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Recommended Citation

Saul Levmore, "Fables, Sagas, and Laws," 33 Willamette Law Review 485 (1997).

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FABLES, SAGAS, AND LAWS

SAUL P. LEVMORE*

I. INTRODUCTION

The fables of my title refer to stories such as those collected under the name of Aesop.¹ One famous fable is the source of the common reference to “a wolf in sheep’s clothing.” The wolf infiltrates the fold but is then devoured for dinner.² A fable often concludes with a moral.³ Here, as in many other cases, it is the rather rigid and anticlimactic “Appearances can be deceiv-

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This talk was delivered as the 1997 Paulus Lecture at Willamette University College of Law. I am most grateful to my colleagues and new friends at Willamette for comments on this particular topic and, more generally, for their extraordinary hospitality. I am indebted to Jerome McGann, Julie Roin, and Pam Karlan for discussions on some of the topics touched on in this Essay.

1. For the canonical collection of the earliest texts, see 1 *AESOPICA: GREEK AND LATIN TEXTS* (B.E. Perry ed., 1952). A convenient translation of the most popular fables is *FABLES OF AESOP* (S.A. Handford, trans., 1954).

2. The particular fable is more interesting than most of us recall. The wolf dresses in costume in order to gain entry. He succeeds. But before he can do any harm, the shepherd comes out for dinner and, aiming to consume one of his own sheep, chooses the wolf, who has blended into the flock too successfully.

3. For discussion of the difference between these moral-oriented fables and the original fables in their larger narrative contexts, see GREGORY NAGY, *THE BEST OF THE ACHAEANS* 280-88 (1979).

ing,” although we can sketch in the more subtle “Beware deception—but immoral deceivers beware!” Such animal-based fables were passed down in many societies.⁴ Diverse peoples apparently perceived foxes as cunning and wolves as cruel, for example. They also shared the habit of communicating norms regarding human behavior through the camouflage animals provide.⁵

By the term “saga,” I refer to a story handed down in a family or culture, dealing with actual or implied ancestors.⁶ I am especially interested in those that bear some relationship to legal rules. I will dwell on one story about an ancestor who went bankrupt, eventually recovered and re-entered the middle class, and then labored to repay old creditors even though he need not have done so. It may not be as vivid as the wolf in sheep’s clothing, but it comes with its share of provocative applications. I have been collecting such family-legal sagas for several years now in order to substantiate a theory of the survival of these stories or, dare I say, myths—for it is their transmission, rather than truth, that is of interest. It is this theory that I hope to spin out here.

The short form of my thesis proceeds in four steps. (1) Stories survive if they resonate with audiences; (2) this resonance reflects discomfort, at least at the level of popular culture, with particular legal rules; (3) this discomfort or uneasiness often coincides with theoretical (or highbrow) problems regarding the same rules; and (4) this discomfort also signals instability and the potential for reform in an area of law. I will not say we should take up the call for reform whenever sagas converge on a legal rule, for popular conceptions may be the product of misconcep-

4. On the distinction between casual folktales (with animal fables as a subset) and cosmic myths, see G.S. KIRK, *MYTH: ITS MEANING AND FUNCTION IN ANCIENT AND OTHER CULTURES* 31-41 (1970).

5. George Orwell’s *Animal Farm* and Disney’s *Toy Story* are more modern examples. In many cultures, the camouflage is meager and the animal-based stories are simple; but this is not universally the case.

It is interesting that, in contemporary sentiment, foxes are regarded as cunning and wolves as predators—but not as particularly cruel. And the old fables that are most familiar today include ones with clever foxes and hungry wolves, but those with cruel wolves seem to be of less interest. I will leave for another day, however, a deeper investigation of these fables. I warrant that they are especially interesting from a law and economics perspective.

6. My label is unfaithful to the tradition that sometimes sagas concern a series of stories.

tions. However, I am claiming that law from the bottom up has something to teach us, and that we might even be able to predict a change in the law based on these stubborn sources of sagas.

