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Outdoing Lewis Carrol: Judicial Rhetoric and Acceptable Fictions

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Abstract:
This paper examines the functions of narrative within written legal argumentation. My purposes are these: 1) to repudiate common assumptions that differentiate "argumentation" and "storytelling" in the law; 2) to begin to theorize anew how legal argumentation functions; 3) to explore the difficulties of evaluating the law's argumentative narratives, and 4) to trace some of the anxiety that judges themselves reveal about their roles as storytellers. I conclude that narrative is necessary to law's claims to authority, even as it complicates our understandings about how legislative policy decisions produce effects, and even as judges themselves seek to mask its importance.

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I take my title for this paper from the rhetoric of a judge who accuses his colleagues of writing "pure fiction" even to the extent of "outdoing Lewis Carroll" in their presentation of the facts of a case. Dissenting opinions in other cases make similar claims. For example, one recent dissent described the majority opinion as being "spun with threads of judicial straw."[1] And in another case, the dissenter accused the majority of "forcing a square peg into a round hole."[2] Each of these three dissenting judges claims that the narrative of events on which the court bases its legal decision is manufactured, inappropriate, and consequently in error.

This paper focuses on the rhetoric of the case that includes the "outdoing Lewis Carroll" language. I analyze two conflicting judicial opinions, a majority opinion and a dissent, that exemplify what David Luban has described as the "struggle for the privilege of recounting the past" that is legal argument's stock and trade.[3] I attempt, by comparing the contrasting presentations of the facts of the case, to show that both opinions, not just one, may be to some degree fictional. I suggest, moreover, that such fictionality is inevitable because of the narrative form of judicial writing, and that there is no need, even in a discipline that necessarily seeks historical truth, to apologize for it. I conclude that the rhetoric of this particular case is overblown, and that legal argument would be better served if such allegations of fictionality were left out of it.

The case that prompted my inquiry is *Lazo-Majano v. I.N.S.* which arose from a Salvadoran woman's attempt to gain political asylum in the United States.[4] Her request had been denied by an immigration judge and by the Board of Immigration Appeals. She then took her case to the Ninth Circuit, which is the United States federal appellate court for the western states.[5] The Ninth Circuit reversed the earlier denials, holding that Olimpia Lazo-Majano was entitled to asylum because she had suffered in El Salvador "persecution on account of political opinion" (1436). Like many cases, *Lazo-Majano v. I.N.S.* consists of two separate opinions, an official, authoritative opinion issued by the two-judge majority and a dissenting opinion by the one-judge minority.

An appellate court's task is only to determine whether the lower court applied the law appropriately. Appellate courts do not, under the rules, decide factual matters; such decisions are the province of trial courts exclusively.

At issue in this case was "the purely legal question concerning the meaning of 'political opinion'" (1434). Yet answering that question required not just interpreting statutory language but also interpreting the events underlying Olimpia Lazo-Majano's flight from El Salvador.6 The Ninth Circuit judges who heard Lazo-Majano's appeal construed the facts of her case differently from one another; and their conflicting conclusions turned on these different views.

I'll begin my discussion of the case with the majority opinion. It begins in typical fashion with a narrative. This section includes no legal analysis or other signposts of legal significance; still, it carries much of the burden of justifying the legal conclusion the judges later reach. The first paragraphs are these:

> Olimpia Lazo-Majano is a thirty-four year old woman. She is the mother of three children. In 1981, when she was twenty-nine, her husband left El Salvador for political reasons: he had been in the rightist paramilitary group known as ORDEN; when he quit he was wanted by the guerrillas and distrusted by the government. Olimpia had always lived in the same small town. For five years she had been working as a domestic for another woman, getting a day off every fifteen days. In the middle of April 1982, she received a telephone call from Sergeant Rene Zuniga who had known her since childhood. He asked her to wash his clothes. Olimpia agreed.
>
> On her day off during the next six weeks Olimpia worked for Zuniga at Zuniga's place. Zuniga then pointed out that Olimpia's husband was no longer in El Salvador and raped her. In Olimpia's words: "With a gun in his hand he made me be his."
>
> In the following months Olimpia accepted Zuniga's domination. She continued to wash for him on her days off. She accepted taunts, threats, and beatings from him. He broke her identity card in pieces and forced her to eat the pieces. He dragged her by the hair about a public restaurant. He pummeled her face, causing a blood clot to form in one eye; she thought that she had lost the eye. Olimpia became nervous, preoccupied, and depressed, ate little, and became thin and frail. She wanted to escape her tormentor but saw no way of doing so. (1433)
>
> Central to the situation was the fact that Zuniga was a sergeant in the *Fuerza Armada*, the Armed Force which is the Salvadoran military. Zuniga used his gun in forcing Olimpia to submit the first time. On another occasion Zuniga held two hand grenades against her forehead. On another occasion he threatened to bomb her. When he referred to her husband, Zuniga said that if he returned Zuniga himself would cut him apart, kill both Olimpia and her husband and say that they were both subversives. Zuniga told Olimpia that it was his job to kill subversives. (1433)

