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## Bringing Fiction to Justice: Including Individual Narrative in Judicial Opinions

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# *Bringing Fiction to Justice: Including Individual Narrative in Judicial Opinions*

*by Valerie Karno\**

## I.

### **Introduction**

As a fiction writer and a reader of judicial opinions, I have observed that judicial opinion writing and fiction have many parallels--both are narratives, both put order to perception, and both communicate from an author to a reader through language. However, despite these lingual similarities, I feel alienated when I read judicial opinions, and I turn to fiction reading and writing for comfort and validation. And so curiosity and frustration have led to this exploration. I want to know what it is about judicial opinions that is alienating, and what it is about fiction that is validating. I then want to incorporate the validating factors of fiction into judicial opinions so I, and others like me, do not feel alienated. It is possible to include previously excluded voices in judicial opinions. We can do this by changing our medium of expression, and integrating individual narrative into opinions.<sup>1</sup>

In the next section of this article I examine what my voice is--and how it is alienated due to gender socialization and identification. I further discuss whether there exists a "feminine voice," and if so, whether my voice is part of it. Section III explains how language is one perpetual narrative--a narrative that creates and is created by my voice, orders my perception, and defines my thoughts. Section IV considers how language is transmitted through all writing, and how the differing purposes of judicial opinion and fictional writing alter the way language is communicated. In Section V, I conclude that my voice, as a voice integrally related to gender, is better recognized by fiction. I propose in sections VI and VII a solution to the alienating factors of judicial opinion writing. The integration of fictional characteristics into judicial opinion

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\* B.A. (English) University of California at Berkeley, 1987. Member of the Hastings Class of 1991. This essay is dedicated to all who feel they don't fit in. My very special thanks to Janine Natter and Diane Bessette for their editorial assistance and loving support, and to Professor Stephanie Wildman for helping me recognize the importance of my own voice.

1. This paper is an example of including individual narrative voice in analytic writing.

writing will dispel the alienation of my voice without undermining the purpose of the judicial opinion.

## II.

### The "Feminine Voice"

Attempting any definition, or even acknowledging the presence of a feminine voice can be very dangerous. The feminist movement has been debating whether there *is* a feminine voice. The danger in defining one essential voice is that any generalization is liable to over-encompass or incorrectly categorize any single woman. Since the "movement" is only a conglomerate of a mass of individuals, even subjecting one woman to an improper description can be very devastating. So, as Annette Kolodny originally suggested, I will undertake "treating each author and each separate work by each author as itself unique and individual."<sup>2</sup> I will thus draw upon my own experiences as a woman, a fictional writer, and a reader of judicial opinions to explain how I view my voice, and how I feel it is treated in the varying genres of writing. I believe my voice is one recognized by contrast, and one which manifests itself in the outreach for other voices.

First, I premise my discussion on my belief that my experience as a woman is integrally related to what my voice is. I was socialized completely interdependently with my gender. I grew up being told that I should see the world a certain way. Outwardly I was supposed to be nice and soft and submissive; inwardly these concepts seeped into my very language, and my very experience of the world. I saw the world as my parents, and the culture they lived in, believed a girl should--from a nice and soft and submissive perspective. The statement "Wear this dress so you will look like a nice young lady" resounds in my ears even today. I was supposed to let men open doors for me, but not myself open doors for them because "that's just not the way a girl should act." I remember staying inside, watching the guys play basketball outside, and thinking "I'll stay here because I don't belong out there with them."

This historical account controls even the way I see the world today. Whether I am rebelling against, or conforming to this gender-based perspective, I still act from the framework of a gender-base, thus giving

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2. Kolodny, *Some Notes on Defining a "Feminist Literary Criticism,"* CRITICAL INQUIRY 75, 79 (Autumn 1975).

it continued existence.<sup>3</sup> My socialization and my language have now blended into a unique way of perceiving the world. The way I particularly see the world is "my voice."<sup>4</sup> My voice is my individual outlook. It is the "me" that is my perspective. Since I do consider my voice to be largely a product of my gender, I shall call this my feminine voice.

Were all human voices to be the same, my voice would be indistinguishable. However, I am aware of my unique voice and perspective when I notice a contrast between my perception and another's. Through difference I recognize individuality.

