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How to Tell Law Stories

Michael Grossberg

I have been asked to comment on Brook Thomas's review of *A Judgment for Solomon*. Beyond the obvious challenge of trying to strike a pose somewhere between defensiveness and dogmatic reiteration of points made, it is a rather difficult assignment because Thomas has quite effectively explained the intent of the book and identified its central issues. And he has done so with his characteristic insight and verve. Thus not only do I find myself quite willing to accept his positive assessments, but more important, I agree with much of what he has to say about the book and the issues it raises. Nor am I inclined to dwell too much on some of his specific criticisms. Instead, I want to address briefly the two central issues he finds most problematic in the book: my form of storytelling, and my use of the concept of legal hegemony.

Thomas is correct in concluding that these two issues were at the heart of my decision to write about the d'Hauteville case and to write about it in the way I did. And he is equally correct in assuming that I wanted readers of the book to leave its pages with thoughts about each subject. Indeed, it is because both issues are so significant to our understanding of American law and society—present and past—that I want to respond to Thomas's critique. In doing so I will inevitably try to clarify the way I approached storytelling and legal hegemony in the book; however, my larger intent here is to explain why I think these issues are worth grappling with in the first place. As Peter Brooks put it, "How stories are told, listened to, received, interpreted—how they are made operative, enacted—these are issues by no means marginal to the law nor exclusive to theory; rather they are part of law's daily living reality" (1996, 22).
I will begin with the issue of legal storytelling. As Thomas notes, I turned to a narrative of the d'Hauteville case because I saw in its remains a way to investigate "the complicated link between social and legal change" (1998, p. 431). The richness of the material made the case particularly appealing, especially a cache of introspective letters that formed the initial means of bargaining between the warring couple. The d'Hauteville case was, I decided, a great story. My challenge became how to tell it.

I took up that challenge in part because I have come to believe that such particularized tales return a needed sense of contingency and indeterminacy to our understanding of the past and also that narratives return a sense of the importance of stories to the way we understand events. In making this move, of course, I joined a large and growing cadre of historians and an equally large contingent of sociolegal scholars who champion the importance of storytelling. Animating this turn to narrative is the belief that storytelling is an old art form that can and should be reclaimed as a means of analysis and a form of presentation. The sources of this renewed interest in storytelling are varied. Prime among them is a sense of disenchantment with the positivism of many reigning social science methods as well as a conviction that stories are powerful vehicles with which outsiders can challenge established authority (Sewell 1992; Brooks 1996; Maza 1996; French 1996).

Among the many debates generated by the return to storytelling has been one about authorial intent and authorial voice. This specific debate has been strongly influenced by postmodernism generally and by recent understandings of textual creation and interpretation developed by literary critics more particularly. While I do not want to rehearse all the various arguments here, I do want to emphasize that one of the major results of this debate has been a much greater consciousness about the authorial role in all narratives. It is a consciousness shared by both writers and readers, and one that Thomas and I clearly share as well. And thus Thomas is quite correct in concluding that I crafted my story of the d'Hauteville case in a very deliberate fashion as I made a number of choices about how to present the tale.

Where I think Thomas and I diverge is on the place of overt authorial interventions in the stories historians tell. He casts the choice primarily as one of showing versus telling, and in my case quite rightly links it to a declared goal of having readers experience the d'Hauteville case. As he suggests, legal experience is a keyword of my narrative of the case. Equally important, he is quite right in concluding that for me as a historian, the choice of authorial voice was inextricably linked with the fundamental importance of context. However, I differ from Thomas on the question of the narrative styles open to historians and the possible analytical roles of read-
ers, especially in his juxtaposition of traditional and experimental historical methods.

All of us, I assume, want to be considered innovative, and thus to be labeled traditional is inevitably a bit deflating. Beyond the issue of ego, however, is the larger question of whether overt interpretative interventions by historians in their narratives ought to be considered simply a replay of our craft's conventional methods or a part of new approaches to the writing of historical narratives. Thomas seems to think the answer is clear. His presentation suggests a set of methodological polar opposites: the more overt the interpretation, the more conventional the style, and thus, the more the story is what he considers a recovery project; conversely, the more primary texts are presented in a seemingly unmediated form, the more experimental the style and thus the greater latitude for readers to become interpreters and for the story to be recounted, not recovered. I am not sure, however, that the range of approaches historians and sociolegal scholars are taking to the question of authorial intervention is comfortably situated on a continuum from traditional to experimental.