The message of this narrative is that Lazo-Majano was economically oppressed and physically abused. She was terrorized by a man with power, a man who professed to killing subversives and to being willing to kill her. There was no way out that she could see; and she began to physically and emotionally show the great strain of her situation. This is a story, moreover, of a simple woman. She "had always lived in the same small town." She is unsuspecting, willing to go to work for a man she had known since childhood; and she is either so meek or so defenseless that she "accepted" his ill-treatment. She appears younger and more in need of protection than many thirty-four year old mothers of three, so much so that the judges paternalistically refer to her by her first name. We might imagine that there are only two possible endings to this story: death or rescue.

From the following passage we are supposed to conclude that no rescue was forthcoming. Lazo-Majano's tormentor's power was derived from his military position, and the military was uncontrollable:

> The persecution has been conducted by a member of the Armed Force, a military power that exercises domination over much of El Salvador despite the staunchest efforts of the Duarte government to restrain it. Zuniga had his gun, his grenades, his bombs, his authority and his hold over Olimpia because he was a member of this powerful military group. (1434)

In this passage Lazo-Majano is metonymically linked to the gun, grenades and bombs. She, like them, is a feature of war; they are the weapons, she is the prisoner. And like other prisoners of war, she should be the subject of international concern. Moreover, because the military controlled El Salvador and because the violence against her occurred under the guise of military authority, Zuniga's acts should be treated like acts of a government against one of its citizens, like the abuses of human rights that the United States asylum statute is intended to address.

But there's one hurdle that this narrative hasn't yet cleared: the persecution of Lazo-Majano needs to be "on account of political opinion."[7] If it is, then U.S. asylum policy can offer Lazo-Majano relief. To show that Lazo-Majano suffered political persecution, the judges must either distinguish the abuse from violence motivated by personal animosities or power struggles, or it must hold, in effect, that all abuses of women by men are political. Rather than choose, the court attempts both of these means of justifying its decision, and finds political persecution in several places: first, Zuniga acted in accordance with his political opinion that a man has a right to dominate a woman; second, Zuniga labelled Lazo-Majano a subversive and threatened to kill her as he killed others, and third, Lazo-Majano believed that the military raped, tortured and murdered and was not subject to political or legal control. This belief, the court said (referring to Zuniga), made her "prey of a hunter of subversives" (1435), by which the court could mean that she was abused because her beliefs might be seen as subversive, or that she was abused because her justified skepticism about the availability of assistance, and fear that she could seek help only at great risk, prevented her from breaking free.

The dissenting judge does not accept any of these alternatives. He sees Zuniga's violence as domestic violence not sanctioned by military authority or motivated by political opinions. He says that although Lazo-Majano "may indeed have suffered emotional and physical abuse in the course of her personal relationship with Sergeant Zuniga, [...] such mistreatment is clearly personal in nature and does not constitute political persecution within the meaning of the immigration laws."[8] His interpretation of the facts includes the following:

> The record here shows a Salvadoran woman, Lazo-Majano, who was abused and dominated by an individual purely for sexual, and clearly ego reasons. Neither petitioner nor her tormentor was "politically" motivated in any sense contemplated by the laws granting asylum to aliens. The holding that, as a matter of law, Lazo-Majano was persecuted on account of political opinion, is a construct of pure fiction. (1437)