At the same time, I will address the moral quality of these sagas. Aesop offers fairly straightforward animal stories. Family and tribal hand-me-downs are often remarkable for their moral and behavioral complexity. Much can also be said about other kinds of parables and their purposes, but I will venture into the saga literature only as I conclude. This emphasis on what survives in family and local lore allows me to focus on the legal component of sagas.

II. BANKRUPTCY

Returning to the bankruptcy saga, I found, as I have discovered in many families, that my own paternal grandfather was in business and—perhaps through no fault of his own but rather because of a general economic downturn—lost all that he had accumulated. His family endured bankruptcy and then poverty. Eventually he succeeded in a new business and repaid old creditors. He was not required by law to repay these creditors, for his debts had been discharged in bankruptcy. These voluntary payments were not easy to make, and his family struggled behind him through these difficult periods. There is a family Bible in which my father keeps a letter from one of Grandfather's trade creditors. It thanks the debtor for his belated and legally unrequired payment and marvels at what an unusual and honorable person he has been. A thrill travels through my spine when I read that letter. I once told this story and was surprised when two of four listeners had remarkably similar stories to tell about their own ancestors. I have since heard others as well.⁷

There is something interesting about the fact that we do not quickly ridicule the behavior that is superficially exalted in the bankruptcy saga. The post-bankruptcy payments (and any admiration of them) seem to reflect ignorance of law and economics analysis and perhaps a kind of moral narrow-mindedness as well. The interest rate originally charged to debtors like my grandfa-

7. "Urban legends" have a similar unsettling quality of eliciting parallel experiences—or at least those attributed to a "friend of a friend"—from listeners. *See, e.g.*, JAN H. BRUNVAND, *THE BABY TRAIN* (1993); JAN H. BRUNVAND, *CURSES! BROILED AGAIN* (1989).

ther must have incorporated the prospect of various business failure scenarios. The interest rate also reflected the costs of fraud, but the analysis here assumes that there is no evidence of wrongdoing on the part of the debtor; bankruptcy must have been caused by bad luck, a general business downturn, or even poor (but honest) management.⁸ By paying the old creditors, Grandfather gave them double payment in a sense. There is, moreover, a case to be made for preferring other sorts of post-recovery expenditures. Many people recover from bankruptcy and turn to philanthropy, and perhaps we should prefer one who gives a substantial percentage of his wealth to charitable causes over one who turns this wealth over to banks and ex-suppliers. As a moral matter, if a post-bankruptcy debtor asks whether to donate to charity or to old creditors, most of us would prefer the charity over business creditors.

Imagine, however, that our legal system contained bankruptcy rules designed not around the dual goals of saving the debtor from inefficient disintegration and providing the debtor with a fresh start, but rather around the first of these ideas alone.⁹ The law could remove the incentive for creditors to rush in inefficiently and disassemble the debtor while doing as little violence as possible to existing creditors' claims. Current law extends the all-or-nothing character of bankruptcy by offering the debtor a completely fresh start. It is plausible that (ex ante) creditors and debtors would prefer a rule that merely suspended creditors' claims and awaited the debtor's recovery. Such a rule would remove some of the debtor's incentive to recover and prosper; but it would also lower interest rates because the prospect of bankruptcy would be less costly to creditors. This Essay is not the place to develop details; the point is simply that our bankruptcy law offers a completely fresh start when it is possible that something less than that would work as well or better. At some point, this sort of system would resemble reorganizations

8. If there were affirmative wrongdoing, then the argument against repaying creditors would be flawed much as it is mistaken to justify shoplifting with the claim that the storekeeper's prices take some shoplifting into account.

