

Michigan Law Review

Volume 92 | Issue 6

1994

West on Story and Theory

L. H. LaRue

Washington and Lee University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

 Part of the [Law and Philosophy Commons](#)

Recommended Citation

L. H. LaRue, *West on Story and Theory*, 92 MICH. L. REV. 1786 (1994).

Available at: <https://repository.law.umich.edu/mlr/vol92/iss6/28>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WEST ON STORY AND THEORY

*L.H. LaRue**

NARRATIVE, AUTHORITY, AND LAW. By *Robin West*. Ann Arbor: University of Michigan Press. 1993. Pp. ix, 439. \$49.50.

Robin West¹ is one of our most creative legal thinkers, and I, for one, am constantly inspired by her work; she shows us new ways to see. Her new book collects into a single volume nine essays published in the recent past — over more or less a decade. As one would expect from such an author, the collection has a unifying theme, and, consequently, one is invited to reflect on the brilliance of West's performance over this last decade of our lives so as to assimilate the lessons she has taught us.

Although I say that her book has a unifying theme, perhaps it may be controversial for me to declare wherein that unity lies; certainly, the topics of the chapters are diverse. Consider, for example, the diversity of topics in the first four chapters. In Chapters One and Two, West criticizes Judge Richard Posner and his arguments for the moral significance of "choice," thereby challenging the fundamental axioms of the law-and-economics movement (pp. 27-87). In the third chapter, she criticizes those who see adjudication as procedurally "interpretive," thereby challenging the fundamental principles of Ronald Dworkin's jurisprudence (pp. 89-176). The fourth chapter addresses basic issues of feminist theory, and in it West criticizes those who would pursue equality of rights or power as a means of achieving "happiness" rather than set up "the pursuit of happiness" itself as the fundamental goal; thus, she challenges the fundamental tenets of radicals such as Catharine MacKinnon and mainstream liberal feminists who are too numerous to name (pp. 179-249). As one can see from this preliminary sketch, West casts her net across a broad range of topics, and so one must conclude that any unifying theme of her work is not to be found in a single topic.

In the introduction to her book, West offers us at least one key insight into her writing. She states that our task is to generate a "morally grounded legal criticism" and that this task is extraordinarily difficult because we are caught in a "critical dilemma" (p. 2; emphasis omitted). The dilemma is that the values that law expresses also shape our moral values and our political values; consequently, there is no

* Professor of Law, Washington and Lee University. A.B. 1959, Washington and Lee; LL.B. 1962, Harvard. — Ed.

1. Professor of Law, Georgetown University.

obvious place “outside the law” from which we can criticize the law. In other words, we can leave the institutional venues of courthouses and law offices, but we cannot escape their influence; we can move in space, but the air we breathe will remain the same. Thus, the critic who claims to offer a morally grounded legal criticism may be offering nothing more than a legally grounded legal criticism.

Because legal values have “infected” moral values, the grand and honorable tradition of English legal positivism — from Jeremy Bentham to H.L.A. Hart — has been unable to fulfill its ambitions (pp. 3-4). The positivists urged that we separate law from morality when we analyze law so that we can criticize it, but they were blind to the obstacle of circularity. West credits the critical legal studies movement for describing this obstacle to legal criticism with brilliance, although she also believes that the critics have not come up with any convincing means of overcoming the obstacle (pp. 4-7).

Where, then, should we search for a way out? West answers that “the humanities” are the best source of guidance:

[T]his book defends both substantive and methodological claims. The unifying substantive thesis is that, contrary to the skeptical claims of both contemporary liberals and their post-modern critics, we can and should rely on universal descriptions of human nature as a grounds for criticism of law, as well as for social and cultural criticism. The methodological claim is that the traditional and not-so-traditional critical methods of the humanities, including the reading and interpretation of literature, the telling and hearing of stories, and the development of a capacity for empathizing with the experiences of others, might constitute one means of pursuing a rich understanding of human nature and, therefore, a partial means of developing criticism of law from a genuine moral perspective. [p. 7]

When I read these words, I was filled with admiration for the ambition and the scope of West’s intentions, and I was struck once again by how novel her vision is to the legal academy. To say that one must seek “universal descriptions of human nature” is to speak words that are practically heretical. Furthermore, to seek such descriptions in the humanities instead of in the social sciences, where most legal academics are comfortable, is to be eccentric — although not alone. West is admirably courageous; she is our Antigone, willing to face down all of the Creons to her left and to her right who invoke social contingency against her invocation of natural right.