The dissent differs from the majority opinion both in its analysis of Lazo-Majano's relationship with Zuniga and in its interpretation of the legal standard. According to the dissent, the statute calls for inquiry into the motives of the persecution exclusively; after-the-fact justifications or effects are of little consequence. The dissent consequently dismisses the majority's holding that Zuniga's attribution to Lazo-Majano of the political opinion of a subversive was significant; to the dissenting judge, only actual beliefs about a victim's political opinions and actual government backing of persecutors' actions constitute political persecution. While the majority weighed Lazo-Majano's isolation and Zuniga's increased power because of his military standing, and Lazo-Majano's fear that he could kill her as a subversive with impunity because, as Zuniga told her, "it was his job to kill subversives" (1433), the dissent looks only for political motivations for the abuse and finds none:

> That he was a member of the local police force played no part in Zuniga's treatment of the petitioner, and certainly did not convert his violent appetites into political motivation. He acted in no official capacity, pursuant to no government policy; and he had no official sanction to "persecute" petitioner as a "real or potential" opponent of the state. Rather, Zuniga acted as an individual, motivated by nothing more than his own "exaggerated *machismo*," the rampaging lust-hate of the common rapist. That this made him a criminal, a brute, and, undoubtedly, a coward, reinforces the justification of the prison system for such predators; it does not become the statutory equivalent of political persecution. (1438)
>
> ... The fact is [...] that Zuniga did not subject her to repeated humiliations because he saw her as a subversive; nor was she endangered by the government of El Salvador for any political opinion. . . . Her peril lay in Zuniga's unrestrained carnal appetites and his total conception of her as an available sexual object. His threats to have her killed as a subversive, if she complained to the authorities, were all for that purpose. (1439)

In the dissenting judge's view, Zuniga's actions were not "political" for the purposes of the statute despite any political circumstances or threats contributing to Lazo-Majano's inability to escape from Zuniga. To emphasize his point, he proclaims that "the majority has outdone Lewis Carroll in its application of the term 'political opinion' and in finding that male domination in such a personal relationship constitutes political persecution" (1437). The facts as told by the majority are "pure fiction"—illegitimate because far-fetched, distorted, or simply not true.

The dissent denies that abuse of women by men in "personal relationships" (a characterization of Lazo-Majano's relationship with Zuniga that never appears in the majority opinion) is "political" in any way covered by the asylum statute:

> The statutory concept does not purport to address the general plight of men or women in a particular social order, except as such persons meet the above statutory requirements. Neither does it endeavor to extend the laws of asylum or withholding of deportation to the myriad one-on-one interpersonal conflicts of emotional and physical confrontation not set forth in the statutes. (1437)

While denying that political asylum may be granted to sufferers of "the general plight of men or women in a particular social order" and by placing Lazo-Majano within this group of sufferers of a "general plight" the dissent implies that the pervasiveness of violence in some cultures relieves us of the obligation of attempting to address it —or, at least, cautions us against interpreting our asylum statute generously and thereby inviting a torrent of new claims.[9]

The dissent denies, moreover, that there was anything about Lazo-Majano's plight that could not be suffered by "men or women," ignoring the gendered character of Zuniga's power abuses (even as it, in an equally dismissive but somewhat contradictory gesture, characterizes Zuniga's violence as the "lust-hate of the common rapist"). The majority, by contrast, foregrounds sexual violence with the dual purpose of rooting Zuniga's brutality in his political assertion of a right to dominate women, and of eliciting its audience's outrage and sympathy. It quotes Lazo-Majano's testimony about Zuniga's rape of her—"With a gun in his hand he made me be his" (1433)—releasing the emotive power of her language at a crucial narrative turning point at which Zuniga achieves his control over her and after which Lazo-Majano is subjected to seemingly endless abuses. Sexual violence is uniquely capable of activating the protective and vengeful instincts of a woman's self-appointed protectors; it is into this role that the majority opinion casts its audience.