For example, when I read a judicial opinion and feel alienated, feel a sense that "this does not involve me," I then am acutely aware of the exclusion of my voice. When trying to decipher why I feel excluded, I notice that the writing is stingingly objective. The lack of the author's stated presence feels counter-intuitive to me--it seems a lie. Furthermore, if "my voice" were "in" the opinion, it would pronounce itself honestly and reach out to the other excluded "me's" who read this strange language and feel a tug of "I'm not in here," but don't know quite why. So, for me, my voice is a voice left out of judicial opinions, wanting to include others, desiring to include all voices while not subverting any individuality.

There are many theories regarding the existence and characteristics of the feminine voice. I briefly explain them here to show the reader that other people's unique voices perceive feminine voices as either possessing shared characteristics, or retaining important distinctions.

First, one school of thought believes that defining a single feminist voice is wrong. For example, some allege that pronouncing the existence of a feminine voice only reinforces the female's indoctrination into male categorization. The feminine voice could only exist as a reiteration of the hierarchy between male and female. One typical claim from this area of thought is that "[f]eminists are simply incorrect when they claim the critique of absolutes as women's voice, since that critique has been developed by men . . . ."<sup>5</sup> People in this school prefer not to define a feminine voice.

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3. I am not saying that my entire perspective is based on gender, but since my childhood was immersed in gender definition, I believe it is a controlling factor in my outlook.

4. It has been suggested that language, and experience, is inherently gendered. See Showalter, *Introduction: The Rise of Gender*, in *SPEAKING OF GENDER* 3-4 (E. Showalter ed. 1989).

5. Williams, *Deconstructing Gender*, 87 *MICH. L. REV.* 797, 843-44 (1989); See generally Rhode, *The "Woman's Point of View,"* 38 *JOURNAL OF LEGAL EDUCATION* 41-44 (1988).

A second, and major school of thought does define a feminine voice. This school characterizes the feminine voice as existing, and arising from a fundamentally different manifestation than the male lingual voice. Various reasons have been advanced for this distinct manifestation. Carol Gilligan, developer of the archetype theory in this field, attributes the difference of the feminine voice to women's desires for relationships and connections. She distinguishes women from men when she empirically concludes that ". . . in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection."<sup>6</sup> Gilligan bases her categorization of the feminine voice on women's moral and social values.

Virginia Woolf attributes a different feminine voice to the historical male creation of the standard lingual form. She states, for example, that ". . . the very form of the sentence does not fit her [woman]. It is a sentence made by men . . . . And this [sentence] a woman must make for herself, altering and adapting the current sentence until she writes one that takes the natural shape of her thought without crushing or distorting it."<sup>7</sup>

A third body of theorists believe that there is no definition of feminine voice, but that mere undefinability does not preclude the possibility of the existence of a feminine voice. They suggest that any definition would be based on male discourse, and so would not be uniquely feminine, but yet there may still be an undefinable, intangible feminine voice. One typical statement in this body of theory is that, "It is impossible to define a feminine practice of writing . . . for this practice can never be theorized, enclosed, coded--which doesn't mean that it doesn't exist. But it will always surpass the discourse that regulates the phallogocentric system . . . ."<sup>8</sup>

Given the diversity of theories about the existence and attributes of the feminine voice, I shall proceed throughout this paper analyzing how my voice, which I perceive as being gender-related, is recognized in

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6. C. GILLIGAN, IN A DIFFERENT VOICE 173 (1982). See also Valian, *Linguistics and Feminism*, in FEMINISM AND PHILOSOPHY 155 (1977) for a discussion of how women's writing empirically appears differently in the text than men's writing. See generally M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, WOMEN'S WAYS OF KNOWING (1986) [hereinafter WOMEN'S WAYS OF KNOWING] for empirical conclusions that a different voice is related to mind, self, and experience.

7. V. WOOLF, WOMEN AND WRITING 48 (1979).

8. Cixous, *The Laugh of the Medusa*, in THE SIGNS READER 287 (1983). See also Lamont, *The Off-Center Spatiality of Women's Discourse*, in THEORY AND PRACTICE OF FEMINIST LITERARY CRITICISM 141 (1982). (Lamont stresses the need for women to create their own dissident "discourse.")

writing. I do not suggest that my voice is a universal women's voice; however, coinciding with all these theories, I see my voice as being unique and difficult to describe within language. It is also the only voice I know. I offer my experiences in this paper for women to both find similarities to and distinctions from their unique voices, so that we all may better get to know what each of our voices is, and, whatever they may be, let them emerge.