9. These ideas, along with the nonwaivability of the full discharge rule in bankruptcy, are discussed in THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 10-17, 225-48 (1986) (discussing the fresh start policy, the inability of individual borrowers to gain lower interest rates in return for opting out of full discharge, and the desirability of preventing creditors from rushing to disassemble debtors).

where the maturity of credit arrangements is extended by law or where creditors receive equity in the surviving firm.¹⁰

If this claim about bankruptcy law is correct as a theoretical matter, then my larger point can be completed: the sagas suggest a preference for a world in which debtors who recover repay their old creditors, and these sagas may have pinpointed a legal rule correctly—namely, full discharge in support of a complete fresh start—which will prove unstable because of its questionable foundations and inconsistency with that preference. Put differently, if bankruptcy law compromised between these regimes, and required that recovered debtors pay the old creditors some fraction of their claims (or their full claims sans interest), I am confident that most observers would prefer that a debtor who then contemplated making a larger repayment than required be encouraged to donate the excess to charity, rather than to the cause of fuller compensation for ex-creditors.

In short, the observation here is that many people are uncomfortable with individual bankruptcy law and its form of a fresh-start policy. Much as lawyers come to expect judges to exhibit discomfort with secured creditors' priorities because the moral and economic arguments for these priorities are difficult, so too nonlawyers' experiences reflect discomfort with rules that at least nominally prefer the debtor's fresh start to the sanctity of earlier promises between debtor and creditors.

An alternative, and somewhat opposing, view is more opti-

10. Thus, it is interesting that many sagas (and movies) involving bankruptcy law are about personal bankruptcies with the family business at stake. These businesses often deal with suppliers or lenders that are themselves likely to survive any crisis through reorganization or other legal means. Thus, a family whose farm is sold in a foreclosure proceeding might be puzzled or embittered by the fact that a change in economic circumstances cost them their farm, while a comparable change in circumstances allows a large oil company either to regard contracts for the sale of oil as somehow excused or to lead to the mere reorganization (but survival) of the company. The comparison is obviously more complicated (inasmuch as the farmer gets to keep all his human capital and also can enjoy excuses if grain prices change dramatically); but the point is that sagas draw attention to subtle and unstable rules. Bankruptcy and reorganization laws are indeed ever-changing.

Comparative lawyers will note that the discussion in the text suggests that we might find variety rather than uniformity in bankruptcy law over a range in which creditors are prevented uniformly from disassembling debtors but where debtors are offered different degrees of encouragement to produce profit in the future. See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43-65 (1987); Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 31 TULANE L. REV. 235-87 (1986).

mistic about the development of legal rules. Moral intuitions are reflected in sagas, as before, but lawmakers are a product of the same culture that produces and is shaped by these stories. Therefore, the legal rules we find are influenced already by these sagas. In the bankruptcy case, the law may anticipate that some private players will invest in their own reputations by paying debts that otherwise could be forgiven legally. Sagas serve the role of reminding people about this option of doing more than the law requires. Under this view, the sagas do not signal instability in the law. I find this perspective a bit too optimistic, given the prevalence of sagas in those very areas in which substantial legal change has been relatively frequent. Bankruptcy is one of those areas.

III. OTHER SAGAS AND DISCOMFORT WITH LAW

There is no shortage of examples of this connection between sagas and popular discomfort with legal rules. Numerous sagas deal with opportunistically broken promises, and, correspondingly, the theory of efficient breach is the subject of vigorous academic disagreement. Similarly, many sagas involve immigration experiences. Visa preferences and other pieces of immigration law indeed are controversial and sometimes difficult to defend. A colleague of mine reports that his great-grandfather was detained at Ellis Island, swam ashore, slept on a park bench in New York's Central Park, and stumbled into two co-villagers; with their help he married, began a business, prospered, chaired the local victory bonds campaign, and became a citizen through a private bill that was introduced after it was discovered that this victory-bonds stalwart was an illegal immigrant. I have repeated this tale before audiences, often with more than a hint of skepticism in my voice; and invariably some member of the audience comes forward to report a similar saga closer to home. Aesop would infer that small-time, well-intentioned lawbreaking is fine if you prosper prior to detection, for it is the underlying human essence that matters. ("Moral: The spirit of a rule is more important than its details.") I would say that there is something to be said for a tournament not outside our gates, but inside; for the former excludes more people than we like to think.¹¹ This immi-