The dissenting judge defuses any protective instincts of his audience by dropping a portion of the blame at the feet of the victim. He shifts focus away from the horror of Zuniga's treatment of Lazo-Majano, onto Lazo-Majano's seeming acquiesence to the "relationship" and her failure to free herself from it:

> For a long while petitioner made no attempt to get away from Zuniga; she kept returning to his apartment, and submitting to his desires. ... At some time she actually lived with Zuniga's sister and told the latter about her relationship with him. The Immigration Judge concluded from her testimony that the sister correctly assumed that petitioner and Zuniga were "sweethearts." The evidence indicates that this was also Zuniga's feeling. The last time they were together, Zuniga asked her to go with him to his parent's home because he wanted her to meet them. Assuming that petitioner was indeed subjected to sustained mistreatment by this ungainly male, substantial evidence supports the Immigration Judge's conclusion that on the whole, their love-hate relationship was not all involuntary, even if often violent. (1440-41)

The dissent emphasizes, moreover, that Lazo-Majano failed to appeal for help: "The record does not show any complaints by her to his military superiors—and his lowly rank suggests that above him was a tower of supervisors—or to other authority" (1437). Thus the dissent suggests (without assessing the likelihood that any complaint against Zuniga would be fruitful) that Lazo-Majano did not try all of the resources available to her in El Salvador and suggests both that she must not really have needed them and that the U.S. certainly is not obligated to intervene.

The majority opinion, on the other hand, describes reasons for Lazo-Majano's passivity. Zuniga's threats and Lazo-Majano's fear prevented her from acting:

> Zuniga said to Olimpia that if she ever told on him he would have her tongue cut off, her nails removed one by one, her eyes pulled out, and she would then be killed . . . .
>
> Olimpia believed the Armed Force would let Zuniga carry out his threat. She believed that in 1979 a nineteen-year old boy she knew by sight had been tied, tortured and killed by the Armed Force; that in 1981 the husband of a neighbor had been taken away in a truck at night with fifteen others and killed by the Armed Force; that the Armed Force had raped "young college girls," as had Zuniga himself. In her view there was nobody in El Salvador that could stop the Armed Force from doing such things. In her experience when Zuniga was dragging her by the hair in the restaurant no one helped because where the Armed Force is concerned, "no one will get involved." (1433)

This story, unlike the dissent's, is of a woman immobilized by reasonable fear, a woman who correctly perceived the horror around her and the danger of her own situation. That she did not seek help or resist was no failure; rather, it evidenced conditions justifying her need for sanctuary in the United States.

What, then, really happened? Did Lazo-Majano have an affair with Zuniga that went sour, as the dissent suggests, and that carried no traces of political persecution? Or was the only "relationship" between Lazo-Majano and Zuniga that which he demanded by violence, forced servitude and a governmentally authorized abuse of power? The majority opinion is, of course, the "winning" one, the one that establishes the historical record. *Lazo-Majano* was not appealed to a higher court; so for the purposes of the law, "what happened" was as the Ninth Circuit majority described it.

The principal assertion of every narrative in law is the truth of its factual claims. But what is as important as "truth" for the operation of law are the varying degrees of authority with which narratives are told. Majority opinions are authoritative and dissenting opinions are not; judicial opinions trump advocates' briefs; and opinions of higher courts displace those of lower courts. Justice Jackson of the United States Supreme Court conceded in 1953, "We are not final because we are infallible, but we are infallible only because we are final," thus acknowledging that the hierarchy within the judicial system may have as much as epistemological certainty to do with the setting of the historical record.10

Indeed, because it is communicated through narrative, the law implicitly concedes the possible fictionality of its truth claims. As Hayden White has argued of historical narratives generally,

> [T]he fact that [events] *can* be recorded ... in an order of narrative ... makes them at once questionable as to their authenticity and susceptible to being considered tokens of reality. In order to qualify as "historical," an event must be susceptible to at least two narrations of its occurrence. Unless at least two versions of the same set of events can be imagined, there is no reason for the historian to take upon himself the authority of giving the true account of what really happened.11

Similarly, unless at least two versions of the same event or series of events can be imagined, there can be no disputes calling for litigation, no means of defending an accused, and no reason for the I.N.S. to oppose an asylum petition. Moreover, though the system is designed to facilitate the uncovering of "truth," that effort is inevitably constrained by language's imperfections, the pressure of the law's organizing principles, and the need to construct narratives to lead to a judicial decision. Elizabeth Mertz has argued that a judicial opinion "as a whole is the carefully—and often quite self-consciously-constructed story of a social conflict and its legal resolution ... in which the description of events and the discussion of legal issues and conclusions are integrally intertwined, shaping and framing one another."12 The description of events must be tailored to the law against which they will be measured, even as the law is itself rearticulated with reference to those events. As Jerome Bruner has said, "The events need to be *constituted* in the light of the overall narrative—in Propp's terms, to be made 'functions' of the story."13 A judicial opinion is a form of story, a legal story of conflict and resolution, crafted for a particular rhetorical effect; the parts of the story, including the "facts" of the case, must be articulated *in service of that story*.14