In the introduction, West briefly outlines why she thinks the skeptics to her left and right are wrong, but, of course, one must read the substantive chapters to understand her views; the introduction is too sketchy to persuade. The principal argument in the introduction is that the skeptics are wrong because their theses paralyze moral criticism (pp. 17-23). Unfortunately, this particular criticism is not a good one: first, the skeptics are a rather mouthy and judgmental group, so

their skepticism does not seem to paralyze them, even if it should; second, if the skeptics are right in their theses, and if West is right that the consequence is the paralysis of moral criticism, then so be it. If our world is as opaque to moral criticism as West fears the skeptics have made it, then our world is indeed dismal; but the mere fact that the consequences of the skeptical arguments are distasteful is not alone enough to disprove the skeptics.

Consequently, one must plunge into the nine substantive chapters of the book to grapple with the richness of West's refutation of the critics to her left and right. In these chapters, she does more than argue that the consequences of their arguments are bad; she tries to show that the arguments that her critics put forth so confidently ought not to persuade us.

The unifying theme of West's work can be variously described, but my own judgment is that it springs from lessons she drew from disputes among feminists. If my thesis is correct, then perhaps the reader might best start with Chapter Four, "Women's Hedonic Lives," and read forward from there before going back to Chapter One. Back at a time when dumb old white guys like me were only vaguely aware that the pot was boiling in the laboratory — or kitchen, if you prefer — of feminism and, furthermore, had no idea of why the pot was boiling, West was thinking deeply about the question: What should the goals of feminism be? She labels those who decided that the goal should be equal rights "liberal feminists," and those who decided that the goal should be equal power "radical feminists." Each group imagined that the goal of equality — of rights or of power — was the key to unlocking the door.

West, however, decided that equality was a diversion and that suffering was the real issue (pp. 185-87). Liberals and radicals argued that equality would relieve suffering, but West refused to address the problem so indirectly; she wanted to relieve suffering directly, even if it could only be relieved by embracing inequality. By now, I suspect that one might ask how her focus on the hedonic issues of suffering versus pleasure supplies the theme for her book. Of course, the hedonic issue standing alone does not provide a theme. However, the way in which West established the importance of hedonism — by *hedonism* she means to claim that the statement, "That hurts," is a fundamental moral claim — is crucial. She rests her claim on the basic methodology of feminism — women listening to other women telling stories, and listening with empathy (pp. 219-20, 229-31). West believes that the liberals and the radicals have fled from story to theory, that they no longer listen to what their sisters have to say, or, if they do listen, that they are inclined to condemn as "false consciousness" a story that is inconsistent with their political goals; they have lost their empathy

for any woman who does not tell the proper liberal or radical story (pp. 242-49).

I cannot summarize the details of West's argument with liberal feminists and radical feminists in this review, but I would like to outline her methodological argument with them; her method is what is significant, and her method is the unifying theme of *Narrative, Authority, and Law*. West describes her method in the following passage: "My methodological assumption is that the key to moral decision making lies in our capacity to empathize with the pain of others, and thereby resist the source of it, and not in our capacity for abstraction, generalization, or reason" (p. 188). This "capacity to empathize" forms the fundamental core of feminist practice according to West, so her basic gripe with the liberals and the radicals is that "*both positions, at critical theoretical junctures, abandon feminist practice*" (p. 219). In other words, they use normative theory to judge the worth of a story, instead of following feminist practice by using the stories told in "consciousness-raising" to judge the theories; thus, they reason backwards, according to West (p. 215).

If I may speculate, I would guess that West's rupture with liberal and radical feminists was painful — a claim that I hope is not a cheap attempt to empathize on my part. My evidence for this claim is purely circumstantial, resting merely on the inference that a painfully learned lesson is a deeply learned one. West learned a lesson about the importance of feminist practice that is obviously deeply felt because it pervades the book. For example, in the first two chapters of the book, she uses stories drawn from literature to attack Richard Posner's view of the world (pp. 37-45, 52-58, 64-72, 81-84). Posner values the laissez-faire choices of the market, and he generalizes this theme across the entire field of law, asking whether the law honors the choices private actors make (pp. 31-35). But, just as West dissents from the liberal feminist normative theory, so too she dissents from the law-and-economics normative theory. In both cases, she dissents because she listens to some stories — in Posner's case, stories by Kafka — and because she believes the stories make the theories ring false.

In her third chapter, West dissents from one of the fundamental premises about law and adjudication asserted by such worthy scholars as Owen Fiss, Ronald Dworkin, and Thomas Grey, all of whom have claimed that adjudication is fundamentally an interpretive act — that is, that judges adjudicate cases by interpreting a written text or unwritten norms (pp. 89-97). West disagrees. She sees the creation of law as an act backed by force; she sees an act of power. To be sure, one can see some of both; the real issue is the relative weight of force and interpretation that one might discern in the law. I suspect that the average hard-nosed social scientist would side with West's conclusion but be shocked by the way she reaches it. West notes that the "interpre-

tivists" have an elaborate domestic dispute among themselves over technique and method, but she cuts through the pretensions of the different schools by testing them against some stories by Mark Twain and John Barth.² As you might imagine, the claims of the interpretive theorists sound hollow when confronted with stories.

