

## The Stories of American Law

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Caleb was finishing the first grade, and although it couldn't be said that he loved school, he certainly did love his teacher. Ms. Casey was her name, and she seemed to adore all the kids.

One of the kids in Caleb's class was named Gabrielle, and late in the school year, Caleb announced to his parents that "Ms. Casey likes Gabrielle the best." He said it matter-of-factly, without a hint of envy or disappointment, but still, it wasn't the kind of thing that his parents wanted to let stand.

"We are sure," they told him, "that Ms. Casey likes all the kids equally."

"Yeah, probably," he replied, "she likes all the kids equally." He took off his glasses, and rubbed his eyes. "And she likes Gabrielle the best."

They knew better than to argue the point. As parents, they had learned what lawyers too often forget: that some arguments are not worth having. Instead, they asked him: "What makes you think Ms. Casey likes Gabrielle the best?"

He pondered it. "Well, Ms. Casey put a sign on Gabrielle's desk."

"Well, what did the sign say?"

"I don't know," he said, "I can't read. Don't you remember that?"

"Yes, we remember. Well, what do you think the sign said?"

"Hmm," he literally stroked his chin, assuming his most pensive pose. "Probably," he offered, "the sign said 'I like Gabrielle the best'."

You most likely see where this is heading more clearly than Caleb's parents did at the time; there was no persuading Caleb that he was wrong. He saw in that sign—or claimed to see in that sign—what he believed to be the case, and unless his parents produced that sign to show him otherwise, he wasn't budging from his view. And frankly, even if they had that sign, we doubt that he'd trust their translation.

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We felt bad when we first read that young Andy Meeks "suffered from attention deficit hyperactivity disorder and dyslexia," and that he couldn't go to the Seattle school that was arguably best for him. It was Chief Justice John Roberts who told us about Andy—he did it in his opinion for

the Court in *Parents Involved*, the last desegregation case—and we’re pretty sure that he wanted us to feel bad. We think, though, that he wanted us to feel bad—or maybe even angry—because Andy was being victimized due to his whiteness, which was preventing him from going to a school where there were already too many white kids.

But that’s not why we felt bad. We felt bad—and yes, a little angry—to learn that another kid was being made to “suffer from” his perceived disabilities. We have seen too much of this sort of suffering. And we thought that it was wrong for the Chief Justice to exploit Andy this way, particularly seeing as how it was the Court’s crabbed interpretations of IDEA and Section 504, and its regressive conceptions of “disability” and “equality,” that to a very significant degree, likely caused Andy needlessly to “suffer.”

A lot of the suffering in the world is due to the way that we have constructed “disability.” And a lot of the suffering in the world—and especially in the United States—is due to the way that we have constructed “race.” In both cases, isolation causes a lot of the suffering, an isolation that follows from a construction of differences as something ab- or sub-normal.

We think that’s what racial segregation was all about, and we think the boldness—and the beauty—of the opinion in *Brown v. Board of Education* rested principally in its willingness to confront this truth. Enforced segregation—even if it was enforced equally on everyone—was harmful. It was not harmful in some abstract, theoretical, first-principle violating sort of way, but was harmful in concrete, experiential, people-hurting kinds of ways. And the harms of segregation were inflicted—intentionally and obviously—on black Americans, whose perceived inferiority was both the *causa causans* of Jim Crow, and its inevitable effect.

Racial segregation caused black Americans to suffer. Because it caused suffering, it was bad; because the suffering was visited unequally on black Americans, it was also unconstitutional.

That is the argument made over and over again in the *Brown* briefs, and in the oral arguments. It is the argument ultimately accepted by the *Brown* Court, which felt compelled to support its conclusion with a fairly cursory reference to the social science evidence, documenting the unequal harms of segregation. And the broader societal harms of segregation—elaborated upon at considerable length in the *amicus* submissions from the United States—stem entirely from this injustice, from “discrimination against minority groups,” and its consequent impacts on America’s standing in the world.

Segregation was part of a racial caste system. That’s why it was harmful. And that’s why its defenders clung to it so desperately.

Hadn’t it always been about “caste”? We thought that’s what we had read in the record of the Reconstruction Congresses. We thought that’s what we had read in Justice Harlan’s dissent in *Plessy* (“There is no caste here.”). We thought that’s what we had read in the *Brown* briefs, and in the histories of resistance to desegregation.