What in the *Lazo-Majano v. I.N.S.* majority opinion, then, does the dissenting judge find so hard to bear that he calls it a "construct of pure fiction"? Shouldn't the idea that judicial opinions are narratives, and as such inevitably to some degree fictional, be an old and comfortable one for a judge? Certainly his dissenting opinion, too, tells a tale-a tale of sexual violence and its sad consequences, of brutish and cowardly "exaggerated machismo," of the "rampaging lust-hate of the common rapist." Are these characterizations of Zuniga any less imaginative than the majority's? No; they are emotionally evocative, embellished representations of a person (who, by the way, has never been before this or any U.S. court evaluating this case), his actions and his motivations.

Active use of the imagination is a valuable step in judicial reasoning and writing; and the rhetoric that would make it a bad thing is nonsensical.15 Imaginative work, even fictionalizing, must happen for the law to retain its flexibility, its stability, and its ability to speak to our lives. The law often needs to understand and act upon that which is unfamiliar and unaccounted for. How can it do so, when the judge's toolbox ostensibly contains only statutory language and cases previously decided? What is its mechanism for change, adaptation to the new problems of an unpredictible world? Certainly such a mechanism must be built into its methodology, for without it, the structures of thought which shape the law would inevitably crumble under the pressure of the law's own

anachronisms. Lon Fuller has explained the problem and its solution this way:

> The human mind is a machine subject to certain limitations. Perhaps the greatest of these limitations consists in the fact that human reason must always proceed by assimilating that which is unfamiliar to that which is already known. The situations that may be presented to a judge for decision are infinite in number; the intellectual equipment of rules, distinctions, concepts, and words, upon which the judge must rely in dealing with these situations, is limited and finite. We are forced to deal with new problems in terms of an existing conceptual apparatus which in the nature of things can never be entirely adequate for the future. "In order to understand, a certain degree of intellectual stability is needful, and stability cannot be obtained except at the sacrifice of truth. Truth is in a state of perpetual oscillation; its mobility, its variety is disconcerting. We cannot grasp it without falsifying it."16

This explanation appears in Fuller's book entitled *Legal Fictions*, which deals with a whole category of legal rules that lawyers refer to, without apology, as "fictions." These are doctrines that "deem" something true for the purposes of being able to apply a legal rule designed for slightly different situations. For example, the rule of vicarious liability, which holds employers liable for harms done by their negligent employees, is such a fiction. It says, in effect, "even though the employer was not the person who caused the harm, we will treat him as if he was."17 In other words, "if the facts are *x*, we will imagine that they are *y*." Such rules exist so that a particular result might be achieved despite the mismatch between the facts and the old category of cases into which it is being classified. Such a fiction's purpose, in other words, is to bridge the gap between facts and doctrine, to facilitate reaching a just result while respecting the law's historical and methodological constraints. "The [legal] fiction," Fuller said, "is generally the product of the law's struggles with *new* problems."18

As Fuller describes it, judging is not unlike writing poetry according Adrienne Rich, who says,

> You have to be free to play around with the notion that day might be night, love might be hate; nothing can be too sacred for the imagination to turn into its opposite or to call experimentally by another name. For writing is renaming.19

If law is to be sufficiently flexible, sufficiently insightful to keep up with a changing world, judges need to take seriously the task of renaming.

Let's accept, then, our limitations and our opportunities, the inevitability and necessity of our invoking our imaginations to help us understand that which is unfamiliar or unaccounted for. Our task then is to face our fictions honestly, and ask of them not, "why are you fictional?" but rather, "do you help us understand?" and for law, "do you help us judge judiciously?"20

Inevitably we will run up against the question of boundaries: When does a fiction cross the line of the acceptable? At what point might we claim that a narrative is only a "token of reality"21 that leaves a more complete, more fully referential narrative unexpressed? For the dissenting judge in *Lazo-Majano*, that point, however we theorize it, was reached. His rhetoric marks the place where he sees that invisible boundary between legitimate and illegitimate judicial action. Perhaps the emphasis in his phrase "construct of pure fiction" is on "pure." Perhaps he views the problem as one of degree: any judicial narrative that is *purely* fiction has over-stepped its bounds. The problem of "outdoing Lewis Carroll," then, might be in the *out*doing, rather than in the *doing*.

