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# Undressing the Judge: Feminism, Adjudication and the Legal Imagination

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## Abstract

This thesis explores the legal imagination. In particular, it focuses on the role of imagination in shaping and informing understandings of law, justice and adjudication. It seeks to provoke and generate new insights about the processes and substance of legal decision-making through the invocation of the idea of difference in the context of debates about the role and composition of the judiciary. Harnessing the power of literature – its images and stories – the thesis highlights the extent to which imagination is involved in our perceptions and evaluations of judging and the judge. To this end it deploys literary examples and techniques, alongside the destabilising potential of feminist method and insights, to identify and disrupt the imaginative hold of particular images and narratives about law and adjudication. Debate about difference brings into sharp relief the extent to which prevailing understandings of the judge are enmeshed in notions of sameness and uniformity. This thesis invites us to take seriously images of the judge, so familiar and two-dimensional as to belie their unacknowledged grip on our imaginative and cognitive processes. It encourages us to disturb such images and the assumptions underlying them with a view to imagining new conceptions of the judge and unearthing a broader understanding of legal decision-making. Put another way, difference becomes not an end in itself but rather a means – a route – to engendering diverse perspectives on adjudication, justice and law, to 'undressing the judge'.

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## Declaration

An earlier version of chapter one was published in *Legal Studies* (2002) under the title 'Representations of the (woman judge): Hercules, the little mermaid, and the vain and naked Emperor' and chapter 3, 'Reassessing Portia: The Iconic Potential of Shakespeare's Woman Lawyer', appeared in the 2003 volume of *Feminist Legal Studies*.

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# Introduction

This thesis explores the legal imagination. Its focus is on the role of imagination in shaping and informing understandings of law, justice and adjudication. It invokes the idea of difference in the context of debates about the role and composition of the judiciary to provoke and generate new insights about the process and substance of adjudication. Harnessing the power of literature and the images and stories of which it is composed the thesis highlights the extent to which imagination is involved in our perceptions and evaluations of judging and the judge.

'Legal imagination' is in essence a term of art used to capture ideas and images about law that reside primarily in the realm of the imagination.[1] My contention is that our understandings and interpretations of law are as much derived from the imagination as they are from what is conventionally considered as rational thought or, to put it another way, I question the extent to which law is,

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[1] My understanding of the 'legal imagination' is perhaps close to an imperfect amalgamation of the differing – although not mutually exclusive – approaches developed by James Boyd White in *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown & Company, 1973) and Ian Ward in *Shakespeare and the Legal Imagination* (London: Butterworths, 1999). Briefly, White seeks to establish law as 'art' and "the lawyer [as in his] heart a writer [or artist] ... who lives by the power of his imagination" through an "advanced course in reading and writing, a study of what lawyers and judges do with words" (at xxxi, 758). Ian Ward, on the other hand, seeks to deploy literature's "essential role in fashioning a mutable legal imagination" in order to consider, *inter alia*, how far "the legitimacy of law, the extent to which we accept it as valid, whether it be rational, providential or simply effective, rest[s], in the final analysis, in our collective and individual political [or legal] imagination" (at 1-2).

narrowly conceived, a rational, disembodied project. To this end, the thesis deploys literary examples and techniques to identify and disrupt the imaginative hold of particular images and narratives about law, specifically those which surround and infuse debates about adjudication and the legal decision-making process.

Of crucial significance in this context are current debates about gender representation in the judiciary. Throughout the western world the slowly gathering experience of women judges in hitherto male-dominated legal systems is provoking extensive commentary about the extent to which women judges can or should make a difference to the style and substance of legal decision-making. This focus on difference brings into sharp relief the extent to which prevailing images of the judge are enmeshed in notions of sameness and uniformity. Debate about difference both highlights the particularity – specifically the gendered particularity – of conventional understandings of the judge and threatens and exposes our allegiance to them. Difference invites us to take seriously our images of the judge, images which are, at one and the same time, so familiar and two-dimensional as to belie their unacknowledged grip on our imaginative and cognitive processes. It encourages us to disturb such images and the assumptions underlying them with a view to unearthing new conceptions of the judge and a broader understanding of legal decision-making. In other words, difference, in this thesis, becomes not an end in itself but a means – a route – to engendering diverse perspectives on adjudication, justice and law.

My methodological stance is eclectic and interdisciplinary, invoking a range of analytical and strategic approaches. Legal doctrine is presented both in its conventional form and, at the same time, subject to literary and critical analysis. Dominant understandings of the judge and legal decision-making – including ideas of legal reasoning and judgment – are placed alongside and combined with an enquiry drawing extensively on the texts and techniques of law and literature, while also developing the destabilising potential of feminist legal theory.

Scholarship at the intersection of law and literature has grown exponentially since its "renaissance" in the early 1980s.[2] Although described variously as the law and literature 'movement', 'debate' or 'enterprise', their affiliation and mutual affection has not established a monolithic approach or method, but rather a number of indistinct and related strands or themes, which combine and diverge in their imaginative use of literature and its techniques to yield provocative and substantial insights on law, justice and adjudication.

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[2] J Smith 'The Coming Renaissance in Law and Literature' (1979) 30 *J Legal Educ* 13 in I Ward *Law and Literature – Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995) 206. The recognition of the potential two-way interaction between law and literature is by no means a recent occurrence, see, e.g., Benjamin Cardozo 'Law and Literature' (1925) 14 *Yale L Rev* 699. The impetus for its renaissance – or rebirth – is, Ward suggests, commonly held in hindsight to be the publication of James Boyd White's *The Legal Imagination* in 1973 (*ibid*) (at 206). However, it was not until the early 1980s that there was a marked increase in scholarship in this area. For a general introduction to law and literature approaches, see, e.g., Ward, above, chap 1. Recent works on law and literature 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).

Nevertheless, a distinction is usually drawn between law *in* literature and law *as* literature. Briefly, the former explores the significance for law of varied literary texts – from the 'legal' stories of, for example, Charles Dickens' *Bleak House*, Franz Kafka's *The Trial*, and Susan Glaspell's *Jury of her Peers* to the less explicitly jurisprudential tales of Thomas Hardy's *Tess D'Urberville*, J K Rowling's *Harry Potter* and Beatrix Potter's *Peter Rabbit*.[3] In comparison, 'law as literature' seeks to apply the techniques of literary analysis to law – including, *inter alia*, its focus on storytelling, the aesthetic, rhetoric, deconstruction and interpretation.[4]

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[3] See, e.g., D H Lowenstein 'The Failure of the Act: Conceptions of Law in *The Merchant of Venice*, *Bleak House*, *Les Miserables*, and Richard Weisberg's *Poethics*' (1994) 15 *Cardozo L Rev* 1139; R West 'Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner' (1985) 99 *Harv L Rev* 1149; P Bryan 'Stories in Fiction and Fact: Susan Glaspell's *A Jury of her Peers* and the 1901 Murder Trial of Margaret Hossack' (1997) 49 *Stan L Rev* 1293; M Williams '"Is Alec a Rapist?" – Cultural Connotations of 'Rape' and 'Seduction' – A Reply to Professor John Sutherland' (1999) 7(3) *Fem LS* 299; W MacNeil '"Kidlit" as "Law-and-Lit": Harry Potter and the Scales of Justice' (2002) 14 *Cardozo Stud L & Lit* 545; and I Ward 'Children's Literature and Legal Ideology' in Ward, *ibid*, 90.

[4] The law *as* literature approach is traditionally associated with scholarship of James Boyd White, Stanley Fish and Richard Weisburg (see respectively, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990); *Is There a Text in this Class?: The Authority of Interpretative Communities* (Cambridge, Mass.: Harvard University Press, 1980) and *Poethics: and Other Strategies of Law and Literature* (New York: Colombia University Press, 1988)) who might be regarded as the first generation of the modern law-as-literature tradition. Subsequently however, burgeoning law as literature/narrative scholarship has developed and, at times, diverged from their seminal insights in the pursuit of diverse and promising directions see, e.g., J B Baron & J Epstein 'Is Law Narrative?' (1997) 45 *Buff L Rev* 141; J B Baron 'The Many Promises of Storytelling in Law: An Essay Review of *Narrative and the Legal Discourse: A Reader in Storytelling and the Law*' (1991) 23(1) *Rutgers LJ* 79; K Abrams 'Hearing the Call of Stories' (1991) 79 *Cal L Rev* 971; P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (New Haven & London: Yale University Press, 1996). For criticism of the use of storytelling and narrative in law see, e.g., D A Farber & S Sherry 'Telling Stories out of School: An Essay on Legal Narratives' (1993) 45 *Stan L Rev* 807 and rebuttal by J

Both of these complementary and interdependent approaches of law and literature methods are strategically deployed within this thesis. In it, literary imagery and stories, together with the insights derived from the idea of law as narrative – especially those exploring the symbolic dimension to images of the judge and notions of judging – highlight the role of the aesthetic, fairy tale, and myth in our understandings and legitimation of legal decision-making and adjudication.[5] Its invocation of fairy tale and myth, deliberately seeking not only to mirror and, perhaps, unsettle their use by other legal commentators but, more importantly, to harness the idiosyncratic promise and potential of such narratives.[6]

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Baron 'Resistance to Stories' (1994) 67(2) *S Cal L Rev* 255; and R Posner *Law and Literature: A Misunderstood Relation* (Cambridge, Mass.: Harvard University Press, 1988) and review by J B White 'What can a Lawyer Learn from Literature?' (1989) 102 *Harv L Rev* 2014.

[5] On the relationship between law and aesthetics, and the implication of imagery in law's authority see, e.g., C Douzinas & L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago, Ill.; University of Chicago Press, 1999) esp ch 1; A Geary *Law and Aesthetics* (Oxford: Hart Publishing, 2001); P Schlag 'The Aesthetics of American Law' (2002) 115 *Harv L Rev* 1047 and P Goodrich 'Specula Laws: Image, Aesthetic and Common Law' (1991) 2(2) *Law & Critique* 233.

[6] See, e.g., Ronald Dworkin's adoption of Hercules as his ideal judge in *Taking Rights Seriously* (London: Duckworth, 1977) ch 4; the 'Nightmare and Noble Dream' of H L A Hart in '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) 123; and Simon Lee's concise assessment and rebuttal of adjudicative fairy tales, 'Noble Dreams' and 'Nightmares' in *Judging Judges* (London: Faber & Faber Ltd, 1988) chs 1-5. On the purpose and potential of fairy tales and myth see M Warner *From the Beast to the Blonde: On Fairy Tales and their Tellers* (London: Vintage, 1995) and R Cavendish (ed) *Mythology: An Illustrated Enyclopedia of the Principal Myths and Religions of the World* (London: Little, Brown & Company, 1992) respectively.

A cynic or sceptic of law and literature methods might argue that reading and writing about Hans Andersen's fairy tales and Shakespeare's Portia is almost inevitably far more enjoyable and interesting – at least on first impressions – than reading and writing about, say, the intricacies of the European Community's comitology procedure or the constitutional ramifications of Welsh devolution.[7] The implication being, perhaps, that the literary diversion of law and literature, while providing the legal scholar with pleasant recreation or an intellectual breather (for which most likely any – if not all – legal scholars would be grateful) is, in fact, distinct from the demands of their 'real' job or scholarship.[8] Indeed a difficulty with the kind of method I am adopting is that the invocation of the images and stories of literature, fairy tale and myth is not easily susceptible to traditional evaluations according to standards of integrity, legitimacy and academic rigor. The use of such images cannot be substantiated in any probative sense: moreover, to attempt to do so is to misunderstand their purpose both here and in themselves. Their role, in this thesis, is to highlight the imagination as an important site of discursive/political struggle and to trace the extent to which it may be harnessed to ideological purposes through the appeal of attractive but

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[7] See, e.g., B Bix *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 2nd edn, 1999) 221.

[8] For an interesting related discussion in the context of children's literature and, in particular, the academic/adult response to girls' school stories see, e.g., R Auchmuty 'The Critical Response' in S Sims & H Clare (eds) *The Encyclopaedia of Girls' School Stories* (Aldershot: Ashgate, 2000) 19 (volume 1 of a two-volume Encyclopaedia of School Stories edited by R Auchmuty and J Wotton); and further R Auchmuty *A World of Girls: The Appeal of the Girls' School Story* (London: The Women's Press Ltd, 1992) and its sequel *A World of Women: Growing up in the Girls' School Story* (London: The Women's Press Ltd, 1999).

ultimately constraining images. The object is to offer counter-images and narratives, which act as stimuli or catalysts to provoke thought and through which perhaps to engender a better understanding of lawyering and adjudication.

In addition to this literary approach, this thesis also draws on the strategic insights of feminist legal method and analysis.[9] However, despite its deployment and exposition of aspects of a feminist agenda – in particular, feminist understandings of difference, embodiment and rationality – the thesis is not exclusively, or even primarily, a 'feminist' project, in the sense of addressing and readdressing aspects of gendered injustice. That said, its engagement with feminist legal scholarship is one of happy convenience, affection and, hopefully, mutual benefit. The purpose is to utilise feminist perspectives and their irritant and unsettling potential as portals – means – through which to trouble the imaginative hold of traditional accounts of adjudication and to begin to envisage, with a view to making real, alternative understandings of the judge and judging.[10]

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[9] On the relationship between feminism, law and literature see, e.g., R West 'Law, Literature and Feminism' in *Caring for Justice* (New York: New York University Press, 1997) 179; I Ward 'Law and Literature: A Feminist Perspective' (1994) 2(2) *Fem LS* 133 and C Heilbrun & J Resnik 'Convergences: Law, Literature, and Feminism' (1990) 99 *Yale L J* 1913.

[10] See, e.g., but not exclusively, C Gilligan *In a Different Voice – Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982; repr 1993); M Gatens *Imaginary Bodies – Ethics, Power and Corporeality* (London: Routledge, 1996); and G Lloyd *The Man of Reason: Male and Female in Western Philosophy* (London: Methuen, 1984).

*Outline of Chapters*

Literature, feminism and adjudication combine, in the opening chapter, in the characters of Hercules and Hans Andersen's little mermaid and naked emperor as an exploration of the paradox underlying calls for a more diverse judiciary provides a starting-point from which to consider '(Re)presentations of the (Woman) Judge'. It begins to 'undress' and probe the image of the Herculean judge, which inhabits the legal imagination, arguing that while we may dismiss him as a fairy tale we routinely deny this to ourselves and to others. This not only ensures the normative survival of Hercules but also constrains counter-images of the judge, including the woman judge, who becomes almost a contradiction in terms. Like the little mermaid, it seems she must sell her voice for partial acceptance in her prince's world.

This image of silencing, so vividly captured in Andersen's tale, provides the impetus for the second chapter, 'Exorcising the Different Voice'. It explores feminist legal scholars' attempts to identify the little mermaid's siren call – the woman judge's perceived difference – and its continuing challenge for law through an exploration of the narrative of the different voice as it emerges from Carol Gilligan's *In a Different Voice*.[11] It offers an alternative understanding of the different voice as a fictional device. As such, its ongoing promise lies not in its difference *per se*, but rather in its ability to render contingent particular, but dominant, forms of legal reasoning by highlighting the limits of conventional

[11] Gilligan, *ibid.*

accounts of adjudication and the judge. 'Reassessing Portia', develops this insight through a meditation on Portia, the heroine of Shakespeare's *The Merchant of Venice*. In a reassessment of her continuing role as a metaphor for the woman lawyer, the chapter tracks her progression from an idol to a myth, before finally (re)establishing Portia as an icon – a window – through which feminist legal scholars can imagine alternative adjudicative landscapes.

In fact, chapter three marks a watershed in the development of the thesis, a turning point in the alternative adjudicative story that is unfolding. As Portia's story begins to fade there is a definite change of gear and pace. The revised direction and plot within the thesis reflects a recognition that traditional accounts of adjudication haven't been telling the whole story; that there is much more going on when judges judge. Thus, in the remaining chapters, the thesis moves through the portal – highlighted by the earlier chapters' focus on difference – to explore diverse, previously overlooked or unimaginable adjudicative techniques and approaches with a view to yielding new understandings of the judge and hitherto hidden aspects of legal decision-making. 'Unpicking the Judicial Quilt', considers the judge's use of narrative as persuasion and highlights the power of storytelling through the tale of the judicial quilt. As the tale unfolds, combining a traditional exposition of the "patchwork quilt" which represents the law on tortious recovery for negligently inflicted pure psychiatric harm with an exploration of its subversive subtext (the unsaid of the judge's story) the convergence of law and

narrative becomes clear.[12] As the chapter comes to an end, we recognise that who the storyteller is matters, not only for the story being told but also for the continuing character and shape of the judicial quilt – the law – itself.