11. See Saul Levmore, *Unconditional Relationships*, 76 B.U. L. REV. 807 (Dec. 1996) (describing social tastes that permit tournament-like processes among applicants

grant proved that he was deserving, and his minor if implausible lawbreaking is the stuff of admiring legends. The real message of this recurring saga is that immigration law is unstable. And indeed, it has proved so.

Another representative story and subject revolves around the making and losing of real estate fortunes. Many people tell of an ancestor who sold land to a buyer who then reaped a fortune when the path of an interstate highway was announced and land prices skyrocketed. A law professor friend of mine reports that his ancestor received an option as a sales commission and through that option he bought the entire company for which he had worked (so terrific were his sales skills and so badly drafted was the option). In short order, this salesman lost the fortune when he sold the firm to a buyer who had an informational advantage in the real estate market.

One function that such stories play is educational and psychological. A parent who hands down this saga can be seen as saying, "Do not worry about our poverty or middle-class life and the correlation between intelligence and wealth. Your gene pool is just fine. Hard work and intelligence make for success. Our family simply had a stroke of bad luck." A more subtle feature of this saga is that it reflects the discomfort every first-year law student feels upon learning how little law concerns itself with incentives for telling the truth. A buyer who knows of a coming interstate highway (or a contracting party who can see that the other party to his contract has failed to provide for an extreme eventuality) need not disclose this information. We should expect numerous stories about this unsettling legal rule. The option saga is especially ironic because the very fellow who profits from a fancy option that was drafted too plainly (with no ceiling or inflation protector) is then ironically hoisted when he sells land without retaining an option to share in the next buyer's gain. It goes almost without saying that nonlawyers, or perhaps noneconomists, are quite suspicious of options.

Other sagas I have collected converge on the law of finders (possession is but nine-tenths in the law), the law of intellectual property protection, the law of government takings of private property, and so forth. These, too, reflect vulnerable legal rules

for immigration rights but abhor explicit competition among applicants who already have permeated a country's borders).

about which theorists disagree—and regarding which nonlawyers understandably might exhibit discomfort. Popular culture has a way of conveying important truths about social organization and control. Lawmakers and legal academics might do well to pay attention to law and morality from the bottom up, and to be especially careful that formal rules that oppose these foundations really do make sense.

IV. WRONGFUL DISCHARGE AND CONTEMPORARY SAGAS

Let me dwell on a final set of stories that I will describe as implicating the law of wrongful discharge. A family discovers that a silver dish has been stolen and, after carefully retracing the steps of all who had access to their home, they discharge their maid. Three years later, they travel to England and see the missing silver dish in a friend's home. They recollect that, in fact, the friend's son had been in the United States as a college exchange student and had been a weekend guest at their home when the silver dish disappeared. They are horrified and reclaim the dish.¹² The story, along with all the others retold here, is typical.¹³ Aesop might have provided a version that pointed to the importance of cautious factfinding and to the tragedy of assuming too quickly that maids are more likely to be criminal than are one's own acquaintances.

I suggest that we focus our interest on the difficulty of rectifying the wrong done to the maid. The discharge of the maid might have been supportable. Yet, the maid's extralegal loss is likely to exceed the affluent college kid's extralegal (reputational) loss upon detection. It is by no means clear whether the

12. As the story was told to me, the son gave the dish to his own parents as a gift, and he returned the dish when the visiting owners threatened to disclose its source. As is often the case with these sagas, the details cast a shadow on the central tale. If the rightful owners repossess the dish without saying a word, the thief's parents may regard them as thieves. I have imagined a conversation among the four adults, but the saga may be passed on with the implausible ending reported here, to discourage the next generation in the dish-owning family from bringing the matter up in conversation when they meet their English acquaintances.