If fiction helps us understand, helps us *see*, then perhaps the word "fiction" properly understood has nothing to

do with referentiality (that is, with the reflection of a non-linguistic truth), but everything to do with imagination, with our abilities to get our minds and hearts around an unfamiliar scene. Such an interpretation turns the word as it is used in the *Lazo-Majano* dissent on its head. By itself, it need not carry a negative charge; instead it draws attention to the ways in which responsible judicial decision making is necessarily a creative process. And when used negatively, as part of an accusation, its appearance says more about the author than his subject.

This author objected to his colleagues' willingness to call "political" that which in another time, and still in his view, was just "domestic." This "re-naming" may have raised for him a host of problems: 1) it would open the door to a flood of new asylum claims; 2) the new applicants would be women whose claims of political abuse within domestic, out-of-sight spaces would be difficult to verify except by testimony from the victim herself; and 3) recognizing such claims challenges the private/public distinction that keeps domestic problems out of the public view. If he had these concerns, then whether the majority's opinion was in some sense fictional was the least of his worries. More pressing was the need to maintain boundaries: the U.S. border, the border between objective and subjective jurisprudential work, between political persecution and domestic violence, between public and private. And in light of those concerns, it makes sense that he would reassert another easily deconstructible boundary—that between fact and fiction—when doing so still packs such rhetorical punch.

What would happen if we took seriously the idea that without imagination, without vision, there can't be justice, and if we read "outdoing Lewis Carroll" as referring to a heroic act of vision? Perhaps it would be the beginning of an era in which the rhetoric of judicial disagreement would focus more on the actual points of dispute, and in which accusations of fictionality do not cloud the real issues.

Notes

1. *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996).

2. *United States v. McGuire*, 79 F.3d 1396 (5th Cir. 1996).

3. David Luban, "Difference Made Legal: The Court and Dr. King." 87 *Michigan L. Rev*. 2152 (1989).

4. *Lazo-Majano v. I.N.S*, 813 F.2d 1432 (9th Cir. 1987). Subsequent citations to this case will be by page number in in-text parentheses.

5. Arizona, California, Hawaii, Nevada, Oregon and Washington.

6. Interpretations of law and of facts inevitably are intertwined. In this case, how the events were characterized depended on the legal rule and precedents against which they were measured; likewise the meaning of 'political opinion' was articulated in light of assumptions about the nature of Lazo-Majano's abuse. John Cole has argued about legal reasoning generally, using the example of a criminal defendant, that as both law and facts require definition, and because elucidation of one affects the other, the decision-making process involves simultaneous decisions about each:

> We decide all at once through what frame we should assess or define 'guilt' (what it is to be criminally responsible) and what we should label this defendant. The actual specific contextual defendant gives us insight into what kind of frame of criminal responsibility we ought to adopt, while the consideration of various frames helps us to judge what to do with this defendant. ... [W]e

> restructure the world all at once by making a simultaneous decision about how we will classify this defendant and what classification system we will use to define the concept of "guilt," or "criminal responsibility," in general. ... We do not, as our language and logic lead us to believe, operate in a linear fashion in which we ascertain the frame and then deduce the disposition. (John Cole, "Thoughts from the Land Of And." 39 *Mercer Law Review* 907, 918-19 (1988)).

Whether the decisions about 'frame' and "classification"—in *Lazo-Majano* about the interpretation of 'political opinion' and the characterization of Lazo-Majano's persecution—are simultaneous or linear is inconsequential; what is important is the interdependence of 'frame' and 'classification' and of the narratives that express them.

7. Immigration and Nationality Act, §§ 208(a).

8. *Lazo-Majano v. I.N.S.*, 813 F.2d at 1436, Poole dissenting. Subsequent citations to the dissenting opinion will be by page number in in-text parentheses.