In chapter five, 'Aesthetics, Vicarious Liability and the Judge', the expansion of the law on vicarious liability in relation to institutional sexual abuse provides a backdrop against which to explore the relationship between the judge and the aesthetic. Drawing on the work of Pierre Schlag, it suggests that this legal development reveals as much about the persuasive appeal, legitimating effect, and ongoing attraction of particular legal aesthetics, as it does about the law on vicarious liability.[13]

Finally, in its concluding chapter the thesis returns to feminist critiques of the judge and adjudication and, in particular, to their emphasis on care, connection and empathy. Through the stories of Jodie and Mary Attard and Oscar Wilde's *The Happy* Prince, 'Judging Connection' re-examines the imaginative hold of particular, yet restrictive, images of the judge and judging. It becomes clear that the Herculean judge is not merely unattainable, but increasingly undesirable. The detached, disembodied, and impassive judicial superhero has had his day and in his place an alternative image of the judge has begun to emerge; one who seeks connection within detachment and justice

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[12] Lord Steyn *White* v *Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509, 1547.

[13] Schlag, n above.

through care, who recognises the power and ubiquity of empathy and who, silently, weeps as she begins to judge.

## Chapter 1

## REPRESENTATIONS OF THE (WOMAN) JUDGE: HERCULES, THE LITTLE MERMAID, AND THE VAIN AND NAKED EMPEROR

### Introduction

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

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

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[1] H C Andersen 'The Little Mermaid' in N Lewis (trans) *Hans Andersen's Fairy Tales* (London: Penguin, 1981) 41, 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 long 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 his wedding to a neighbouring princess, her sisters rise from the sea and offer the little mermaid an escape from her imminent death – 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) 16 quoted in C McGlynn *The Woman Lawyer – Making the Difference* (London: Butterworths, 1998) 7. Belva Lockwood went on to become the first woman admitted to practice before the US Supreme Court in 1879. Moreover, in 1884, despite the absence of universal suffrage, she ran for President, garnering 4149 votes (S O'Connor 'Portia's Progress' (1991) 66 *NYU L Rev* 1546, 1548).

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 chapter tells a story of the woman judge.[4] It argues 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.

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[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) 203, 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, i.e., love) returns and tempts him irrevocably away from the mermaid's side with tales of dancing feet.

[4] Although distinguishing and acknowledging the *woman* judge risks reinforcing man as the norm, it 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, e.g., McGlynn (n 2 above, 4) and M Thornton *Dissonance and Distrust: Women in the Legal Profession* (Oxford: Oxford University Press, 1996) 5 adopting a similar approach. However, cf Regina Graycar 'The Gender of Judgments: An Introduction' in M Thornton (ed) *Public and Private – Feminist Legal Debates* (Oxford: Oxford University Press, 1995) 262, 264-5 and 'The Gender of Judgments: Some Reflections on "Bias"' (1998) 32 *UBCL Rev* 1 arguing against the prefix 'woman' which, she suggests, serves to "disempower what would otherwise be a position of power" (at 3). 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, e.g., R Collier '"Nutty Professors", "Men in Suits" and "New Entrepreneurs": Corporality,

The exploration of the woman judge's story through fairy tales and myth challenges previously unacknowledged, possibly unconsidered, images of the (woman) judge. Far from being simply foolish childhood stories lacking integrity or foundation, fairy tales and myths offer possibilities for insight; because they are not mere 'fictions', they may reveal a "truth of a different or deeper kind".[5] 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".[6] They offer a literary pathway, a conduit or road to another world, a window onto a future as yet unenvisaged.

The use of such images, of course, cannot be substantiated in any probative sense. The idea is to offer them as stimuli, 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 may be harnessed to ideological purposes through the appeal of attractive but ultimately constraining images.[7] It emphasises too

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Subjectivity and Change in the Law School and Legal Practice' (1998) 7 *Social & Legal Studies* 27.

[5] R Cavendish (ed) *Mythology: An Illustrated Enyclopedia of the Principal Myths and Religions of the World* (London: Little, Brown & Company, 1992) 8.

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

[7] On the legal imagination see, e.g., J B White *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown & Co, 1973) esp ch 6 and I Ward *Shakespeare and the Legal Imagination* (London: Butterworths, 1999) 1-19. My account of the legal imagination is perhaps best seen as an imperfect amalgamation of these two approaches. Adopting White's implicit challenge – through his "imaginative and literary" understanding of law as an "activity" and the lawyer as a "writer [who] trust[s] and follows [his]

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.[8]

In this context, this chapter re-examines the powerfully attractive yet ultimately suffocating image of the Herculean judge of our legal imagination.[9] It argues 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 faced with the need to shed her difference and fit the fairy tale must, like the little mermaid, trade her voice for partial acceptance in the prince's world. So viewed, the Herculean image of the judge 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

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own curiosity" and imagination (at 758, xxxv) – to Mr Micawber's misapprehension that the lawyer's "mind is not at liberty to soar to any exalted form of expression" (C Dickens *David Copperfield* (London: Penguin Books, 1979) 628) I, like Ward, strategically deploy the insights of literature, and especially fairy tale and myth, in order to identify and disrupt the imaginative hold of particular images and narratives of the judge and judging.

[8] See, e.g., P Schlag 'The Aesthetics of American Law' (2002) 115 *Harv L Rev* 1047; P Goodrich 'Specula Laws: Image, Aesthetic and Common Law' (1991) 2(2) *Law & Critique* 233; and C Douzinas & L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago, Ill.; University of Chicago Press, 1999). On the aesthetic dimension of both the law and the judge, see further, chapter 5, 238-249, below.

[9] Hercules is, among other things, the name given by Ronald Dworkin to his fictitious 'superjudge' in *Taking Rights Seriously* (London: Duckworth, 1977) 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

the varied perspectives of 'others' will make a difference – are ultimately defeated by the (our) continuing infatuation with Hercules. Whereas 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, 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 to confront fully its implications. In response, this chapter seeks to 'undress' the judge, to flush out images of adjudication that deter or prevent women from joining the judiciary and constrain their potential within it. It highlights not only the role of the imagination in existing conceptions of adjudication but also 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.

The chapter begins by tracking the actuality of women's exclusion from and marginalisation within the judiciary as well as traditional explanations for this. 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

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Hercules and his are necessarily correspondent on all points. See further n 85 below, and surrounding text.

(whether biologically or socially derived).[10] It then goes on to consider the judge who inhabits the traditional legal imagination, akin to the Herculean superhero of ancient mythology and modern comic strips. Here it is argued that, despite his mythical status, the Herculean judge continues to exercise enormous normative power, promulgating and perpetuating a particular worldview by calling into service notions of objectivity, neutrality and detachment. This ideological figure is necessarily male and the internalisation and collective denial of this gender dimension effects the exclusion and/or silencing of the woman judge.[11] Finally, the idea of the woman judge is developed 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.

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[10] Although this chapter 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) 87, 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.

[11] 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. See further, n 102 below and surrounding text.

## '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 female law students enrolling than men. In 2000, women law students continued to achieve significantly more firsts and upper-second class degrees.[12] 58.8% of trainees registered in the same year were women, reflecting a 46.7% change between 2000/2001 and 1990/1991 in female trainees, compared with a 20% increase in male trainees.[13]

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, 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.[14] Clare McGlynn rejects it as 'simplistic', overlooking the institutional discrimination

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[12] 52% of female students compared with 46.5% of male students (B Cole *Trends in the Solicitors' Profession – Annual Statistical Report 2001* (London: Law Society, 2000) 9, 54). See generally, Clare McGlynn *The Woman Lawyer* (n 2 above), which 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.

[13] Cole, *ibid*, 59-60.

[14] H Sommerlad 'The Myth of Feminisation: Women and Cultural Change in the Legal Profession' (1994) 1 *Int J of the Legal Profession* 31, 34. The Lord Chancellor's Department (as was) predicts that women will make up 25% of the bench by 2010 (120 years after they became eligible). No date is given as to when to expect equality (K Malleson 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Fem LS* 1, 16).

present both at the Bar and within the judicial appointments system.[15] 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 23.9% of partners were female in July 2001.[16] In fact, 82.9% of men compared to 56.6% of women with 10-19 years experience are partners or sole practitioners.[17] Meanwhile, women's presence at the bar has increased from 8% in 1970 to 46% in 2000.[18] Although there is the highest proportion of female silks ever, only 9.8% of applicants for silk in 2003 were women, despite 16.2% of women at the Bar having more than 15 years experience (although 23.1%, or 9 out of the 39 applications were successful).[19] 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, Arden and Smith sit in the Court of Appeal and, in the High Court, there are six female judges.[20] Despite figures contained in the 2001/2002 edition of the Judicial Appointments Annual Report, indicating that the appointment of women to the judiciary in that period

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

[16] In 2000-2001, 54.7% of new qualified solicitors were female (Cole, n 12 above, 6,19).

[17] Cole, *ibid*, 20.

[18] Lord Irvine, 'Speech to the Association of Women Solicitors' (London, 23 March 2001), reproduced at www.lcd.gov.uk/speeches/2001/lc230401.htm.

[19] LCD 'Queen's Counsel 2003' www.lcd.gov.uk/judicial/qc03/silk03fr.htm; LCD Press Notice 'Rising Trend in Numbers of Women and People from Ethnic Minorities Appointed as Judges – New Official Figures' 378/02, 30 October 2002.

[20] This figure is correct as of 1 March 2003 and is taken from the Lord Chancellor's Department website at www.lcd.gov.uk/judicial/womjudfr.htm.

rose to 34.4% from 28.4% the previous year,[21] only 6.25% of the senior judiciary is female, with women making up a mere 14.3% overall.[22]

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 alongside more structural forms of institutional discrimination within the legal

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[21] Overall, in 2001/2002, 31.7% of judicial applicants were female, compared with 25.6% and 24.2% in 2000/01 and 1999/2000 respectively. 23.5% of these applicants were successful in comparison to 20.8% of male applicants (LCD Press Notice, n 19 above). The Judicial Appointments Annual Reports 2001/2002, 2000/2001, 1999/2000 and 1998/1999 are reproduced at www.lcd.gov.uk/judicial/jaarepfr.htm.

[22] Figure taken from LCD website (n 20 above). This compares to approximately 25% worldwide (U Schultz 'Introduction: Women in the World's Legal Professions: Overview and Synthesis' in U Schultz & G Shaw (eds) *Women in the World's Legal Professions* (Oxford: Hart Publishing, 2003) xlvi, xxxvii-xxxviii). Whilst the High Court of Northern Ireland does not have any female judges (xxxiii), in Australia women make up approximately 21% of the bench (Australian Institute of Judicial Administration. This figure is correct as of 30 May 2002 and is 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, which includes 3 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 (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, and more than 80% of those entering the French judiciary, although significantly in the higher ranks men continue to outnumber women 2:1 (A Sage 'Women on Top in Race to Sit on the Bench' *The Times* June 3 2003).

profession (for example, working hours which are not generally family-friendly) to prevent legal mermaids from reaching its top levels.[23]

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”,[24] the class, age, education, sex and, most recently, race of the judiciary have been subject to vigorous scrutiny.[25] 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, who is “too old” and who “just [doesn’t] know what is going on in the world”.[26] Further, this homogenous group has

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[23] On a hostile legal culture see generally, U Schultz & G Shaw, *ibid*; H Sommerlad & 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 & J Brockman ‘Barriers to Gender Equality in the Canadian Legal Establishment’ (2000) 8 *Fem LS* 169 (Canada); J Resnik ‘Gender Bias: From Classes to Courts’ (1993) 45 *Stan L Rev* 2195 (US).

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

[25] See, e.g., 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 & Brockman, n 23 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).

[26] ORC International ‘Public Perceptions of Working Court Dress in England and Wales’ (London: Lindsay Hermans, October 2002) 11. 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. See further, Malleson, n 15 above,

been able to "self-perpetuate"[27] 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.[28]

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

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103-5, 233-4. Whether his views on adjudication have become less traditionally 'Griffithesque' is a matter considered below.

[27] Griffith, n 24 above, 22.

[28] Robert Sayer, former Law Society President, in C Palmer 'A job, old boy? The school ties that still bind' *The Observer* 11 June 2000. The Law Society announced its boycott of the system of 'secret soundings' in September 1999 (Law Society Press Notice 'Outdated System for Judicial Appointments' 28 September 1999), a move severely criticised by Lord Irvine as a 'disservice' to Law Society members (LCD Press Notice 'Increasing Diversity in Judicial Appointments' 385/00, 31 October 2000). When Lord Chancellor, Lord Irvine repeatedly reaffirmed his commitment to the 'consultation process', distinguishing it from the non-existent albeit 'sinister' sounding term 'secret soundings'. See, e.g., LCD Press Notice 'First Judicial Appointments Commissioner Named' 103/01, 15 March 2001; Lord Irvine 'Speech to the 1998 Women Lawyer Conference' (London, 25 April 1998) and 'Speech to the Minority Lawyers' Conference' (London, 29 November 1997) both reproduced in full at www.lcd.gov.uk/speeches.htm. See also the recommendations of Sir Leonard Peach in *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales* (London: Lord Chancellor's Department, 1999) 19-21, reproduced at www.lcd.gov.uk/judicial/peach/indexfr.htm. The role of consultation is identified as one of the 'issues for ongoing debate', alongside the effective promotion of diversity, the criterion of 'merit' and the role of the government in the appointment of the judiciary and silks, in the first annual report of the Commission for Judicial Appointments (Commission for Judicial Appointments *Annual Report 2002* (London: Lord Chancellor's Department, 8 October 2002) 21-27, available via the LCD website).

operate under a shroud of mystique, dependent on "patronage, being noticed and being known".[29] Appointments to the High Court and above remain largely based on consultation. The consultee, described by Lord Irvine as one of an "informed many" as opposed to a "favoured few" among the judiciary and legal profession, is asked to assess the overall suitability of the candidates based on 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]

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[29] 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, 91. On the recent developments in the judicial appointments system, see LCD Press Notice 'Lord Chancellor Welcomes the First Report by Judicial Appointments Commissioner Sir Colin Campbell' 345/02, 8 October 2002.

[30] As defined by Lord Irvine, as Lord Chancellor, in his speech to the 1998 Women Lawyer Conference (n 28 above). On the consultation process generally, see www.lcd.gov.uk/judicial/appointments/jappinfr.htm.

[31] McGlynn, n 2 above, 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) 267. The rejection of Kishoree Pau's application to join the judiciary may be a case in point. A senior solicitor with over 17 years experience of practice in London, Pau applied to join the bench in 1998. Her application was refused the following year. At her feedback interview, she was told she was not only too young (she was 40) – but also that she "did not speak loudly enough" (R Verkaik 'Case Study: Rejection on "Trivial Points" Breeds Disillusionment' *The Independent* 8 October 2002).

In March 2001, the then Lord Chancellor, Lord Irvine, following a recommendation in the Peach Report,[33] established the Commission for Judicial Appointments to review

> the appointment processes of judges and Queen's Counsel (Silk) in England and Wales ... and report on the appropriateness and effectiveness of the criteria and the procedures for selecting the best candidates, on the extent to which the candidates are assessed objectively against the criteria for appointment, and on the safeguards against discrimination on the grounds of race or gender.[34]

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[33] n 28 above, 27. At 5.45pm on 12 June 2003, the Prime Minister, Tony Blair, announced the creation of a new Department for Constitutional Affairs. It will incorporate most of the responsibilities of the former Lord Chancellor's Department. However, there will be new arrangements for judicial appointments; the Lord Chancellor will no longer be a judge and Speaker of the House of Lords, and the post itself will be abolished once the reforms are in place. Further proposals, including the establishment of an independent Judicial Appointments Commission on a statutory basis, to recommend candidates for the judiciary, the creation of a Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords and the reform of the Speakership of the House of Lords, will be discussed following the Government's publication of a consultation paper on 14 July 2003 (10 Downing Street Press Notice 'Modernising Government – Lord Falconer appointed Secretary of State for Constitutional Affairs' 12 June 2003). Derry Irvine, seen, by some, as a crucial obstacle to reform, resigned as Lord Chancellor following this announcement and has been replaced by Lord Falconer, who will retain the title of Lord Chancellor until it is abolished by statute. On Wednesday 18 June 2003, the Prime Minister responded in the House of Commons to critics of his proposals who, he suggested, "want to fight to the death to keep the Minister in charge of our court system in a full-bottomed wig, 18th century breeches, and women's tights, sitting on a woolsack rather than running the Court Service" (HC Deb vol 407(111) col 357-372 18 June 2003, 363). For comment on the proposals see, e.g., R Verkaik 'Out goes Irvine – and a Judicial Function Untouched Since Saxon times' *The Independent* 13 June 2003; P Wintour & C Dyer 'Blair's Reforming Reshuffle' *The Guardian* 13 June 2003; J Joseph 'Tories Unsure if They Are Outraged Don't-knows' *The Times* 19 June 2003.

