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Teaching Health Law

Legal Archaeology: Recovering the Stories behind the Cases

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Every lawsuit is a potential drama: a story of conflict, often with victims and villains, leading to justice done or denied. Yet a great deal, if not all, that we learn about the most noteworthy of lawsuits — the truly great cases — comes from reading the opinion of an appellate court, written by a judge who never saw the parties of the case, who worked at a time and a place far removed from the events that gave rise to litigation. We focus on “the facts of the case,” as described in a judge’s opinion, and then we describe the way the court applied the law to such facts as *doctrine*, hardly pausing to note the irony of this *ex cathedra* image, smacking of infallibility. Rarely do we admit that the official factual account contained in an appellate opinion may have only the most tenuous relationship to the events that actually led the parties to court. The complex stories — turning on small facts, seemingly trivial circumstances, and inter-contingent events — fade away as the “case” takes on a life of its own as it leaves the court of appeals.

Developments in legal scholarship pose a challenge to our continued near-exclusive reliance on a court’s version of the “facts.” The last 20 years have seen a trend toward increased emphasis on “stories” as a feature of legal teaching and scholarship.¹ The legal bibliography describing this trend now encompasses volumes ranging from constitutional law to tax law, with everything in between.² Health law teachers can take advantage of these developments, and their classes can enrich health law students’ learning by increasing exposure to the factual context of the cases we study. As one proponent of this on-the-ground analysis of cases declares,

“To the extent that law is taught and received as a set of abstract rules, one can safely remain at a distance from the significance of a ruling to the parties, the greater community and the legal system.”³ If she is correct, then health law teachers can use law stories as another tool in making students more aware of the human factors that shape every piece of litigation and of the law’s resulting force in individual people’s lives.

The “legal stories” movement has given rise to a wide-ranging debate, with some proponents of the “narrative” method trumpeting its importance, while others question the value of what they characterize as emotive, non-logical, personalized (and sometimes fictional) exposition as a vehicle for understanding the law.⁴ I refer to that discussion not to enter the fray, but merely to note that it has not happened in a vacuum. While legal scholars have debated the value of “law stories,” other disciplines have gone through similar ferment. The fields of biomedical ethics and medical humanities have seen a burgeoning literature in the area of “narrative medicine” that uses the skills of storytelling, along with attention to literary genres incorporating myth, legend, and the personal essay to better understand the relationships of patients and their doctors and to enrich the clinical practice of medicine.⁵ Similarly, some anthropologists have explained the value of “thick description”⁶ as a method of teasing out telling detail that will help us understand the context in which otherwise inexplicable behavior occurs, and as an antidote to mechanistic theories of human activity. Bioethicists, literary scholars, anthropologists, and others often use

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"thick description" as one strategy in pursuit of a more textured narrative.⁷

Many scholars in the U.S. legal academy today are pursuing a similar strategy in their work. Judith Maute and Deborah Threedy call this type of work "legal archaeology."⁸ It depends on using a more expanded set of source documents than those most commonly referenced in legal scholarship, in an attempt to unearth details of events that resulted in important litigation and to move beyond the appellate opinion. Doing legal archaeology helps us understand the context of seminal cases more completely, and it helps students develop a healthy skepticism about "the facts as stated, and constantly ask whether the court's decision was based upon assumptions about the facts which could not withstand careful scrutiny."⁹

A Method for Doing Legal Archaeology

In this article, I explain how nontraditional sources can form the basis for doing legal archaeology in health law, and offer a small toolkit to ease the way. There was a time not too far in the past when this kind of scholarship was a costly and time-consuming habit, feasible only for legal historians or other specialists. With the advent of digital document formats and Internet access, that has changed. Completing the most thorough job of ferreting out all the details related to the unpublished history of a case will still require a significant time commitment, but doing a reasonable job of discovering additional details of the "story" that gave rise to that case is well within the reach of most people teaching health law. Students are also up to the task, as I note regularly in the seminar I teach entitled "Great Cases in Bioethics." I require every student in that class to make an hour-long class presentation and then produce a paper based on the kind of sources I describe in this article. With only a brief introduction to this method, the students rise to the challenge admirably.

