Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor

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This paper reconsiders images of the judge and, in particular, the position of the woman judge using fairy tale and myth. It begins by exploring the actuality of women's exclusion within the judiciary, traditional explanations for this and the impact of recent changes. It goes on to consider the image of the Herculean judge, arguing that whilst we may view him as an ideological construct, or even as a fairy tale, we routinely deny this to ourselves and to others. This both ensures the normative survival of Hercules and simultaneously constrains counter-images of judges, including that of the woman judge, who becomes almost a contradiction in terms, faced with the need to shed her difference and fit the fairy tale. Like the little mermaid, the woman judge must trade her voice for partial acceptance in the prince's world.

This image of silencing which Andersen's tale so vividly captures highlights a paradox in current discourses of adjudication. On the one hand, women judges are viewed as desirable in order to broaden the range of perspectives on the bench, thus making the judiciary more representative; on the other hand, judges are supposed to be without perspective, thus suggesting there is little need for a representative judiciary. Feminists and other commentators negotiate their way uncomfortably through this territory, acknowledging a gender dimension to adjudication, but failing fully to confront its implications. This paper seeks to 'undress' the judge, to flush out images of adjudication which deter or prevent women from joining the judiciary and constrain their potential within it. It highlights both the role of the imagination in existing conceptions of adjudication and the increasing necessity for a re-imagined Hercules – an alternative understanding of the judge which women and other groups currently underrepresented on the bench can comfortably and constructively occupy.

"'But if you take my voice" said the little mermaid "what shall I have left?"'[1]

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1. H C Andersen 'The Little Mermaid' in N Lewis (trans) *Hans Andersen's Fairy Tales* (London: Penguin, 1981) pp 41–72, 61. *The Little Mermaid* is the story of a young mermaid who falls in love with a handsome prince after she saves him from drowning. In order to join his world and win his love (and thereby an immortal soul), she enters into a dangerous bargain – her beautiful voice in exchange for legs. If she is to survive, the prince must fall in love with her. Yet, although the silent mermaid intrigues the prince, he does not love her. On the morning of the prince's wedding to a neighbouring princess, her sisters rise from the sea and offer the

INTRODUCTION

In 1869, the Faculty of Columbian College refused Belva Lockwood's application to the law department, believing 'such admission would not be expedient as it would be likely to distract the attention of the young men'.[2] To the selectors, Belva Lockwood was like a mermaid, dangerously distracting to the young men of the academy, her siren call and femininity threatening to lure them from their set course like fated sailors. Fearing she would bewitch them into selling their souls,[3] the faculty excluded her from their midst. This story of the woman lawyer is one of silencing and exclusion, mirroring the tale of the little mermaid who sold her voice to walk on land with her prince.

This paper tells a story of the woman judge.[4] It is argued that she too remains cast as a mermaid. Her physical appearance threatens to upset aesthetic norms; her presence is an inescapable irritant, simultaneously confirming and disrupting the established masculinity of the bench. As such, the woman judge is almost a contradiction in terms. She is *so* deviant that she is inevitably subject to an irrepressible desire to conform. Like Andersen's mermaid, she is induced to deny herself and sell her voice; her dangerous siren call is silenced and in the silence difference is lost.

The exploration of the woman judge's story through fairy tale and myth challenges previously unacknowledged, possibly unconsidered, images of the (woman) judge. The use of such images cannot be substantiated in any probative sense. The idea is to offer them as stimuli, as catalysts to provoke thought and extend debate about the nature and role of adjudication. They serve to highlight the imagination as an important site of discursive/political struggle, showing how it

little mermaid an escape – a knife that she must plunge into the prince's heart. Unable to kill her prince, her heart breaks. She throws herself into the sea where she dissolves into the foam. As the story ends, she is transformed into a spirit of the air – neither mermaid nor woman.

2. L Dusky *Still Unequal – The Shameful Truth about Women and Justice in America* (New York: Crown Publishers, 1996) p 16, quoted in C McGlynn *The Woman Lawyer – Making the Difference* (London: Butterworths, 1998) p 7.

3. See Oscar Wilde's tale 'The Fisherman and his Soul' in I Murray (ed) *Oscar Wilde: Complete Shorter Fiction* (Oxford: Oxford University Press, 1979; issued as a World Classic paperback, 1980) pp 203–236 in which the story of Hans Andersen's little mermaid is reversed. In Wilde's story, the fisherman rejects his soul in order to be with the mermaid. Ultimately, however, the mermaid suffers the same fate – death – when the fisherman's soul (evil without the tempering influence of his heart, ie, love) returns and tempts him irrevocably away from the mermaid's side with tales of dancing feet.

4. I would argue that distinguishing and acknowledging the *woman* judge, whilst risking reinforcing man as the norm, is nevertheless a necessary route to the exposure of hidden gendered assumptions, thus enabling progression toward a time when such a prefix (woman) is superfluous. See, for example, McGlynn, n 2 above, p 4; and M Thornton *Dissonance and Distrust: Women in the Legal Profession* (Oxford: Oxford University Press, 1996) p 5, adopting a similar approach, but cf R Graycar 'The Gender of Judgments: An Introduction' in M Thornton (ed) *Public and Private – Feminist Legal Debates* (Oxford: Oxford University Press, 1995) pp 262, 264–265 and 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 UBCL Rev 1 at 3, arguing against the prefix 'woman' as it serves to 'disempower what would otherwise be a position of power'. It is equally arguable that within the legal world men who fail to conform to the 'masculine' norm are also disadvantaged and as such become 'other'. See, for example, R Collier '"Nutty Professors", "Men in Suits" and "New Entrepreneurs": Corporality, Subjectivity and Change in the Law School and Legal Practice' (1998) 7 Social and Legal Studies 27.

may be harnessed to ideological purposes through the appeal of attractive, but ultimately constraining, images. It emphasises too the aesthetic dimension to law's authority – the way in which our acceptance of and engagement with law is in part shaped by its aesthetic appeal. In this context, I wish to re-examine the powerfully attractive, yet ultimately suffocating image of the Herculean judge of our legal imagination.[5] I will argue that such an image operates both to prevent women from *being* judges and from allowing them to make a difference *as* judges. In other words, the invocation of fairy tale and myth works to enact the paradox whereby arguments for a more diverse judiciary – grounded in the belief that the varied perspectives of 'others' will make a difference – are ultimately defeated by the (our) continuing infatuation with Hercules. Fairy tales and myths – far from being simply foolish childhood stories lacking integrity or foundation – offer possibilities for insight; because they are not mere 'fictions', they may reveal a 'truth of a different or deeper kind'.[6] Tales of handsome princes and mermaids, invisible clothes and vain Emperors, capture and then transform the imagination 'disrupt[ing] the apprehensible world in order to open spaces for dreaming alternatives'.[7] They offer a literary pathway, a conduit or road to another world, a window onto a future as yet unenvisaged.[8]

This paper begins by tracking the actuality of women's exclusion from and marginalisation within the judiciary, as well as traditional explanations for this state of affairs. It considers the potential impact of recent developments in the UK to secure a more representative judiciary in the light of literature suggesting that women can enrich and make a difference to both the practice and content of law through the incorporation of their 'distinct' experiences and perspectives (whether biologically or socially derived).[9] It goes on to consider

5. Hercules is, among other things, the name given by Ronald Dworkin to his fictitious 'superjudge' in *Taking Rights Seriously* (London: Duckworth, 1977) ch 4 and *Law's Empire* (Oxford: Hart Publishing, 1986). Although his selection for his judge of a character of such massive mythical proportions is far from coincidental, I would not wish to contend that my Hercules and his are necessarily correspondent on all points. On 'the Legal Imagination' see further, I Ward *Shakespeare and the Legal Imagination* (London: Butterworths, 1999) esp ch 1.

6. R Cavendish (ed) *Mythology: An Illustrated Enyclopedia of the Principal Myths and Religions of the world* (London: Little Brown and Company, 1992) p 8.

7. M Warner *From the Beast to the Blonde: On Fairy Tales and their Tellers* (London: Vintage, 1995) p xvi.

8. The development of law and literature approaches law in recent years has many strands, only one of which is represented in this paper. For a general introduction to law and literature approaches, see I Ward *Law and Literature – Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995) ch 1. Recent works include M Aristodemou *Law and Literature – Journeys from Her to Eternity* (Oxford: Oxford University Press, 2000); and M Williams *Empty Justice: One Hundred Years of Law, Literature and Philosophy* (London: Cavendish Publishing Ltd, 2002). On the relationship between law and aesthetics, and the implication of imagery in law's authority, see C Douzinas and L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago, Ill; London: University of Chicago Press, 1999) esp ch 1.