Of course, West herself is a theorist, not a storyteller — I do not want to create a false impression in this review. Her reliance on stories does not mean that she disdains theory; she is not an aesthete who is repulsed by theories because they are ugly. Instead, she is a theorist of stories; she starts with the fundamental assumption that good feminist practice will ground feminist theories in the stories that women tell, and she wishes to generalize this feminist practice as far as she can. Her basic questions seem to be: If our fundamental knowledge comes from our stories, then what are the theoretical consequences of this phenomenon? If we can listen to the stories of others and understand them, does empathy follow? If so, what are the further theoretical consequences of the capacity to have empathy?

The economists have a label for the capacity to have empathy: they call it *the intersubjective comparison of utility* (p. 253), and their official dogma is that it is a bad thing. One might regard this jargon as a rather bizarre specimen of English, but West argues in her Chapter Five that the economists' claim — that we cannot empathize — is the truly bizarre feature of economic discourse. The economist — or at least, the Posnerian economist — takes the individual's preferences as a given, an unquestionable. There is no way to rank preferences that is not arbitrary. But if we theorize the consequences of the human capacity for empathy, then we know that some people are in greater pain than others; if we can know that, West argues, then we can know what the economist says we cannot know.

I hope that the above discussion gives some indication of what one can find in West's book and, more importantly, some understanding of how it hangs together. Let me now turn to some criticisms. My primary difficulty with West's argument is that I am suspicious of the distinction between theory and story. I am not sure that one can base a theory in any straightforward way upon the narratives that people tell. Of course, West does not explicitly make any such claim, but she also does not explicitly exclude the possibility, and I suspect that most readers may well interpret her analysis as a claim that one can base theories upon the narratives that people tell. My discomfort is based on my hunch that the relationship between theory and narrative is circular — every theory implies a narrative, and every narrative implies a theory.

2. See pp. 108-36 (discussing MARK TWAIN, *PUDD'NHEAD WILSON* (1894), reprinted in *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* (Sidney E. Berger ed., 1980)); pp. 151-73 (discussing JOHN BARTH, *THE FLOATING OPERA* (1967)).

However, I mean only to criticize the way in which West presents her theses, not the validity of what she says. Let us suppose that the relationship between theory and narrative is circular. It follows, then, that our stories are equally as fundamental as our theories; neither one can claim priority. Granting equal priority to both theory and story would provide West with most of what she needs to mount her critique. If stories are just as fundamental as theories, then one can use stories to refute theories; stories can falsify, as Karl Popper would have it,³ the theories of Posner, Dworkin, and MacKinnon. This thesis is powerfully argued throughout West's book, and I certainly recommend that one examine its nuances.

The relationship between stories and theories need not, of course, be limited to the possibility that stories can falsify theories; stories can also inspire theories. I use the word *inspire* deliberately; I wish to suggest that there is, perhaps, a deep psychological connection between the stories one loves and the theories one constructs. West addresses this topic in Chapter Eight, "Jurisprudence as Narrative," in which she uses Northrup Frye's *Anatomy of Criticism* to characterize different schools of jurisprudence.⁴ She suggests that the polarities of tragedy versus comedy and romance versus irony illuminate the psychology that underlies the differences we perceive in such oppositions as Posner versus Unger (pp. 373-74, 384-85). The entire chapter is refreshing in its refusal to accept the theorists' pretensions that they are sober and serious analysts; West shows us how to understand them as storytellers.

Let me end by recommending West's last chapter, "Narrative, Responsibility, and Death," which is my favorite. In that chapter, she illuminates the necessity of both theory and story, and her demonstration should enlighten anyone who might be puzzled on this topic (pp. 426-28). The Supreme Court, in its 1990 Term, decided a series of death penalty and habeas corpus cases (pp. 427 n.21, 429 n.23), approving death and restricting habeas. West notes that the majority presented extended narratives of the horrible crimes and only cursorily analyzed the doctrine, whereas the dissenters thoroughly analyzed the doctrine but refused to give any narrative (pp. 428-35). Her judgment: a pox on both. One needs both coherent doctrine and powerful stories. For what it is worth, I think she is right, and if you read nothing else in the book, you should read Chapter Nine.

3. See KARL POPPER, CONJECTURES AND REFUTATIONS 228-31, 256 (1962).

4. Pp. 345-418 (discussing NORTHRUP FRYE, ANATOMY OF CRITICISM (1957)).