[34] Commission for Judicial Appointments, n 28 above, para 1.2. The establishment of the CJA is 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 '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

While the creation of this Commission is 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:

> 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 reforms so far 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 myth that "ability, like cream, floats to the top"[39] needs to be addressed

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2001). At present, despite the recommendation of the Peach Report, (*ibid*, 26) the Commissioners have no remit in relation to making or recommending appointments (Commission for Judicial Appointments, n 28 above, 4). This restriction is criticised by those who would prefer the Commission to have independent powers of appointment. See, for example, Lord Justice Steyn's comment that "A true Judicial Appointments Commission will have to come" which seemed somewhat optimistic in March 2002 but which now seems prophetic in light of recent Government announcements (Steyn LJ 'The Case for a Supreme Court', The Neill Lecture to All Souls College, 1 March 2002).

[35] Kamlesh Bahl EOC Evidence to the Home Affairs Committee *Minutes of Evidence and Appendices* (Third Report of Session 1995-6, Volume II) p 211 in McGlynn, n 2 above, 180. See also Commission for Judicial Appointments, n 28 above, para 6.22-6.25.

[36] Kennedy, n 32 above, 267.

[37] F Burton 'What Now Portia?' (1998) *Sol J* 784-785.

[38] Female Barrister Letter to The Independent, 26 November 1990 in McGlynn, n 2 above, 150.

[39] John Taylor quoted in A Doran 'Lawyers hold no brief for equality code' *The Daily Mail*, 7 November 1995 reproduced in McGlynn, *ibid*, 150.

head on; the debunked 'trickle-up' approach may well need to be reconsidered, as well as the view of the appointments process as a "neutral conduit" through which the most qualified candidates will emerge.[40]

It is perhaps time, suggests Kate Malleson, to "rethink the traditional definition of merit",[41] to allow for character traits, experiences and career patterns more commonly associated with women. Although this may not be a solution in and of itself as, in particular, it does not address the significant discrimination outside the appointments process, it might, Malleson continues, represent a positive and proactive solution when "the fallacy of the 'trickle-up' approach" is recognised and the "willingness to 'think the unthinkable'" increases.[42] Moreover, it has been utilised to good effect in post-apartheid South Africa. Here, in order to redress the significant racial imbalance within the legal profession, the concept of 'merit' has been reworked to recognise the 'potential' of those with less experience and to include "diversity as a *collective* requirement of competence":

> Thus, the person who in other respects is less well-qualified than a candidate from a traditional background may be regarded as being equally well-qualified when her or his background is taken into account as a contribution to the collective competence of the judiciary ... [it] does not constitute unfair treatment of the man because he is 'not the best person for the job' when diversity is taken to be a factor in competence.[43]

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[40] Malleson, n 15 above, 116 and n 14 above, 22.

[41] Malleson, n 14 above, 16.

[42] Malleson, *ibid*, 22. See also K Malleson 'Prospects for Parity: The Position of Women in the Judiciary in England and Wales' in U Schultz & G Shaw n 22 above, 175, 177-180.

[43] Malleson, n 14 above, 17.

Moreover, if the newly renovated Judicial Appointments Commission, like Lord Irvine, is serious in its determination to "break down the culture of not applying because 'they'd never have the likes of me'",[44] it must go beyond telling the under-represented – "don't be shy; apply"[45] – 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,[46] which, of course, begs the question: 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 on 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

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[44] Lord Irvine 'Speech to Minority Lawyers Conference' (n 28 above).

[45] Lord Irvine 'Speech to the Association of Women Barristers' (The Barbican, London, 11 February 1998) reproduced at www.lcd.gov.uk/speeches/1998/1998fr.htm.

[46] See K Malleson & F Banda *Factors Affecting the Decision to Apply for Silk and Judicial Office* (London: Lord Chancellor's Department Research Series, 2/00, 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), which 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.

the legitimacy of the judiciary as a whole.[47] 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.[48] 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 emphasize connection, care, and responsibility.[49] The

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[47] See further, Malleson, n 14 above; B Hale 'Equality and the Judiciary: Why Should We Want More Woman Judges?' [2001] PL 489 (UK); the well-cited arguments of Bertha Wilson in 'Will Women Judges Really Make a Difference?' (1990) 28 *Os HLJ* 507 (Canada); S Abrahamson 'The Woman Has Robes: Four Questions' (1984) 14 *Golden Gate U L Rev* 489 (US) and S Cooney 'Gender and Judicial Selection: Should There Be More Women on the Courts?' (1993) 19 *Melbourne Uni L Rev* 20 (Australia).

[48] See especially, Carrie 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. However, cf I Ward 'When Mercy Seasons Justice: Shakespeare's Woman Lawyer' in C McGlynn (ed) *Legal Feminisms: Theory and Practice* (Aldershot: Dartmouth, 1998) 63 and J M Cohen 'Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction' (1990) 25(4) *Tulsa LJ* 657. The continued adoption of Portia as a metaphor for the woman lawyer is explored further in chapter 3, 126-160, below.

[49] C Gilligan *In a Different Voice – Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982; repr 1993) 24-63. Gilligan's narrative of

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".[50] 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.[51]

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.[52]

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the different voice and its application by feminist (legal) scholars is considered further in chapter 2, 63-125, below.

[50] Menkel-Meadow (1985), n 48 above, 46-7.

[51] Menkel-Meadow, *ibid*, 54-5.

[52] See, e.g., 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, for the time being, that all (or even most) women lawyers and judges *did* speak as Amy, that is, with something akin to Gilligan's different voice (in the face of attempts to suppress it), then an increase in the number 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.[53] The concern is that while the different voice purports to have somehow captured the essence of the feminine, in actuality, it may operate to exclude the polytonality of women's voices.[54] Moreover, Malleson contends, the strategic deployment of difference is

> a double-edged sword. If the rationale for seeking gender equality on the bench is based on the value of incorporating the feminine perspective and if it emerges that the decision-making of women judges is much the same as their male counterparts and that women do not appear to bring with them a different voice to the adjudication

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

[54] 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, neither does she suggest that all women necessarily speak as Amy ('Letter to Readers', n 49 above, xiii, 2).

process, or if early differences disappear as numbers grow, the basis for seeking equal numbers of women judges is undermined.[55]

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.[56] However, while the gender implications of Gilligan in the context of law have largely been sidestepped,[57] 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 model 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

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[55] Malleson, n 14 above, 21. Kate Malleson's rejection of the strategic deployment of difference as a means through which to make the case for more women judges as "theoretically weak, empirically questionable and strategically dangerous" reflects her primary focus on the composition of the judiciary rather than on the adjudicative process *per se* (at 1). However, in her haste to throw out difference in relation to the promotion of judicial equality, she perhaps fails to recognise the production of possibilities to which the concept of difference has given rise in the context of both judging and adjudication, explored and developed throughout this thesis.

[56] See, e.g., Selma 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; J 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).

[57] Although compare the application of the ethic of care in an adjudicative context by Robin West in *Caring for Justice* (New York: New York University Press, 1997) esp chs 1 and 2.

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".[58]

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".[59] It is not, she argues, simply a question of whether 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?"[60] 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

[58] Berns, n 10 above, 9. See also S Berns & P Baron 'Bloody Bones: A Legal Ghost Story and Entertainment in Two Voices – To Speak as a Judge' (1994) 2 *Australian Feminist LJ* 125.

[59] Berns, *ibid*, 13.

[60] Berns, *ibid*.

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, s/he 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.[61] 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.[62] 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

[61] On the relationship between 'self' and law, see especially Pierre Schlag 'The Legal Self' in *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 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 Margaret Thornton on the 'technocratic' approach of legal education ((1996) n 4 above, 75-79, 268-271) and on the "institutionally managed trauma [which] gives birth to a conforming or believing soul", Peter 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) 59. See also chapter 2, 81-84, below.

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 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'.*[63]

**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

[62] See, especially Thornton, *ibid*.

[63] Andersen, n 1 above, 63.

is often hidden beneath a wig and gown, his humanity erased, his voice silenced, his actions directed and constrained.[64]

This suits us just fine.[65] We expect the judge to have no identity.[66] We like the idea of a judge who performs superhuman feats in human form, just like a superhero.

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[64] 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' American 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 on-going debate about the proposed abolition of barristers' and judges' wigs in the UK, now a part of the Lord Chancellor's Department Consultation Paper on 'Court Working Dress in England and Wales' May 2003 (reproduced at www.lcd.gov.uk/consult/courtdress/index.htm). In his foreword, the Lord Chancellor is keen to stress "the issue at stake here is *far* more important than the mere wearing of wigs ... [It is rather] the extent to which court working dress impacts on public confidence, on court users and on the wider public esteem in which our courts are held, either positively or otherwise". Nevertheless, in the results of a public opinion survey commissioned by the Lord Chancellor in which around 2000 court (non)users were interviewed in October 2002, "wigs emerged as a key and symbolic feature of current court dress, and central to any debate about change"; views as to the 'appropriateness' (determined according to the status of the official) of the wig informed and determined their choice of preferred dress option with 68% in favour of retaining the wig for criminal judges, and only 15% wanting to retain the wig for court clerks (ORC International, n 26 above, 2, 21).

[65] '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 especially Ronald Dworkin, n 9 above, but also Pierre Schlag on the role of the idealised judge in legal education in 'The Legal Form of Being' in *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 as such, is also a feature of popular culture. Hence, perhaps, e.g., the media outcry following Lord Hoffman's failure to disclose his links with Amnesty International during the Pinochet litigation (H Young 'Pinochet may, or may not, clear off. But Hoffmann certainly should' *The Guardian* 19 January 1999). Although cf K Hughes 'Another Pinochet Atrocity – This Time by the Media' *The Guardian* 20 January 1999. See also Duncan Kennedy's discussion of public

> 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 ...[67]

The judge who inhabits our legal imagination is expected to transcend, deny, or eclipse his self, supposedly submitting to something "bigger" and "higher".[68] 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 and his efforts to transcend, that allow us to "believe in" his superiority and special mission.[69]

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 occasions the rule may even 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

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perceptions of adjudication (n 11 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.

[66] Berns, n 10 above, 202.

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

[68] Kennedy, n 11 above, 3.

[69] Kennedy, *ibid*, 4-5.

minimum as it disrupts the delicate balance of powers which clearly separates the judiciary from other branches of government.[70]

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.[71] 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.[72] 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.[73] However, there appears to be

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[70] "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 15 above, 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, e.g., R Cotterrell 'The Problem of the Creative Judge...' in *The Politics of Jurisprudence* (London: Butterworths, 1989) ch 6.

[71] See Schlag, n 61 above, 127-129.

[72] See R M Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601.

[73] Pierre Schlag uses the image of the 'frame' n 61 above, 135.

a flaw or virus in the system. Increasingly, the judge, it seems, acts not only as a mere 'conduit' for the application of democratically enacted laws, but also as part of a dynamic process of judicial activism 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.[74]

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.[75] Moreover, within legal positivism, while there is undoubtedly controversy as to the extent to which 'judicial discretion' can or

[74] Lord Reid 'The Judge as Law Maker' (1972) 12 JSPTL 22.

[75] 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 of Legal Stud* 673, 675-679, responding to D Dyzenhaus 'Positivism's Stagnant Research Programme' (2000) 20 *Oxford J of Legal Stud* 703, itself a review of Kramer's book *In Defence of Legal Positivism: Law Without Trimmings* (Oxford: Oxford University Press, 1999).

should be exercised,[76] 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.[77]

Among American theorists of adjudication there is, perhaps 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"[78] – while delivering judges more *practical* room for manoeuvre, is ultimately a staunch attempt to defend the notion of judicial

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

[77] This argument is effectively made by Kenneth Einar Himma 'Judicial Discretion and the Concept of Law' (1999) 19 *Oxford J of Legal Stud* 71.

[78] Dworkin (1986), n 9 above, 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) 123. See also, for a concise assessment and rebuttal of adjudicative fairy tales, Noble Dreams and Nightmares, Simon Lee *Judging Judges* (London: Faber & Faber Ltd, 1988) chs 1-5 and for an imaginative critique of Dworkin's *Law's Empire* (n 9 above) A Hutchinson 'Indiana Dworkin and Law's Empire' (1987) 96 *Yale LJ* 637.

constraint and with it the superhero ideal (hence, his adoption of Hercules as his ideal judge).[79]

We first meet Dworkin's Hercules in *Taking Rights Seriously*: "I have invented ... a lawyer [judge] of superhuman skill, learning, patience and acumen, whom I shall call Hercules".[80] His ability to find the 'right answer', to decide 'hard cases' with 'humility' and within an understanding of 'law as integrity', his ability to treat the law a 'seamless web', whilst avoiding the sirens of 'judicial originality' and personal preference, is the very stuff of superheroes.[81] He reappears in *Law's Empire* as

> Indiana Dworkin's ... trusted sidekick and judicial alter ego ... an academic one-of-a-kind ... his singular talent is to reveal 'the hidden structure of ... judgments' that eludes lesser mortals. He responds to Indy's assignments with a flexing of his mental muscles and a brief, but respectful, 'Okey-doke' ... As imperial acolytes, when the going gets tough, we can rely on the tough Indiana Dworkin and incomparable Hercules to get us going.[82]

Given Hercules' mythological heroic credentials, Dworkin's portrayal and identification of his 'superhuman' judge is, perhaps, unsurprising. As Dworkin

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[79] See here Duncan Kennedy's characterisation in *A Critique of Adjudication* (n 11 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" (at 33).

[80] Dworkin (1977), n 9 above, 105. On Dworkin's Hercules, see Berns, n 10 above, *passim*, and S Berns 'Hercules, Hermes and Senator Smith: The Symbolic Structure of *Law's Empire*' (1988) 12 *Bulletin of the Australian Society of Legal Philosophy* 35.

[81] Dworkin, *ibid*, 105-130.

[82] Hutchinson, n 78 above, 640.

is well aware, the character, exploits and labours of Hercules – his fits of bestial frenzy, conflicts with primal monsters and his relation to death – have captured the imaginations of generations of thrill-seekers and myth enthusiasts.[83]

> [To] the Greeks of the 6th and 5th centuries BC Herakles [sic] was the greatest heroic example of strength and prowess, of god-like powers which overcame tremendous obstacles and won for him immortality on Olympos [sic]. He alone bridged the seemingly impassable gulf between the short and fateful life of man and the unending splendour of the gods.[84]

So viewed, Dworkin deliberately draws on the Herculean myth to support and reinforce his particular invocation of the ideal judge, harnessing the power of myth to capture and subsequently constrain the legal imagination, as Hercules, the superhero, is given a 20th century jurisprudential twist.[85]

In *A Critique of Adjudication*, Duncan Kennedy explores our simultaneous belief in and denial of the mythical superhero judge. Kennedy sets out to demonstrate that adjudication (in the US at least), far from being a neutral realm beyond the reach of ideology and political lobbying, is in fact

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[83] Most recently in the 1997 Disney musical adaptation *Hercules: The Original Action Hero* directed by J Musker & R Clements (USA, Walt Disney Home Video).

[84] J Kane 'Greece' in Cavendish, n 5 above, 120, 127-128.

[85] The image of the Herculean judge who inhabits the legal imagination, which stalks this thesis, draws on, as opposed to mirrors, both the Dworkinian and mythological Hercules. Rather than invoking him, as Dworkin does, as the ideal judge, I seek to establish Hercules as the embodiment or representation of a range of characteristics and attributes that inform our understanding and fashion the judge who inhabits the legal imagination. In so doing, my goal

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.[86] However, as Joanne Conaghan asserts, "Kennedy's focus is not just on the ideological character of judicial decision making but also on the political consequences of the widespread failure to acknowledge it".[87] In particular, he argues that our collective denial contributes to our widespread ignorance of many aspects of adjudicative processes, including the power of judges to 'work' the materials, perhaps "with the conscious strategic goal of unsettling the obvious solution".[88]

He goes on to identify three 'postures' the judge can adopt.[89] First, there is the "(constrained) activist judge" who, although working within the constraints of the law with no intention of disobeying it, is "anything but neutral".[90] Despite "a good faith risk of being persuaded to the opposite side", he pursues the strategy most likely to achieve his desired result, that which is "permitted" as opposed to "mandated" or "required" by the materials.[91] He will

is to highlight the extent to which our understanding of the judge both captures and is captured by the legal imagination.

[86] See Kennedy, n 11 above, chs 9-11.

[87] J Conaghan 'Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy's Critique of Adjudication' (2001) 22 *Cardozo L Rev* 721, 726.

[88] Kennedy, n 11 above, 163.

[89] Kennedy, *ibid*, 182-6.

[90] Kennedy, *ibid.*

[91] Kennedy, *ibid*, 183-4.

struggle against what he sees as an unattractive conclusion, but will, ultimately, submit to it if no other outcome is obtainable.