In the rest of this article, I describe several types of source documents

where scholars of all kinds can rediscover the stories behind the cases we study. Most of these sources are now available online or can be readily accessed in the public document depositories described in the literature noted below.

Official Case Files: Briefs and Records

The best starting point for doing legal archaeology is the case record itself. We all begin our investigation of cases by reading an appellate opinion. With some extra effort, we can retrieve the records and briefs that the judges relied on as they wrote that opinion. Of course, the case record that is printed for submission to an appellate tribunal will include only a small portion of the documents that make up the lawsuit's paper trail. Yet even in the excerpted form in which they often appear, those documents can pro-

vide a trial that exists.¹⁰ Use of the transcript also allowed Garrow to correct the faulty impressions of other commentators who suggested that Griswold was one of "two doctors," presumably male.¹¹

For other cases, key portions of the printed record could include material from discovery such as affidavits, interrogatories, and deposition transcripts. It could also reveal the complaint that initiated the case, transcripts of preliminary hearings, and interim court orders, along with documentary exhibits and other evidence, such as photos. These documents provide insights to the identities of parties, witnesses, and public officials, along with actual comments they made during the legal process. The "story" of any case is made infinitely richer by access to the case record, and the perspectives of many more people who played roles in the

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vide a myriad of factual details about a case that one would never have suspected from reading the opinion alone. The facts, and the ways they may be emphasized and used in an opinion to support a court's conclusion, can take on an entirely different cast when retrieved from documents like a trial transcript.

In older cases, the transcript may be the only tangible record of relevant comments by a party to the case. For example, David Garrow describes how Estelle Griswold conducted herself at the short trial that led to a Supreme Court decision in *Griswold v. Connecticut*. In his magisterial study of reproductive rights, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*, Garrow was able to tell that story because he located the transcript of the case — the only verbatim account of the

dispute leading to the lawsuit become available. The case record also contains briefs written on appeal, which may yield other obscure factual material, and will certainly show how those facts were emphasized by the attorneys who argued the case. Briefs also often remind us of the source of arguments that make their way into a court's opinion.

Much of the material contained in the case record is now filed electronically, and for recent cases, may be available on the Web. But even for most pre-Internet cases, finding the proper repository for all these records is not difficult. A visit to your school's reference librarian with copies of the articles referenced here should get you started.¹² You may also want to refer to similar material already online, provided by authors of "sto-

ries" texts as digital supplements to their published work.¹³

Case records are only one source of details you can use to reconstruct a case. Once you have retrieved the official record along with the various briefs, you will be ready to supplement your story with other types of documents. Vintage journalistic accounts are a rich source of narrative detail, and they are becoming increasingly more accessible as newspapers are converted into an electronic resource.

via the usual legal documents. The news accounts of *Jacobson* which they located also highlighted — in headlines — an important detail of the case neglected by many legal commentators as well as by judges who relied on the vaccination case as precedent. Reverend Henning Jacobson was not subject to forced vaccination, but merely to a five dollar fine for failing to make himself available for the preventive inoculation.¹⁹ Similarly, I was able to find reportage on the trial of the enigmatic Mary Schloendorff

Institutional and Administrative Records

The annual reports of hospitals or other publicly supported facilities such as prisons, asylums, and universities sometimes described the background of lawsuits in which those institutions were involved. Published reports of government or private agencies may contain surprising details that help to explain the otherwise undisclosed stories buried in a history of litigation. Agency reports are just one of the many types of sources relied