### III.

#### Voice, Language, & Narrative

I will now describe the seemingly circular process of how language and narrative are interwoven with perception of the world. I see the world through my eyes, my perspective, my voice. However, my perception occurs to me through thought in the form of ordered language, or "narrative." In order to communicate or categorize an experience to oneself or another, we use a string of ordered words. This thought process is dualistic in that we have control over the categorization by our choice of words, and yet language controls our experience by restricting the ways in which we are able to perceive and communicate our thoughts.

For example, all my thoughts occur to me in a narrated sentence form ("I like this," "This is blue," "I am tired," etc.). For instance, when I see a flower a number of processes occur. First, I identify the object as a flower (unthinkingly categorizing my perception of an object into an understandable ordered narration--"This is a flower."). Then I may think, "How beautiful." (my perspective on the flower which also occurs to me through ordered language, or "narration."). However, underlying this entire process is the fact that I could not have any of these thoughts unless I have already seen the world that way. (I would never know an object as a flower unless I had already been taught through books, others, or stories, to use narrative language to categorize it as a flower.) Thus language, "narration," is continually creating my experience of the world, and yet my experiences of the world are continually recreating the orderly narration of the world through my use of language. Every thought occurs to me through the ordered narration

that is language, and my perspective is an integral part of how that narration occurs to me. Each one of us thus has a biased point of view.<sup>9</sup>

Another example of this is the women's movement itself, which has given a vocabulary to women's oppression. Before this new language existed, there were no words to say that women were being treated unfairly. When women always washed dishes while men read the paper, that was just how it was. Now there is a language to describe that as unjust, and create an alternative. Women and men can now have a new experience of the world, previously unavailable without the language to describe it. Each of us can have a new point of view.

Much has been written on narration, but I want to stress that narration frames perception into an easily understandable linear thought. Steven Winter has written that narrative corresponds to the way "the human mind makes sense of experience . . . . In narrative, we take experience and configure it in a conventional and comprehensible form."<sup>10</sup> Speaking of fictional narration, Winter has furthermore stated that "the strategy of even the most unstructured narrative is to draw upon the reader's natural urge to seek order and meaning . . . ."<sup>11</sup>

Language is one perpetual string of narratives about the way the world is. It orders the world. As Anne Dillard explains, "[l]anguage . . . selects, abstracts, exaggerates, and orders . . . . [A] writer's language does an airtight job of signifying his [sic] *perceptions* of things as they are."<sup>12</sup> More importantly, language orders *each person's* world uniquely for that person. Each individual's perspective is encapsulated in her formation of language, and her language then recurringly supports her perspective. As Sartre observes, "We are within language as within our body."<sup>13</sup> Language is both "our shell and our antennae . . . ."<sup>14</sup> Thus the antennae of language investigate and order the world, and the shell of language then protects and reaffirms the ordering.

The narration that is language then has voice, perspective, and individuality from the outset. Lingual narration cannot by its very definition be neutral or objective because individuals habitually reinforce their unique way of perceiving the world. Every written text exemplifies some authorial perspective on the world merely by its being a

9. See Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1949 (1988). (This bias should be revealed in one's writing or language instead of hidden under the guise of a fictional objectivity.)

10. Winter, *The Cognitive Dimension of the AGON Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

11. *Id.* at 2251.

12. A. DILLARD, *LIVING BY FICTION* 70 (1982).

13. SARTRE, *What Is Literature*, in "WHAT IS LITERATURE?" AND OTHER ESSAYS 35 (1988).

14. *Id.*

manifestation of the author's internal narrative. As James Boyd White explains:

Every text is written in a language, and the language always entails commitments to views of the world--of oneself, of one's readers, and of others--with which the writer must somehow come to terms. Similarly, every text is radically social: it always defines a speaker, an audience, and a relation between them. Every text thus creates a community and it is responsible for the community it creates.<sup>15</sup>

Thus, there exists no neutral description of an event.<sup>16</sup> There will always be a written voice based on a biased, unique point of view.

If we want to change anything we must change not the external manifestations of the individual biases, but the underlying cause of the problem. We must change the way that language and narrative are formed; we must alter the way that individual voices perceive the world. Only through recognizing the way narration is formed can we change the manner in which it is then physically projected. This is particularly necessary for analyzing the reasons language is manifested so disparately in judicial opinion and fictional writing.