Much of the intellectual richness of the present moment in academic writing is a consequence of the variety of narrative styles being developed by scholars in a number of fields. Among historian storytellers, the range is indeed quite broad. Approaches to historical narratives include the frequent authoritative interventions of Natalie Zemon Davis in *The Return of Martin Guerre* (1973), the seemingly authorless presentation of multiple and contradictory texts in James Goodman's *Stories of Scottsboro* (1994), the overtly autobiographical narrative style in the stories Patricia J. Williams published as *The Alchemy of Race and Rights* (1991), the injection of invented dialogue into John Demos's story of *The Unredeemed Captive* (1994), and many others. Yet these approaches are all pursued in an effort to have readers experience the tale in some fashion.

In other words, at present there is not so much a singularly preferable or effective approach to the authorial role in telling history stories as a range of options. Each narrative choice has attributes and liabilities, but each is informed as well by the intellectual currents of an age that make them quite different from previous forms of historical storytelling. In fact, as I note in the preface to *A Judgment for Solomon*, part of the reason I wrote the book in the way I did was a sense of dissatisfaction with the way most trial tales have been written. So many of these seem to me to take a “Dragnet” approach to trials (“Just the facts, Ma'am; nothing but the facts”), with little conveyed sense of the subjectivity of facts or the implications of authorial choice. And thus one result of postmodernism and the linguistic turn is the insight that questions of authorial intervention in storytelling must be examined by all would-be storytellers, much like the advent of

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1. For a particularly compelling recent example see Cohen 1997.
Freudian psychology compelled all biographers to think about the inner life of their subjects. In both cases, however, the results need not be, and have not been, uniform styles and methods. In other words, it is critical to realize that, as Robert Weisberg explains, "modern theorists of narrative often argue that every historical rendering of events is an aesthetic project, as well as an empirical one, and that every aesthetic strategy has ethical premises and effects" (Weisberg 1996, 63).

My own narrative approach falls closest to that of historians like Davis and Carlo Ginzburg (1980), especially their efforts to use their stories to convey what I would call "the otherness of the past." By that I mean an authorial intention to make clear to readers the seemingly obvious but I think quite hard to grasp point that the past was different from the present. This task is particularly difficult in the United States because it is such a presentist society. The task is pursued in authorial choices about the presentation of a story's characters and events, the selection of which and how many words from the past to use, and the determination of the nature and scope of explicit authorial interventions in a narrative. Making the "otherness of the past" clear was a particularly important objective in my story of the d'Hauteville case because it could easily be read in very presentist terms—Kramer versus Kramer in period dress. And thus in draft after draft as I struggled to balance various forms of my own analysis with a presentation of words from the case, I found myself compelled to make more and more interventions.

Looking back on those decisions, I would categorize the way that I directly intervened in my story of the d'Hauteville case in two ways. First, I penned explicitly contextual interventions. For example, I thought it important for readers to understand the significant time-bound features of the case. These included the way the characters in the story conformed to the letter-writing conventions of their time, the status of mental cruelty as an illegitimate ground for divorce in the era but one generating debate and support, and the emergence of the penny press—cheap daily newspapers—as an innovation of the 1830s with direct implications for popular understanding of the law. These were all part of the "otherness" of the past that I thought had to be explained for readers to experience the case. Second, I also intervened at various points in the story and particularly at its end to present my own argument about the meaning and importance of trials in American culture. As I think Thomas's synopsis makes clear, I had dual though interconnected goals in writing my story of the case: to have readers experience the case itself, and to have them evaluate my argument about the meaning of such experiences. In the preface, organization of the chapters, and conclusion, I tried to engage readers in these linked but separate conversations. Thus, I tried to speak directly to readers in a way that I do
not think would have been possible in a less mediated presentation of less contextualized material like Goodman chose for his Scottsboro narrative.