The “difference-splitting judge” locates himself in between what he sees as polarised ideologies. He adopts what appears, to the outsider, to be a ‘moderate’ and more passive position than the constrained activist. He identifies the “optimal liberal and conservative rule interpretations, and then chooses an interpretation that lies in between”.[92] Nevertheless, despite his attempts to avoid them, he remains “controlled” by ideologies:

> what he predictably splits is the difference between other people's ideological positions. He lets the ideologues decide for him indirectly by setting up a choice and then refusing it by choosing the middle.[93]

Finally, the “bipolar judge” incorporates both positions. He understands himself to be a constrained activist whilst consistently oscillating between ideological preferences. Put crudely, if he has recently gone one way, he is now more likely to go the other. Like the difference-splitter, he is influenced by the strategic choices of others; yet, unlike him, the bipolar judge “‘lets himself go’ and participates actively in constructing the very ideological positions of which he is at the same time ‘independent’”.[94]

It is important to stress that Kennedy is not seeking to discover the ‘true’ interpretation, untainted by the judge's strategic choice, had the judge

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[92] Kennedy, *ibid*, 185.

[93] Kennedy, *ibid*.

[94] Kennedy, *ibid*, 186.

simply "just interpreted" the legal materials. Any attempt to do so would be both "methodologically incoherent and practically impossible" without a standard of universal legal correctness against which to judge.[95]

Nevertheless, 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,[96] but whether one believes the judge to be constrained, neutral, apolitical – an eclipsed, legal self – or whether one doesn't, 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. Perhaps, 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

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[95] Kennedy, *ibid*, 187.

[96] 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 L Rev* 701.

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.[97] 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.

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 enquiry 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.[98] We fail to take seriously the power of the imagination to clothe and elevate the judge, to dress and adorn the Emperor.[99]

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[97] 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 one which denies judges a law-making-legislative role, see further, Malleson, n 15 above, 17, 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 11 above, esp ch 2.

[98] See Schlag, n 61 above, 126.

[99] H C Andersen 'The Emperor's New Clothes' in N Lewis (trans) *Hans Andersen's Fairy Tales* (London: Penguin, 1981) 32. 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 of Legal Stud* 278) asserts that his

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".[100] 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.[101]

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students, like the young boy in Andersen's tale, 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.

[100] Andersen, *ibid*, 32.

[101] Andersen, *ibid*, 40. See also Marie-Jeanne L'Héritier's precursor to Hans Andersen's tale, *La Robe de Sincérité* (The Robe of Sincerity). In this tale, a wizard aptly named Misandre

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, 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 application of a concept of denial in a judicial context is derived from Duncan Kennedy. The 'paradox of denial' enables one to be 'in denial' of anything, drinking, the existence of invisible clothes, belief in superheroes, ideological decision-making.[102] It is an act of bad faith because at the back of

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claims his Robe of Sincerity has the power to reveal a wife's infidelity, a mother or daughter's virtue, a sister's chastity and so forth; if the woman is pure, pictures of virtuous women will be visible when she wears the robe, if not the embroidery will remain invisible on the black cloth. The men (in this instance) pretend they can see the embroidery, whilst secretly consumed with jealousy (discussed by Marina Warner in 'In the Kingdom of Fiction: Seduction II', n 6 above, 161, esp 178-179).

[102] Kennedy, n 11 above, ch 8. For a detailed and pertinent consideration of Kennedy's use of the concept of denial see G Minda 'Denial: Not Just a River in Egypt' (2001) 22 *Cardozo L Rev* 901.

his mind the denier knows that what he is denying is true. In this way, the judge, like the active alcoholic, is forced to live a life of daily denial. "The motive for denial [Kennedy tells us] ... is the anxiety produced by the dilemma of not being able to do the right thing no matter how hard you try, because you are being told to do two opposite things at the same time", that is, to make nonideological decisions within the context of ideology.[103] The judge keeps the secret because he knows that

> [e]veryone wants it to be true that it is not only possible but common for judges to judge nonideologically. But everyone is aware of the critique, and everyone knows that the naïve theory of the rule of law is a fairy tale.[104]

The point is we recognise that the superhero judge isn't 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".[105]

Further, not only does the judge who inhabits our legal imagination remain a superhero, he is also a super-man.[106] The woman judge cannot

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[103] Kennedy, *ibid*, 203.

[104] Kennedy, *ibid*, 192.

[105] On the importance of the imaginary domain see D Cornell *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge, 1995).

[106] On the exclusion of an awareness of the impact of gender in some (traditional) understandings and critiques of the superhero judge, see, e.g., Joanne Conaghan's engagement with Kennedy, n 87 above and 'Review of Duncan Kennedy's *Critique of Adjudication*' (2000) 27 *J Law & Soc'y* 328 (book review); Allan Hutchinson's review of Dworkin, n 78 above, 652; and generally, Berns, n 10 above, *passim*.

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,[107] 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.*[108]

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[107] Kennedy, n 11 above, 3. Although cf Robert Cover's portrayal of an arguably re-habilitated 'Hercules' as female (n 72 above, 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 *S Cal L Rev* 1887, 1910).

[108] Andersen, n 1 above, 67.

**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 symbols (the wig and the gown) of his authority to underline and reinforce his superhero attributes.[109] 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 don't 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

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[109] On the (de)humanisation of the judge see Sandra Berns' (n 10 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" (at 208). However, cf Brenda Hale (n 47 above) arguing that the effect of the wig is not to 'dehumanise' the (woman) judge but to humanise them into a man, "deny[ing] us our femaleness let alone our femininity" (at 497). Focus group discussions in preparation for the ORC International survey on working court dress (n 26 above) revealed diverse perceptions of the wig; from a powerful historical symbol – "The wig signifies that justice is being done" – to "antiquated, frightening and unnecessary" – "The wigs are daft ... there's no need for wigs ... Let's lose the 'mad syrup'" (at 14-15).

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.[110] 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".[111] 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".[112]

> To speak as a judge is to speak in a way that cannot be bracketed ... One cannot speak as a woman (judge) or even as (woman) judge. Judge must stand alone if judgment is to carry weight.[113]

When the woman judge speaks she is marked by difference; authority and distance collapse, "[t]he legitimacy of ... [her] choices is always open to

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[110] On the 'siren call' of 'exceptional' success in a male world, see Helena Kennedy in McGlynn (n 2 above, 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 Margaret Thornton (1996), n 4 above, 106-129.

[111] Graycar (1995), n 4 above, 269 (footnote omitted).

[112] C L'Heureux-Dubé 'Outsiders on the Bench: The Continuing Struggle for Equality' (2001) 16 *Wis Women's LJ* 15, 21.

[113] Berns & Baron, n 58 above, 127.

question".[114] Her difference and divergence from the "working image of a judge" is, it seems, an immediate and automatic confirmation of bias.[115]

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.[116] Hence, perhaps, the legal attempt to challenge a planning tribunal's decision on the grounds that the "tribunal was pregnant";[117] 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

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[114] Berns, n 10 above, 33. See, e.g., the challenge to Bertha Wilson by conservative campaign group REAL (Realistic, Equal, Active, for Life) Women of Canada following her speech at Osgoode Hall Law School (n 47 above) in which she considered the extent to which women judges will make a difference. It seems that simply to raise 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, 8). On REAL Women of Canada, see generally www.realwomenca.com, n 120 below and further chapter 2, 99-100, below.

[115] L'Heureux-Dubé, n 112 above, 22-30.

[116] It is interesting to note in the examples below, which explore criticisms of and, in particular, accusations of bias in relation to non-white male judges' decisions, that despite the diversity of jurisdictions involved, the image of judge appears to embody and exclude similar characteristics and traits. See further e.g., M Minow 'Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors' (1992) 33 *Wm & Mary L Rev* 1201 (US); L'Heureux-Dubé, n 112 above (Canada); Graycar (1998), n 4 above (Australia); and McGlynn, n 2 above, 104 (UK). Regina Graycar and Jenny Morgan in *The Hidden Gender of Law* (Sydney: Federation Press, 2nd edn, 2002) are only able to cite 2 occasions where a male decision-maker has been (un)successfully challenged as biased. In March 2001, for example, a challenge of bias by the Fawcett Society arguing that an all male court in the House of Lords should not hear a rape appeal was rejected. There are of course no female law lords (*The Times*, 21 March 2001, in Graycar & Morgan, above, 60).

[117] B Naylor 'Pregnant Tribunals' (1989) 14(1) *Legal Service Bulletin* 41.

employment because of race and sex".[118] The image of the superhero judge may also play a role in judicial findings that the remarks made by 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",[119] 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*.[120] In all these contexts, the superhero's suit fails

[118] *Blank* v *Sullivan & Cromwell*, 418 F Supp 1, 4 (SDNY 1975) in L'Heureux-Dubé, n 112 above, 22.

[119] *R* v *S(RD)* [1997] 3 SCR 484, available at www.scc-csc.gc.ca. The decision of Nova Scotia Supreme Court (Trial Division) and Court of Appeal was overturned by a majority of the Canadian Supreme Court. See further Richard Devlin 'We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R* v *RDS*' (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).

[120] [1999] 1 SCR 330, available at www.scc-csc.gc.ca. See further L'Heureux-Dubé, n 112 above, 24-26, the text of the Canadian Judicial Council's reprimand of Mr Justice McClung and response to the complaint by REAL Women of Canada (CJC News Release 'Council Releases Response to REAL Women of Canada' Ottawa, 1 April 1999 and 'Panel Expresses Strong Disapproval of McClung Conduct' Ottawa, 21 May 1999) and discussion in the REAL Women of Canada's newsletter '*REALity*' ('The Unravelling of Canada's Justice System' (March/April 1999) XVIII (2) *REALity*; 'L'Heureux-Dubé – C A Supremely Forgetful Judge' (May/June 1999) XVIII (3) *REALity* and 'Speeches by Judges Create Controversy' (March/April 2000) XIX (2) *REALity*). See also the complaint made against Madam Justice Southin of the British Columbia Court of Appeal for, *inter alia*, smoking in her office. Mr Christie, a Vancouver lawyer, alleged that "by continuing to smoke and by accepting changes to her chambers to accommodate a ventilation system, [she] had brought the administration of justice into disrepute ... [Moreover] he also argued that the judge's conduct will give rise to a reasonable apprehension of bias on her part when cases are argued before her by the provincial government or its Crown corporations, because she will be beholden to the AG for providing the changes in her chambers". Both allegations were rejected by the Canadian Judicial Council (CJC News Release 'Judicial Council Closes File in Complaint Against BC Madam Justice Southin' Ottawa, 21 March 2003). CJC news releases are available at www.cjc-ccm.gc.ca/english/news_releases.htm.

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.[121]

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.[122] She destabilises the "fraternal values ... fostered in an attempt to retain the separation between the imagined masculine and the fictive feminine",[123] 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,[124] she 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".[125] Put simply, her different presence or (in)voluntary

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[121] L'Heureux-Dubé, *ibid*, 28.

[122] See, e.g., Thornton (1996), n 4 above, 26.

[123] Thornton, *ibid*, 166-7.

[124] McGlynn, n 10 above, 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) 152.

[125] Thornton (1996), n 4 above, 3. See further and compare 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).

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.[126] Hence, for example, the comment by Judge Bland of the Victorian County Court instructing a jury in a rape trial that

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[126] Graycar (1995), n 4 above, 271-2 and (1998), n 4 above, 10-17. See also M Gatens *Imaginary Bodies – Ethics, Power and Corporeality* (London: Routledge, 1996) 136-141 and Berns & Baron, n 58 above.

> it does happen, in the common experience of those who have been in the law as long as I have anyway, that no often subsequently means yes.[127]

And, perhaps, that of Justice O'Bryan in the Victorian Supreme Court who

> in the course of sentencing a man to eleven years' jail, commented that a seventeen-year-old girl who was bashed, raped and had her throat slit was 'not traumatised' by the rape because she was 'probably comatose at the time', having been knocked unconscious by the offender.[128]

Graycar 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.[129] Ultimately, she argues "the vantage point of a white male"[130] becomes what Martha Minow describes as the unarticulated and uncritical "neutral baseline against which to evaluate bias".[131] So viewed, (judicial) knowledge, understanding and significantly imagination are, suggests Moria Gatens, necessarily and inevitably effected, constrained and informed by their embodied context:

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[127] As reported in *The Age* 6 May 1993 in Graycar 1995, *ibid*, 271.

[128] As reported in *The Age* 13 May 1993 in Graycar, *ibid*.

[129] Graycar, *ibid*, 276; Graycar (1998), n 4 above, 4.

[130] Graycar (1998), *ibid*.

[131] Minow, n 116 above,1207.

> There is no place in [these] judgments for multiple and perhaps contradictory 'experiences' of the same event; and no awareness of the manner in which their own experience is inescapably perspectival in nature.[132]

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.[133] In so doing, she creates opportunities for conjuring 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.

> [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.[134]

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

[132] Gatens, n 126 above, 138.

[133] Berns, n 10 above, 33.

[134] Berns, *ibid*, 34.

engage in "contextualised judging",[135] in which prior knowledge is coupled with a willingness to be open to the "possibility of surprise"[136] enabling a genuine and impartial judgment.[137] Judicial impartiality might be re-understood as an 'open mind' as opposed to a "blank slate",[138] as situated rather than non-situated and achieved through the acknowledgment and embracing of perspective, that is, through the recognition of the ubiquity and utility of judicial bias.[139] Finally, justice might be seen to be

> engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign or control them.[140]

When the little mermaid wears the Emperor's new clothes, she unavoidably highlights that which is most frequently denied, that is, that *who* the judge is matters: that the person beneath the suit is "a necessary and inevitable part of the story which is unfolding".[141] She goes on to expose and challenge the paradox in current discourses of adjudication, whereby the

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[135] *R* v *S(RD)*, n 119 above, para 16.

[136] Minow, n 116 above, 1215.

[137] *R* v *S(RD)*, n 119 above, para 42.

[138] 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) and 'Making a Difference: The Pursuit of a Compassionate Justice' (1997) 31(1) *UBCL Rev* 1.

[139] Wilson, n 47 above, 522; See also Resnik, n 107 above; P Cain 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *S Cal L Rev* 1945; K Malleson 'Safeguarding Judicial Impartiality' (2002) 22(1) LS 53, 65 and W Baker 'Women's Diversity: Legal Practice and Legal Education – A View from the Bench' (1996) 45 UNBLJ 199. See further chapter 6, 'At the End of our Affair(s)', 333-353, below.

[140] M Minow 'Foreward: Justice Engendered' (1987) 101 *Harv L Rev* 10, 62-63.

[141] Berns, n 10 above, 8.

woman judge is expected to be conventionally different – simultaneously revitalizing, energising and resuscitating the judiciary – whilst being required to mirror the judge who inhabits the legal imagination, to wear 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/lawyers toward the 'imaginary domain', in which the power of images both to constrain and free the (legal) imagination is acknowledged. They watch as the little mermaid fashions, through her strategic, yet constrained, manipulation of the flaws in the weave, a "new vocabulary of justice, and a new understanding of what it means to judge".[142] 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;[143] to recognise and include alternative perspectives, understandings and experiences in his decision-

[142] Berns, *ibid*, 210.

[143] On the importance of context in judicial decision-making, see *R* v *S(RD)* above n 119; Bertha Wilson in *R* v *Morgentaler* ([1998] 1 SCR 30) and *R* v *Lavallee* ([1990] 1 SCR 852), considered in detail by Elizabeth Halka in 'Madam Justice Bertha Wilson: A "Different Voice" in the Supreme Court of Canada' (1996) 35(1) *Alberta L Rev* 242; 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 considered in detail in chapter 2, 103-108, below; and generally, M Minow *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) and M Minow & E Spelman 'In Context' (1990) 63 *S Cal L Rev* 1597.

making; to "listen with connection" and "enter the skin of the litigant"; to infuse his conception of justice with care;[144] and most importantly to bare his self.

> *Suddenly, rising out of the sea, she saw her sisters. They were as ghastly pale as she, and their beautiful hair no longer streamed in the wind – it had been cut off. 'We gave our hair to the witch in return for help, for something that will save you from death when morning breaks. She has given us a knife … Before the sun rises you must plunge it into the prince's heart; when his warm blood splashes your feet, they will grow together into a fish's tail and you will become a mermaid again, just as you used to be.*[145]

## 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 doesn't, she is faced with an empty choice – her life or that of her prince – her fate is fixed.[146] Her story ends with the haunting implication that

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[144] On 'entering the skin of the litigant' see Wilson, n 47 above. Also see Cain, n 139 above, on 'listening with connection'; and, on the necessary relationship between justice and care, see West, n 57 above, ch 1. See further, chapter 6, 334-338, below.