But that’s not what we read in the opinion of the Court in *Parents Involved*; it says not one word about caste. It says not one word about the harms of racial segregation. The only harms it

recognizes are the harms that inhere in the bare invocation of “race.” “Race”-consciousness, it advises, is harmful, regardless of its motives, and the proof of that critical fact is to be found in, well, a few scattered opinions of fairly recent vintage, mostly concurrences and dissents, which do indeed say that, over and over again (the Court “apparently believing, with the Bellman, that what it says three times must be true.”) (Cohen 1935: 820).

Oh, and the *Brown* briefs. There’s proof there too, according to the *Parents Involved* Court—a sentence broadly condemning “differential treatment” based on race. And also, the Court says, the oral arguments: Robert Carter, lawyer for the schoolchildren, had argued that no state could “use race as a factor” under the Fourteenth Amendment.

Judge Carter, now ninety, was not pleased by this appropriation of his words. “It’s to stand that argument on its head,” he responded, “to use race the way they use it now.” But the fact of his displeasure, clearly, should not interfere with a good story.

Maybe Judge Carter is wrong. Maybe he really was arguing for color-blindness, and not against caste. And maybe Jack Greenberg is wrong too (“The plaintiffs in *Brown* were concerned with the marginalization and subjugation of black people. They said you can’t consider race, but that’s how race was being used.”), and William T. Coleman (“It’s dirty pool, to say that the people *Brown* was supposed to protect are the people it’s now not going to protect.”). And, of course, Thurgood Marshall. Maybe none of them really knew what *Brown* was about.

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We do not know the elements of narrative truth. We know that the opinion in *Parents Involved* was entirely predictable. But that doesn’t make it “true.” We know that the Court had the power to do what it did, and that the Chief Justice carefully aligned his opinion with prior decisions, and that the Chief Justice did what the President who appointed him wanted him to do, and did what the supporters of the President wanted him to do, and that the President was supported by a majority of the voters in the election preceding the Chief Justice’s appointment. But none of that makes it true—any more than it is true that there are weapons of mass destruction in Iraq, or that Saddam Hussein was behind 9/11, or that the science is equivocal on global warming.

But then again, it is not *less* true because two thirds of Americans disapprove of the job the President is doing. And the opinion in *Parents Involved* is not rendered demonstrably *un*-true by the failure of the Court to ground it in the text of the Fourteenth Amendment, or the history of the Thirty-Ninth Congress, or the available evidence on the construction of “race” and inequality.

And yet—*Brown* seems true, and *Parents Involved* seems not. We cannot say precisely what separates them, but we think it has something to do with suffering. And understanding. And, in the final analysis, with love.

We need to learn, we think, the elements of “narrative truth.” Or our children will not believe us when we tell them, that Ms. Casey really does not like Gabrielle the best.

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Let us tell you a story about Legal Realism. The first Legal Realism was born of

sociologically trained legal theorists, who criticized the formalist model of law as a collection of “paper rules,” and the natural law concept of law as principles dictated by a “brooding omnipresence in the skies.” (K.N. Llewellyn 1934; 210) These Realists saw law as dynamic; judges as policymakers who were influenced by their own ideologies; and the primary task of legal academics as formulating a functional approach to law, one that would explain law according to its social purposes, rather than in terms of abstract concepts (“transcendental nonsense”). (Cohen 1935)

The first Legal Realism had a number of descendants: the law and society movement, normative law and economics, and various critical theories. Now, at the turn of the twenty-first century, it has yielded a New Legal Realism, one that weaves together a number of the philosophical strands from the first effort: the interplay of law, social science, and political analysis; skepticism about the prospects for formal rules to generate social change; and empirical investigations, using the methods of the social sciences, into a wide range of questions about the formation and impact of law.

Like the first Legal Realism, the New Legal Realism is acutely concerned with “law in action”—developing understandings of the role of law in relation to social hierarchies, the distributive consequences of law, and the prospects for law to bring about progressive social change. (Gulati & Nielsen 2006: 797). It renews attention to the architecture of law (e.g., the public/private distinction) and to the effects of economic status on political rights. (Balkin 1990; 381-82). It embraces a commitment to “bottom-up” research, which emphasizes examinations of “everyday experience” to assess “the impact of law on ordinary people’s lives.” (Erlanger et al. 2005; 340).

The New Realism is also interdisciplinary in multiple ways. It encompasses greater engagement between legal theorists and social scientists, including conversations, critique, and collaboration. Social scientists—sociologists, anthropologists, social psychologists—are publishing in law reviews; law professors are producing empirical legal scholarship; and theorists in all disciplines are blogging and bringing the fruits of their research to a wide public audience. The empirical work is increasingly sophisticated, with complex quantitative studies using multiple regression analyses and Bayesian methods. Even the qualitative or interpretive work—ethnographic studies, micro-institutional analyses, and examinations of local cultural practices—is methodologically more refined. (Rubin 1996).