Another possibility is that by not confronting the friends (his parents), the willingness to minimize the thief's loss from detection subtly highlights the treatment and social standing of the maid who was fired after a presumably one-way conversation.

13. Similar stories involve expensive and easily identifiable clothing that is missing and then discovered in the home of a friend. The stories may survive because of a fascination with, or wishful thinking about, the stupidity of thieves or their subconscious desire to have their wrongdoing discovered.

maid should have a legal claim—and in any event, such a claim likely would go unmade. In fact, the maid almost surely has no cognizable claim in our legal system.¹⁴

Collecting these stories has made me think that a cultural norm could develop in which the wrongdoer is asked to repent and self-educate by mailing a substantial sum of money to the maid. It may even be healthy for there to be a norm that encouraged the (mistaken-discharging) family to “atone” by matching that payment. A formal legal rule of this latter kind may be unworkable because, in the shadow of such a liability rule, dischargers will decline to pursue the truth even as new facts or suspicions arise. On the other hand, with such a practice in place, we might have fewer tragic stories.

My immediate point is that the prevalence of these sagas, with endings that can be seen as bittersweet (truth uncovered, half-justice done, but the poor maid still in bad straits), focuses attention on at-will employment (although these discharges probably would be regarded as reasonable for non-at-will employees as well), wrongful discharge, defamation, and tortious interference with contract or business opportunity. All these subjects are very difficult in theory and practice. And in this case, asking ourselves how law or practice would need to be reformed in order to avoid these moral quandaries suggests something like a restitution remedy.¹⁵ This is not the place to sketch such a remedy or legal reform, but I think that its potential is fairly clear.

V. WRONGFUL DISCHARGE AND ANCIENT SAGAS

Among the most penetrating and long-lived sagas are those found in the Bible and classical literature. A good number of stories found in the Bible and in Homer can be understood as occupying a middle ground between Aesop and our immediate

14. The maid has no claim against the employer for wrongful discharge because the discharge was mistaken but not legally wrongful. Moreover, as noted presently in the text, any recovery against the employer could be counterproductive because it would discourage the employer from pursuing the truth or from informing the maid of what was learned after her departure. The maid has no claim against the thief because her injury is not proximate to his wrongdoing. He has neither directly nor maliciously caused her loss.

15. Casting the remedy as restitutionary might suggest payment from the wrongdoer who was enriched by the stolen item. It makes payment from the employer seem even less likely than before because the employer was not enriched in any sense.

ancestors' tales; their human character introduces flawed, multidimensional heros. Some of these heros generate simple morals, while others (dare I say modern ones) are of a piece with more contemporary, locally transmitted sagas. This is not the place to explore the legal simplicity of animal fables and the relative complexity of stories using human or demigod action figures. It is probably not a matter of evolving sophistication because some of these complex human stories are obviously very old.¹⁶

Perhaps the best-known wrongful discharge story bears this attribute of legal complexity, if only because the human characters are all flawed and thus multidimensional. There is the story of Joseph,¹⁷ who finds himself wrongfully accused by the wife of Potiphar, Pharaoh's captain of the guard and Joseph's master.¹⁸ Joseph is cast into prison, where he meets two palace employees, the cupbearer and the baker, who have been discharged by the king. He interprets their dreams as containing interwoven predictions; when these materialize, one of his new friends regains his original position and eventually recommends Joseph to the

16. One generalization is that animal fables are less complex than sagas told about human affairs. Simple truths might resonate better in animal tales because human characters may encourage audiences to identify with the tale and to perceive complexity. Thus, wolves kill animals for their nourishment, but the fable format passes over this complexity in a way that it could not if it dealt with a human who destroyed another human in order to survive. Still, there are often animal fables on both sides of an issue. In this way, animal fables will resonate with lawyers who are accustomed to opposing doctrines.