[145] Andersen, n 1 above, 69-70

[146] Compare Disney's explicitly happy ending (*The Little Mermaid* (1990) animation directed by M Henn, G Keane, D Marjoribanks, R Aquino, A Deja and M O'Callaghan, USA, Walt Disney Home Video) 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, 234).

cutting out your tongue is still not enough. To be saved more is required: self-obliteration, dissolution ... [her] seductiveness remains under interdiction; the only redemption death through self-sacrifice.[147]

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".[148] In the deafening silence,[149] the implications of the gender dimension to adjudication continue to be evaded, the woman judge is represented as somehow androgynous, her difference – whatever that might be – denied, lost in the imposition of a gender-neutral debate; "[we] drown in law until we learn to swim and its language then becomes second nature".[150] The representation of the woman judge as the little mermaid does not seek to invoke her essential difference or indeed imply the existence of a 'different voice'.[151] Rather, its purpose is to acknowledge the prevailing *construction* of the woman judge as different and to confront the implications of that construction for 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

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[147] Warner, n 6 above, 398-399 and generally on the little mermaid, ch 23 'The Silence of the Daughters'.

[148] L'Heureux-Dubé, n 112 above, 30.

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

[150] Berns & Baron, n 58 above, 146.

[151] The question of whether women judges speak with a 'different voice' remains hotly disputed among academics and women judges themselves and is explored in depth in the following chapter.

judge from the adjudicative paradox, from the pressure of simultaneously effecting the radical transformation of the judiciary whilst suppressing her irritant potential through conformity so as to enable, perhaps, the role of the judge to 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" – which, in keeping with the tradition of fairy tales, brings neither closure nor completeness, but promises and prophecies of new adventures, the challenge of beginning a new story that re-imagines the fairy tale and the judge.[152]

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[152] Warner, n 6 above, xvi-xxi.

# Chapter 2

## EXORCISING THE DIFFERENT VOICE

### Introduction

*They had lovely voices – no human voice was ever so hauntingly beautiful – and when a storm blew up, and they thought that a ship might be wrecked, they would swim in front of the vessel and sing about the delights of their world beneath the sea; the sailors should have no fear of coming there. But the sailors never understood the songs; they fancied they were hearing the sound of the storm.*[1]

The sailors in Hans Andersen's tale do not understand the mermaids' voices. Their songs to reassure and inspire the sailors are mistaken for the sound of the sea: beautiful, yet unintelligible. Meanwhile, the little mermaid, who was once "the sweetest singer of all", is silent; she has sold her voice in order to walk alongside her prince.[2] Surrounded by this distracting, although intriguing, combination of romance and mutation it is unnervingly easy to overlook the abstruse distinctiveness of the little mermaid's lost voice. Indeed, it seems that even if she had made a different bargain – if she had kept her exquisite voice – her prince, like the sailors, might not have understood or even heard it. In fact, seen in this way, perhaps the little mermaid had little to lose. Her voice made her as much a mermaid as her tail: to join her prince she had to

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[1] H C Andersen 'The Little Mermaid' in N Lewis (trans) *Hans Andersen's Fairy Tales* (London: Penguin, 1981) 41, 47-48.

[2] Andersen, *ibid*, 57.

sacrifice both. Similarly, the woman lawyer trades her voice for law's authority, bargaining away her siren call – *her different voice* – to become a silent recruit of law's monotony. Yet, could the woman lawyer's lost song, if found, embolden her legal voice? Would it be understood? Indeed, was it ever there in the first place?

This chapter considers the continuing challenge of the woman lawyer's muted voice for law through an exploration of the narrative of the 'different voice' as it emerges from Carol Gilligan's *In a Different Voice*.[3] Part map, part sympathetic critique, it seeks to utilise the aching familiarity and impending doom that pervades and threatens to stifle conversations ignited by attempts to articulate the 'different voice'. Neither a eulogy nor an epitaph, as it searches for a way through and beyond these discourses it begins with an exploration of the characteristics, insights and potential of the different voice and its application by feminist legal scholars to law. It then goes on to consider their largely unsuccessful attempts to establish the perceived difference of the woman judge. As these efforts to identify (with varying degrees of success) the different voice in the judgments and commentary of three prominent female judges – Sandra Day O'Connor, Bertha Wilson and, in particular, Brenda Hale – fall silent it seems that, at least in terms of everyday practice, the woman judge, like the little mermaid, is more mythical than real.[4]

[3] C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982; repr 1993).

[4] On the positive as opposed to disparaging invocation of myth, see further R Cavendish (ed) *Mythology: An Illustrated Encyclopedia of the Principal Myths and Religions of the World* (London: Little, Brown & Company, 1992) 8-12; see further n 208 below and surrounding text, and chapter 3, 145-147, below.

Thus, the final section of this chapter combines an exploration of E. B. White's *Charlotte's Web* with a swift, yet distinct, nod in the direction of the virulent and sustained feminist critiques of Gilligan's different voice. It strives to eschew the inevitably fruitless attempts to articulate the woman judge's lost voice, offering an alternative understanding of the 'different voice' as a fictional device.[5] So understood, the different voice – by destabilising taken-for-granted assumptions and rendering contingent particular, although dominant, forms of legal reasoning – is capable of inspiring dreaming alternatives. Its ongoing potential revealed, the different voice can be seen to begin a new story, opening windows onto previously unimaginable and diverse adjudicative landscapes.

**(Un)covering the Essentials**

Since its publication in 1982,

> *In a Different Voice* ... has become part of the process that it describes – the ongoing historical process of changing the voice of the world by bringing women's voice into the open, thus starting a new conversation.[6]

Its uneasy, yet striking, narrative of the different voice and its unnerving sense of familiarity have generated deep-seated and often conflicting feelings of recognition, hostility, acceptance and rejection among it readers. Thus, it is important at the outset of this enquiry to establish the essentials of *In a*

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[5] E B White *Charlotte's Web* (London: Penguin, 1963).

[6] Gilligan 'Letter to Readers' n 3 above, xxvii.

*Different Voice* – to (un)cover the origins, characteristics, key players and perceived insights of Gilligan's narrative.

Put simply, *In a Different Voice* is an exploration of moral reasoning and decision-making, which seeks to highlight the absence and devaluing of women's voices and thought within traditional psychological theory. By listening to the alternative ways of thinking articulated in voices, previously lost or deadened within the monophonic and abstracted hierarchy of traditional moral reasoning, Gilligan attempts not only to recognise and validate these excluded voices and experiences, but also to allow them to inform a more complete understanding of morality, self, conflict and development. She deliberately troubles the innocent, yet instinctive, adoption by psychological theory of the male as the norm, challenging their construction of female as deviant and their subsequent attempts to "fashion women out of a masculine cloth".[7] In so doing, her purpose is simply to amplify and nurture the different voice that emerges from conversations about self and morality and to "reframe women's psychological development as centring on a struggle for connection rather than … a problem in achieving separation".[8] As she seeks to expose and explore the disconnection,

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[7] Gilligan, n 3 above, 6. Classic examples of this may include Lawrence Kohlberg's description of the development of moral judgment, empirically grounded in his study of 84 *boys* and the theory of psychosexual development proposed by Sigmund Freud arising out of his study of the experiences of the *male* child. In both these studies girls as subjects simply, and literally, do not exist (L Kohlberg *The Philosophy of Moral Development* (San Francisco: Harper and Row, 1981 and S Freud *Three Essays on the Theory of Sexuality* (1905) Vol VII) considered in depth, with others, by Gilligan in 'Woman's Place in Man's Life Cycle' n 3 above, esp 1-23).

[8] Gilligan, n 6 above, xv.

dissonance and disassociation between this different voice and dominant (male) representations, her two modes of thought, speech and reason are captured in the "metonymy" of 'male' and 'female' voices.[9]

The perceived synonymity between the metonymic use of 'female' and the different voice is underlined by the empirical association (in terms of Gilligan's research subjects) of the different voice with women, leading some critics to conclude that Gilligan purports to establish the different voice as necessarily or essentially female. This is not her aim. The different voice is characterised by theme and not gender:

> the contrasts between male and female voices are presented ... to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalisation about either sex.[10]

Her title deliberately reads 'in a *different* voice', not 'in a *woman's* voice'.[11] Her focus is on the dissonance between women's voices and psychological theory, as opposed to any essential differences between women and men.[12] Her purpose is "progressive" rather than "conservative"; she seeks to "challenge" as opposed to "validate" gender difference, "strategically

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[9] K C Worden 'Overshooting the Target: A Feminist Deconstruction of Legal Education' (1985) 34 *Am U L Rev* 1141, 1143.

[10] Gilligan, n 3 above, 2.

[11] C Gilligan 'Reply' (1986) 11(2) *Signs* 324, 327. Nor does it read *In THE Different Voice*, however, as Mary Joe Frug suggests, *Different Voices* might more accurately capture Gilligan's 'progressive' purpose ('Progressive Feminist Legal Scholarship: Can We Claim "a Different Voice"?' (1992) 15 Harv Women's LJ 37, 57).

[12] In e.g., the work of Jean Piaget, Erik Erickson and Lawrence Kohlberg. See further, Gilligan, n 3 above, 5-23.

deploy[ing it] to unsettle existing inequalities between the sexes".[13] In short, *In a Different Voice* seeks to explore "the interaction of experience and thought, in different voices and the dialogues to which they give rise, in the way we listen to ourselves and to others, in the stories we tell about our lives".[14] In so doing, it considers difference and embraces dissonance, hearing and then listening to the sounds of silence.

In fact, Gilligan's initial focus on women was less a matter of design and more that of chance and circumstance.[15] Her earlier attempt to consider judgment and action in the context of 'real life' moral conflicts was thwarted by the ending of the Vietnam draft. Her next opportunity emerged in the wake of the US Supreme Court's limited legalisation of abortion in *Roe* v *Wade.*[16] Following this decision, Gilligan interviewed a number of pregnant women who, for one reason or another, were considering an abortion.[17] Despite her deliberate attempt to avoid any explicit assumptions as to the morality of the

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[13] Frug, n 11 above, 52.

[14] Gilligan, n 3 above, 2.

[15] C Gilligan in I Marcus *et al* 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buff L Rev* 11, 37 – an edited transcript of the discussion between Ellen DuBois, Mary Dunlap, Carol Gilligan, Catherine MacKinnon, and Carrie Menkel-Meadow moderated by I Marcus and P Spiegelman, held on 19 October 1984 at the law school, State University of New York in Buffalo.

[16] 410 US 113.

[17] During the course of the abortion decision study, 29 women (referred to the study by pregnancy counselling services and abortion clinics) between the ages of 15-33, with differing ethnic and social backgrounds, marital statuses, and with/without children, were interviewed about their decision. No effort was made to select a representative sample of the clinic/pregnancy counselling service client composition. A year later, 21 of the women were re-interviewed (Gilligan, n 3 above, 3). See further, C Gilligan 'Concepts of Self and Morality'

process itself and its impact on the women's decision making, Gilligan found that moral language – words like good, bad, right, wrong, should, ought – "spontaneously appeared in the women's narratives about the decisions they were actually making".[18] What is more, as she began to map the construction of morality implied by this moral language, she was able to identify in the women's responses a different way of seeing or understanding the choice they were about to make – a different voice. It became clear that the women involved did not construct their decision in the same way as the Supreme Court in *Roe* or in accordance with public opinion of the time. In fact, rather than understanding their decision as an adversarial or hierarchical, rights-based fight between themselves (as potential mother) and the foetus, the women's dilemma arose out of their feelings of connection and responsibility toward the foetus and

> the conflict between compassion and autonomy, between virtue and power – which the feminine voice struggles to resolve in its effort to reclaim the self and to solve the moral problem in such a way that no one is hurt ... The sequence of [the] women's moral judgment proceed[ing] from an initial concern with survival to a focus on goodness and finally to a reflective understanding of care as the most adequate guide to the resolution of conflicts in human relationships.[19]

In the course of their decision-making, the women considered the (im)morality and (ir)responsibility of abortion in the context of an inability, for whatever reason, to maintain and deepen their feelings of connection with care or

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n 3 above, 64-105 and 'Hearing the Difference: Theorising Connection' (1995) 10(2) *Hypatia* 120.

[18] Gilligan, n 15 above, 37-38.

responsibility; some concluded that, whilst abortion cannot perhaps be 'right' or 'good', it might be the 'lesser of two evils' or the 'better' thing to do.[20] In short, they concluded that connection could be both good and bad.[21] In this way, the masculine assumptions of detachment, hierarchy and principle that underpinned the 'rights' or 'justice' approach of the legal voice at best misunderstood and, at worst, distorted the situation the women saw themselves as facing. In order to engage with the legal system, the women had to deny their feelings of connection, care and responsibility, and adopt an unfamiliar voice.

> To enter the legal system, therefore, [the] women had to act as though they did not know things that they felt they knew, and that they did not in a sense understand issues of connection which could not be represented within the adversarial-rights model which pitted one life against the other.[22]

Their distinctive understanding of their situation, as one of care, concern and conflicting responsibilities, was reframed in terms of hierarchy, rights and principle. Their – perhaps, too different – voices were effectively silenced or gagged through their interaction within the legal process.

*Amy and Jake*

Differing understandings of the world and its relationship with the self, which are not gender-specific, but are gender-related, can also been seen in

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[19] Gilligan, n 3 above, 71, 105.

[20] Gilligan, *ibid*, 38.

[21] On 'good' and 'bad' connection see further, chapter 6, 346-349, below.

[22] Gilligan, n 15 above, 39.

Gilligan's conversations with perhaps her most memorable – or at least most often referred to – research subjects, Jake and Amy.[23] She presents the eleven year-olds with a dilemma devised by Lawrence Kohlberg to measure moral development in adolescence; Heinz's wife is dying and he cannot afford to buy the drug that will save her – should he steal the drug? In their responses

> both children ... recognise the need for agreement but see it as mediated in different ways – [Jake] impersonally through a system of logic and law, [Amy] personally through communication and relationship.[24]

Jake sees the situation to be "sort of like a math problem with humans",[25] a logical conflict between life and property. As "a human life is worth more and money", Heinz should steal the drug, despite the fact to do so is to break the law.[26] Jake recognises the limits of logic; whilst the law and principles are important and necessary to maintain social order, "laws have mistakes, and you can't go writing up a law for everything that you can imagine".[27] He abstracts and redefines the moral problem; "[t]ransposing a hierarchy of power into a hierarchy of values, he defuses a potentially

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[23] As participants in the rights and responsibilities study, which involved a total of 144 male and female participants aged 6-9, 11, 15, 19, 22, 25-27, 35, 45 and 60 (matched for age, intelligence, education, occupation and social class), Jake and Amy were interviewed about their conceptions of self, morality, moral conflict and choice (Gilligan, n 3 above, 3).

[24] Gilligan, *ibid*, 29.

[25] Gilligan, *ibid*, 26.

[26] Gilligan, *ibid*.

[27] Gilligan, *ibid*.

explosive conflict between people by casting it as an impersonal conflict of claims".[28]

Alternatively, Amy hears in Heinz's story a narrative of fractured relationships "that must be mended with its own thread".[29] Unlike Jake, she understands the dilemma in terms of *how*, as opposed to *whether*, Heinz should act – should Heinz *steal* the drug?[30] Within her world of connection and care, she takes it as given that Heinz will act. She seeks a solution to the dilemma that will maintain the networks of relationships between, and reinforce the responsibility of, the parties involved. In order to do so she fights the hypothetical. She asks questions; why doesn't Heinz get a loan or explore the potential of an agreement between himself and the pharmacist? She considers Heinz's responsibility to his wife – what if he gets caught and goes to jail, who will support her then? – and the responsibility of the pharmacist, "believing that the world should just share things more and then people won't have to steal".[31] Her contextual and relational care-based moral reasoning is grounded in her assumption of shared connections and a belief that "her voice will be heard".[32] Despite appearing "evasive and unsure", Amy reveals a "different truth" and ultimately, suggests Gilligan, a more adequate solution to the problem.[33]

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[28] Gilligan, *ibid*, 32.

[29] Gilligan, *ibid*, 31.

[30] Gilligan, *ibid*.

[31] Gilligan, *ibid*, 29.

[32] Gilligan, *ibid*.

[33] Gilligan, *ibid*, 28-31.

Amy and Jake, in their responses to Heinz's dilemma, like the US Supreme Court and the women in Gilligan's abortion study, hear different stories. Whilst Jake hears Heinz's dilemma as one of conflicting claims, hierarchy and rights, Amy listens to a tale of connection, relationship and responsibility; their differing understandings transform, or more specifically, separate Heinz's dilemma into two distinct stories, each requiring the application of different understanding of moral reasoning. Yet whilst Jake's response is seen, according to Kohlberg's scale, to represent that of a

> child standing at the juncture of childhood and adolescence at ... the pinnacle of childhood intelligence, and beginning through thought to discover a wider universe of possibility,[34]

Amy's is interpreted, somewhat differently, as illogical and evidence of her "inability to think for herself".[35] Her alternative understanding of the dilemma falls outside Kohlberg's trajectory of moral development. As a result, to the frustration of both Amy and her interviewer, her solution is (mis)understood and dismissed as evasive, as opposed to inclusive, of the difficulties raised by Heinz's dilemma.[36] Consequently, as Jake surges ahead – his approach not

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[34] Gilligan, *ibid*, 27. Kohlberg, with Kramer, identified six stages of moral development, in which there are essentially three levels. At first, the individual's understanding of fairness is seen to stem from his egocentric focus on his own needs (stages one and two). This later develops into an understanding grounded in social conventions and agreement (stages three and four) until finally the individual develops "a principled understanding of fairness that rests on the free-standing logic of equality and reciprocity" (stages five and six) (L Kohlberg & R Kramer 'Continuities and Discontinuities in Child and Adult Moral Development' (1969) 12 *Human Development* 93-120 in Gilligan, *ibid*, 27).