9. Although this paper focuses exclusively on the woman judge, Clare McGlynn suggests a similar approach can be used to explore the 'multiple sites of discrimination' within the 'closed' judiciary: see C McGlynn 'Judging Women Differently: Gender, the Judiciary and Reform' in S Millns and N Whitty (eds) *Feminist Perspectives on Public Law* (London: Cavendish Publishing Ltd, 1999) pp 87–88; See further McGlynn, n 2 above; and S Berns *To Speak as a Judge – Difference, Voice and Power* (Dartmouth: Ashgate, 1999) esp ch 9.

the judge who inhabits the traditional legal imagination, akin to the Herculean superhero of ancient mythology and modern comic strips. It is argued that despite his mythical status, the Herculean judge continues to exercise enormous normative power, promulgating and perpetuating a particular world view by calling into service notions of objectivity, neutrality and detachment. This ideological figure is necessarily male, and the internalisation and collective denial[10] of this gender dimension effects the exclusion and/or silencing of the woman judge. Finally, the paper develops the idea of the woman judge by casting the little mermaid as the perpetual other. Her story is used to challenge and question the knowledge, appearance and very essence of the judge who inhabits our legal imagination. It is suggested that as the little mermaid undresses the superhero judge to reveal the vain and naked Emperor beneath, she is able to find her voice, offering opportunities for new understandings of the judge and the adjudicative process.

'EFFECTING' THE WOMAN JUDGE

The number of women students entering university law schools in the UK has been steadily increasing since 1970, and since 1988 there have been slightly more women law students enrolling than men. In 1999, women law students continued achieving significantly more first and upper-second class degrees.[11] Fifty-six point nine per cent of trainees registered in the same year were women, reflecting the 77.5% increase in female trainees since 1989, compared with a 46.1% increase in male trainees.[12]

At the same time, research reveals the presence of a number of barriers preventing women from reaching the top levels of the legal profession. The 'trickle-up' argument,[13] that is, that given time and the increasing numbers of women entering the profession, more women will reach its most senior levels, is not, on current evidence, sustainable. Clare McGlynn rejects it as 'simplistic', overlooking the institutional discrimination present both at the Bar and within the judicial appointments system.[14] McGlynn's claims are underlined by the relevant statistics: despite the fact that since 1992 around 51.1% of newly qualified solicitors have been women, only 18.9% of partners were female in 2000, compared with 25.4% of sole practitioners.[15] In total,

10. A stance of denial in relation to a range of aspects of the adjudicative process is introduced and developed by Duncan Kennedy in *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass: Harvard University Press, 1997) esp ch 8.

11. B Cole *Trends in the Solicitors' Profession – Annual Statistical Report 2000* (London: Law Society, 2000) p 60. In *The Woman Lawyer* (n 2 above), Clare McGlynn offers a detailed analysis of the statistical information on women lawyers, relying on a number of studies, including the Law Society's *Trends in the Solicitors' Profession – Annual Statistical Reports*, research undertaken by the Young Women Lawyers (YWL) and Bar Council figures. Many of the figures I rely upon here derive from her book, updated where appropriate.

12. Cole, n 11 above, pp 65–66.

13. H Sommerlad 'The Myth of Feminisation: Women and Cultural Change in the Legal Profession' (1994) 1 Int J of the Legal Profession 31 at 34.

14. McGlynn, n 2 above, p 89. See also K Malleson *The New Judiciary – The Effects of Expansion and Activism* (Dartmouth: Ashgate, 1999) pp 106–125, esp pp 115–116.

15. In 1999-2000, 53.1% of new qualified solicitors were female: Cole, n 11 above, p 72.

84.2% compared with 58.2% of men and women respectively with 10–19 years experience are partners.[16] Meanwhile, women's presence at the bar has increased from 8% in 1970 to 46% in 2000.[17] Although there is the highest proportion of female silks ever, only 9% of applicants for silk in 1998 were women, despite 14% of women at the Bar having more than 15 years' experience (although 22%, or ten out of the 46 applications were successful).[18] At present, there are no female judges in the House of Lords. The most senior female judge in the UK is Lady Justice Butler-Sloss, who is President of the Family Division. Lady Justices Hale and Arden sit in the Court of Appeal, and in the High Court there are six female judges.[19] Although figures, contained in the 1999–2000 edition of the Judicial Appointments Annual Report, indicate that five of the 12 most senior appointments were women, only 5.6% of the most senior part of the judiciary is female.[20] Overall, women make up a mere 14.3% of the judiciary.[21]

Traditional explanations for the continued poor representation of women among judges point to a hostile legal culture. It seems that the legal mermaid is still viewed as an exotic and dangerous outsider from whom legal institutions need protection. There continues, it is argued, to be an almost instinctive, yet informal, protection of male power through various manifestations of the 'old-boy' network. These informal practices operate

16. The gap decreases slightly to 87.4% compared with 64.8% after 20–29 years and after 30 or more years experience to 66.1% to 58.8% of men and women respectively are partners: Cole, n 11 above, p 20.

17. Lord Chancellor 'Speech to the Association of Women Solicitors', London, 23 March 2001, reproduced at www.lcd.gov.uk/speeches/2001/lc230401.htm.

18. Lord Chancellor 'Speech to the 1998 Women Lawyer Conference', London, 25 April 1998, reproduced at www.lcd.gov.uk/speeches/1998/1998fr.htm.

19. This figure is correct as of 1 July 2002, and is taken from the Lord Chancellor's Department website at www.lcd.gov.uk/judicial/womjudfr.htm.

20. This compares favourably with 1998–89, when none of the 14 appointments to the High Court and above were women. Overall, in 2000–01, 25.6% of judicial applicants and 28.4% of judicial appointments were women, compared with 24.2% and 26.9% respectively in 1999–2000: LCD press notice 'Progress Towards Greater Diversity in the Judiciary' 408/01, 28 November 2001; LCD press notice 'Judicial Appointments – Annual Report Sees Rise in Female/Ethnic Minority Appointments' 366/01, 30 October 2001. The Judicial Appointments Annual Reports 2000–01, 1999–2000 and 1998–99 are reproduced at www.lcd.gov.uk/judicial/jaarepfr.htm.

21. Figure taken from LCD website, n 20 above. This compares with approximately 21% in Australia (Australian Institute of Judicial Administration, figure correct as of 30 May 2002, available at www.aija.org.au/WMNjdgs.htm). In Canada, the number of women on the bench has risen from 9% in 1990 to 20% in 1998, including three women on the Supreme Court and a Female Chief Justice. Further, over 33% of federal appointments in 1998 were female, an increase from 19% in 1993 (The Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, *Speech at the Ceremonies Marking the Opening of the Courts*, Quebec, 9 September 1998, reproduced at www.canada.justice.gc.ca/en/news/sp/1998/opening.html). Generally, there are more women in European jurisdictions with a so-called 'career judiciary', where (co)incidentally the judiciary has less power or prestige. In France, for example, women make up nearly 50% of the judiciary, although, significantly, in the higher ranks men outnumber women two to one: B McKillop 'The Judiciary in France' Unpublished Research Paper, Faculty of Law, University of Sydney in Malleson, n 14 above, pp 123–125.

alongside more structural forms of institutional discrimination within the legal profession (for example, working hours which are not generally family-friendly) to prevent legal mermaids from reaching its top levels.[22]

Ever since John Griffith identified the judiciary as a largely homogenous group, possessing 'a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions',[23] the class, age, education, sex and, most recently, race of the judiciary have been subject to vigorous scrutiny.[24] However, although, there have been changes in the profile of the lower realms of the judiciary, senior judges, by and large, continue to reflect the traditional profile of the unrepresentative 'out of touch' judge.[25] Further, this homogenous group has been able to self-perpetuate,[26] particularly through the mechanism of 'secret soundings' as a mode of judicial selection. This system has been described as:

> 'more appropriate to the nineteenth century than the twenty-first ... [that] keeps alive an outdated, discriminatory old boys network [and unfairly favours] the traditional elite of the bar in preference to solicitors, women and ethnic minorities.'[27]

22. On a hostile legal culture, see further, for example, H Sommerlad and P Sanderson *Gender, Choice and Commitment: a study of woman lawyers* (Dartmouth: Ashgate, 1998); and McGlynn, n 2 above (UK); Thornton (1996), n 4 above (Australia); F M Kay and J Brockman 'Barriers to Gender Equality in the Canadian Legal Establishment' (2000) 8 Feminist LS 169 (Canada); J Resnik 'Gender Bias: From Classes to Courts' (1993) 45 Stan LR 2195 (US).

23. J A G Griffith *The Politics of the Judiciary* (London: Fontana Press, 5th edn, 1997) p 7.

24. See, for example, McGlynn, n 2 above; Law Society *Judicial Appointments Commission* (London: Law Society, 11 January 2000) and *Broadening the Bench – Judicial Appointments* (London: Law Society, 9 October 2000), both reproduced at www.lawsociety.org.uk (England and Wales); Thornton (1996) , n 4 above (Australia); Kay and Brockman, n 22 above (Canada); B Kruse 'Luck and Politics: Judicial Selection Methods and their Effect on Women on the Bench' (2001) 16 Wis Women's LJ 67; and B Simon 'The Underrepresentation of Women on the Court of Appeals for the Federal Court' (2001) 16 Wis Women's LJ 113 (US).