The increased emphasis on empiricism includes not only a receptivity to social science methods in law, but a more nuanced understanding of interpenetrations between the disciplines, so that empirical work is more than just “the means of investigating questions formulated by lawyers.” (Erlanger et al. 2005; 337). It also encompasses a more sophisticated use of quantitative methods; more refined empirical explorations of judicial ideology on voting behavior; the wide scale use of rational choice theory and economic models to understand human decisionmaking; greater attention to standpoint epistemology or situated knowledge in the legal systems of various cultures; and a reliance on experimental studies and other social science research by courts. (Cross 1997; Farber 2001).

But empiricism seems not quite enough; in a sense, it proves its own limitations. To adequately describe legal decision-making, it evolves, multivariate analysis must nearly be omnivariate—such, we have learned, is the importance of context. As an instrument of persuasion, the knowledge generated by empirical works proves remarkably unstable; studies beget counter-

studies, facts produce counter-facts, all in an endless cycle of skepticism. And then there are those things not easily quantified, not easily objectified, not easily reduced to a determinate essence: our aspirations, our motivations, the bounds—or boundlessness—of our comprehension and our compassion.

What we are left with is the words. It is a return of sorts—to rhetoric, to forms. But it is not classical rhetoric; it is not a revived formalism. The task is different now—as the Realist movements, old and new, have each peeled away levels of naiveté. The modern student of narrative may begin and end with the words, but she knows now, that not all the words are written.

Thus, the New Realism also suggests an alternative path to empiricism, one that focuses more on the narrative dimensions of law. The original realists saw stories primarily as ethnographic accounts or case studies. Many focused on appellate decisions to understand legal doctrine; others understood the importance of examining trial court decision making. (Frank 1949). Karl Llewellyn once joined anthropologist E. Adamson Hoebel to undertake a project on case studies of lawmaking and dispute resolution among the Cheyenne. (Llewellyn & Hoebel 1941). Llewellyn spent just ten days among the Cheyenne, and “a photograph taken at the time shows Llewellyn and his wife seated in the back seat of an open convertible with elderly Indians being led up to him to be interviewed.” (Conley & O’Barr 2004). Still, he recognized that for indigenous peoples, in the oral tradition, stories of individual cases were the foundations of their legal systems.

The New Realists see a variety of dimensions to the narrative project. They see narrative as framework, as methodology, as evidence, as plural truths, and as a means of fundamentally reshaping legal doctrine.

They also tell stories. Beginning in the late 1970s, they have told parables, allegories, and real stories of their own experiences, and those of their clients. (Alfieri 1991; Bell 1987; Dworkin 1977; Williams 1991). These stories have raised awareness—of discrimination based on identity characteristics (race, gender, sexual orientation, disability), of unequal treatment based on class, of the absence of fair process based on power differentials. They have done more: they have changed the lens through which we view legal experiences. Stories insist on the importance of local knowledge and perspective; as such, they have been instrumental in incorporating the voices of outsiders—particularly of subordinated groups—whose narratives have been omitted in the development of law and legal theory.

The turn toward storytelling has fundamentally changed the way we think about legal theory, and law. Scholars like Richard Delgado and Catharine MacKinnon have demonstrated that judges’ opinions in legal cases were merely stories too—they simply told the dominant narrative. Critical legal studies writers, feminist legal theorists, and critical race theorists thus confronted the “Just So” stories of the legal academy and told counterstories to challenge the “received wisdoms.” (Delgado 1989; 2413).

Legal theorists soon began to recognize what historians and practicing lawyers had long known, and what cognitive psychologists were just discovering—the extraordinary power of stories. Research in the social sciences shows that stories are the way people organize information and make sense of the world. Stories matter in law not only because they are the way people comprehend

experiences, but because personal stories are such powerful tools for persuasion. They are rich with details and facts; they humanize, evoke empathy, and offer insights into other people's lives. For good lawyers, then, legal practice is a storytelling enterprise.

Trials have long been contests in storytelling, and now, stories are sifting into appellate litigation. As just one example, in the mid-1980s, the National Abortion Rights Action League began to submit an amicus brief in major Supreme Court abortion cases. Known as the "Voices Brief," this document was primarily a compilation of letters—narratives of women's reasons for having an abortion and experiences in trying to obtain one—intended to create some level of empathic understanding in members of the Court, by allowing them to more directly hear women's voices. Today, appellate decisions, once relentlessly stripped of their human content, now address the stories of lived experience.