[35] Gilligan, *ibid*, 28.

[36] Gilligan, *ibid*, 31.

only a "conventional" mixture of stages three and four, but it seems evidence of his "moral maturity"[37] – Amy's response, like those of the women considering an abortion, falters between stages two and three. It is seen to

> reveal a feeling of powerlessness in the world, an inability to think systematically about the concepts of morality or law, a reluctance to challenge authority or to examine the logic of received moral truths, a failure even to conceive of acting directly to save a life or to consider that such action, if taken, could possibly have an effect.[38]

The insights of her different voice are overlooked and downplayed; her focus on connection, care, responsibility and relationship is not only misunderstood, but also effectively silenced. Indeed, by the time Amy is fifteen she is beginning to change her mind.[39] Asked again about Heinz's dilemma, she replies,

> "I hated these dilemmas last time as much as I do now" ... "It all depends. What if the husband got caught? It would not help his wife. And anyway, from everything I know about cancer, it cannot be cured by a single treatment. And where would this drug be, sitting out on the shelf of a drugstore? The whole situation is unreal". She then said: "Like I said last time [actually she had not], life comes before property. He should steal the drug".[40]

Her pre-teenage confidence that her voice will be heard has given way to a, perhaps unconscious, understanding that, in fact, in order to be heard she must articulate Jake's voice and in so doing "accept a construction of reality

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[37] Gilligan, *ibid*, 27.

[38] Gilligan, *ibid*, 30.

[39] Gilligan, n 6 above, xxi-xxii.

and morality that she identifies as problematic".[41] She must learn to distinguish between what she thinks and what she *really* thinks.

Interestingly, Jake's approach at fifteen has also changed; "[w]hat had seemed a simple exercise in moral logic [has] become a more complex moral problem".[42] He now seeks, and is able, to identify with both Heinz and the pharmacist.

> "I think that what the druggist is going to experience is some sorrow and some anger over losing his money, and it is a shame that he has to feel like that" ... But he says: "It is not as deplorable a thing as the idea of Heinz – with his wife dying and him having to deal with his wife's dying".[43]

Unlike Amy, who advances a full stage on Kohlberg's scale, Jake fails to evidence any advance in moral development between the ages of eleven and fifteen. His introduction of a moral perspective is, albeit unsurprisingly, unintelligible within an understanding of moral development equated with justice reasoning. Kohlberg's scale is ultimately unable to respond fully to the approach of either Jake or Amy. The result being, that whilst both teenagers are bilingual they each have a different second language,[44] Amy is encouraged to "become more deeply uncertain and Jake ... more simply dogmatic".[45]

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[40] Gilligan, n 15 above, 41 (paraphrasing Amy's responses).

[41] Gilligan, n 11 above, 329.

[42] Gilligan, *ibid*.

[43] Gilligan, n 15 above, 42 (paraphrasing Jake's responses).

[44] Gilligan, *ibid*, 63.

[45] Gilligan, *ibid*, 42.

In response, Gilligan, through her articulation of the different voice, establishes a framework in which both ways of seeing are recognised and valued. She develops an understanding of moral decision-making, which reflects and combines the voices of both Amy and Jake, seeking a transformative – as opposed to an 'androgynous' or 'separate-but-equal' – solution in which the values and priorities of each voice are fused together.[46] It is an understanding in which Amy's 'ethic or activity of care', with its focus on responsibility and relationship, concrete circumstances and webs of connections, tempers and merges with Jake's 'ethic of justice', where self is abstractly defined through separation, and decision-making is mediated through hierarchy, principles, right, equality and justice.[47]

Once again it is important to emphasise that Gilligan's purpose is not to suggest that all women do – or even should – speak and reason like Amy and that all men are like Jake. Nor is it to suggest that Amy's voice is essentially 'better' than Jake's.[48] Rather, the narrative of the different voice enables the exploration of the interaction between a justice and a care perspective, revealing and then subverting attempts to promote one over the other.

> The inclusion of two voices in moral discourse, in thinking about conflicts, and in making choices, transforms the discourse. It is no longer either simply about justice or simply about caring; rather it is about bringing them together to transform the domain.[49]

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[46] Gilligan, *ibid*, 45.

[47] Gilligan, n 3 above, 30-32.

[48] Gilligan, n 6 above, xiii.

[49] Gilligan, n 15 above, 45.

In short, as Jake and Amy play together, a new game emerges in which they both become the pirates that live next-door.[50]

*A Glimpse of Promising Potential*

In her assessment of the relationship between the ethic of care, female subjectivity and feminist legal theory, Maria Drakopoulou suggests that

> [w]hat *was* extraordinary about the ethic of care, and what underpinned its profound impact and continuing success beyond the disciplinary limits of psychology, derives neither from a widespread acceptance of Gilligan's findings nor a firm belief in their scientific truth. The key element was the *promise* her work held for academic feminism, both as an institutional movement and as part of the wider struggle of women.[51]

Gilligan's narrative of the different voice offers a glimpse of an alternative reality where connection, care, empathy and responsibility might be sought alongside separation, autonomy, rights and justice; where relationships might be understood in terms of webs as opposed to ladders; where justice is caring and care is just; and where the defiled and excluded are valorised and able to sing. Independent of its acceptance as distinctly – or even predominately – female, Gilligan's recognition of an alternative or different voice, a voice that no one else was listening to, in her studies has been seen to validate

[50] Carol Gilligan compares these two alternative understandings of moral self to a conversation between two four-year olds who want to play different games. The boy wants to play pirates and the girl would rather play next-door neighbours – "'okay' says the girl, [coming to what Gilligan defines as an *inclusive* as opposed to a fair solution] 'then you can be the pirate that lives next-door'" (*ibid*, 45).

perspectives too often silenced, devalued and dismissed as "naïve, irrelevant, underdeveloped, sick and so forth" within dominant understandings of moral decision-making.[52]

At the same time, her work highlights the inherent inadequacy of and flaws in attempts to prescribe and impose order on human responses to moral dilemmas uninformed by a multiplicity of narratives. In particular, Gilligan's identification of the different voice challenges the 'point-of-viewlessness' of traditional psychological theories, which embrace impersonal objectivity and rationality whilst reducing all human experience to the experiences of men. She exposes their inability to recognise and include difference without distortion and diminution, and calls time on their masquerade.

What is more, by acknowledging the importance of alternative forms of reason and reasoning traditionally associated with the excluded and/or feminine voice – emotion, care, connection, and empathy – Gilligan destabilises the monotonic norm and illuminates the paradox whereby the

> very traits that traditionally have defined the 'goodness' of women, their care for and sensitivity to the needs of others, are those that mark them as deficient in moral development.[53]

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[51] M Drakopoulou 'The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship' (2000) 8(2) *Fem LS* 199, 204 (footnotes omitted).

[52] Gilligan, n 15 above, 63.

[53] Gilligan, n 3 above, 8.

In so doing, she contributes to the exposure of the constructed hierarchy behind knowledge claims, revealing the power implications of knowledge legitimating mechanisms and creating a normative demand for the inclusion of 'other' knowledges within the dominant discourse. All in all, it seems that Gilligan's narrative – and in particular the possibility of diverse modes of reasoning and decision-making revealed in her articulation of the different voice – could ultimately have profound philosophical, epistemological, and legal implications that stem far beyond Amy and Jake's game of next-door pirates.

**The Application of Gilligan in Feminist Legal Scholarship**

Feminist legal scholars quickly embraced and utilised the insights and potential of the different voice in order to challenge the predominance of traditional accounts of legal reasoning. Carrie Menkel-Meadow, for example, has argued that law and the legal system might "represent an embodiment of Jake's voice – the male voice".[54] Similarly, others have likened law's traditionally adversarial and hierarchical nature to that of a boy's childhood game.[55] In this way, the legal process is seen as a competition with clear

[54] C Menkel-Meadow in I Marcus *et al* 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buff L Rev* 11, 53. Carrie Menkel-Meadow is not suggesting here that the law and the legal system are *necessarily* male, rather that they are associated with and derived from traits commonly and perhaps empirically, but not exclusively or universally, identified with men.

[55] D Jack & R Jack 'Women Lawyers: Archetype and Alternatives' in C Gilligan, J V Ward, J McLean Taylor with B Bardige (eds) *Mapping the Moral Domain* (Cambridge, Mass.: Harvard University Press, 1988) 263-288, 264; Gilligan, n 15 above, 59-60; Menkel-Meadow, *ibid*, 56; and Worden, n 9 above, 1149.

rules, winners, and losers, in which the (male) lawyer dispassionately "spots the legal issues ... balances the rights and reaches a decision".[56] Human interaction is understood as atomistic and competitive; the behaviour and success of the individual are measured against allegedly abstract principles of justice, fairness, neutrality, and reasonableness and women, it seems, if they want to join in the legal game, must learn to play by the law/men's rules.

Not insignificantly, at least one of these rules relates to what is considered appropriate dress, that is, literally what the *woman* lawyer should and should not wear.[57] This is vividly captured in Worden's description of the impact of her failure to wear a suit whilst participating in a moot court. Her dress (pumps, nylons and a straight grey skirt) was at once a distraction – emphasising her difference both as a woman and as a non-suit-wearing would-be lawyer – and, apparently, was part of her evaluation. Her lack of a jacket or its apparently acceptable alternative (a soft bow at her neck) exposed her as "unprofessional and detracted from the content of her presentation".[58] She continues,

> [t]his experience blew me away ... Somehow ... one's neckline is a crucial feature of legitimacy! Scoop neck, v-neck, ruffles and clinging sweaters, are all unacceptable: they are too feminine, and hence 'unprofessional'. On the other hand, men's neckties are too masculine, too severe, and, therefore, equally taboo. The best bet seems to

[56] C Menkel-Meadow 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1(1) *Berkeley Women's LJ* 39, 46.

[57] Jack & Jack, n 55 above, 266-267.

[58] Worden, n 9 above, 1148.

be a large (but not too large) soft bow (feminine) tied at the neck (masculine) which calls as little attention as possible to the chest beneath it.[59]

Feminine traits are simultaneously designated and devalued; it seems the woman lawyer must speak more like a man and less like a woman, whilst neither looking or acting too much like either: "Be like us, but not totally; join our game, play by our rules ... but not on our team, and not on their team".[60] To be successful, the woman lawyer is encouraged to deny or suppress her caring and affectionate characteristics (if indeed she has them) and adopt the (masculine) tactics of hierarchy, competition, and emotional detachment. Thus, it is argued, in order to join the legal game the woman lawyer must not only play by its rules, but "play longer and harder to earn the right to compete on equal terms".[61]

Perhaps unsurprisingly, the processes of legal education have come to be seen by some as the juncture at which one way of knowing the world is replaced by another; where perceived diversity and difference are submerged beneath the 'legal self'.[62]

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[59] Worden, *ibid*, 1149.

[60] Worden, *ibid.*

[61] Jack & Jack, n 55 above, 267.

[62] This process of 'eclipsing the self' by both male and female students is well documented in the literature on legal education. See, e.g., P Schlag 'The Legal Self' in *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 126-140 and D Kennedy *Legal Education and the Reproduction of Hierarchy – A Polemic Against the System* (Cambridge: Afar, 1983) in D Kennedy *Essays on Legal Education* 1 January 1996 (unpublished). However, interestingly both Schlag and Kennedy are silent on the gender implications of this process. My suggestion that, at least in his adjudicative role, the legal self is recognisably male means that this process is inevitably particularly and peculiarly disorientating and

I felt it happening in law school. I honestly felt it happening. I know people thought I was crazy, but I can remember first-year law school – I have this feeling when I was being forced to change my set and I can feel it. It's hard to describe but I felt it. And I remember saying to my friend, "They're fucking with your brain. Can you feel it?" [Jane, attorney, 36][63]

In the groves of the legal academy, Shelia McIntyre suggests, women learn how "to speak male as a second language ... fluently".[64] The would-be woman lawyer learns how to play by Jake's rules – to "think like a lawyer" and to renounce her previous "knee-jerk, passionate reactions" – and suppress her other 'other-like' tendencies.[65] Her 'female' voice is denied and subordinated, not only formally through the internalisation of the detail and abstraction of legal reasoning, but informally in the "'what-goes-without-saying' of the law school experience" and legal culture.[66] The potential for possibly overwhelming feelings of "dissatisfaction and alienation" amongst those who see themselves as 'outsiders' is encapsulated in an open letter sent to the Yale law school community by a number of women and minority law students. In it they spoke of

the monolithic, confident voice of the 'insiders' who see themselves as the norm and who have (often unconsciously) little tolerance for our interest in diversity and difference. This voice, tone, style is often defended as 'the way lawyers speak' ... to

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alienating for women. See further, M Thornton *Dissonance and Distrust: Women in the Legal Profession* (Oxford: Oxford University Press, 1996) 75-79, 268-271 and Worden, n 9 above.

[63] Jack & Jack, n 55 above, 271.

[64] Address by Sheila McIntyre, 8th Annual Conference on Critical Legal Studies, Georgetown University Law Centre, Washington, DC (16-18 March, 1984) in Worden, n 9 above, 1145.

[65] Kennedy, n 62 above, 7.

[66] Worden, n 9 above, 1145.

> the extent that this *is* the way lawyers speak, *we* must conclude that we cannot be lawyers – or that we cannot be ourselves.[67]

According to such a perspective, the would-be (woman) lawyer, like the little mermaid, is faced with an empty choice: her self or the law. Torn between the prospects of mutilation or alienation – of belonging or exile, between sound and silence – the woman lawyer must, like Shakespeare's Portia, adopt the necessary strategic identity.[68] She must choose her tactics well, so as to play her role unnoticed within the legal game. To this end, Dana and Rand Jack describe three distinct "patterns of adjustment", emerging out of their conversations with eighteen female lawyers, which the woman lawyer might adopt.[69] She might seek to 'emulate the male model', denying her difference by ensuring that her affectionate or relational self "stays at home" – or better still dormant.[70] Alternatively, she might adopt a part mermaid/part lawyer approach, attempting to 'split her self' between the two roles so that each is

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[67] 'Open Letter to the Law School Community' by Minorities and Women at Yale Law School, unpublished document (1984) in Jack & Jack, n 55 above 268. See also, e.g., Jeannie's story in Worden, n 9 above, 1145-1147.

[68] On the adoption of Portia, Shakespeare's heroine in *The Merchant of Venice* as a metaphor for the woman lawyer, see further, chapter 3, 126-160, below.

[69] Jack & Jack, n 55 above, 269. Dana and Rand Jack interviewed a total of 36 attorneys (18 male and 18 female matched for type and length of practice) based in a northwest county of the US about "moral choice and conflict in the practice of law". The article cited represents only a part of this project and focuses on the women lawyer's perspectives and patterns of adjustment to the role of lawyer. See further, n 55 above, 263-264 and R Jack & D Jack *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (Cambridge: Cambridge University Press, 1989). See also Margaret Thornton's explorations of the images adopted by the woman lawyer in an attempt to ensure her acceptance within the legal academy: the 'body beautiful', the 'adoring acolyte', the 'dutiful daughter' and the 'queen bee' (n 62 above, 106-129).

[70] Jack & Jack, n 55 above, 271.

master of its own sphere; the 'lawyer self' and 'caring self' are, in theory, neatly compartmentalised.

> To be a full person you don't want to lose the emotional side of yourself. You would hope to be able to have in your personal life that emotional response that you aren't necessarily allowed in your practice. And you hope that your analytical, critical self just doesn't eat that all up because then you're left with a void. That's something I fight against, you know, and almost all the other women I know fight against also. [Ann, attorney][71]

Finally, the woman lawyer might eschew mutation and compartmentalisation in favour of 'reshaping her legal role', infusing it with care as she "bleed[s] for" and "stand[s] in the emotional as well as the legal shoes of [her] clients".[72]

In light of increased attention to and knowledge of the experiences of the woman lawyer, Gilligan's articulation of the different voice was timely, resonating, in particular, with the woman lawyer's feelings of 'not quite belonging' and somehow explaining her continued isolation and marginalisation within the legal profession. It literally gave her a voice – Amy's – and the transformative potential of this final strategy – reshaping the role of the lawyer – hugely impacted on the feminist legal scholars' imagination as they began to consider the potential impact of Amy's different voice on the legal system. What would happen if Amy refused to play by Jake's rules? Could she re-write the rules of the game?

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[71] Jack & Jack, *ibid*, 279.

[72] Jack & Jack, *ibid*, 282-283.