As a result of these choices I am a little perplexed when Thomas says, for example, "rather than simply describe Ellen's and Gonzalve's marital difficulties, [Grossberg] explains their significance by framing them in terms of conflicting theories of marriage" (1998, 447). I am perplexed in part because one of the chief lessons I learned from Allan Megill (1989) is that there is no such thing as simply describing an action in the past; description is always analysis, and has to be understood as such by authors and readers. At the same time, it seemed to me that readers could neither understand nor experience the d'Hautevilles' clashing marital beliefs without some level of contextualization. That conviction itself is clearly derived from my sense of the otherness of the past and the concerns I have about just how accessible its words are to those in the present. In taking such an approach to past texts I consider myself a beneficiary of intellectual historians such as J. G. A. Pocock and Quentin Skinner, whose struggles to understand the meaning of early modern European political language led them to turn the noun "context" into the verb "contexualize." Failing to contextualize the d'Hautevilles' words, I feared, would mean that readers would give them present-day meanings. I say all this understanding that, as Thomas puts it, "a 'context' is itself constituted by events that require interpretation and reconstruction. In other words, to provide a context for events is as much an act of 'recounting' as narrating the events themselves" (1998, 447-448). If we eschew the possibility of a completely objective presentation of the past—even by simply recording its words in the present—then providing a context for past events is one of the fundamental tasks of a historian writing a narrative or any other kind of an analysis. Contextualization can be done well; it can be done poorly. But I do not think it is a task that ought to be spurned in an effort to encourage readers to experience past events. However, I should acknowledge a critical assumption embedded in such assertions: Ultimately, the past can never be completely accessible to those in the present, and thus its events can never be fully experienced.

Perhaps I tipped the balance between intervention and recording past words too far toward the former, but the decision to strike the balance that I did stemmed from my dual objectives. I wanted readers to engage with the case itself as much as possible on its own terms and with my analysis of the meaning of such cases for our understanding of the changing place of law in American society. I tried to separate the two objectives. I tried, in particular, to present as full an account of the clashing ideas and interests in the case as I could—albeit in a contextualized fashion. I wanted readers to form their own conclusions about the fate of the disputed child and the other issues of the case without being guided to favor one spouse or the other.

2. For the seminal studies using this method see Pocock 1975; Skinner 1979.
Thus I not only withheld the decision of the case, I also made the expository decision to place many words from the couple and their families, lawyers, judges, newspaper writers, and others directly in the text and secured the right from my publisher to have all their words—statements short and lengthy—set full width rather than indented. I did so because I have always thought that readers’ eyes fly over indented text, and that the format itself inevitably subordinates the actor’s words to an author’s analysis. I tried to avoid these problems and thus in my contextualized manner give readers a basis for experiencing the case through its words and thus for making their own judgments about both the case itself and my analysis of such cases.

Whether I succeeded in these objectives or not, my intentions and Thomas’s critique underscore the importance of authorial intervention as an issue in the writing and reading of historical stories. And they bring to the fore questions about whether a more or less authorially mediated story is the more effective means of enhancing readers’ encounters with the past. In other words, I hope these comments make clear that I think Thomas has raised some critical questions about the relationship between methodological choices, the nature of the historian’s craft, and her or his engagement with readers. I think these questions are important because I am even more convinced than when I wrote A Judgment for Solomon that storytelling is an important method of writing legal history, though I also believe it can be undertaken in a variety of ways.

Thomas’s essay also highlights a second analytical issue I struggled with in telling the story of the d’Hauteville case. He raises questions about how stories can be used to analyze the power and authority of the law in a society like that of the United States. Thomas quite rightly notes that I was attracted to the case in part because it provided me with a compelling means of addressing that issue. I also thought the case offered material for analyzing how the place and power of American law have changed over time, the issue central to historical analysis. Indeed, it may be that the primacy I give as a historian to questions about change over time has produced some of our differences about narratives. In any event, as Thomas explains, my attempt to address questions of legal power in a story of the d’Hauteville case led me to Alexis de Tocqueville and his metaphor of the shadow of the law. It did so in part because I sought ways to generalize about the story. As Paul Gewirtz has pointed out, stories tend to be particularized, theories to be more general. Consequently, to “move from story to action, we need theories too, theories that help us to assess the representativeness of a particular story, to choose among competing stories, to decide which facts are relevant. So, too, we need to appreciate the value of general rules as well as particular stories, for general rules, in spite of their imperfections, can protect against favoritism and unequal treatment” (Gewirtz, 6–7).
Perhaps Thomas is right that I became captured by the shadow of the law metaphor and thus victimized by its unintended images. I do know that I was captured by the d’Hauteville story itself. I was drawn to the case because the d’Hautevilles’ letters and other archival materials provided a unique set of sources chronicling how laypeople encountered the law and reacted to what I termed the legalization of their dispute. As I read and re-read Ellen and Gonzalve’s letters, their lawyers’ letters and briefs, and then the widening commentaries on the couple and their case, I certainly got a sense that they all felt the presence of the law.