#### IV.

#### The Transmission of Language into Writing

Every writing has an author, and is written with another, perhaps called the "theoretical reader," in mind. There exists at least a dual purpose in any writing, and the language of that writing reflects those purposes. First, one writes to communicate something to another. Second, one writes to fulfill oneself, perhaps by feeling that the writing makes oneself an essential part of the world.<sup>17</sup>

Within these common goals of all writing, each genre of writing has its own purpose as well. The purpose of a writing controls how the language of that writing is communicated. Delivery, tone, and syntactic structure of the writing will vary with the differing purposes.<sup>18</sup>

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15. White, *Law and Literature: "No Manifesto,"* 39 MERCER L. REV. 739, 745 n.14 (1988).

16. Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2165 (1989).

17. SARTRE, *supra* note 13, at 65.

18. R. BARTHES, *WRITING DEGREE ZERO* 15 (1977).



For example, consider a love letter versus a collection notice. The love letter has as its purpose the conveyance of intimacy coupled with the desire to receive a returned communication of intimacy. The author's presence in the writing is both known and strong. The reader is desired to interpret the message as positive, loving, and caring. The words of the letter indicate self involvement, and will often be emotive. The letter has a subjective tone and can lack formal sentence structure.

The collection notice, however, has a different purpose, and is thus written quite differently. The purpose of the notice is to declare objectivity, to intimidate, to communicate the lack of compassion available, and to evoke immediate responsive practical action. To achieve this purpose the author is unidentified as a human being; there exists seeming objectivity, and no feeling connection between author and reader. There is no self involvement of the author. The letter is written in short, unmistakable sentences. The tone is unrelenting and unforgiving. These methods of writing are utilized to achieve the purpose of the notice, as were the methods of the love letter used to facilitate that purpose.

I use this extreme example as a foundation for showing that the purposes of judicial opinion writing and fictional writing also dictate the forms in which they are written. The manner in which these forms are written, and the perceptions underlying this manner explain why they either alienate or validate me.

## V.

### Judicial Opinion Writing Versus Fictional Writing

#### A. Judicial Opinion Writing

Judicial opinion writing has several purposes. First, the opinion is meant to be authoritative and directive. The reader of the judicial opinion is supposed to implement the statements therein declared. The reader of the opinion is "its servant."<sup>19</sup> Since the opinion is supposed to lead and command, the text is written with the reader in mind, and with an aim to affect behavior.

In addition to directing new behavior, the opinion is written with the purpose of maintaining a preconceived system smoothly and consistently. Here the purpose extends beyond the mere reaction of the individual, to abstract adherence to an overall scheme of analyzing rules.

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19. J. WHITE, HERACLES' BOW 95 (1985).

One way this adherence has been maintained is through *stare decisis*, the judicial method of analysis.

As David Kairys summarizes, "one of the basic elements or mechanisms of legal reasoning, *stare decisis* . . . embodies the notion of judicial subservience to prior decisions or precedents."<sup>20</sup> While *stare decisis* may help preserve a continuous system, the narrative behind the minds of *stare decisis* users can be one of enclosure. If one perceives the world within a framework of subservience to history, there exists the danger that changes in the future will be slow coming, or non-existent.

I, as a voice often alienated from opinion writing, am concerned with this dilemma. If the writer is committed to viewing the world in an alienating way, and then manifesting this vision in the writing, I have no recourse; I will continue to be alienated. However, if I can change the writer's underlying vision of the world, my voice may be recognized. As I will suggest, one way of altering this underlying vision is by changing the method of manifestation of the perception. By changing how the perception is communicated, by utilizing a freer method of expression, the underlying perception can slowly change also. There is at least room for the basis of the perception to change.

Moreover, because of the need to provide widespread, uniform authority, judicial opinions are often written in a feigned neutral tone. The authorial voice and perception are ignored. Recognizing the judge as an author with a personal voice and perspective will actually better facilitate handling a multitude of divergent situations within the opinion than does the current method of false objectivity. It is important to acknowledge the truth of any situation if we are to change anything. As I will later more fully develop, instead of pretending human preconceptions do not exist, we should embrace, talk about, and announce our perceptions. Only then can we dispell with them, and truly become closer to a neutral governing.

Judith Resnik reminds us that "[a] judge is either male or female and is of a particular race, class, and social position; the appearance of neutrality, of evenhandedness, of impartiality is false comfort."<sup>21</sup> When I read an opinion the affected "neutrality" shuns my individual perspective. James Boyd White, one of the founders of the Law and Literature movement, has further explained that "the judicial opinion . . . might be far more accurately and richly understood if it were seen . . .