In her consideration of Amy's "Portia-like dissatisfaction" with the male adversarial voice, Menkel-Meadow has suggested that the introduction of the different voice into law could lead to a radically different legal system, reflecting Amy's understanding and perspective.[73] Amy's rejection of Jake's hierarchical ordering of claims and refusal to "play by the adversarial rules",[74] is seen to promote communication, relationship and negotiation over the adjudication of winners, rights and principles. Her inclusive focus concentrates as much on procedure – how the dispute is resolved – as on the development of alternative substantive solutions.[75] As a result, if Amy's perspective was incorporated, perhaps the processes of legal decision-making might give greater recognition, emphasis and legitimation to negotiation and mediation as potential methods of, and alternatives to traditional methods of, dispute resolution.[76] Advocacy might come to resemble something more like a "conversation" grounded in a relationship of trust and mutual respect as opposed to persuasive intimidation, dramatics and power.[77]

The recognition and acceptance that "the adversary system of justice impedes not only 'the supposed search for truth', but also the expression of concern for the person on the other side",[78] might enable the courtroom battle to be replaced with a more caring, inclusive ethic. An understanding of the

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[73] Menkel-Meadow, n 56 above, 42 and n 54 above, 54.

[74] Menkel-Meadow, n 56 above, 51.

[75] Menkel-Meadow, *ibid*, 51-52 and see also Menkel-Meadow, n 54 above, 52.

[76] N Cahn 'Styles of Lawyering' (1992) 43 *Hastings LJ* 1039, 1048.

[77] Menkel-Meadow, n 56 above, 54.

opposing side, not as an end to be defeated but, as someone to be "cared for, thought about and dealt with",[79] might allow the lawyer, no longer "imprisoned in the role of advocate",[80] to "lean across the adversarial table and help her client's opponent".[81] Perhaps current ethical guidelines as to appropriate behaviour and conduct might be re-imagined; infused with the instincts and concerns of Hilary and Amy, their focus might be widened to include the client/client and lawyer/opposing client relationships.[82]

Alongside this increased awareness and understanding of the other party's perspectives and interests, Naomi Cahn suggests that the application of the different voice might also encourage greater recognition of the "relational context in which the client's problem arises" and acknowledgement of the importance of listening to, understanding and empathising with the totality of their experience.[83] Amy and Hilary's ability to

> 'take the part of the other and submerge the self' may ... [enable them] to enter the world of the client, thereby understanding fully what the client desires and why,

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[78] Hilary, a young lawyer interviewed by Gilligan as part of her college student study, quoted by Gilligan, n 3 above, 135. On the college student study generally see Gilligan, n 3 above 2-3.

[79] C Menkel-Meadow 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24(4) *Os HLJ* 897, 915.

[80] Menkel-Meadow, n 54 above, 55.

[81] C Menkel-Meadow 'Portia Redux: Another Look at Gender, Feminism and Legal Ethics' (1994) 2 *Va J Soc Pol'y & Law* 75, 79.

[82] Menkel-Meadow, n 54 above, 55-56. See further, Stephen Ellmann's consideration of how an ethic of care might alter understandings of the lawyer's ethical responsibilities, 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 *Geo LJ* 2665.

[83] Cahn, n 76 above, 1049.

without the domination of what the lawyer perceives to be 'in the client's best interests'.[84]

This widened perspective, eschewing the traditional legal focus on principle, reduction and abstraction, focuses instead on the particular, connected and contextual, recognising and seeking to maintain the 'web' of relationships between the parties. Within this re-imagined legal system, the (woman) lawyer might endeavour to avoid the reductive and distortive effects of abstraction, dispassionate detachment and universal application, by reasoning differently and thereby reconstructing the situation before her in its "contextual particularity".[85] By expanding the conception of legal relevance and the definition of interested parties, she might expose and embrace the social contingencies previously flattened, silenced, and abstracted within traditional legal reasoning and thus engender a better understanding and realisation of justice.[86]

In short, if Amy or Hilary were to re-write the rules of the legal game, the practice of law might favour and prioritise cooperation over competition, relationships over rules, nurturing over detachment, dialogue over argument, mediation over confrontation, and connection over separation. It might become less aggressive, hierarchal and confrontational, focusing less on the creation of abstract disputes and binary results – on winning or losing – and

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[84] Menkel-Meadow, n 56 above, 57.

[85] Gilligan, n 3 above, 100.

[86] Menkel-Meadow, n 56 above, 58-59.

more on 'real' issues, context and relationships. As a result, the lawyer might be less "offended by emotions" and recognise, with Mary Dunlap, that

> [w]e need the full range of emotion. In court we need anger (wow, do we need it). We need compassion. We need tenderness. We need all the things that make the legal system, or could make the legal system, more of a healer and less of a slayer.[87]

It seems that the application of Amy's different voice challenges the superiority, dominance and legitimacy of Jake's 'masculine' qualities in traditional accounts of legal reasoning in a multitude of ways. Gilligan explores this through a comparison of the approaches taken by two lawyers to moral conflict at work quoted below:

> [Lawyer one] "I usually resolve the dilemmas according to my internal morality. The more important, publicly, your office is, the more important it is that you play by the rules" ... [Lawyer two] "I have to preside over these decisions and I try to make them as non-disastrous as possible for the people who are most vulnerable. The fewer games you play, the better".[88]

Interestingly, both use the image of a game, albeit in different ways. Gilligan suggests that whilst lawyer one might be said to focus on justice, the other lawyers with care. Her point is not to establish one way as somehow 'better' than the other. Rather, it is simply to highlight different ways of seeing and, in this context, alternative ways of lawyering. More broadly, it is to explore the

[87] M Dunlap in I Marcus *et al* 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buff L Rev* 11, 20.
[88] Gilligan, n 15 above, 59-60.

opportunity to transform the legal system through the incorporation of both perspectives and to reassess

> our most basis conceptions of what it means to be a lawyer [and] ... the possibility of creating new ways of [being and understanding and], not just adopting new styles for doing the same old thing.[89]

The recognition "that each time we let in a new excluded group, that each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing",[90] not only legitimates alternative means of dispute resolution and offers the opportunity to include previously excluded knowledges, but, by so doing, radically expands our horizons. It disrupts conventional legal assumptions, replacing law's one-way system of communication with dialogue and conversation.[91] It presents opportunities "to complete the picture of the world painted by legal education"; an opening toward a transformed and re-imagined law school curriculum that acknowledges the compelling intellectual, practical, psychological, ethical and equitable reasons for affirming and incorporating Amy's previously ignored and devalued insights, values and skills.[92] Arguably too it invites the restructuring of the legal profession and workplace so as to allow for both

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[89] A Shalleck 'The Feminist Transformation of Lawyering: A Response to Naomi Cahn' (1992) 43 *Hastings LJ* 1071, 1972.

[90] C Menkel-Meadow 'Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law' (1987) 42 *U Miami L Rev* 29, 52.

[91] Menkel-Meadow, n 54 above, 53.

[92] 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' (1998) 38 *J Legal Educ* 243, 252.

'vertical' and 'horizontal' satisfaction,[93] including shorter working hours, reorganised family-friendly work environments, the provision of childcare in the workplace, the wider acceptance of part-time work, reduced expectations in relation to travel, and less hierarchical, and more consensus-building and nurturing, management styles.[94] In fact, the incorporation of Amy's voice offers the possibility, not only to alter the rules of the game, but also to re-imagine and transform the context in which it takes place. It is to establish a different, previously unimaginable, legal system that is neither Amy's nor Jake's, neither exclusively male nor essentially female, but rather a combination of the two that goes beyond gender and which might offer increased opportunities for the delivery of justice.[95]

### The Different Voice and the Woman Judge

Conversations as to the potential of Amy's different voice have become intrinsically linked with debates about the particular contribution of the woman lawyer and judge.[96] Although scholars generally acknowledge that the different voice is not necessarily gender-specific and recognise 'male' and

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[93] Menkel-Meadow, n 81 above, 87.

[94] Cahn, n 76 above, 1049.

[95] Cahn, *ibid*, 1068-1069. For a UK perspective particularly in relation to women sureties, see e.g., R Auchmuty 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11(2) *Social & Legal Studies* 257.

[96] My focus here is predominantly, although not exclusively, on the woman judge. On the potential 'difference' of the woman lawyer, academic and student see, e.g., U Schultz & G Shaw (eds) *Women in the World's Legal Professions* (Oxford: Hart Publishing, 2003); Thornton, n 62 above; and J Taber *et al* 'Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates' (1988) 40 *Stan L Rev* 1209 respectively.

'female' as "code" for Gilligan's empirical observations,[97] Amy's and the woman lawyer's voice have become to some, in practice, if not in theory, almost synonymous. Yet, no causal link or necessary connection has been established. Moreover, any strong suggestion of a necessary correlation between Gilligan's different voice and that of 'women' stands accused of invoking an essential conception of 'womanhood' which is, inevitably, contentious and difficult to sustain.[98] For this reason, attempts to identify the different voice in the actions of women lawyers, and in the commentary and judgments of female judges, have been both inconclusive and highly controversial.[99]

The fluctuation in mood amongst feminist legal scholars is reflected in the titles of their articles and books: compare Bertha Wilson's gentle question, 'Will Women Judges Really Make a Difference?' with Clare McGlynn's more positive assertion, 'The Woman Lawyer – Making the Difference', and the somewhat more reserved enquiry of Hilary Sommerlad 'Can Women Lawyer

[97] Menkel-Meadow, n 54 above, 53.

[98] See, e.g., Kate Malleson 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11(1) *Fem LS* 1.

[99] See, generally, Malleson, *ibid*; Schultz & Shaw, n 96 above and H H Kay & G Sparrow 'Workshop on Judging: Does Gender Make a Difference?' (2001) 16 *Wis Women's LJ* 1 introduction to a collection of symposium paper following a 'Symposium and Workshop on Judging' at the University of California, Berkeley School of Law (Boalt Hall) 2000. See further, e.g., M Solimine & S Wheatly 'Rethinking Feminist Judging' (1995) 70 *Ind LJ* 891-920; E Martin 'Women on the Bench: A Different Voice?' (1993) 77 *Judicature* 126; D Allen & D Wall 'Role Orientations and Women State Supreme Court Justices' (1993) 77 *Judicature* 156; K Werdegar 'Why A Woman on the Bench?' (2001) 16 *Wis Women's LJ* 31; J Toobin 'Women in Black: Female Judges are More Compassionate than Men the Theory Goes. Not in Texas' *The New Yorker* 30 October 2000 and B Bogoch 'Judging in a "Different Voice": Gender and the Sentencing of Violent Offenders' (1999) 27 *Int J Soc L* 51.

Differently?'[100] The rather flippant comments of Dean Enwin Griswold on women's admission to Harvard Law School in 1950 appear, to some, as sadly prophetic:

> Most of us ... have seen women from time to time in our lives and have managed to survive the shock. I think we can take it, and I doubt it will change the character of the School or even its atmosphere to any detectable extent.[101]

The irony of this is not lost on Deborah Rhode: "For centuries, women were excluded from the professions on the assumption that they were different; once admitted the assumption typically was that they were the same".[102] The presence of the woman lawyer within the legal academy and profession, once a potential irritant or disruption, is seen as inert or placebo-like; her difference is rendered stable. Whilst others suggest a more positive, "intuitively obvious"[103] impact of gender on the processes of lawyering and judicial decision-making, scholarly opinion is divided as to the extent to which this 'intuitive difference' is in fact identifiable and correlative. Cynthia Fuchs Epstein suggests that, ultimately, researchers tend to find what they are looking for – be it difference or similarity – with variation in legal behaviour

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[100] B Wilson 'Will Women Judges Really Make a Difference?' (1990) 28 *Os HLJ* 507; C McGlynn 'The Woman Lawyer – Making the Difference' (London: Butterworths, 1998); H Sommerlad 'Can Women Lawyer Differently? A Perspective from the UK' in Schultz & Shaw, n 96 above, 191.

[101] E Griswold 'Developments at the Law School' *Harvard Law School Year Book 10* (Cambridge, Mass.: Year Book Committee of Philips Brooks Home Association of Harvard University, 1950) in Deborah L Rhode 'Gender and the Profession: An American Perspective' in Schultz & Shaw, *ibid*, 3, 3.

[102] Rhode, *ibid*, 4.

most likely within, rather than across, gender.[104] Indeed, Cahn suggests it may be that women, when they depart from traditional adversarial lawyering, are simply assumed or perceived to be adopting peculiarly feminine, as opposed to appropriately different, styles of lawyering; what is seen as unremarkable in a man is viewed as 'different' or feminine in a woman.[105]

> Not all male lawyers resort to the stereotypical aggressive, hard-ball, 'male' style of lawyering. Many are soft-spoken and conciliatory in negotiations. They may be more skilled at listening than at arguing. But when men display these varieties in lawyering styles, it is regarded as just that – a difference in style. When women depart from the stereotypical aggressive lawyering, it is more likely to be regarded as a gender difference and a basis for questioning competence.[106]

Whilst the traditional legal voice, it is argued, remains implicitly reflective of male experience and viewpoints, an openly caring lawyer risks being seen not only as feminine but also as "unprofessional and perhaps incompetent".[107]

When the lawyer in question becomes a judge, the stakes are even higher. To speak both as a woman *and* as a judge, that is, "to wish for otherness in adjudication represents a move in a profoundly dangerous

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[103] J Aliotta 'Justice O'Connor and the Equal Protection Clause: A Feminine Voice?' (1995) 78 *Judicature* 232, 232.

[104] C Epstein *Deceptive Distinctions* (New Haven, Connecticut: Yale University Press, 1990) in Menkel-Meadow, n 81 above, 87.

[105] Cahn, n 76 above, 1046.

[106] ABA Commission on Women in the Profession, Report to the House of Delegates (1988) in Cahn, *ibid*.

[107] Jack & Jack, n 55 above, 281.

game".[108] It is deeply radical and subversive; like other unwelcome or subversive intruders, the different voice is unlikely to leave explicit evidence of its presence. The woman judge is self-consciously dismissive of her difference in her desire to emulate the male lawyer model; difference is lost, hidden and unwelcome. Gender is pronounced "irrelevant";[109] everyone is assumed to be male – or perhaps unisex.[110]

What is more, even positing the question of the existence of a different voice is viewed, at least by Sandra Day O'Connor, as a "dangerous and unanswerable" recollection of the old myths women have "struggled to put behind" them.[111] The female judge, it seems, is a judge first and a woman second. In the face of such denial, the threat of the emasculated judge recedes behind the façade of sameness; the evidence of brutal mutation and "stigmata" of gender is obliterated.[112] The woman judge's insistence of her uniformity and univocality is so strong that even if she did speak with a different voice, the legal scholar is unlikely to be able to find it.[113]

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[108] S Berns *To Speak as a Judge – Difference, Voice and Power* (Dartmouth: Ashgate, 1999) 33.

[109] Dame Rosalyn Higgins QC in McGlynn, n 100 above, 189-191. See also A Boigeol 'Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary' in Schultz & Shaw, n 96 above, 401, 416.

[110] Anon 'Butler-Sloss is content to be a unisex judge' *The Times* Tuesday November 21, 2000. See also E B Junqueira 'Women in the Judiciary: a Perspective from Brazil' in Schultz & Shaw, n 96 above, 437, 450 although, cf, S Rush 'Feminist Judging: An Introductory Essay' (1993) 2 *S Cal Rev L & Women's Stud* 609, 611.

[111] S O'Connor 'Portia's Progress' (1991) 66 *NYU L Rev* 1546, 1557, 1553. Transcript of the 23rd James Madison Lecture on Constitutional Law given by O'Connor at New York University School of Law (29 October 1991).

[112] Berns, n 108 above, 203.