In an effort to understand and then convey the pair’s “lived experience” of law, I recalled a dramatic exchange between the couple as their efforts at negotiating a settlement crumbled. Gonzalve wrote to Ellen invoking his legal rights to their son Frederick and warning, “Neither days, nor weeks, nor months, nor constant efforts would succeed in changing my determination with regard to it.” Ellen responded to his threats to haul her into court and to pursue her relentlessly by declaring, “Remember, you are accountable to your final Judge for the suffering you occasion. Arbitrary and artificial rights will not weigh in the balance against humanity and mercy, before Him” (Grossberg 1996, 48, 49). These words were important to me because they indicated the pair’s growing consciousness of the law, Gonzalve’s conscious use of legal rules as bargaining chips in their spousal conflict, and Ellen’s ultimately unsuccessful invocation of a competing regime of authority, religion, to counter Gonzalve’s legal claims. As the case developed, its growing pile of public and private documents clearly revealed that the couple felt a growing presence of the law in their lives. By its end, both d’Hautevilles understood that the discretionary authority of courts under American custody law and its “best interest of the child” rule meant that they and their families were in the law’s thrall until the child became an adult. Every action they took sprang from their consciousness of the law’s hold on them. Thus I concluded that I had to find a way to convey the central reality of their legal experience: an increasing consciousness of the law, an appreciation of its power over them, and a sense of the tactical options it afforded them to contest specific rules and decisions as well as the constitutive consequences of their choices. And that conclusion led me to generalize about their legal experiences by adopting Tocqueville’s metaphor and crafting an argument about the growing hegemony of the law. Thomas questions both decisions and in doing so raises some compelling issues about the use of narrative to probe the relationship between legal events and structures.

I should note that my use of the shadow-of-the-law metaphor was not premised on an assumption that individuals preexisted the law. On the contrary, I quite agree with Thomas on that score, and perhaps I should have made it clearer that, to use his phrase, “people are always already born
within the shadow of the law” (1998, 455). However, my concern was with trying to understand and write about changing individual legal consciousness. I think that finding ways to examine legal consciousness, and how it has changed over time individually and collectively, is both a critical issue in legal history and a primary reason for writing legal narratives. It is also a very difficult task for historians because there are so few sources that can be used to examine legal consciousness in the past.

Thus one reason for writing A Judgment for Solomon was to take advantage of the revealingly introspective materials in the case to examine the issue of legal consciousness. In doing that, I did not mean to imply that the d’Hautevilles operated outside of a legal regime until their marital woes erupted, but rather to demonstrate that neither one of them was very much aware of such a regime. Conflict forced Ellen, Gonzalve, their parents, and then an escalating cast of characters to think about and try to understand the rules of marriage, divorce, child custody, and habeas corpus for the first time. I relied on the notions of “drift” and “trouble cases” developed initially by Karl Llewellyn and E. Adamson Hoebel in their classic The Cheyenne Way to analyze legal continuity and change. I used them to argue that it is in cases of trouble that laypeople’s individual legal consciousness is most visible, and that such cases produce the kind of sources I found in the debris of the d’Hauteville case.

The shadow metaphor seemed to be a phrase from the era itself that conveyed the consciousness of the law that individuals like Ellen and Gonzalve experienced. It also conveyed the reality that the law included not merely a matrix of formal institutions, rules, and actors, but also a set of cultural beliefs and practices that influenced individuals as their conflicts became consciously “legal.” For this couple, as for so many others, private conflicts led to a first encounter with law and thus the first need to think about it consciously. Perhaps “trapped in the shadow of the law” is not the most effective phrasing to achieve these ends; however, the phrase does present the visual image I sought: individuals forced to deal with the power of legal rules, legal beliefs, legal customs, and legal institutions in a way that demonstrated both their agency and the limits that the law imposed on their choices. And thus the metaphor is not meant to assert that individuals like this warring couple are simply trapped and powerless, but rather to suggest the relative power of the legal order and litigants once a conflict has become a legal one. Still, Thomas’s critique has made me understand that the metaphor may not be as useful in suggesting the impact of laypeople on the law.