9. The dissenting judge's dissatisfaction with the majority opinion appears to be its liberality, what he perceives as its easing of burdens on asylum applicants. Behind such a concern may be a fear of inviting more immigrants to the United States and possibly upsetting Congressional policy decisions concerning the circumstances of legitimate entry into the country. He surmises that '[i]n a country engaged in bloody civil war such as El Salvador, where guns and uniforms are plentiful, perhaps a significant portion of the population, male and female, could probably establish political persecution under the majority's test' (1438). Again, frequency of violence appears to left nonintervention. The dissent's implication—which may be a reasonable interpretation of Congressional intent—is that asylum-granting standards are a function of our perception of how many people in a country can satisfy them.

10. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson concurring).

11. Hayden White, "The Value of Narrativity in the Representation of Reality," in *On Narrative*, 1-23, at 19 (W.J.T. Mitchell ed., 1981).

12. Elizabeth Mertz, 'Consensus and Dissent in U.S. Legal Opinion: Narrative Structure and Social Voices.' 30 *Anthropological Linguistics* 369, 369-70.

13. Jerome Bruner, "The Narrative Construction of Reality," 18 *Critical Inquiry* 1, 8 (1991).

14. For a discussion of the characteristic tonal, methodological and rhetorical features of the judicial opinion, see Robert Ferguson, "The Judicial Opinion as Literary Genre," 2 *Yale Journal of Law & the Humanities* 201 (1990).

15. I am aware that in this paper I elide any difference between 'fiction,' 'narrative' and 'imaginative writing.' I do so to build a bridge between the 'pure fiction' accusation and the less rhetorically-charged words and phrases (for example, 'representing the facts') lawyers use to describe what they do.

16. Lon Fuller, *Legal Fictions* 65 (1967), quoting Tourtoulon, *Philosophy in the Development of Law* 395 (1922).

17. The reasons for this particular rule are various, according to Prosser and Keaton:

> A multitude of very ingenious reasons have been offered for the vicarious liability of a master: he has a more or less fictitious 'control' over the behavior of the servant; he has 'set the whole thing in motion,' and is therefore responsible for what has happened; he has selected the servant and trusted him, and so should suffer for his wrongs, rather than an innocent stranger who has had no opportunity to protect himself; it is a great concession that any man should be permitted to employ another at all, and there should be a corresponding responsibility as to the price to be paid for it—or, more frankly and cynically, "In hard fact, the reason for the employers' liability is the damages are taken from a deep pocket.' None of these reasons is so self-sufficient as to carry conviction, although they are all in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss. All of them go beyond that notion in holding the defendant liable even though he has done his best. *Prosser and Keaton on Torts* 500 (cites omitted).

18. Fuller at 94.

19. Adrienne Rich, "When We Dead Awaken: Writing as Re-Vision" in *On Lies, Secrets, and Silence* (1979).

20. I have no illusions about the size of this leap for law. Certainly the law must seek to ascertain the truth of matters in order to do justice. And the conventional wisdom is that it must communicate those truths straightforwardly, clearly and objectively, without bias or embellishment, so that all who read judicial opinions may also know the facts and evaluate them.

Towards these ends the law is continuously striving for objectivity. Even when the very possibility of 'objectivity' is elsewhere denied, the law expects legal decisions to be made, at a minimum, without bias, without invoking the legal decision-maker's own subjectivity, without interest, connection, emotion, and certainly without imagination. The image of Justice holding the scales with her eyes blindfolded suggests, perhaps, that the weighing of competing claims is to proceed without the decision maker really even *seeing* the litigants themselves.

The law also seeks clarity and certainty. Viewing a matter retrospectively, it strives to ascertain the truth of it; prospectively, it seeks to define obligations unambiguously. Consequently, it uses language conservatively, sometimes highly technically, ostensibly precisely: 'the Law has developed a highly specialized language that seeks to excise metaphor, simile, and image' because 'from the Law's perspective, all of these are seen as fraught with ambiguity, multiple meanings, and uncertainty' (Sells 54). It seems to go without saying, then, that the law also seeks to excise fiction: when could there be more uncertainty in the law than when there is any doubt that the facts of a case are true and that their articulation is straightforward? Where there's fiction, there isn't truth, there isn't objectivity, and then there can't possibly be justice. These ideas fuel the rhetoric of the *Lazo-Majano* dissent and are the background against which this paper has arisen.

21. White at 19.

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