



1996

Fictions About Fictions

Daniel J. Solove

Follow this and additional works at: <http://digitalcommons.law.yale.edu/ylj>

Recommended Citation

Daniel J. Solove, *Fictions About Fictions*, 105 *Yale L.J.* (1996).

Available at: <http://digitalcommons.law.yale.edu/ylj/vol105/iss5/10>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law Journal* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Fictions About Fictions

Constitutional Law as Fiction: Narrative in the Rhetoric of Authority. By L.H. LaRue.* *University Park: Pennsylvania State University Press, 1995. Pp. x, 158. \$13.95 (pbk.).*

In *Constitutional Law as Fiction*, L.H. LaRue examines the art of storytelling in the law. Because his book seeks to read the law as an “example of literary fiction” (p. 2), LaRue argues that it should be classified as part of a unique area of scholarship called “law and rhetoric” (p. 3).¹ According to LaRue, judicial opinions are, in large part, stories. Thus, LaRue does not advance a normative claim about the degree to which rhetoric should inhabit legal texts;² rather, he describes the law as essentially a rhetorical enterprise.³ LaRue’s thesis is that the stories in legal opinions are composed not solely of facts but of fictions. A fiction, LaRue claims, is commonly defined as “a story about something that didn’t really happen” (p. 13).⁴ By masquerading as facts, fictions can increase the persuasiveness of a narrative. Fictions thus serve as an essential component of our legal system (p. 8): “Without persuasion, law could not be law,” LaRue notes, “and without fiction, there would be no persuasion” (p. 11).

In an interesting and complex discussion, LaRue analyzes the difficulty in drawing the boundaries between fact and fiction. “[M]ost discourse is in part fictional” (p. 13), and all stories are composed of both fact and fiction (p. 14). Fictions “fill in gaps” in our narratives and plug the holes in our empirical evidence (p. 20). In addition, we can create fictions by the way we craft our

* Class of 1958 Alumni Professor of Law, Washington and Lee University.

1. LaRue’s book is not novel enough to be set apart in a separate scholarly domain. LaRue’s “law and rhetoric” field actually fits squarely into the law-and-literature movement. While LaRue’s book does not analyze the insights that works of literature can bring to law, it does make claims similar to those made by proponents of law-as-literature, who analyze how literary theory can be applied to legal texts. For an introduction to these arguments, see RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 269–316 (1988); Sanford Levinson, *Law as Literature*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 155 (Sanford Levinson & Steven Mailloux eds., 1988).

2. Some commentators have argued that style and rhetoric play an essential role in judicial opinions. See, e.g., BENJAMIN N. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 26 (Fred B. Rothman & Co. 1986) (1931) (arguing that form is indispensable to substance of judicial opinions); RICHARD WEISBERG, *POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE* 9 (1992) (“[D]isjunction of form and substance in the opinion brings a relatively quick reversal.”).

3. James Boyd White also views law as a branch of rhetoric. See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

4. LaRue does not offer clear definitions for “fact” or “fiction.” Instead, he uses this definition of fiction as a starting point and then exposes the inadequacy of any definition that assumes a dichotomy between fact and fiction.

narratives; when we select and order the facts, we erect an artificial construction of reality that can be incomplete or misleading. For LaRue, there is no strict dichotomy between fact and fiction because all stories are produced at least partly from our imagination (p. 13).

After establishing the framework from which he plans to analyze the law, LaRue launches into a literary exegesis of numerous constitutional opinions, including the *Dred Scott* case,⁵ *Everson v. Board of Education*,⁶ and *City of Richmond v. J.A. Croson Co.*,⁷ exposing the fictions in their narratives. But most of the book centers on what LaRue characterizes as the two fundamental stories of constitutional law: *Marbury v. Madison*⁸ and *McCulloch v. Maryland*.⁹ LaRue proceeds to dissect the opinions, both authored by Chief Justice Marshall, exposing the Justice's rhetorical tactics and separating the narratives from the theoretical legal arguments. For example, in his explication of *McCulloch*, LaRue demonstrates how Marshall uses a fiction—"that judges stand above the fray and thus can bring peace" (p. 73)—to compose a narrative that validates Marshall's interpretation of the Constitution as a flexible document designed for an evolving society (pp. 89–90). Thus, LaRue uses the storytelling of Chief Justice Marshall to strengthen his own claims about how fictions perform the essential task of persuasion.