As the foregoing explanation suggests, I found the shadow metaphor compelling in part because it provided a means of analyzing the power of law beyond its formal institutions and thus a way to engage with the Gramscian concept of hegemony. Like many historians of American law, I was
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3. For the most important recent statement of this argument see Tomlins 1993. And for a compelling discussion of the consistent failure of alternatives to the law see Auerbach 1983.

hegemony, particularly with the insightful distinction between it and ideology developed by Jean Comaroff and John Comaroff, helps us understand the utility and significance of portraying the law as a distinct and dominant arena for “competing ideologies” (1998, 452) such as maternalism and paternalism. Similarly, legal hegemony helps us understand Gramsci’s still very salient point that power does not emanate simply from political institutions. In the United States, part of the law’s power came from the conviction that it was not so clearly a part of the traditional political structures but a distinct set of social and cultural practices. Thus a set of framing beliefs about the autonomy of law encouraged a rule-of-law ideology embedded in the republic during the antebellum years. Those beliefs were premised on a separation of law and politics and encouraged growing assertions of law as the nation’s civil religion and the growing appeal of rights and rights talk. In turn, these convictions postulate an extension of law beyond the concrete organs of the state as does Tocqueville’s metaphor of the shadow of the law. Thus to me, cases like the d’Hautevilles’ demonstrate in multiple ways that the power of the American legal order had real consequences for lay and professional groups. Though I agree that crude capture models depicting the law as simply the tool of a singular dominant class greatly oversimplify legal authority, I also think that the time-bound use of the concept of legal hegemony prevents us from elevating the power of individual agency so high that it turns the legal system into some sort of neutral arena for interest-group conflicts.

Finally, I also want to address the important questions Thomas raises about the implications of combining the shadow of the law metaphor with legal hegemony through statements like law tightening “its stranglehold on American dispute resolution.” Such depictions, he insists, are oversimplifications and convey “a very negative image” (1998, 453). However, I am less concerned with whether it is a negative image than with how effectively such phrases portray legal experiences like those I chronicled in A Judgment for Solomon. Phrases like that one certainly express my conclusions about the direction of legal change, and I think it proceeds logically from the d’Hauteville case.

While I of course agree with Thomas that a doctrine like coverture influenced individuals before the custody changes I discuss in the book, my argument is that changes in the place and influence of the law must be charted as well. Thus, documenting the existence of a body of legal rules at any particular point in time is less significant than an attempt to historicize the power of legalism as an ordering force in society. In that vein, the d’Hauteville case reveals the increasing legalization of troubled marriages in antebellum America. It also suggests some of the sources and consequences of the steady growth of the American divorce rate from the 1830s to the present and the accompanying rise in child custody determinations that it
has spawned. These developments are, to my mind, but one example of why the law has assumed a greater presence in the lives of increasing numbers of American men and women and thus why they have entered the law's shadows. Indeed, it is worth noting that when family law scholars Robert Mnookin and Robert Kornhauser (1979) wanted to paint a word picture of the dynamics of divorce negotiations, they too seized on the Tocquevillian metaphor to talk about "bargaining in the shadow of the law." It is this dynamic reality rather than a static sense of law as a constant set of institutions that I tried to capture with the shadow metaphor and the use of legal hegemony.

And thus my use of the terms was not intended to champion a return to a pre-nineteenth-century era in the history of Anglo-American cover- ture, but rather to suggest that the growing consciousness of family law rules among Americans has had very real consequences. I also used these terms to raise questions about the wisdom of relying on an adversarial legal system and its showcase trials to resolve family problems like child custody. Perhaps such assertions are negative, but I think they are logical conclusions of the story I told. Indeed, they are one of its morals.

I want to conclude by noting that despite my disagreement with some facets of Thomas's critique, I take some solace from that the fact he has addressed precisely the issues that I wanted to raise in writing A Judgment for Solomon. And I appreciate the seriousness with which he engaged me on those issues. My comments here are intended to continue that dialogue.

REFERENCES