25. See Malleson, n 14 above, pp 103–105, 233–234. While it is tempting to assume that Griffith's 'typical' judge has largely been replaced by a more fashionable 'redbrick' version, in terms of the composition and background of the *senior* British judiciary in particular, he continues to hold a tenacious grasp upon the reins of judicial power. Whether his views on adjudication have become less traditionally 'Griffithesque' is a matter considered below.

26. Griffith, n 23 above, p 22.

27. Robert Sayer, former Law Society President, in C Palmer 'A job, old boy? The school ties that still bind' *Observer*, 11 June 2000. The Law Society announced its boycott of the system of 'secret soundings' in September 1999 (Law Society press release 'Outdated system for judicial appointments' 28 September 1999), a move severely criticised by the Lord Chancellor as a 'disservice' to Law Society members: LCD press notice 'Increasing diversity in judicial appointments' 385/00, 31 October 2000. The Lord Chancellor has repeatedly reaffirmed his commitment to the 'consultation process', distinguishing it from the non-existent albeit 'sinister' sounding term 'secret soundings': see, for example, LCD press notice 'First Judicial Appointments Commissioner Named' 103/01, 15 March 2001; Lord Chancellor, n 18 above; Lord Chancellor 'Speech to the Minority Lawyers' Conference', London, 29 November 1997, reproduced at www.lcd.gov.uk/speeches/1997/speechfr.htm.

Despite the introduction of a number of reforms, including job advertisements and descriptions and interviews for judicial office in lower courts, the judicial appointment process, it is widely argued, continues to operate under a shroud of mystique, dependent on 'patronage, being noticed and being known'.[28] Appointments to the High Court and above remain largely based on consultation. The consultee[29] is asked to assess the overall suitability of the candidates based on the Lord Chancellor's criteria, which involve a consideration of the candidate's:

> 'intellectual and analytical ability, sound judgement, decisiveness, authority, [l]egal knowledge and experience ... integrity, fairness, humanity, and courtesy.'[30]

The reality, McGlynn argues, is a process heavily reliant on 'gut' feelings and gossip.[31] Moreover, there remains the continued risk that 'so long as judges choose judges they will look for "chaps like themselves"'.[32]

Recently, the Lord Chancellor has taken the first steps toward the development of a Judicial Appointments Commission with the appointment, following a recommendation in the Peach Report,[33] of a new part-time post of First Commissioner for Judicial Appointments in March 2001.[34] While unquestionably a welcome development, any substantial change in the composition of the judiciary surely necessitates a transformation within legal culture itself and, in particular, in understandings of what makes a good judge:

28. TMS Consultants *Without Prejudice? Sex Equality at the Bar and in the Judiciary* (London: Bar Council and Lord Chancellor's Department, 1992) in McGlynn, n 2 above, p 91.

29. Described by the Lord Chancellor as an 'informed many', as opposed to a 'favoured few', among the judiciary and legal profession: n 18 above.

30. As defined by the Lord Chancellor in his speech to the 1998 Women Lawyer Conference, n 18 above. On the consultation process, see further the LCD website at www.lcd.gov.uk/judicial/appointments/jappinfr.htm.

31. McGlynn, n 2 above, pp 90–91.

32. Comment by Lord Bridge in 1992, reproduced by Helena Kennedy in *Eve was Framed – Women and British Justice* (London: Chatto & Windus, 1992) p 267.

33. Sir Leonard Peach *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales* (London: Lord Chancellor's Department, 1999) p 27, recommendation 13, reproduced at www.lcd.gov.uk/judicial/peach/indexfr.htm.

34. A move welcomed by Sir Leonard Peach and acknowledged by Michael Napier, Law Society President, as a 'step in the right direction': LCD press notice 'First Judicial Appointments Commissioner Named' 103/01, 15 March 2001; LCD press notice 'Lord Chancellor seeks First Commissioner for Judicial Appointments' 376/00, 24 October 2000; Law Society press notice 'Law Society Response to First Judicial Appointments Commissioner', 15 March 2001. This was followed by the appointment of seven commissioners in December 2001 (LCD press notice 'Commissioners for Judicial Appointments Appointed' 433/01, 12 December 2001) who, with the First Commissioner, will conduct an ongoing audit of appointments of silks and to the judiciary. The Lord Chancellor will consider consultation on the possibility of an Appointments Commission 'in the full sense' following the publication of the First Commissioner's Annual Report in Autumn 2002: Lord Chancellor 'Speech to the IBA World Women Lawyer Conference Judges Session' London, 1 March 2001, reproduced at www.lcd.gov.uk/speeches/2001/lc010301.htm.

> 'the great danger in an area such as the judiciary ... is that it has always been seen as a male area of work, so perceptions of what makes a good judge – and what is "authority" and "decisiveness" – are also likely to be male.'[35]

It is this cultural change and 'potential for cloning'[36] that the Lord Chancellor's reforms risk failing to address.[37] Moreover, despite the removal of overtly hostile barriers to women's appointment, 'subtler' forms of structural discrimination remain in the form of 'glass ceilings', inequalities in pay and the continued expectation of 'invisible pregnancies and self-raising families'.[38] It may be that the Lord Chancellor needs to address directly the myth that 'ability, like cream, floats to the top'[39] and reconsider his commitment to the debunked 'trickle-up' approach, as well as his understanding of the appointments process as a 'neutral conduit' through which the most qualified candidates will emerge.[40] Moreover, if he is serious in his determination to 'break down the culture of not applying because "they'd never have the likes of me"',[41] he must go beyond telling the under-represented – 'don't be shy; apply'[42] – and properly consider the reasons *why* they do not apply for judicial appointments. It is not simply a question of challenging the perceived and actual discrimination within the system, but of recognising that many have internalised their own exclusion to the extent that they simply do not see themselves as judges,[43] begging the question of who it is they *do* see as a judge.

And yet, one might well ask: what is all the fuss about? *Why* should we want a more representative judiciary? Is it simply that there *ought* to be more women judges, just as there ought to be more women in Parliament or in the police force, not to mention more male nurses and primary school teachers (a kind of numerical aestheticism)? Or is it no more than the formal adherence to principles of fairness and equal opportunities? Perhaps it is a mechanism to ensure the judiciary's survival? It may be that an increase in judicial diversity is necessary in order to maintain public confidence and trust, that is, to ensure the legitimacy

35. Kamlesh Bahl EOC Evidence to the Home Affairs Committee *Minutes of Evidence and Appendices*, Third Report of Session 1995–96, vol II, p 211, in McGlynn n 2 above, p 180.
36. Kennedy, n 32 above, p 267.
37. F Burton 'What now Portia?' (1998) Sol Jo 784–785.
38. Female barrister Letter to *Independent*, 26 November 1990, in McGlynn, n 2 above, p 150.
39. John Taylor, quoted in A Doran 'Lawyers hold no brief for equality code' *Daily Mail*, 7 November 1995, reproduced in McGlynn, n 2 above, p 150.
40. Malleson, n 14 above, p 116.
41. Lord Chancellor 'Speech to Minority Lawyers Conference', n 27 above.
42. Lord Chancellor 'Speech to the Association of Women Barristers', The Barbican, London, 11 February 1998, reproduced at www.lcd.gov.uk/speeches/1998/1998fr.htm.
43. See K Malleson and F Banda *Factors Affecting the Decision to Apply for Silk and Judicial Office* Lord Chancellor's Department Research Series 2/00 (London: Lord Chancellor's Department, 2000), reproduced at www.lcd.gov.uk/research/2000/200es.htm. The publication of *Judicial Appointments in England and Wales – The Appointment of Lawyers to the Professional Judiciary – Equality of Opportunity and Promoting Diversity* (London: Lord Chancellor's Department, 2001), reproduced at www.lcd.gov.uk/judicial/judequal.htm, sets out the Lord Chancellor's approach, policies and aspirations toward equality and diversity in the judicial appointments process, may represent a first step in this direction.

of the judiciary as a whole.[44] The difficulty is that none of these proffered rationales draw on any advantage in the woman judge per se, but should they? Surely the mermaid has something to offer her prince besides evening up the numbers at the table? How, if at all, might her presence make a difference?