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Newspapers and Magazines

The most obvious place to look for case accounts is in a newspaper. Some national newspapers like the *New York Times* have recently made their entire historical print run — from 1851 to the present — available online at no cost,¹⁴ while others have deposited their archives in a central database for subscribers.¹⁵ Many other newspapers are scanning in past issues and posting them online for access at a very reasonable price.¹⁶ One of the most extensive collections of regional and local news archives containing material from over 700 United States towns and cities is available online at a monthly or annual fee.¹⁷ The newspapers in that collection span editions printed as early as the Colonial era. Though less immediately accessible, archived copies of many newspapers may also be found in their original form or preserved on microfilm and available through libraries.¹⁸

The centennial reflections on *Jacobson v. Massachusetts* by authors Wendy Parmet, Richard Goodman, and Amy Farber showed how a very old newspaper story could provide details of a landmark public health case concerning compulsory vaccination — details not readily available

in a newspaper article. The account of her famous case that health law teachers remember by Benjamin Cardozo's opinion also contained the only known image of Schloendorff, made by a courtroom illustrator.²⁰

Professional Journals

Most people who do research in health law regularly use professional journals from medical or scientific disciplines. Copies of those same journals and their archived, earlier counterparts are quickly being made available online also. They can be an important source of commentary on older health law cases. The JSTOR database, now widely provided through university libraries, contains back issues of hundreds of academic and professional journals.²¹ Many 19th- and early-20th-century medical journals can be accessed through the American Periodicals Series (APS) digital archive.²² For example, teachers of mental health law can find details on the trial of civil-commitment reformer Elizabeth Packard through the APS archive.²³

on by the late James Harvey Young in his exploration of early food and drug cases. Using such documents, Young recounted the roles of the American Medical Association, the Secretary of Agriculture, and the Food and Drug Administration in cases like the "Great Coca-Cola Trial of 1911," which involved a challenge to the ingredients contained in the famous American "brain- tonic."²⁴

Material Generated by the Parties or Their Lawyers

Sometimes, unwilling to let others tell their stories, the protagonists from our great cases step out of their roles as witnesses or previously invisible litigants and write their own accounts. Their lawyers may also become authors, giving personal perspectives on how the cases played out. Many books written in this vein and describing famous health law cases have appeared recently. These books provide first-person reflections on litigation and its aftermath, told from a vantage point far removed from the judicial chambers where opinions are born. Examples include Norma McCorvey's report of her life as the pseudonymous Jane Roe in *Roe v. Wade*,²⁵ Bill Colby's memoir as law-

yer for Nancy Cruzan,²⁶ and Kenneth Donaldson's version of *O'Connor v. Donaldson*, his own case challenging the civil commitment of the mentally ill.²⁷

to-mine, material in private collections or archives. This short list is merely a starting point to provide assistance for those who may wish to step beyond appellate opinions in

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Lawyers' Archives and Records

Occasionally, particularly for cases that are quite old, the actual records of lawyers involved in the case you are studying may be available. The many parts of the attorney work product to be found in a lawyer's file can be a source of rare but very valuable insights into how a controversy that became a case began and made its way through the court system. Law schools often become repositories of the papers of lawyers and judges, and their archives should also be considered as a possible fertile ground to do legal archaeology. The extensive documentation generated through discovery in complex class-action lawsuits may also remain intact after litigation; it represents another source of intimate factual details.²⁸ The meticulous reconstruction of the litigation in "tobacco cases" described in Alan Brandt's prizewinning book *The Cigarette Century* relied on such an archive.²⁹

Conclusion

This is in no way an exhaustive listing of the possible resources one might use to do legal archaeology. Note, for just one example, that I have said nothing about legislative documents, equally available and equally useful in the detail they may yield to help explain the foundations, the progress, or aftermath of a case. Additionally, I have concentrated primarily on items that can be found online, rather than the rich, but perhaps more difficult-

a search for the factual complexities of actual cases, and dirty their hands in the kind of digging that can sometimes yield "the rest of the story."