Even the ability to tell a story—to have one's day in court—has value. The expressive function of the legal process—the very heart of due process—is significant and often undervalued. People who have been wronged want to tell their stories, want to voice their pain. The opportunity to be heard in a formal tribunal that takes complaints seriously may give a victim a restored sense of control, or a renewed sense of dignity. This is why the client-centered narrative work by Alfieri and others is so important—it makes sure that the story is the client's, not the lawyer's.

Narratives provide truths beyond the individual tellings. Because lived experiences have plural truths, stories offer multiple different perspectives and interpretations of events. Narratives thus offer an important type of qualitative research—they record personal experiences in varying cultural contexts and often provide a platform for survey research. Researchers are beginning to undertake ethnographic studies of participants in the legal system. For example, John M. Conley, an anthropologist and law professor, conducted interviews of lawyers in law firms to compare perceptions of racial and gender equity in law firms to diversity statistics. The combination of interviews with statistics revealed that lawyers felt resigned to the racial status quo, while law students lack incentives to change the racial dimensions of firms and feel powerless to do so. (Conley 2006).

Stories have become the evidentiary foundation for some fundamental changes in law, particularly in the human rights arena. Stories from all over the world have documented human rights abuses: arbitrary detention, enslavement, forced labor, rape, torture, forced relocations, political executions, cultural genocide. Organizations like Human Rights Watch and Amnesty International gather victims' stories to illuminate these violations of rights. The Battered Mothers' Testimony Project collected the accounts of battered women about their degrading treatment in Massachusetts family court. "Typically, these are the very voices that are muted or silenced by the government and society." (Goodmark 2005; 723, 729) Law from the bottom up will demand even more specific attention to the particular situations of individuals—and that means their stories.

We are learning that narrative truths are vital to human existence. As generations age, the gathering and preservation of stories has taken on a particularly urgency. The projects to collect these narrative truths have ranged widely from the stories of comfort women in Asia to those of the "stolen generations" in Australia. The Department of Justice's Office of Special Investigations has preserved stories from holocaust survivors to assist in the prosecution of Nazi war criminals. The

Truth and Reconciliation Commission in South Africa helped a country transition from apartheid to democracy. The lesson is timeless—that stories can do more than unearth agonizing truths, expose perpetrators and document atrocities; they can turn toward understanding, toward forgiveness and love; they can begin to heal people, and even heal nations.

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But if lawyers are to trade in stories—and if we are to take the lawyer’s trade seriously—is it fair to ask that their stories be true? The “Voices Brief,” after all, has yielded to the new “reality” of *Gonzales v. Carhart*: the teaching of a very different amicus brief, that women “come to regret” the choice to terminate a pregnancy. Which story do we believe? What stories are true?

The simplest answer—and, we suspect, the most common response—equates truth with persuasiveness: those stories are true that persuade. There is no end to the questions begged by this response—the whom’s, how many’s, how much’s, for how long’s, and so on—but we sense a more fundamental dilemma.

The line separating persuasion and coercion is surely a fine one when we speak of the law: the official narrative comes cloaked in an inherent—and perhaps necessary—vener of truth. But official narratives can be faulty; official narratives can be false. And we—storytellers, and critics of stories—need a way to describe the faults, and the falsehoods. We need a way, then, to describe the truth, as a condition of—not merely the result of—persuasion.

Thus the task of the modern storyteller, we think, is to renew the struggle for truth. It is a struggle that must recognize limits: that knowledge is culture-bound; that the structural conditions on knowledge are barely known and perhaps unknowable; that truth must be contextual, and contingent, and personal. But it is simultaneously a struggle for transcendence—for truths to be found beyond these limits, if only because the limits must be, in the course of the search, momentarily suspended.

If law is to partake equally of science and art, we probably should insist that its art be genuine. “Language destroyed by irrational negation becomes lost in verbal delirium,” wrote Camus; “subject to determinist ideology, it is summed up in the slogan.” “Halfway between the two,” he concluded, lies art.” We should insist on more than “verbal delirium,” on more than “slogan.” We should insist on something that “uses reality and only reality with all its warmth and its blood, its passion and its outcries,” but that simultaneously “adds something that transfigures reality.” (Camus 1956: 273). We should insist on some reconciliation of the actual and aspirational, of the real and the ideal. We should insist on something that we can, without embarrassment, describe as the truth.

We do not know the criteria of narrative truth. We suspect that they will be found in those features of our lives that are distinctively—and universally—human. Precisely what those are, and how they are to be identified, we cannot say. But we think the search is a worthy project—a necessary chapter, perhaps, in the story of American law.

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