It has been argued – often using the image of Shakespearean heroine, Portia – that women have a distinctive style of lawyering.[45] This claim generally stems from the work of Carol Gilligan who, in her exploration of the development of moral reasoning in children, identified a 'different voice' corresponding (in terms of her research subjects) to female modes of reasoning. In a comparison of two 11-year-olds, Jake and Amy, Gillligan found that whereas Jake's voice reasoned from abstract principles or rules, Amy's sought to emphasise connection, care and responsibility.[46] The exclusionary and hierarchical approach of Jake has since been likened to that of a traditional (male) lawyer who 'spots the legal issues ... balances the rights and reaches a decision', whereas Amy, with her focus as much on procedure – *how* the dispute is resolved – as on substance, 'seeks to keep the people engaged; she hold the needs of the parties and their relationships constant and hopes to satisfy them all'.[47] Drawing on these insights, a number of feminist legal scholars have suggested that, in practice, the introduction of a 'different voice' into law could yield a radically different legal system, reflecting and applying Amy's understanding and perspective, and making law's empire less adversarial and more like a 'conversation':

> 'a more co-operative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed on the loser'.[48]

Inevitably, many of these arguments are permeated with claims about the maleness of the current system and the possibilities posed for law by the introduction of more feminine, 'Amy-like' values.[49]

44. See further, B Hale 'Equality and the Judiciary: Why should we want more Woman Judges?' [2001] PL 489. See also the well-cited arguments of Bertha Wilson in favour of a more diverse judiciary: 'Will Women Judges Really Make a Difference?' (1990) 28 Os HLJ 507.

45. See esp C Menkel-Meadow 'Portia in a Different Voice: Speculations of a Women's Lawyering Process' (1985) 1(1) Berkeley Women's LJ 39 and 'Portia Redux: Another Look at Gender, Feminism, and Legal Ethics' (1994) 2 Va J Soc Pol'y & Law 75. But cf I Ward 'When Mercy Seasons Justice: Shakespeare's Woman Lawyer' in C McGlynn (ed) *Legal Feminisms: Theory and Practice* (Aldershot: Dartmouth, 1998) pp 63–83; and J M Cohen 'Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction' (1990) 25(4) Tulsa LJ 657.

46. C Gilligan *In a Different Voice – Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 1982; repr 1993) pp 24–63.

47. Menkel-Meadow (1985), n 45 above, pp 46–47.

48. Menkel-Meadow (1985), n 45 above, pp 54–55.

49. See, for example, L Bender 'From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law' (1990) 15 Vt L Rev 1; N R Cahn 'Styles of Lawyering' (1992) 43 Hastings LJ 1039 and response by A Shallack 'The Feminist Transformation of Lawyering: A Response to Naomi Cahn' (1992) 43 Hastings LJ 1071; S Ellman 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 Geo LJ 2665. For an interesting related discussion in the context of legal education, see P Spiegelman 'Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web' (1988) 38 J Legal Educ 243.

Assuming that all (or even most) women lawyers and judges *did* speak as Amy, that is, with Gilligan's different voice (in the face of attempts to suppress it), then an increase in the numbers of women judges would surely have a significant impact on the adjudicative process. However, within the feminist legal community, the weight of opinion is firmly against such an assumption/assertion, with many feminist scholars regarding the 'different voice' warily as an essentialising myth with problematic connotations for women who do not conform to its features.[50] The concern is that while the different voice pertains to have somehow captured the essence of the feminine, in actuality, it may operate to exclude the polytonality of women's voices. Gilligan rejects this as a misunderstanding of her work, criticising the polarisation of essential 'maleness' and 'femaleness' attributed to her. Her articulation of a different voice, she argues, although empirically explored through women, is characterised by theme not gender; its association with the female is empirical but not absolute, and she does not suggest that all women necessarily speak as Amy.[51] In the event, criticisms of essentialism have meant that many of the insights generated by Gilligan's work have been carefully and deliberately distanced from essentialising invocations of gender categories. In particular, feminists have moved onto philosophical terrain to develop the ethic of care in the context of normative reconstructive projects addressing concepts of justice, morality, citizenship and political decision-making.[52] However, while the gender implications of Gilligan in the context of law have largely been sidestepped,[53] what continues to be highlighted is the possibility of an approach to decision-making and dispute resolution *other than* the traditional, adversarial, right-based, rule-oriented mode that characterises Anglo-American law. In this context, Gilligan's work and its subsequent applications draw attention to the particularity of current adjudicative discourses in sharp contrast to the universality to which they claim to adhere. Women may not speak with a different voice, but nor do they necessarily 'speak as a judge'.[54]

Sandra Berns has recently counselled feminists to be wary of too much discussion about the content of and identification with the different voice. She argues that such a preoccupation threatens to 'seduce' women away from the more important issue of trying to understand what happens to women as women when they claim their 'right to participate authoritatively within an interpretative community which has, for most of its existence, been unproblematically male'.[55] It is not, she argues, simply a question of whether

50. On the critique of essentialism in feminist legal scholarship, see J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) J Law & Soc'y 351. On its implications for Gilligan's 'different voice' and the ethic of care, see M Drakopoulou 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' (2000) 8(2) Feminist LS 199.

51. Gilligan 'Letter to Readers', n 46 above, pp xiii, 2.

52. See, for example, S Sevenhuijsen *Citizenship and the Ethics of Care* trans L Savage (London: Routledge, 1998), who argues that a re-evaluation of the ethic of care could transform our conceptions of justice, morality and politics. See also the works of J C Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (London: Routledge, 1993); and V Held *Feminist Morality: Transforming Culture, Society and Politics* (Chicago: University of Chicago Press, 1993).

53. Although cf the application of the ethic of care in an adjudicative context by R West *Caring for Justice* (New York: New York University Press, 1997).

54. Berns, n 9 above.

55. Berns, n 9 above, p 13.

it is possible to speak authoritatively and simultaneously *as a woman and as a judge* but rather 'whether the law allows room for any voice that has not been woven into its fabric. Can one who speaks the law do anything but speak the law?'[56] The question becomes one of the extent to which the woman judge may contribute to the generation of conditions leading to *changes* in the legal cultural climate and voice. Can the woman judge, whether by the disruptive significance of her very material presence or by bringing to bear a broader range of social and cultural experiences and perceptions to law and the adjudicative process (including her experience of a legal culture which tends to distrust, misunderstand and exclude her), dislodge and render unstable traditional assertions of legal/judicial authority? Can she, by speaking both as a woman *and* a judge, transform the legal voice and, in so doing, invite and encourage re-imagined understandings of the judge and the act of judging?

The difficulty is that by the time, the (woman) lawyer has entered the legal academy, long before progressing through the rank and file of the legal profession, he or she is already in a sense diminished and deformed by the narrowing and constricting effects of learning the law. This process of 'eclips[ing] the self', of purging the imagination and committing the mind to a single unitary perspective which constitutes 'thinking like a lawyer', is a well-documented phenomenon in legal educational literature.[57] While all law students – male and female – are subject to this process of alienation, for women it is a peculiarly distorting experience, as the self they strive to become is imbued with gendered cultural signifiers which render unstable their newly acquired sense of legal identity.[58] In these circumstances, there is an overwhelming temptation to repress all signs of difference, to surrender, to conform. To walk alongside her prince, the legal mermaid must have *legs*, acquired at a price, but providing her with access to and acceptance in his world. She must send away her soul, deny her 'self' and her voice, and live a painful 'self'-less existence, a life in denial securing her mutated survival as she waits for the prince to notice her. Yet, the bargain she makes may ultimately be fruitless; he may overlook her *because* she is silent. Her denial of herself is thus as futile and brutal as our denial of the ideological character of the judge who inhabits our legal imagination. How, then, can the woman make a difference if she has bargained away her voice, internalising and imitating the judge who inhabits our/her legal imagination?

> 'She was given rich dresses of finest silk and muslin. All agreed that she was the loveliest maiden in the palace. But she was dumb; she could neither sing nor

56. Berns, n 9 above.

57. On the relationship between the 'self' and law, see esp P Schlag 'The Legal Self' in P Schlag *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) p 126. Interestingly, Schlag is silent on the gender implications of this process. I am suggesting that the 'legal self', at least in his adjudicative role, is recognisably male: see further Thornton (1996), n 4 above, pp 75–79, 268–271, on the 'technocratic' approach of legal education. See also, on the 'institutionally managed trauma [which] gives birth to a conforming or believing soul', P Goodrich 'Of Blackstone's Tower: Metaphors of Distance and Histories of the English Law School' in P Birks (ed) *What are Law Schools For?* (Oxford: Oxford University Press, 1996) p 59.

58. See, esp Thornton (1996), n 4 above.

speak. Beautiful slave girls in silk and gold came forward to sing for the prince and his royal parents. One of them sang more movingly than the rest, and the prince clapped his hands and smiled at her. This saddened the little mermaid, for she knew that her lost voice was far more beautiful. She thought: "If only he could know that I gave away my voice for ever, just to be near him".'[59]

HERCULES: THE SUPERHERO JUDGE WHO INHABITS OUR LEGAL IMAGINATION

The judge is a person formed in and clothed by imagination, that is, a person stripped of self and re-clothed with the magical attributes of 'fairness', 'impartiality', 'disengagement' and 'independence'. The judge who inhabits our legal imagination has no personality, no history and no voice. His identity is often hidden beneath a wig and gown, his humanity erased, his voice silenced, his actions directed and constrained.[60]

This suits us just fine.[61] We expect the judge to have no identity.[62] We like the idea of a judge who performs superhuman feats in human form, just like a superhero.