Another link between animal fables and law is that these fables often camouflage criticism of humans, which is to say that these fables are often a form of safe political speech. The wolf may be understood to represent the master, the farm may be Stalin's domain, and so forth. Indeed, an animal may be more recognizable than a single human representation. Over time, the very use of an animal might signal the simplicity or the allegorical quality of the story.

The generalization about complexity is, of course, sometimes misleading. The animal fables we have inherited may touch on complex legal rules only rarely, while human-based sagas often do; but there are many cultures in which animal-based tales are quite complex. And there is always the argument that we are culturally-bound in a way that makes us appreciate complexity in human stories more readily than we do in animal fables.

17. *Genesis* 39-41.

18. Not only is this story much like modern sagas, but it is said to have a close analogue in ancient Egyptian literature in "The Story of the Two Brothers." That story, however, is so rich and disjointed that it might contain any number of other stories, including the tales of Adam and Eve and a variety of those found in Greek mythology. See MIRIAM LICHTHEIM, 2 *ANCIENT EGYPTIAN LITERATURE: THE NEW KINGDOM* 203-11 (1976).

Pharaoh when the need for an interpreter of dreams again arises. Even if we take few liberties with the plain text, the story has multiple layers of wrongful discharge and other relevant material. There is the topical problem of distinguishing between false and honest claims regarding unwanted sexual advances. And there is the question of strict liability versus negligence because, at least as legend would have it, the cupbearer was held strictly liable for a fly in the wine while the baker, who was more likely to have been negligent, was hanged rather than rehabilitated. Potiphar imprisoned Joseph much as the families in our more modern sagas discharge domestic employees. The mistaken or even wrongful discharge puts Joseph in the right place at the right time; we are permitted to slide by the question of an appropriate remedy once we are convinced that the discharged person was accused falsely. Indeed, we have the feeling that Joseph's talents as an interpreter and administrator were sufficiently great that it made no difference whether he continued to be regarded as one who had misbehaved earlier toward his first master's wife. There are enough morals for diverse congregations.

VI. CONCLUSION

I have insisted that these stories converge on and point to vulnerable legal rules. An alternative claim might be that they converge on instances where there is tension between *ex ante* rulemaking and *ex post* realities—which is to say, between rules set down in advance and the realities that become known later on. In the immigration context, for example, visas are issued in advance, in ignorance of a person's performance on American soil. Discharge in bankruptcy looks troubling when we see the debtor thriving *ex post*, following the fresh start.¹⁹ Thus, there is a sense in many of these contexts that the law rushes too quickly to fashion *ex ante* rules—and then creates discomfort as people observe subsequent developments. This observation, however, does not apply to those cases involving asymmetric information (and disclosure regarding real estate development), unrewarded inventors, and government takings. So, in the interest of economy, I prefer to focus on vulnerability and instability rather than

19. It is possible, of course, that we should be heartened by the thriving debtor, whose success might be traced to removal of the interest costs associated by earlier debts. Here, as is often the case, moral intuitions seem fueled by *ex post* observations.

ex ante and ex post rulemaking.²⁰ Either way, I am suggesting something different from the conventional, contemporary emphasis on the value of narratives or storytelling to lawyers. I hope that by drawing attention to real legal (and perhaps moral) problems, alongside contemporary theoretical issues, I have identified a rich source of materials for further thought.

20. Another ex ante/ex post example involves stories about inventors who turn down offers to share royalties. They lose and someone else earns a fortune. In a way, I think the "moral" rule might be a sharing scheme, but our laws eschew sharing in favor of winner-takes-all. This provides yet another example of the ex ante/ex post point as to the design of rules and their subsequent reception. Similarly, when governments take or regulate private property, there are often fortunes made and lost because of the applicable (and perhaps chaotic) legal rules.