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20. Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW* 11 (D. Kairys comp. 1982).

21. Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877, 1908 (1988).

as a statement by an individual mind or a group of individual minds exercising their responsibility to decide a case as well as they can . . . ."<sup>22</sup> We need a more honest acceptance of subjective authorial voice in judicial opinions. Interestingly, the purpose of fictional writing allows for this honest communication of voice.

## B. Fictional Writing

Fiction allows for greater diversity and presence of voice because it is not concerned with what is "objectively" real, if that exists at all. Fiction instead openly addresses the author's, or another's, perception of this or any other world. The author of a fictional narrative is free to order the world as she chooses.<sup>23</sup> Publishing aside, this allows anyone to be validated.<sup>24</sup>

Fiction is inventive. The author has tremendous power to interact with the text however she wants. She can insert the precise degree of voice and description she desires. The author is "in control" of the substance and the form of the work. She need not be a specialist to write a fictional work.<sup>25</sup>

Moreover, historically fiction has been accessible to politically subverted individuals. For example, Virginia Woolf considered why women wrote fiction. She inquires: "why did their [women's] art then [in the eighteenth century], and why to some extent does their art still, take the form of fiction?"<sup>26</sup> She answers by noting that "fiction was, as fiction still is, the easiest thing for a woman to write. . . ."<sup>27</sup> Thus, fiction's purpose has traditionally been the facilitation of individual freedom of expression.

The reader of fiction has great power of interpretation. She is free to perceive what she desires in the text since there is no directive force to fiction.<sup>28</sup> This is unlike judicial opinions, where the reader is supposed to glean a more narrow and direct message from the writing.

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22. WHITE, *supra* note 19, at 41.

23. DILLARD, *supra* note 12, at 56-57.

24. I am here only speaking of the act of writing and reading fiction. Publishing and receiving recognition are much harder tasks, especially for disadvantaged and poor people, since the dominant white male culture controls that aspect of writing. I do not discuss that in the scope of this article.

25. DILLARD, *supra* note 12, at 77.

26. WOOLF, *supra* note 7, at 43.

27. *Id.* at 46. *But see* A. LORDE, SISTER OUTSIDER 116 (1984) for a discussion of how class and economic status control women's voices by making writing difficult.

28. *See* DILLARD, *supra* note 12, at 13, 77.

Finally, and crucially, fiction potentially allows the reader to experience the world from another perspective. Fiction, by supplanting us with another narrative, allows us an escape from the normal limited framework of narrative with which we each live. We are presented with perceptions distinct from our own, and are invited to extend ourselves to understand them. We are able to virtually enter another's perspective and live her life.<sup>29</sup>

Because fiction seems inherently to value the potentiality for expressing and experiencing a multiplicity of voices, it has been suggested it is anti-authoritarian in nature.<sup>30</sup> However, the realization that we each exist in an internal perpetual narrative can create the possibility that any kind of external manifestation of that narrative, whether it be fictional or judicial, can encompass a myriad of voices. When we realize that we have been trapped in our own way of seeing the world, we can see that there is another way to perceive the world. Recognizing the narrowness of our perception is also recognizing the vastness of the perception we do not have. Once we then realize the other possibilities of perception, we become more open to actually seeing the world different ways. We become more willing to acknowledge other voices. For example, once a white male judge recognizes that his voice is inherently sexist and racist, he will, knowing that there are voices he has not represented, better reach out to understand and include these voices in his experience, and thus in his writing.

### C. Comparing Fictional & Judicial Narrative

Our internal narratives are manifested through the writing forms of both fictional narrative and judicial narrative. At first glance these two methods of writing seem quite different. Fictional narrative, sometimes referred to as storytelling, helps us understand the being of others. It presents diverse experiences and seems almost boundary-less in content. Robin West, describing fictional storytelling, claims that "[t]hrough . . . telling stories . . . , [w]e reach an empathic understanding--a grasping--of the subjectivity, the pain, the pleasure, the happiness, or the sadness of the other."<sup>31</sup>

Judicial narrative seems to present more boundaries to relating diverse perceptions. As Kim Lane Scheppele explains, "[t]he

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29. DILLARD, *supra* note 12, at 11-12.