59. Andersen, n 1 above, p 63.

60. The image of the judge as robed and wigged is a particularly prominent feature of popular cultural conceptions of the British judge, and is in marked contrast to the 'trendy' US judge of TV courtroom drama. There is no doubt that these more diverse images of judging impact upon public understanding and may to some extent effect a shift in traditional conceptions of the judge. This is, perhaps, reflected in the ongoing debate about the proposed abolition of the barristers' and judges' wigs in the UK, recently re-ignited by the threats of solicitors, with rights of audience in the High Court, who 'feel their bare heads mark them out as second-class advocates' to seek a judicial review. The Lord Chancellor has indicated that such an expansion would be 'a step in the wrong direction. Instead, it would be better if both branches of the profession sported just the hair nature gave them' and that he would be 'most surprised' if judges, especially in the civil courts, did not follow suit: C Dyer 'Irvine prepared to drop judges' wigs' *Guardian*, 30 June 2001; R Verkaik 'Irvine says wearing wigs in court is out-dated' *Independent*, 30 June 2001.

61. 'Us' may capture a range of communities here. On the one hand, there is the legal community, that is, law students, teachers, practitioners and judges. There is evidence to suggest that they hold on strongly to the notion of the depersonalised dehumanised judge See esp Dworkin, n 5 above; but see also Pierre Schlag on the role of the idealised judge in legal education in 'The Legal Form of Being' in P Schalg *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (New York: New York University Press, 1996) ch 9. However, I am also suggesting that the Herculean judge, while perhaps not recognised such, is also a feature of popular culture. Hence, for example, the media outcry following Lord Hoffman's failure to disclosure his links with Amnesty International during the Pinochet litigation: H Young 'Pinochet may, or may not, clear off. But Hoffmann certainly should' *Guardian*, 19 January 1999. But cf K Hughes 'Another Pinochet atrocity – this time by the media' *Guardian*, 20 January 1999. See also Duncan Kennedy's discussion of public perceptions of adjudication, n 10 above, ch 1. Thus, while recognising differences in the image of the judge across these different communities, I am arguing that the features I associate with Hercules are generally widely held in popular culture, albeit as ideals rather than as actual perceptions of what judges do.

62. Berns, n 9 above, p 202.

> 'We expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation ...'[63]

The judge who inhabits our legal imagination is expected to transcend, deny, or eclipse his 'self', by submitting to something 'bigger' and 'higher'.[64] However, unlike the Herculean superheroes of ancient mythology or modern comic strips, the judge struggles to attain his supra-human status. Indeed, it is perhaps his struggle to deny what is 'corrupt' or 'banal', his striving for 'constraint', his efforts to 'transcend', that allow us 'believe in' his superiority and special mission.[65]

The role of this idealised judge is simple. He is there to 'find' or 'discover' or 'identify' the law and then apply it in a straightforward and uncomplicated way. The 'law' for these idealised purposes is for the most part viewed as a system of rules with correct or incorrect outcomes, although it is usually acknowledged that rules may require 'interpretation' and that such an exercise may sometimes produce uncertain and unpredictable results. On occasion, even the rule may run out, in which case the judge may have to resort to making one up, although this is generally frowned upon and kept to a minimum as it disrupts the delicate balance of powers which clearly separates the judiciary from other branches of government.[66]

Within this 'virtual reality' the judge, like the superhero, acts as a conduit to and from the gods, possessing special powers to determine and articulate their will. So viewed, his judgments may properly be regarded as 'impartial' and 'objective' in the sense that different judges, all similarly magically endowed, will reach identical decisions; the outcome does not depend on the prejudices of a particular judge because as judge/superhero, he has none. Moreover, the content of the rule to be applied is immaterial to how it is determined.[67] The judge, insulated by his judicial or superhero identity from his own tainted sense of self, is thus able to execute the law's violence that might otherwise be too painful for him to perform.[68] It is a belief in the possibility of his own superheroism that enables the judge to judge.

At the same time, the judge is trapped, a 'self'-less entity who is our collective imaginative creation – a kind of Frankenstein's monster. We hold the game pad in our hands; we limit his movements by programming him to operate within the system we have designed.[69] However, there appears to be a flaw or virus in the system. Increasingly, the judge, it seems, is acting not as a mere 'conduit' for the application of democratically enacted laws, but as part of a dynamic process of judicial activism

63. G Gall *The Canadian Legal System* reprinted in 'Foreword' Canadian Judicial Council *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) p iii.

64. Kennedy, n 10 above, p 3.

65. Kennedy, n 10 above, p 4.

66. 'The function of the legislature is to make the law, the function of the administration is to administer the law and the function of the judiciary is to interpret and enforce the law': Lord Greene (1944) The Law Journal 351, cited in Malleson, n 14 above, p 8. The normative grip of this passive conception of the judge is well illustrated by the tendency to pose the creative judge as a jurisprudential and political problem. See, for example, R Cotterrell 'The Problem of the Creative Judge ...' R Cotterrell in *The Politics of Jurisprudence* (London: Butterworths, 1989) ch 6.

67. See Schlag, n 57 above, pp 127–129.

68. See R M Cover 'Violence and the Word' (1986) 95 Yale LJ 1601.

69. Pierre Schlag uses the image of the 'frame': n 57 above, p 135.

and legal creativity. The judge of our legal imagination can no longer function in the 'real' world and, like the monster, he is dismissed as a fairy tale:

> 'There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame ... But we do not believe in fairytales any more'.[70]

Or do we? It is interesting that in mainstream jurisprudential accounts of adjudication – particularly those in the legal positivist tradition – the law-making role of the judge continues to be presented as minimal. The Hartian approach, acknowledging that the 'open texturedness' of language and the 'penumbra of vagueness' around the certain core of legal rules occasionally require the judge to exercise a discretion as to the best possible way forward, still commands great respect.[71] Moreover, within legal positivism, while there is undoubtedly controversy as to the extent to which 'judicial discretion' can or should be exercised,[72] it is integral to the positivist project – which asserts both the separability of law and morals and the necessary existence of some system of 'pedigree' by which valid laws can be identified and distinguished – to narrow the range of judicial law-making and thereby the opportunities for subjective judicial preferences to come into play or undermine positivism's central tenets.[73]

Among US theorists of adjudication there is, unsurprisingly, greater recognition of the creative or law-making role of judges. However, this does not necessarily entail the denial of the superhero ideal. For example, Ronald Dworkin's more jazzed-up version of the adjudicative process – a 'Noble Dream' whereby law is understood as integrity, where rules give way to principles which are in turn the subject of both interpretation and determination by the judge who attempts to glean from them 'the best constructive interpretation of the political structure and legal doctrine of the community'[74] – while delivering judges more *practical* room for manoeuvre is ultimately a staunch attempt to

70. Lord Reid 'The Judge as Law Maker' (1972) 12 JSPTL 22.

71. H L A Hart *The Concept of Law* P A Bulloch and J Raz (eds) (Oxford: Oxford University Press, 2nd edn, 1994). For a recent affirmation of the traditional Hartian position by legal positivist, Matthew Kramer, in the face of an attack on positivism by David Dyzenhaus, see M Kramer 'Dogmas and Distortions: Legal Positivism Defended' (2001) 21 Oxford J LS 673 at 675–679, responding to D Dyzenhaus 'Positivism's Stagnant Research Programme' (2000) 20 Oxford J LS 703, itself a review of Kramer's book *In Defence of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999).

72. See also J Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) ch 10.

73. This argument is effectively made by Kenneth Einar Himma 'Judicial Discretion and the Concept of Law' (1999) 19 Oxford J LS 71.

74. Dworkin (1986), n 5 above, p 255. On Dworkin's thesis as a 'Noble Dream' described in opposition to 'The Nightmare' of unlimited judicial creativity, see H L A. Hart 'American Jurisprudence through English Eyes: The Nightmare and the Noble Dream' in H L A Hart *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983) p 123. See also, for a concise assessment and rebuttal of adjudicative fairy tales, Noble Dreams and Nightmares, Simon Lee *Judging Judges* (London: Faber and Faber Ltd, 1988) chs 1–5.

defend the notion of judicial constraint and with it the superhero ideal (hence his adoption of Hercules as his ideal judge).[75]

In *A Critique of Adjudication*, Duncan Kennedy explores our simultaneous belief in and denial of the mythical superhero judge. Kennedy argues that adjudication (in the US at least), far from being a neutral realm beyond the reach of ideology and political lobbying, is in fact riddled by ideological conflict and that, in the disposal of this conflict, judges are only minimally constrained. He then goes on to question our reasons for collectively denying this, highlighting the importance of a conventional view of adjudication (as a politically neutral and legally constrained process) to perceptions of democratic legitimacy and the distribution and exercise of power.[76] In identifying a link between perceptions of the judge as neutral and constrained and the allocation and exercise of political power, Kennedy, indirectly presents a powerful argument for the retention of the fairy tale, so blithely dismissed by Lord Reid, at least from the perspective of the political status quo. One can choose to reject Kennedy's account of what adjudication entails,[77] but whether one believes the judge to be constrained, neutral, apolitical – an eclipsed, legal self – or whether one does not, Kennedy offers a range of convincing institutional and political arguments why the fairy tale account continues to retain greater purchase in popular culture than it is fashionable to acknowledge in the legal academy.