LaRue's thesis, on a purely descriptive level, fails to propound any novel claims. Several scholars have explicated legal opinions as literary texts.¹⁰ Numerous scholars have exposed the powerful effects of narrative and rhetoric in law.¹¹ Other scholars have viewed law as a struggle between narratives, often resulting in the exclusion of outsider discourse.¹² Thus, the claim that judicial opinions are narratives, undergirded by contestable assumptions, is nothing new. To push the field further, LaRue needs to develop the evaluative component of his thesis. Recognizing that merely excavating fictions is not "very profound criticism" (p. 26), LaRue declares that certain stories can be appraised as superior to others (p. 14). Accordingly, LaRue not only exposes

5. 60 U.S. (19 How.) 393 (1857).

6. 330 U.S. 1 (1947).

7. 488 U.S. 469 (1989).

8. 5 U.S. (1 Cranch) 137 (1803).

9. 17 U.S. (4 Wheat.) 316 (1819).

10. See, e.g., WEISBERG, *supra* note 2, at 16–22 (analyzing Justice Cardozo's creativity of style, framing of facts, and persuasiveness of rhetoric); Levinson, *supra* note 1, at 164–65 (depicting Chief Justice Marshall's constitutional exegesis as creative, rather than merely interpretive, enterprise); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 297–306 (1992) (presenting examples of rhetoric in Supreme Court opinions).

11. See sources cited *supra* notes 1–3.

12. See, e.g., Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 284 (1994) ("Arguments about law are, in effect, arguments about which stories *should be* privileged."); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1934 (1991) (examining Supreme Court opinions to show instances when Justices "either wrote unaware of the [outsider] narrative or simply ignored it").

the fictions in the opinions he explicates, but he openly evaluates these fictions as well.

Unfortunately, LaRue's own evaluation fails to account for the difficulties and ambiguities raised in his initial discussion of storytelling. For example, LaRue warns of the dangers of creating fictions about legislative intent:

I would like to point out the recurrence of fictions about "intent." I have described in this book how Black, Marshall, Taney, and Miller have written such fictions. So long as judges need to ask—what were they trying to do when they wrote—then so long will such dangerous fictions be written (p. 108).

Yet LaRue fails to explain why these fictions are dangerous rather than merely erroneous. In addition, LaRue commits the same intellectual crime for which he indicts judges, delving into the minds of the Justices he critiques, ascribing motives to them, and determining their sincerity. According to LaRue, Justice Black "obviously believe[d] his story" about religion in *Everson* (p. 21); Chief Justice Marshall should not be accused of lying "since he is totally sincere" (pp. 56–57); and Chief Justice Marshall was afraid "that we will forget what the framers knew about drafting a constitution and that forgetting would be a disaster" (p. 84). What makes LaRue's assessments of judicial intent any less "dangerous" than the Justices' "fictions" about legislative motivation?

LaRue's failure to practice what he preaches results in even more formidable complications in his argument. Although he observes that there can be no clear division between fact and fiction, LaRue's evaluation turns on a sharp dichotomy between the two. In one passage, LaRue condemns Justice Black's historical account of religion in American society in *Everson* as a harmful fiction because it unfairly characterizes religion as a fearsome threat to democratic society (p. 26). LaRue then relates his own historical narrative, providing examples of the positive influences that religion has had in our society. Although LaRue states that evaluation must not always concern the veracity of stories, his own criticisms merely expose the inaccuracies in Black's history. While LaRue had earlier attempted to blur the line between fact and fiction, his method of separating the good fictions from the bad often appears to be nothing more sophisticated than determining whether the stories comport with his version of the facts.

But can the fictions of storytelling ever be neatly extricated from the facts? According to Stanley Fish, "facts are always 'achieved' . . . [by] partisan urging of some ideological vision."¹³ What, then, are "facts"? Is everything

13. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 156 (1994).

just a “fiction”?¹⁴ Perhaps judicial opinions do not just contain fictions, but rather are fictions in their entirety. LaRue comes closest to addressing this problem toward the book’s end, where he notes that good stories have a “complicated and indirect relationship to facts” (p. 125), that fictions can have truth in them, and that some stories “fit the evidence better than others” (p. 129). These fragmentary musings, however, fail to provide a compelling grounding for his own evaluative method. LaRue cannot justify why his interpretation of the “facts” is any less fictional than the fictions he uncovers.