30. White, *supra* note 15, at 746.

31. West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867, 872 (1988).

boundaries of legal narrative are not fixed, but in many cases they might as well be. Those who are experienced legal storytellers often do not perceive themselves as having a choice . . . . The boundaries of legal narratives are shaped powerfully by legal habit, a habit that has worked to the disadvantage of outsiders."<sup>32</sup>

However, this seeming limitation erroneously exists because of a misguided notion about how to achieve the goals of the judicial opinion. The legal institution that gives life to the judicial opinion is a conglomerate of individuals living within narrative. The judicial opinion is only another narrative about the way reality is. As I shall explain, usurping some of the attributes of fictional narrative into judicial narratives can subvert "institutional logic," challenge the status quo, and better include a multitude of voices previously excluded from opinions.<sup>33</sup>

## VI.

### My Voice in Judicial Opinions and Fictional Writings

#### A. My Voice in Judicial Writing

I here use my experience of alienation from judicial writing as a basis for what I call "my feminine voice." My experience when I read a judicial opinion is that my voice is not represented. My views, my outlooks, and my interests are not in the opinion. I am not speaking about the factual content of the writing; I am concerned with the underlying narrative of the opinion writer describing the way the world is. That underlying narrative permeates and is diffused throughout the language and style used in the opinion. My narrative of how the world is does not appear in the words or the style of that opinion. There have been several theories proposed for why my voice, as a woman's voice, is excluded from most judicial opinions.

First, some argue that because historically women have only recently entered the judicial field, it is not surprising that women's voices are often excluded and devalued in the law. Socially and politically the law has been controlled almost solely by men.<sup>34</sup> A simple

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32. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2094 (1989).

33. Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414-15, 2429, 2440 (1989).

34. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 44 (1985), quoting F. Olsen, *The Sex of Law* (unpublished manuscript on file with the author).

remedy for this problem should be happening now. One would assume that the increase of females in the legal profession would correlate with the numbers of women judges, and thus the greater numbers of women's perspectives emerging in the law.<sup>35</sup> However, this correlation between women in the legal profession and women as judges may be an optimistic misnomer. For example, in California, "of Deukmejian's 907 [judicial] appointees, 88 percent have been white, and 85 percent male."<sup>36</sup> Thus, from a strictly numerical viewpoint, the emergence of women's perspectives in judicial opinions may trail behind the emergence of women in the overall legal profession.

Another rationale for the exclusion of my voice involves the male and female polarity. One argument states that because male reasoning is essentially logical, and women are concerned with relationships and feelings, the "feminine voice" is not represented in judicial opinions.<sup>37</sup> This argument fails for me, since my voice is also very logical. This is one example of how a theory may exclude some women by being overbroad. Within this polarity there also exists the "we" versus "they" dichotomy. This dichotomy suggests that anyone not "white and privileged and male" would not naturally fit into the exclusive judicial writing framework. The "'they' are the outsiders," including most women's voices.<sup>38</sup>

While penetrating the judicial system with women will eventually help having my voice recognized, my solution is to work with recognizing the truth of the underlying narrative of all people. Since fictional writing is honest about narrative authorial presence, I turn to that for aid.

## B. My Voice in Fictional Writing

As an author and a reader, my feminine voice emerges much easier in fictional writing than in judicial writing. This is precisely because the purpose of fiction lets any voice in, even the voice that has been alienated from other forms of writing. Just as the lack of women in the judicial field promulgated the absence of women's voices in judicial

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35. See *Id.* at 42-3.

36. Schuyler, *Bringing Diversity to the Courtroom*, S.F. Weekly, Feb. 28, 1990, at 1, col. 1.

37. See GILLIGAN, *supra* note 6, at 29-30. See also Massaro, *Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2100 (1989).

38. Scheppele, *supra* note 32, at 2083-84.

writing, the more extensive female presence in fiction perpetuates getting feminine voices, even if not one single voice, into writing.

The continued qualities of invention, authorial presence, and authorial control provide the proper environment for a voice traditionally excluded to emerge without restraint. The woman's narrative, the woman's voice, is precisely such a voice traditionally excluded. Where feminine narratives could not enter authoritarian judicial writing, they can resurface in a more "free form" style where the voice may be whatever it is or desires to be. Fiction provides this atmosphere.

## VII.

### Bringing Fictional Attributes into Judicial Opinion Writing

Recognizing the differences between fictional and judicial writing does not preclude challenging the underlying basis from which these disparities arise. I will briefly mention a few of the critical differences mentioned by scholars between the two modes of writing, and show how understanding the foundation of these differences can bring refreshing results.