So, maybe we do need to believe in fairy tales. Maybe, as Kennedy and others contend, a belief in the superhero judge who comes with a built-in programme, a game plan to ensure a coherent and certain outcome consistent with the values and premises of the particular political tradition he is there to serve and preserve, is intrinsic to our notion of judging. After all, there is so much at stake. The merest glimmer of recognition that judges may be political actors with substantial power and opportunity to enact their personal political preferences surely threatens to render unstable the whole edifice of law, introducing unsavoury elements of arbitrariness and partiality into a system which rests on its distance from such human/system failings.[78] Hence the importance of preserving the mythological dimension of the adjudicative process, ensuring its distance from the concerns of mere mortals. We can imagine the judge in no other way. He has to be seen as 'supra' human. We even make him dress up in his own kind of cape and mask – well wig – his own 'superhero' outfit.

75. See here Duncan Kennedy's characterisation in *A Critique of Adjudication*, n 10 above, of Dworkin's account of adjudication as dependent upon a 'coherence' strategy, in which disputes are resolved by 'treating the whole existing corpus of rules ... as the product of an implicit rational plan, and asks which of the rules proposed best furthers that plan': p 33.

76. See Kennedy, n 10 above, chs 9–11.

77. For a range of essays assessing Kennedy's contribution to theories of adjudication see 'Critical Legal Studies (Début de Siècle): A Symposium on Duncan Kennedy's *A Critique of Adjudication*' (2001) 22 Cardozo LR 701.

78. These concerns emerge particularly in recent discussion concerning the impact and implications of the Human Rights Act 1998 and the role of the judiciary, where much of the debate has been framed in terms of the proper limits of adjudication in a legislative context. The underlying assumption is that one which denies judges a law-making-legislative role: Malleson, n 14 above, pp 24–35; and A McColgan *Women Under Law: The False Promise of Human Rights* (London: Longman, 2000). On the instability of the legislation/adjudication distinction, see Kennedy, n 10 above, esp ch 2.

Yet, this imaginative creation remains by and large free from the critical scrutiny of lawyers and legal commentators. The very same processes that effect the intellectual limiting of legal thought prevent inquiry into the extent to which the imagination informs and shapes the legal terrain. We can dismiss Hercules as a myth with little operative or normative significance only because of our own self-imposed cognitive limitations.[79] We fail to take seriously the power of the imagination to clothe and elevate the judge, to dress and adorn the Emperor.[80]

In Andersen's fairy tale, there was once an Emperor who was so incredibly vain that he spent all his time and money dressing up in fine clothes. One day, a pair of 'shady' characters arrived at the palace claiming they could weave cloth that was not only beautiful but also 'invisible to anyone who was either unfit for his job or particularly stupid'.[81] The Emperor jumped at the chance to distinguish the 'wise' from the 'foolish' and paid the swindlers well to make him a new set of clothes. From time to time, he sent his courtiers to check on the tailors' progress and each returned with glowing reports of the wonderful cloth. Of course, there was nothing there. Yet everyone, including the Emperor purported to believe in and 'see' this invisible cloth. On the day the clothes were ready, the Emperor got 'dressed' and walked naked out onto the streets. Everyone who saw him admired his new clothes, for no one dared to admit that they could not see them. And so it continued until a child, somewhat confused, was clearly heard to say 'the Emperor has nothing on!' Soon, everyone was repeating it. Finally, the Emperor too realised his mistake:

> 'but he thought to himself, "I must not stop or it will spoil the procession". So he marched on even more proudly than before, and the courtiers continued to carry the train that was not there at all.'[82]

The judge is like the vain and foolish Emperor. Like the Emperor, he is hopelessly obsessed with how he appears. The Emperor needs to appear both physically – in the sense of his dress and external façade – and intellectually able and authoritative. It is unthinkable for him to acknowledge that he cannot 'see' the clothes; in seeking to deny his stupidity, he exposes his vanity. The judge is also invisibly clothed and – like the courtiers – we choose to 'see' him dressed in the magical (albeit invisible) attributes of 'fairness', 'impartiality', 'disengagement' and 'independence'. We rely on the superhero appearance of the judge to disguise the fact that, like the Emperor, he is clothed by ignorance, vanity, and fear. Although we recognise a man behind the superhero ideology,

79. See Schlag, n 57 above, p 126.

80. H C Andersen 'The Emperor's New Clothes' in *Hans Andersen's Fairy Tales* N Lewis (trans) (London: Penguin, 1981) pp 32–40. This analogy with Andersen's equally famous tale is not uncommon in a judicial context. For example, Simon Lee, in his book review of Dworkin's *Law's Empire*, 'Law's British Empire' (1988) 8(2) Oxford J LS 278, asserts that his students are naïve enough to dismiss what they regard as the wilful blindness of jurisprudential reviewers of *Law's Empire* who praise Dworkin's cloak of integrity: '... They cry out that Dworkin is streaking through the jurisprudential stratosphere wearing no clothes' (at 278). My argument is not just that the emperor/judge is wearing no clothes, but that it is our imagination which enables us to believe (albeit at the same time disbelieving) that he is. See further below.

81. Andersen, n 80 above, p 32.

82. Andersen, n 80 above, p 40.

the man underneath the Emperor's new clothes, we keep quiet; we deny it and carry on as the Emperor did 'even more proudly than before'. We are all constrained to act as if the Emperor wore clothes and we are so constrained *because he is the Emperor*.

The point is we recognise that the superhero judge is not real; that he is, if you like, a creature of our imagination. Hence, we can dismiss him. What we fail to recognise is that his status as fiction does not prevent him from having operative effects, and this is in part because, as lawyers, we have already excluded ourselves from 'the imaginary domain'.[83]

Further, not only does the judge who inhabits our legal imagination remain a superhero, he is also a super-man.[84] The woman judge cannot easily step into his shoes – or wear his bespoke superhero suit. The image of the superhero judge restricts our vision and curtails our imagination and, in so doing, suppresses the emergence of counter images, perpetuating the exclusion and marginalisation of 'the other'. The judge must leave his 'self' behind and smother the polyvocality of otherness when the judicial mantle and monophonic voice are assumed. Thus, far from embracing diversity, the image of the judge compels its repression and, in the process, gender is both overlooked and reinforced. Thus, the judge who inhabits the legal imagination remains male,[85] and the woman judge is expected to make decisions as if she too had a voice – his voice – her sense of her own incompleteness permanently threatening to secure and reinforce her denial, exclusion, and mutated silence, as befits a perpetual other.

> 'The prince told the little mermaid tales "of storms and calm, of strange fish in the deep, and the marvels that divers had seen down there; she smiled at his accounts, for of course she knew more about the world beneath the waves than anyone".'[86]

UNDRESSING THE JUDGE

The Emperor's new clothes were tailor-made, individually designed to distinguish him from the crowd and set him apart. In the same way, the miraculously transparent clothes of our superhero transform a man into a judge, his identity mystically and symbolically eradicated, often, but not necessarily, accompanied by visible

83. On the importance of the imaginary domain, see D Cornell *The imaginary domain: abortion, pornography and sexual harassment* (New York: Routledge, 1995).

84. On the exclusion of an awareness of the impact of gender in some (traditional) understandings and critiques of the superhero judge, see, for example, Joanne Conaghan's engagement with Duncan Kennedy in 'Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy's Critique of Adjudication' (2001) 22 Cardozo LR 721 and 'Review of Duncan Kennedy's *Critique of Adjudication*' (2000) 27 J Law & Soc'y 328 (book review); and also Berns, n 9 above.

85. Kennedy, n 10 above, p 3. But cf Robert Cover's portrayal of, an arguably re-habilitated, 'Hercules' as female (n 65 above, pp 1626–1628), which, according to Judith Resnik, provides an 'antidote' to our collective ideological imaginings of a necessarily male judge: 'On the Bias: Feminist Reconsiderations of the Aspirations for our Judges' (1987) 61 SCLR 1887 at 1910.

86. Andersen, n 1 above, p 67.

symbols (the wig and the gown) of his authority to underline and reinforce his superhero attributes.[87] Whilst we recognise that his dress, like the Emperor's, hides (or indeed fails to hide) the man beneath – that the superhero outfit is nothing more than denial, ignorance and fear – we, like the Emperor, choose to deny it.