References

1. For essays that explore the narrative movement, see P. Brooks and P. Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1997). Another strand of that movement can be traced to the work of the late R. Cover, a notable example of which is contained in his book *Narrative, Violence and the Law: The Essays of Robert Cover, Martha Minow, Michael Ryan, and Austin Sarat* (Ann Arbor: University of Michigan Press, 1993).
2. For example, the Foundation Press has an entire "law stories" series that includes *Constitutional Law Stories* by M. C. Dorf; *Civil Procedure Stories* by K. M. Clermont; *Property Stories* by G. K. and A. P. Morriss; *Torts Stories* by R. L. Rabin and S. D. Sugarman; *Contract Stories* by D. G. Baird; *Administrative Law Stories* by P. L. Strauss; *International Law Stories* by J. E. Noyes; *Evidence Stories* by R. O. Lempert; *Business Tax Stories* by S. A. Bank; *Environmental Law Stories* by J. Applegate; and *Legal Ethics Stories* by D. L. Rhode. Other publishers have also embraced the trend.
3. J. L. Maute, "The Value of Legal Archaeology," *Utah Law Review* 2000, no. 2 (2000): 223.
4. Key authors in the creation of fictionalized narratives, allegories, or parables are D. Bell, *Faces at the Bottom of the Well: The Persistence of Racism* (1992), and R. Delgado, *The Rodrigo Chronicles* (New York: New York University Press, 1996).
5. See, for example, R. Charon, *Narrative Medicine: Honoring the Stories of Illness* (New York: Oxford University

Press, 2006) and F. Mullan, E. Ficklen, and K. Rubin, eds., *Narrative Matters: The Power of the Personal Essay in Health Policy* (Baltimore: Johns Hopkins, 2006). Physicians such as Abraham Verghese, Atul Gawande, and Barron Lerner regularly write within this genre.

6. C. Geertz, "Thick Description: Toward an Interpretive Theory of Culture," in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973): at 3-30. Geertz borrowed that phrase from philosopher Gilbert Ryle.
7. D. S. Davis, "Rich Cases: The Ethics of Thick Description," *Hastings Center Report* 21, no. 4 (July-August 1991): 12-17. This focus on narrative detail owes much to the work of the *Annales* school of French historians, including such figures as Fernand Braudel and Emmanuel Le Roy Ladurie. Their thoroughly contextualized histories, often including stories of "low culture" and peasant life, provided a contrast to older histories that emphasized the "high culture" of the court and palace and revolved around political and diplomatic history. Later *Annales* historians sought to resurrect the heretofore absent "voices" of the poor and dispossessed. For example, a book like *The Return of Martin Guerre* by N. Zemon Davis demonstrates a method of scholarship that relies on legal documents to unearth a peasant's tale of misappropriated identity.
8. See Maute, *supra* note 3; D. L. Threedy, "Legal Archaeology: Excavating Cases, Reconstructing Context," *Tulane Law Review* 80, no. 4 (2006): 1197-1238.
9. *Id.* (Maute), at 224. I often refer to the product of legal archaeology as "Paul Harvey history," which provides "the rest of the story." This famous radio commentator's programs regularly included vignettes of famous people, followed by obscure details that did not make it into their official biographies, or similar revelations about important world events whose full story often represents a contrast to the conventional wisdom.
10. D. J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: MacMillan, 1994): at 210-211.
11. Robert Bork condemned the opinion in *Griswold v. Connecticut* as a case involving two doctors whom he incorrectly described as only hypothetically subject to fines by Connecticut for distributing information about contraception. *Id.*, at 268.
12. A series of articles by Gene Teitelbaum identified the location of most state and federal court documents as of the 1980s. See G. Teitelbaum, "United States Supreme Court Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 2, no. 1 (1982): 9-46; G. Teitelbaum,

