, better prison conditions, and socked it to polluters and cartels).

These stories are more than personal, they are the building blocks of my teaching and scholarship. That I take an expansive view of federal power, joined with a mistrust of unchecked state power, but dependent upon maximizing individual autonomy and freedom, gives me a clear tie-breaker in ambiguous legal situations and a strong incentive to create ambiguity whenever there is an apparently clear answer that goes the wrong way.[1] Moreover, that I understand how my story creates my view of the law helps me to see the way in which contrary views are possible. Thus, I am a more effective teacher. I present no false picture of stability or inevitability to law. While students may want a clear answer, what they instead receive is the clear message that law is variable and can be constructed to fit multiple patterns—the essential underpinning of a system that relies on oppositional argumentation to arrive at decisions.

These days, discussions of law that omit narrations leave me cold. They are abstract and beside the point. Law serves a fundamental instrumental purpose—the development of a more just society—only when it brings stories to the front. Therefore, I have begun to write about how the stories of others have shaped our laws and the legal profession. For example, in a 1987 article, I showed how the Court saw only one side of Reconstruction history, a story about the life and times of the members of Congress who wished to maintain society as it was before the Civil War, but how the Court failed to see another counter-story that flowed from a very different, radical world view held by other members of the same Congress.[2] Similarly, in a 1989 article about how one might teach ethics in Civil Procedure courses, I suggested how sharing the moral dilemmas that confront lawyers and clients in various cases, even those presenting seemingly simple technical procedural problems, is a rich way of understanding ethics.[3] Or, in an article published in March of 1990, I showed how real peoples' lives can be hurt by an apparently narrow

1. *See* Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 MICH. L. REV. 1499, 1518 n.70 (1991).

2. Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987) (arguing that the Supreme Court's opinions see only one side of a history that is too complex for capture and that the Court should use history for its rhetorical power and fealty to past traditions, rather than as a force to tie the Court's lawmaking ability).

3. *See* Richard A. Matasar, *Teaching Ethics in Civil Procedure Courses*, 39 J. LEGAL EDUC. 587 (1989) (illustrating in numerous factual contexts how procedural questions force lawyers and clients to make moral choices and arguing that teachers ought to bring out this moral dimension to all cases in their classes). In some ways the technical, everyday stories have the most power. While myths and epic stories of giants often entertain us, they frequently distort our understanding of the human condition. Thus, although we can learn a great deal from legal narratives about extraordinary matters, sometimes it is the mundane that provides the clearest opportunity to see beneath the law's surface. *See* Richard A. Matasar, *Trial Narratives and the Study of Law: Some Questions*, 76 IOWA L. REV. 207, 219-21 (1990).

Supreme Court rule about which governmental institutions could create defenses to lawsuits against government contractors.[4]

While telling the stories of others is certainly different from reliance on the cold and objective, even that is more distant than injecting a personal tale into legal scholarship. Few people (at least this person), are comfortable as the center of attention in discussions of problems with which they have little personal involvement. But it is a mistake to use this as an excuse to hide oneself from the action. Who *we were* affects who *we are* and what *we advocate*. A few years ago, I published an article on legal education that explored *Brown v. Board of Education*,[5] one of the icons of modern American law. I discussed *Brown*'s effect on me as a young child and how my uncertainties about *Brown* are reflected more broadly in the legal academy today.[6] I also wrote an essay about the pain of moral lawyering—pain for others, and the pain that helped me move from the practice of law to legal scholarship and teaching.[7] Thus far—fearful of moving full speed ahead into personal revelations and not quite sure of how to make the personal fit into conventional legal scholarship—I have relegated these discussions to footnotes. But the cat is out of the bag; I am committed to learning a narrative rhetoric—and telling my story and those of others.

Storytelling has been argued as a means to bring the voices of marginalized people to the forefront. It has been suggested as the scholarship of oppressed faculty members—gay men, lesbians, persons of color, and women. To see stories in that light, however, is to trivialize the importance of narratives and to demean those who make the personal a part of their scholarly effort. Moreover, giving stories exclusively to "marginal" faculty members is a mistake of enormous political import. Every piece of scholarship and every legal decision has buried within it a story waiting to be told. It is important to our knowledge and our ability to criticize that even the stories of dominant groups be told and analyzed. When mainstream scholarship embraces narrative methodology, we all will be enriched.

As I conclude this Essay I recognize it to be a story too, one about

4. *See* Michael D. Green & Richard A. Matasar, *The Supreme Court and the Products Liability Crisis: Lessons from* Boyle's *Government Contractor Defense*, 63 S. CAL. L. REV. 637 (1990) (arguing that the Supreme Court's decision to create a contractor defense undervalued the costs to the government of injuries to people and that its isolation from people made the Court a less apt institution than Congress for creating such a defense).

5. 347 U.S. 483 (1954).

6. *See* Richard A. Matasar, *Brown's Legacy in Legal Education*, 7 HARV. BLACKLETTER J. 127 (1990).

7. *See* Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975 (1990).

the gradual growth of a young scholar seeing that his "science" affects people and is capable of mischief. Now, at the end, I see this Essay as evolutionary: it begins in a cold, analytical way, moves to a description by an outsider, and ends with a personal touch. Neither this story, nor any other, is particularly interesting, special, or revealing. Single narratives rarely possess sufficient power to be the focus or explanation of very much. But the stories all of us tell about ourselves and each other inform the law and make it understandable. When we read and hear an array of stories we appreciate the range of problems we face and perhaps we perceive the need for multiple, particularized solutions to those problems. In legal scholarship and teaching, narrative is an instrumental necessity that gives us a chance to create a more just legal system.