The image of the woman judge wearing the Emperor's clothes is attractive, yet unsettling. They do not quite fit or fully cover. This lack of fit becomes a distraction, a lens through which we can see the Emperor's authority as a sham, exposing his nakedness. When the woman judge dons the symbolic dress and transparent clothes of the judge, her difference is apparent, her 'otherness' proclaimed. She challenges the normative survival of the judge who inhabits our imagination; what if the Emperor's new clothes *did* fit the woman judge – where would that leave the Emperor?

At present, although the Emperor lets 'queen bees' and other 'exceptional' or favoured women wear his clothes, he retains ownership.[88] That the woman judge can, on occasion, borrow the Emperor's clothes is not enough (although it may be a start); '[w]e may just be adding more women to the bench – nothing more, nothing less'.[89] However often the woman judge might wear his new clothes, she is never mistaken for the Emperor. Although she may occasionally attract his attention, she continues to be seen and treated as an 'outsider', an 'interloper in a white, male-dominated judiciary'.[90] When she speaks she is marked by difference; authority and distance collapse, '[t]he legitimacy of ... [her] choices is always open to question'.[91] Her difference and divergence from the 'working image of a judge' is it seems an immediate and automatic confirmation of bias.[92]

Thus, despite attempts to represent and deny the image of the superhero judge as mere fiction, it retains a tenacious and exclusive grip upon our legal imagination, and has regulatory effects.[93] Hence, perhaps, the legal attempt to

87. On the (de)humanisation of the judge see Sandra Berns' (n 9 above) discussion of an abandoned attempt to 'humanise' an Australian court. 'Its success, and not its failure, necessitated its abandonment ... The naked humanity of an unrobed judge, revealed as an ordinary human being, can and did become a lightening rod for anger and frustration of many before the court': p 208. But cf Brenda Hale, n 44 above, arguing that the effect of the wig is not to 'dehumanise' the (woman) judge but to humanise them into a man, to 'deny us our femaleness let alone our femininity': p 497.

88. On the 'siren call' of 'exceptional' success in a male world, see Helena Kennedy in McGlynn, n 2 above, p vi. On 'queen bees' and other images adopted by women to ensure their equivocal acceptance within the legal academy: the 'body beautiful', the 'adoring acolyte', the 'dutiful daughter', see Thornton (1996), n 4 above, pp 106–129.

89. Graycar (1995), n 4 above, p 269 (footnote omitted).

90. C L'Heureux-Dubé 'Outsiders on the Bench: The Continuing Struggle for Equality' (2001) 16 Wis Women's LJ 15 at 21.

91. Berns, n 9 above, p 33. See further below and also, for example, the challenge to Bertha Wilson by REAL (Real, Equal, Active for Life) Women following her speech at Osgoode Hall Law School (n 44 above) in which she considered the extent to which women judges will make a difference. It seems simply raising the possibility that women might bring alternative perspectives to their judicial role was enough to suggest that Justice Wilson was 'playing politics and not being impartial': REAL Women Letter to the Editor *Toronto Star*, 24 February 1990, quoted in Graycar (1998), n 4 above, p 8.

92. L'Heureux-Dubé, n 90 above, pp 22–30.

93. It is interesting to note in the examples below that despite the diversity of jurisdictions involved, the image of judge appears to embody and exclude similar characteristics and traits.

challenge a planning tribunal's decision on the grounds that the 'tribunal was pregnant';[94] or that of a New York law firm to disqualify an African-American woman judge from adjudicating in a sex discrimination trial because she was 'strongly identified with those who suffered discrimination in employment because of race and sex'.[95] The image of the superhero judge may also play a role in judicial findings that the remarks of Canadian Judge Sparks that, inter alia, 'police officers do overreact, particularly when they are dealing with non-white groups' gave rise to 'a reasonable apprehension of bias',[96] and almost certainly accounts for the vitriolic and highly personal attacks on Madam Justice L'Heureux-Dubé in response to her judgment in *R* v *Ewanchuk*.[97] In all these contexts, the superhero's suit fails adequately to clothe the woman judge; her difference is apparent, her judgment thereby doubted:

> 'By their anatomy, their skin pigmentation, or their accent, these outsiders are brandished as biased, not to be trusted as judges and not to be accepted as members of the judicial community.'[98]

Precisely because the judicial costume is so ill-fitting and regardless of her efforts to conform, the woman judge cannot help but challenge traditional understandings of legal decision-making and authority, and the image of judge within which 'the other' is both implicitly included and explicitly excluded.[99] She destabilises the 'fraternal values ... fostered in an attempt to retain the separation between the imagined masculine and the fictive feminine',[100] which arguably underpin the jurisprudential community. Troubling the dichotomisation of authority and compassion, whereby authority has come to be associated with the masculine and culturally constructed in opposition and superiority to feminine compassion,[101] she

94. B Naylor 'Pregnant Tribunals' (1989) 14(1) Legal Service Bull 41. For further discussion of this case, those below and others involving non-white male judges, see, for example, M Minow 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 W & MLR 1201; L'Heureux-Dubé, n 90 above; Graycar (1998), n 44 above, p 4; and McGlynn; n 9 above, p 104.

95. *Blank* v *Sullivan & Cromwell* 418 F Supp 1, 4 (SDNY 1975) in L'Heureux-Dubé, n 90 above, p 22.

96. *R* v *S(RD)* [1997] 3 SCR 484, available at www.scc-csc.gc.ca. The decision of the Nova Scotia Supreme Court (Trial Division) and Court of Appeal was overturned by a majority of the Canadian Supreme Court. See further R Delvin 'We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v R.D.S' (1995) 18 Dalhousie LJ 408 for criticism of the lower courts' judgments as, inter alia, an example of 'an emerging pattern whereby women who are beginning to "make it" in the higher echelons of legal bureaucracies are constructed as presumptively partisan': at 443, n 178.

97. [1999] 1 SCR 330. See further L'Heureux-Dubé, n 90 above 90, pp 24–26, and text of the Canadian Judicial Council's reprimand of Mr Justice McClung and response to the complaint by REAL Women of Canada, available at www.cjc-ccm.gc.ca/english/news_releases.htm.

98. L'Heureux-Dubé, n 90 above, p 28.

99. See, for example, Thornton (1996), n 4 above, p 26.

100. Thornton (1996), n 4 above, pp 166–167.

101. McGlynn, n 9 above, pp 97–98, applying K Jones 'On authority: or, why women are not entitled to speak' in J R Pennock and J Chapman (eds) *Authority Revisited* (London: New York University Press, 1987) p 152.

contests the image of the compassionate woman which enables and contributes to the maintenance of a masculine legal culture where women remain outsiders or at best 'fringe-dwellers'.[102] Put simply, her different presence or (in)voluntary deviance disrupts and exposes the previous homogeny and uniformity of the bench, revealing an unavoidable gender dimension to adjudication.

When the woman judge dons the Emperor's clothes, what is often in fact seen is a woman; what is believed or denied depends largely upon how far the Emperor's imagined authority can extend to 'other' wearers – the extent to which his clothes are a universal fit, able to transform any wearer into a judge. Thus, understanding the source and dimensions of judicial authority – the quality of the clothes – is crucial. To some, it seems, the Emperor's new clothes are beginning to look a little threadbare and in need of alteration; the diverting image of the woman judge makes it harder to believe (albeit whilst not believing) in them, to clothe the judge with our imagination.

In this context, a key feature of the weave is judicial impartiality, traditionally understood as 'the view from nowhere', a non-situated position from which each and every judge, properly proceeding, is likely to reach the same objective decision. In her examination of the content and authority of judicial knowledge and the influence of gender upon it, Regina Graycar, focuses on the many instances where judges invoke and rely upon their *own* experiences, understandings or common sense in the course of their decision-making.[103] She shows how this anecdotal knowledge often rests on simplistic ideas that reinforce problematic gendered assumptions about men and women, and in so doing promotes a version of reality in which this male knowledge is seen not only as universal, authoritative, and superior, but also as without perspective.[104] Ultimately, she argues 'the vantage point of a white male'[105] becomes the unarticulated and uncritical 'neutral baseline against which to evaluate bias'.[106]

The woman judge cannot but highlight these 'flaws' and 'breaks' in the weave as she strives to adapt the superhero's suit, to make the Emperor's clothes her own. By identifying those areas where the thread is strained, or even at breaking point, she locates the spots from which 'a voice for otherness in adjudication' may emerge.[107] In so doing, she creates opportunities for *imagining* counter-images of the judge and reveals how Hercules, like the vain naked Emperor, is dressed in clothes that are produced by the imagination, clothes which, if you look again, are not really there at all.

102. Thornton (1996), n 5 above, p 3. See further and cf narratives and testimonies on the exclusion and marginalisation of the woman lawyer within the legal profession and academy in Thornton and McGlynn, n 2 above.

103. Graycar (1995), n 4 above, pp 271–272 and (1998), n 4 above, pp 10–17. This is, of course, a common and well-explored theme in feminist critiques of judicial decision-making See, for example, feminist discussion of judicial interpretations of the 'reasonable man': J Conaghan 'Tort Law and the Feminist Critique of Reason' in A Bottomley (ed) *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish, 1996) p 47.