- "United States Courts of Appeals Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 3, no. 3 (1983): 67-85; G. Teitelbaum, "State Courts of Last Resort's Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 5, no. 4 (1985): 187-228; and G. Teitelbaum, "Intermediate Appellate State Courts' Briefs and Records: An Updated Union List," *Legal Reference Services Quarterly* 8, no. 4 (1988): 159-207. See also *Federal Court Records: A Select Catalogue of National Archives Microfilm Publications*, National Archives Trust Fund Board, Washington D.C., 1991. Since the inception of electronic record-keeping, many courts have begun to accept filings online, and much is available in digital format; for example, see <<http://www.oyez.org/>> (last visited June 24, 2008) for U.S. Supreme Court records.
13. For example, P. Caron's *Tax Stories: Digital Supplement* may be found at <<http://www.law.uc.edu/taxstories/>> (last visited June 24, 2008).
 14. For the *New York Times* archive online, see <<http://www.nytimes.com/ref/membercenter/nytarchive.html>> (last visited June 24, 2008).
 15. Many universities are now subscribing to the Proquest database (Proquest.com), which includes archives for newspapers such as the *Christian Science Monitor* (1908-1980), *Boston Globe* (1872-1923), *Atlanta Journal-Constitution* (1868-1939), *Hartford Courant* (1764-1984), *Chicago Tribune* (1852-1984), *Washington Post* (1877-1986), and the *Los Angeles Times* (1881-1984).
 16. For example, *The Dallas Morning News* (1885-1977), available at <http://nl.newsbank.com/nl-search/we/Archives?p_action=keyword&p_product=DMEC&p_theme=dmecc> (last visited June 20, 2008).
 17. Newspaper Archive Online, available at <<http://www.newspaperarchive.com/>> (last visited June 20, 2008).
 18. The Library of Congress Web page provides a form to assist searches in their newspaper holdings; it is available at <<http://www.loc.gov/rr/news/lcnewsp.html>> (last visited June 20, 2008).
 19. W. E. Parmet, R. A. Goodman, and A. Farber, "Individual Rights versus the Public's Health — 100 Years after *Jacobson v. Massachusetts*," *New England Journal of Medicine* 352, no. 7 (February 17, 2005): 652-655.
 20. P. A. Lombardo, "Phantom Tumors and Hysterical Women: Revising our View of the Schloendorff Case," *Journal of Law, Medicine & Ethics* 33, no. 4 (2005): 791-801. Popular magazines such as *Time* or *The Nation* are also rich sources for accounts lawsuits of the past. Both of those magazines provide free online databases. See *Time*, available at <<http://www.time.com/time/magazine/archives>> (last visited June 20, 2008); *The Nation*, available at <<http://www.thenation.com/archive/>> (last visited June 20, 2008).
 21. JSTOR, available at <<http://www.jstor.org/>> (last visited June 20, 2008). For example, JSTOR contains early editions of *Science*, the *Hastings Center Report*, and the *American Journal of Psychology*.
 22. ProQuest, available at <<http://proquest.umi.com/pqdweb?RQT=302&cfc=1>> (last visited June 24, 2008). Commentary in law reviews and bar journals may be found in the digitized archive at Hein Online, available at <<http://heinonline.org/>> (last visited June 20, 2008).
 23. "Mrs. Packard's Persecution," *Liberator* (Boston), December 30, 1864. Reprinted in *American Periodical Series* 34, at 212.
 24. J. H. Young, "Three Southern Food and Drug Cases," *The Journal of Southern History* 49, no. 1 (February 1983): 3-36.
 25. N. McCorvey, *I Am Roe: My Life, Freedom of Choice and Roe v. Wade* (New York: Harper-Collins, 1994).
 26. W. H. Colby, *Long Goodbye: The Deaths of Nancy Cruzan* (Carlsbad, CA: Hay House, 2002).
 27. K. Donaldson, *Insanity Inside Out* (New York: Crown, 1976).
 28. See, for example, M. Trimble, "Archives and Manuscripts: New Collecting Areas for Law Libraries," *Law Library Journal* 83, no. 3 (1991): 429-450.
 29. A. M. Brandt, *The Cigarette Century: The Rise, Fall and Deadly Persistence of the Product that Defined America* (New York: Basic Books, 2007).