Robin West claims that law and literature are irreconcilably different because law "is imperative and literature is expressive."<sup>39</sup> While this distinction may exist, the goals of pronouncing authority and being obeyed can be achieved in many ways. I shall argue that a more expressive lingual structure in judicial opinions will actually enhance cooperation with judicial decisions.

Steven Winter proposes that the law, in contrast to fiction, must be generalizable, reliable, and evoke automatic validity.<sup>40</sup> This too may be true, but his conclusion that "narrative cannot fulfill these conditions"<sup>41</sup> does not necessarily follow from his premise. Winters neglects to notice that all communication is formed in a narrative--narrative is the medium through which perception is ordered, given meaning, and understood. We live in a narrative, each of us creating a story about how we think the world is. Thus, judicial writing is already, eternally, a narrative. Narrative can, and indeed *does* sustain the judicial process. By recognizing this fact, we can attempt to shift the language within the narrative, actually shift our framing of the way we think the world is, to

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39. West, *Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 277 (1987).

40. Winter, *supra* note 10, at 2259-60.

41. *Id.* at 2260.

better include others, and more efficiently account for the mass of voices not currently represented.

Furthermore, Robin West argues that, unlike the fictional author, judges must keep their subjective narrative instincts separate from lawmaking.<sup>42</sup> Precisely to the contrary, keeping the narrative instinct away is impossible. Ignoring the fact of narration is lying about human nature. What is lawmaking, if it is not addressing the conflicts that arise due to human nature? We must embrace what our nature is and understand it, so that we may honestly judge and resolve. Each judge exists in her own narrative, and acknowledging this is essential to fair judicial writing. Once a judge realizes the nature of her own biased narrative, she will be opened to possibilities previously unknown, and she can include others in her experience, presenting the feminine or other alternative voice in her writing. Without this recognition, the judge is actionless against the fact that she is not neutral. The judge need not, however, feign neutrality and write a limited, biased narrative. Awareness is the solution.

We can “construct a different sort of authority”<sup>43</sup> by borrowing attributes of fictional writing, and using them in judicial opinion writing. We can do this, still maintain all the authority and control the judicial opinion requires, and actually better control the system by bringing under judicial authority those voices who previously seemed excluded. I shall now discuss how this can be done.

First, judicial opinion writers should utilize greater inventive and stylistic control. This will acknowledge the author as a person with her own narrative, and this recognition can lead to the inculcation of more voices in the writing. One concern that could arise is that the judge may seem a dictator--an individual proscribing her own thoughts. However, that judge has been proscribing her own thoughts under the guise of neutrality throughout her judicial career. Revealing the actual truth can be no detriment. Also, the judge's individual declarations will be balanced out by the restrictions on power known as checks and balances.

With this system, the author can still achieve great clarity of meaning through varied styles. The author can also still receive limited reader interpretation. Furthermore, the author can still rely on *stare decisis* because that in itself is not the problem; the problem is the foundation of language from which legal reasoning arises: that foundation must be

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42. West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 211 (1985).

43. WOMEN'S WAYS OF KNOWING, *supra* note 6, at 221.



surfaced and discussed to allow the emergence of voices not previously recognized.

I present one concrete example to illustrate my point. A judge could write, for instance, "I recognize my own bias in this case. I am not a Black woman and I do not know what that would be like. However, I am willing to try to understand. I realize precedent in this situation dictates I convict the plaintiff of misrepresentation; I am bound to follow that precedent and I will. I would like to note, though, that I would like to find the plaintiff innocent if I could, and I suggest the Legislature take steps to change the definition of misrepresentation. I am uncomfortable with it the way it is." This opinion would take great strides in the use of inventive style and the use of the personal voice. The decision is quite clear, and would have little trouble being implemented or understood. There is also a more limited interpretation available here than there is in most ambiguously written objective decisions. One does not need to consider what the falsely objective term "reasonable" means, for instance. (Interpreting reasonableness inevitably becomes a subjective judicial decision anyway. How could a white male judge know what is reasonable to me?) The use of a different style only enhances the meaning of the opinion.

Therefore, bringing fictional attributes to judicial decision writing will facilitate the emergence of diverse perspectives in judicial writing. By changing the medium of thought expression, alternative voices can be included in judicial decisions. Opinions can then truly reflect the melting pot of people residing in this country. This will be an incredible step towards true representation of, and justice for, the people.