104. Graycar (1995), n 4 above, p 276 and (1998), n 4 above, p 4.

105. Graycar (1998), n 4 above.

106. Minow, n 94 above, p 1207.

107. Berns, n 9 above, p 33.

> '[H]er very otherness ... enables her to understand that the realm of the universal and objective to which she has aspired is a fake ... a mirror in which the brothers see themselves reflected, not as they are, but as they believe themselves to be.'[108]

Traditional understandings of the judge and of judging, without the cloak or distraction of invisible clothes, are thus seen to be hopelessly inadequate and incomplete. In particular, impartiality becomes either a lie or a failed and discarded ideal. However, recognition of the judge's situation – rendered inevitable by presence of the woman judge – does not entail a rejection of impartiality, but rather its radical reworking. The judge, for example, might engage in 'contextualised judging',[109] coupling prior knowledge with a willingness to be open to the 'possibility of surprise'[110] and enabling a genuine and impartial judgment.[111] Judicial impartiality might be re-understood as an 'open mind' as opposed to a 'blank slate',[112] as situated rather than non-situated, achieved through the acknowledgment and embracing of perspective, that is, through recognising the ubiquity and utility of judicial bias.[113]

When the little mermaid wears the Emperor's new clothes, she acts as pronouncement on that which is most frequently denied, that is, that *who* the judge is matters: the person beneath the suit is 'a necessary and inevitable part of the story which is unfolding'.[114] She goes on to expose and challenge the paradox in current discourses of adjudication, whereby the woman judge is expected to be conventionally different – simultaneously revitalising, energising and resuscitating the judiciary – whilst being required to mirror the judge who inhabits the legal imagination, to wear his clothes that ultimately silence and suffocate difference. Her difference forces us to confront and reassess our continued infatuation with Hercules, creating space for previously unimaginable alternative images of the judge. The eye-catching image of the little mermaid in the Emperor's new clothes, of the woman judge in clothes that might not be there at all, loosens the normative grip of the image of the superhero judge. Her siren call entices sailors toward the 'imaginary domain', in which the power of images to both constrain and free the (legal) imagination is acknowledged. They watch as the little mermaid fashions, through her strategic, yet constrained,[115] manipulation of the flaws in the weave, a 'new vocabulary

108. Berns, n 9 above, p 34.
109. *R* v *S(RD)* [1997] 3 SCR 484, para 16.
110. Minow, n 94 above, p 1215.
111. *R* v *S(RD)* [1997] 3 SCR 484, para 42.
112. C L'Heureux-Dubé 'Making a Difference: The Pursuit of a Compassionate Justice' Notes for an Address to the International Bar Association, Amsterdam, Netherlands, IBA Joint Session on 'Women on the Bench', 20 September 2000, on file with author.
113. Wilson, n 44 above, p 522; and K Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) LS 53 at 65. On bias, see further L M Antony 'Quine as a Feminist: The Radical Import of Naturalised Epistemology' in L M Antony and C Witt (eds) *A Minds of One's Own: Feminist Essays on Reason and Objectivity* (Oxford: Westview Press, 1993); Resnik, n 85 above; and P Cain 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 SCLR 1945.
114. Berns, n 9 above, p 8.
115. On the judge as (constrained) activist able to make strategic choices, see Kennedy, n 10 above, pp 182–184 and, generally, pp 157–212.

of justice, and a new understanding of what it means to judge'.[116] This entails re-clothing the Emperor with new(er) clothes for a re-imagined Hercules; clothes that enable and require the judge to engage with the context of the case before him;[117] to recognise and include alternative perspectives, understandings and experiences in his decision-making; to 'listen with connection' and 'enter the skin of the litigant'; to infuse his conception of justice with care;[118] and, most importantly, to bare his self.

CONCLUSION

In Andersen's fairy tale, the little mermaid leaves her world and sells her voice to walk alongside her prince. Silent and mutated she waits for her prince to fall in love with her. When he does not, she is faced with an empty choice – her life or that of her prince – her fate is fixed.[119] Her story ends with the haunting implication that 'cutting out your tongue is still not enough. To be saved more is required: self-obliteration, dissolution'.[120]

Sinister and uncomfortable echoes of the little mermaid's self-mutilation and difference continue to pervade the story of the woman judge: '[w]e are still expected to take our place on the bench, suppress our experiences, sit quietly and talk softly and politely.'[121] In the deafening silence,[122] the implications of the gender dimension to adjudication continue to be evaded, the woman judge represented as somehow androgynous, her difference – whatever that might be – denied, lost in the imposition of a gender-neutral debate.

The image of woman judge as the little mermaid is not invoked to establish, articulate or represent the essential difference of the woman judge, or to suggest

116. Berns, n 9 above, p 210.

117. On contextualised judging, see *R* v *S(RD)* [1997] 3 SCR 484; B Wilson in *R v Morgentaler* (1998); and *R v Lavallee* (1990), considered in detail by Elizabeth Halka in 'Madam Justice Bertha Wilson: A 'Different Voice' in the Supreme Court of Canada' (1996) 35(1) Alberta LR 242; and Brenda Hale's recognition of the need for a 'deeper' and contextual enquiry into a mother's 'implacable hostility' or opposition to contact in *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48; B Hale 'The view from Court 45' (1999) 11(4) CFLQ 377 at 380–384. This issue has been recently considered by the Court of Appeal, which held, inter alia, that 'Family judges and magistrates needed to have a heightened awareness of the existence of and consequence on children of exposure to domestic violence between their parents or other partners': *Re L (a child) (contact: domestic violence); Re V (a child) (contact: domestic violence); Re M (a child) (contact: domestic violence); Re H (children) (contact: domestic violence)* [2000] 2 FLR 334.

118. See generally Berns, n 9 above; and Resnik, n 85 above. On 'entering the skin of the litigant', see Wilson, n 44 above; Cain, n 116 above on 'listening with connection'; and on the necessary relationship between justice and care, see West, n 53 above, ch 1.

119. Andersen, n 1 above, pp 69–70. Cf Disney's explicitly happy ending where the little mermaid marries her prince and sails off into the distance under a rainbow and Oscar Wilde's reuniting of the Fisherman, his soul and the little mermaid at the end of his short story (n 3 above, p 234).

120. Warner, n 7 above, p 398; and generally on the little mermaid, ch 23.

121. L'Heureux-Dubé, n 90 above, p 30.

122. James *'Say Something' on Laid* (London: Phonogram Ltd, 1993).

the existence of a different, mermaid voice.[123] Rather, its purpose is to acknowledge the prevailing *construction* of the woman judge as different and to confront the implications of that construction on the judiciary and the act of judging. This requires us to challenge the constraining image of the judge that continues to have a normative hold on our legal imagination, to create space for the emergence of counter-images of judging. We need to release the woman judge from the adjudicative paradox, from the pressure simultaneously to effect the radical transformation of the judiciary whilst suppressing her irritant potential through conformity. The role of the judge must be re-imagined as one in which women and members of other currently underrepresented groups can comfortably and constructively occupy.

Thus, unlike the little mermaid, the woman judge need not rise up and kill her prince or sacrifice herself to save him; her fate is, as yet, unknown. As she wears the Emperor's new clothes, distracting our attention away from superheroes, exposing and exploiting their flaws, she continues to offer the opportunity for re-envisioned understandings of the judge and adjudication. She places her story in our hands – its ending here only the beginning of a larger story. In keeping with the tradition of fairy tales, it brings neither closure nor completeness, but promises and prophecies of new adventures,[124] the challenge of beginning a new story, to re-imagine the fairy tale and the judge.

123. The question of whether women judges speak with a 'different voice' remains hotly disputed among academics and women judges themselves, especially in the US, where attention has focused in particular, but not exclusively, on Sandra Day O'Connor. See, for example, S Sherry 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 Va LR 543; but cf S D O'Connor 'Portia's Progress' (1991) 66 NYULR 1546; E Martin 'Women on the Bench: A Different Voice?' (1993) 77 Judicature 126; S Davis 'The Voice of Sandra Day O'Connor' (1993) 77 Judicature 134; R Ginsburg 'Remarks for California Women Lawyers, September 22, 1994' (1994) 22 Pepperdine LR 1; J M Aliotta 'Justice O'Connor and the Equal Protection Clause: A Feminine Voice?' (1995) 78 Judicature 232; S Abrahamson 'The Woman has Robes: Four Questions' (1984) 14 Golden Gate ULR 489; and, more recently, a collection of papers from the Symposium and Workshop on Judging at the University of California, Berkeley, Spring 2000 (2001) 16 Wis Women's LJ 1 onwards. For a Canadian perspective, see for example, Wilson, n 44 above; and Halka, n 117 above; and in the UK, see, for example, Hale, n 44 above; and McGlynn, n 2 above, p 184.

124. Warner, n 7 above, p xvi.