Occasionally, LaRue admits that he is engaging in the process of fiction-creation. After supplying a historical context for *Marbury v. Madison*, LaRue pauses to ask: “Is my story a fiction?” (p. 44). However, he concludes that he is in a legitimate and authoritative position to evaluate: “[I]n part I can judge, since I do know something about how history is done, and I know something about the fuzziness of the line between fact and fiction” (p. 44). But his self-reflexiveness is not rigorous enough. A mere series of concessions of his own storytelling does not convince the reader that his storytelling is better or more accurate than that of others.

Because LaRue’s “stories” about the narratives employed in legal opinions are also composed of fictions, LaRue must supply a reason why the reader should privilege his narratives over those told by judges. How do we select between two narratives, each advocating its own version of the facts? How do we avoid employing our own fictions when evaluating other fictions? As Jane Baron argues, “All evaluation . . . proceeds from a particular and contingent, although often unacknowledged, perspective; it always starts from a contestable point of view.”¹⁵ Or, as Kim Lane Scheppelle aptly notes, “Stories may diverge . . . not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events.”¹⁶

The problem of how to legitimate certain interpretations of facts over others underlies the difficulty of evaluating competing stories. A fact (or text) can have a multitude of “correct” interpretations.¹⁷ In fact, LaRue correctly observes that “[m]ost events have more than one meaning, all simultaneously both partially true and partially false” (p. 26). If multiple interpretations can be equally true, however, how can we distinguish among them? If we cannot

14. These issues pervade the work of Jorge Luis Borges, who brilliantly examines the complicated relationship between fiction and reality in several of his short stories, poems, and essays. *See, e.g.*, JORGE LUIS BORGES, *LABYRINTHS* (Donald A. Yates & James E. Irby eds., 1964).

15. Baron, *supra* note 12, at 270 (citations omitted).

16. Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2082 (1989).

17. *See* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 327 (1980) (“Interpretation is not the art of construing but the art of constructing. Interpreters do not decode poems; they make them.”).

evaluate on the basis of the truth of an interpretation, then we need to find another way of defending why we adopt certain interpretations over others.

Commentators have taken several interesting positions on this issue. James Boyd White maintains that the law creates a “rhetorical community” by creating an open forum “in which one point of view, one construction of language and reality, is tested against another.”¹⁸ Essentially, White asserts that the legal process, in which different interpretations compete and interact, can serve as a fair method for resolving how stories should be evaluated. Other commentators criticize the process by which law accomplishes this task. Toni Massaro, for example, contends that, because “all stories cannot dominate,” the narratives of more powerful groups will conquer those of marginalized groups.¹⁹ Richard Delgado argues that “[n]ew stories are always interpreted and judged in terms of the old.”²⁰ As a result, “[m]ajoritarian tools of analysis, themselves only stories, inevitably will pronounce outsider versions lacking in typicality, rigor, generalizability, and truth.”²¹ LaRue virtually ignores these problems in evaluating interpretations. Although his own historical and critical narratives hinge on a particular interpretation of the facts, LaRue fails to justify his interpretation as superior to the ones he critiques.

Thus, nearing the end of LaRue’s endeavor, the reader awaits LaRue’s theory about how he evaluates fictions. Throughout the book, however, LaRue consistently evades answering this question, and in the last chapter, he finally confesses that he will not supply a theory to justify his evaluation of fictions (p. 148): “If it is true that storytelling is one of the fundamental ways to understand the world, then a good story does not need to be replaced by a good theory; a good story can stand on its own . . .” (p. 149). But what is a “good” story? LaRue merely begs the question. Because LaRue believes that “the topic of storytelling in law is . . . not the sort of practice about which there can be a theory” (p. 148), he devotes most of the final chapter of his book to discussing a narrative told by writer Norman Maclean and explaining why it serves as an example of a “good” fiction (pp. 129–53).²² Thus, instead of providing a theory and engaging the most difficult and interesting problems of narratives, rhetoric, and legal interpretation, LaRue retreats into an ineffective description of how Maclean tells stories.

Although his book has moments where he deftly navigates a complicated universe of ambiguity between fact and fiction, LaRue frequently abandons this vision for a rather simplistic form of criticism. Unwilling to confront the

18. JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 266, 273 (1984).

19. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words. Old Wounds?*, 87 MICH. L. REV. 2099, 2116 (1989).

20. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 667 (1993).

21. *Id.* at 675.

22. The book LaRue discusses is NORMAN MACLEAN, *YOUNG MEN AND FIRE* (1992).

pressing problems it raises, LaRue's book is merely an overtold story, a narrative without sufficient critical self-awareness.

—*Daniel J. Solove*