[113] Berns, *ibid.*

Nevertheless, despite pronouncements to the contrary, some scholars believe they have found evidence of a different voice in the judgments and commentary of two prominent female judges – Sandra Day O'Connor and Bertha Wilson – whose pioneering achievements as the first female judge on the US Supreme Court, in 1981 and Canadian Supreme Court, in 1982, respectively, have been constantly scrutinised for evidence of 'difference'. Whilst there are no similarly placed female judges in the UK, this has not meant their presence, or rather absence, within and impact on the upper realms of UK judiciary – explored here through the judgments and commentary of Brenda Hale, particularly in relation to parental contact in the context of domestic violence – has gone unnoticed.[114]

*Sandra Day O'Connor*

At the end of her lecture entitled 'Portia's Progress', Sandra Day O'Connor considers the question 'Do women judges decide cases differently by virtue of being women?' acquiescing with the answer of Justice Jeanne Coyne that "a wise old man and a wise old woman reach the same conclusion".[115] Whilst this does not necessarily answer the question, it does reveal O'Connor's reluctance to contemplate difference. Her hostility toward the apparent

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[114] See, e.g., C Dyer 'All-woman court to make history' *The Guardian* 2 February 2001; Robert Mendick's profile of Elizabeth Butler-Sloss, 'To switch off a life or not. It's all up to her' *The Independent on Sunday* 10 March 2002; and chapter 1, '"Effecting" the Woman Judge', 18-34, above. Brenda Hale has for some time been tipped to become the first female law lord (M Berlins 'Judging the Judges' *The Guardian* 20 March 2002); however this was recently doubted by Kate Malleson in conversation with Katherine Ross and Jenni Murray on Radio Four's *Women's Hour* (16 December 2002) available online at http://www.bbc.co.uk/radio4/womanshour/16_12_02/monday/info1.shtml.

recollection by 'New Feminism' of Victorian myths of 'True Womanhood', which sought to legitimate women's exclusion from the legal profession, is perhaps understandable, but nevertheless somewhat reactionary.[116] She is caught in a paradox of denial – torn between her

> aspiration that, whatever our gender or background, we all may become wise – wise through our different struggles and different victories, wise through work and play, profession and family

and the inevitable recognition of self this desire entails.[117]

Despite O'Connor's explicit antagonism toward and denial of a feminine judicial voice, Suzanna Sherry's exploration of the parallels between a feminine perspective in jurisprudence and the classical republican tradition in political philosophy concludes that O'Connor's decisions, particularly in equal protection and religious establishment cases, are "highly suggestive of the operation of a uniquely feminine" – albeit highly conservative – perspective.[118] By this, Sherry means one that emphasises connection over autonomy, contextuality over fixed rules and responsibility over rights.[119]

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[115] Margolick 'Women's Milestone: Majority on Minnesota Court' *New York Times* 22 February 1991 in O'Connor, n 111 above, 1558.

[116] O'Connor, *ibid*, 1553.

[117] O'Connor, *ibid*, 1558.

[118] S Sherry 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Va L Rev* 543, 592, 613.

[119] Sherry, *ibid*, 582. See also Susan Behuniak-Long's critique of O'Connor's promulgation of a *feminine* jurisprudence at the expense of a *feminist* jurisprudence and solid Conservative voting block in 'Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking' (1992) 54 *Review of Politics* 417, 421.

Sherry's conclusions have subsequently been challenged in a number of later studies, which claim to find "few, if any, statistically demonstrable differences" between O'Connor and her colleagues related to gender.[120] Ultimately, it seems, O'Connor remains stuck in the middle, "while feminists criticise her for not being enough of a woman ... mainstream legal scholars chastise her for thinking too much like a woman".[121]

*Bertha Wilson*

Similarly, Elizabeth Halka claims to have identified an "incontrovertible" different voice in Bertha Wilson's contextual, holistic and care-based approach to decision-making in the Canadian Supreme Court, particularly in the context of abortion and spousal abuse.[122] In *R* v *Morgentaler*, for example, in which the majority of the Canadian Supreme Court struck down as procedurally and substantively unconstitutional the provisions in the Criminal Code making abortion illegal, Wilson recognised that

> it is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course the case), but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the

[120] See, e.g., Aliotta, n 103 above, 235; Frug, n 11 above; S Davis 'The Voice of Sandra Day O'Connor' (1993) 77 *Judicature* 134; R A Cordray & J T Vradelis 'The Emerging Jurisprudence of Justice O'Connor' (1985) 52 *U Chi L Rev* 389; and R W Van Sickel *Not a Particularly Different Voice: The Jurisprudence of Sandra Day O'Connor* (New York: Peter Lang Pub, 2002).

[121] Behuniak-Long, n 119 above, 417-418.

[122] E Halka 'Madam Justice Bertha Wilson: A "Different Voice" in the Supreme Court of Canada' (1996) 35 (1) *Alberta L Rev* 242. See also C Boyle 'The Role of the Judiciary in the Work of Madame Justice Wilson' (1992) 15 *Dalhousie LJ* 241.

dilemma ... [the decision to terminate a pregnancy] is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations mitigating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.[123]

In her judgment Bertha Wilson is seen, by Halka, to have spoken in a different voice, to have looked effectively beyond the traditional androcentric conceptions of individual liberalism, privacy and autonomy in order to understand and make a difference to "the intensely personal feminine struggle which reflected and defined the woman's conception of self and her sense of connection with others".[124]

However, Bertha Wilson, in her speech entitled 'Will Women Judges Really Make a Difference?' is much more reticent:

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[123] [1988] 1 SCR 30, 171 ff (available at www.scc-csc.gc.ca). Whereas the other majority judges held that section 251 of the Criminal Code constituted a procedural violation of the pregnant woman's rights guaranteed by section 7 of the Canadian Charter of Rights and Freedoms, only Wilson argued the more controversial, and possibly courageous point, that it offended her rights to life, liberty and security in a *substantive* way (Halka, *ibid*, 254). On the background and response to this decision, see further E Anderson *Judging Bertha Wilson* (Toronto, University of Toronto Press, 2002) 227-234.

[124] Halka, *ibid*, 255. See also Halka's discussion of *R* v *Lavallee* [1990] 1 SCR 852 (at 258-263) described by Wilson as "one of her most important contribution to the development of Canadian Law" (B Wilson 'Women and the Canadian Charter of Rights and Freedoms' Address to the National Association of Women and the Law, Vancouver, February 1993 in Anderson, *ibid*, 221).

When I was appointed to the Supreme Court ... a great many women ... telephoned, cabled, or wrote to me rejoicing in my appointment. "Now", they said, "we are represented on Canada's highest court. This is the beginning of a new era for women". So why was *I* not rejoicing? Why did *I* not share the tremendous confidence of these women?

First came the realisation that no one could live up to the expectations of my well-wishers. I had the sense of being doomed to failure, not because of any excess humility on my part ... but because I knew from hard experience that the law does not work that way.[125]

In light of the hostile response and ensuing controversy, her restraint is perceptive and fortunate. Despite her insistence that she was simply raising, as opposed to answering, the question, her more modest, although no less courageous, suggestion that women brought particular and different perspectives to their judicial role and "can play a major role in introducing judicial neutrality and impartiality into the justice system" was received as controversial.[126] Almost immediately the right-wing women's group, REAL (Realistic, Equal, Active, for Life) Women of Canada attempted to discredit and remove Wilson from the Supreme Court. Her mere questioning of the possibility of judicial neutrality, it seems, "was in itself enough to reveal Wilson to be a feminist judge who had violated her own judicial oath of impartiality and [who] was accordingly incapacitated from the execution of her judicial duties".[127] Like a similar previous attempt, and the periodic future complaints

[125] Wilson, n 100 above, 507 (Presented at the 4th Annual Barbara Betcherman Memorial Lecture, Osgoode Hall Law School, 8 February 1990).

[126] Wilson, *ibid*, 515.

[127] Anderson, n 123 above, xiii.

to come, it failed.[128] Yet the controversy is indicative of the common perception of Bertha Wilson who, despite her emphatic and constant rejection of the label, was considered a feminist judge throughout her career.[129]

In fact, Ellen Anderson believes the identification of Wilson as a 'feminist' judge is grounded in a misunderstanding of her difference and voice. In her biography of Bertha Wilson, she suggests Wilson adopted a postmodern, as opposed to feminist approach to jurisprudence; "the contingencies of her own life and the multiplicity of perspectives she brought to the task of judicial analysis had prepared her to be a postmodern judge in a postmodern time".[130] That said, and whatever her motivation, Anderson is clear: "There can be no question whatsoever that this particular woman judge really *did* make a difference".[131] Bertha Wilson's "courageous and transformative" approach to judicial decision-making approach is clearly different.[132] Her willingness to "enter into the skin of the litigant ... mak[ing] his or her experience [her] experience and only ... [then] to judge", evidencing not only her ability infuse Canadian jurisprudence with "an understanding of what

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[128] The first attempt by REAL Women of Canada to remove Wilson from the bench was in 1983 following her speech on sexual equality, 'Law in Society: The Principle of Sexual Equality' ((1983) 13(2) *Manitoba LJ* 225). It also failed. Despite this, and the support of Brian Dickson who had attended the lecture, Wilson felt Dickson's remark that the complaint may have arisen due to her "impassioned" delivery, rather than the lecture's content, was an "implied rebuke [and] a black mark on her record" (Anderson, *ibid*, xv-xvi). On the REAL Women of Canada, see chapter one, 52-53, above and on their continued antagonism toward those judges they see as 'feminist' see, e.g., 'The Feminist Canaries are Singing Again' (May/June 2000) XIX (3) *REALity* (reproduced in full at www.realwomenca.com).

[129] Anderson, *ibid*, 197.

[130] Anderson, *ibid*, 136-141.

[131] Anderson, *ibid*, xvi.

it means to be fully human",[133] but also, suggests Brian Dickson, her colleague on the Supreme Court,

> how much weaker our legal culture has been for the dearth of women lawyers and judges. That the quality of her contribution has made our previous failings in this respect so obvious is the ultimate measure of her success.[134]

*Brenda Hale*

In November 2002, whilst chairing a lecture given by Joanne Conaghan at the Faculty of Laws, University College London,[135] Brenda Hale referred to her judgment in *Parkinson* v *St James and Seacroft University Hospital NHS Trust*[136] as one that, a male colleague had suggested, could only have been written by a woman. Although it was not clear as to the extent to which she agreed with this interpretation, it is perhaps a fairly accurate appraisal. Possibly only a female judge would have written, in a judgment allowing (limited) recovery for the 'wrongful birth' of a disabled child, of the invasiveness of pregnancy and its impact on a woman's autonomy, including

> the physical changes in the [mother's] body or responsibility towards the growing child. The responsible pregnant woman forgoes or moderates the pleasures of alcohol and tobacco. She changes her diet. She submits to regular and intrusive medical tests. She takes certain sorts of exercise and forgoes others. She can no longer wear her favourite clothes. She is unlikely to be able to continue in paid employment throughout the pregnancy or to return to it immediately thereafter. The

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[132] Halka, n 122 above, 265.

[133] Wilson, n 100 above, 521-522.

[134] B Dickson 'Madame Justice Wilson: Trailblazer For Justice' (1992) 15 *Dalhousie LJ* 1, 5.

[135] J Conaghan 'Tort Law and Feminist Critique' [2003] CLP *forthcoming*.

process of giving birth is rightly termed 'labour'. It is hard work, often painful and sometimes dangerous.[137]

Yet such a frank, albeit vicarious, admission of self and, more specifically, sex, whilst uncommon among the (female) judiciary, is perhaps not overly surprising from this particular female judge. Her appointment to the Court of Appeal in October 1999 is the most recent stage of a varied career in which she has been a successful legal academic, barrister, Law Commissioner and judge.[138] Her longstanding, although not exclusive, focus on women and the family generally, is reflected in her continuing academic commentary and her previous involvement as "chief architect" of the Children Act 1989 and other family law reforms.[139] Indeed, her potential for difference can be seen much

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[136] [2002] QB 266.

[137] Hale LJ, *Parkinson ibid*, 286. It is interesting to compare Hale LJ's explicit and unique acknowledgement of the array of (non) economic consequences that might stem from an involuntary pregnancy not only with the limiting 'pure economic loss' frameworks of the other (male) judges – "Left to myself ... I [Hale] would not regard the costs of bringing up a child who has been born as a result of another's negligence as 'pure' economic loss. Rather they are economic losses consequent upon the invasion of bodily integrity suffered by a woman who becomes or remains pregnant against her will" (*Groom* v *Selby* ([2001] EWCA Civ 522, para 31). See further, B Hale 'The Value of Life and the Cost of Living – Damages for Wrongful Birth' (Stapleton Reading, 2001). See also the difficulties of other (male) commentators to comprehend involuntary pregnancy as invasive at all and, in particular, Joanne Conaghan's (n 135 above) response to Christian Witting's rejection of involuntary pregnancy as 'physical damage' ('Physical Damage in Negligence' (2002) 61 CLJ 189).

[138] P Healy 'Mrs Justice Hale' (1994) 138(22) *Sol J* 588.

[139] Healy, *ibid*. See, e.g., S Atkins & B Hoggett, *Women and the Law* (Oxford: Basil Blackwell, 1984); B Hale 'Family Law Reform' (1995) 48(2) CLP 217; *From the Test Tube to the Coffin: Choice and Regulation in Private Life* (London: Sweet & Maxwell, 1996); B Hale 'Private Lives and Public Duties: What is Family Law For?' (1998) 20(2) *J Soc Wel & Fam L* 125; B Hale 'The View From Court 45' (1999) 11(4) CFLQ 377; B Hale 'Equality and the Judiciary: Why Should We Want More Women Judges?' [2001] PL 489; and B Hale A Pretty Pass: When Is There a Right to Die' (2003) 32 *Common Law World Review* 1.

earlier than her judgment in *Parkinson*; in, for example, her "recontextualisation" of the judicial approach to decision-making in relation to parental contact in situations of domestic violence in *Re D (Contact: Reasons for Refusal)*.[140]

Although there is no clear legal presumption in UK law favouring contact between a child and their non-resident parent, generally the courts assume maintaining, or even establishing, contact to be "almost always" in the interests of the child.[141]

> So far as the law is concerned, it is right that there is a presumption in favour of contact between a natural parent and children ... The children or the child under consideration has a right to a relationship with both parents unless there are cogent reasons why the child or children should be denied contact to the parent with who the child does not live at the relevant time.[142]

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[140] [1997] 2 FLR 48. On recontextualisation as a 'critique' (as opposed to a strategy for reform) "which unearths the logic, the substantive assumptions, underlying law's current contextualisation of its subject ... illumina[ting] the interests and relationships which these arrangements privilege" see N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) 6-7.

[141] Bingham MR *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 128. On the development and theoretical underpinnings of this assumption see R Bailey-Harris, J Barron & J Pearce 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 111 and follow up by R Bailey-Harris 'Contact – Challenging Conventional Wisdom' (2001) 13(4) CFLQ 361.

[142] Connell J *Re A (Contact: Domestic Violence)* [1998] 2 FLR 171, 174 applying the Court of Appeal decision in *Re H (Minor) (Access)* [1992] 1 FLR 148. An attempt by Wilson LJ in *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 to incorporate the Children Act 1989 s1(3) checklist into his decision-making was "greeted with horror" by the court and academics (Hale (1999), n 139 above, 381). Although, cf, *G* v *F (Contact: Allegations of Violence)* [1999] Fam Law 809.

Domestic violence can, of course, in some circumstances be such a reason. However, it does not and cannot in itself, as a matter of principle, constitute a bar to parental contact. Varieties in nature, degree and effect – "from a minor scuffle leading to a blow on the face struck in anger and frustration ... [to] murder, rape and psychological intimidation"[143] – prevent the establishing of any, necessarily arbitrary, restrictions. Domestic violence can only be one of any number of factors to be considered within a complex family dynamic:

> Each case must inevitably be decided on its facts. Domestic violence can only be one factor in a very complex equation. There will be contact cases in which it is decisive against contact. There will be others in which it will be peripheral.[144]

Consequently, the courts are "very reluctant to allow the implacable hostility of one parent [usually the mother] ... to deter them from making a contact order where they believe the child's welfare requires it".[145] A mother who apparently (un)reasonably opposes contact is, more often than not, seen as "bad" and a "threat to her child's well-being".[146]

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[143] The Advisory Board on Family Law: Children Act Sub-Committee 'A Report to the Lord Chancellor on the Question of Parental Contact in Cases Where There is Domestic Violence' (London: Lord Chancellor's Department, May 1999) 79, para 3.6.

[144] *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42, 56.

[145] Balcombe LJ *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736 affirmed in Bingham MR's comprehensive expression of the legal principles in *Re O (Contact: Imposition of Conditions)* n 141 above, 128-130.

[146] F Kaganas 'Contact and Domestic Violence' – The Winds of Change' (2000) 30 *Fam LJ* 630. Until recently neither risks to the mother's health nor serious violence by the non-resident father have been sufficient to deny contact. See, e.g., *Re F (Minors) (Contact: Mother's Anxiety)* [1993] 2 FLR 830; *Re P (Contact: Supervision)* [1996] 2 FLR 314. This view is underlined by the increasingly tough line on enforcement exemplified in the Court of Appeal's approval in *A* v *N (Committal: Refusal of Contact)* [1997] 1 FLR 533 of the use of committal where a mother unreasonably prevents contact.

Nevertheless, whilst "[n]either parent should be encouraged or permitted to think that the more intransigent, the more obdurate and the more uncooperative they are, the more likely they are to get their own way",[147] a parent's implacable hostility can "supply a cogent reason for departing from the general principle that a child should grow up in the knowledge of both his parents".[148] A mother's 'implacable hostility' is not necessarily irrational or inevitably selfish.[149] There may, in fact, be genuinely 'good' reasons for her hostility, including acts of violence, intimidation and cruelty, which might only become apparent once the judge distinguishes between the hostility and the reasons for it. This involves what Hale LJ describes as a "deeper enquiry into why the mother is so hostile";[150] an approach she first adopted, whilst rejecting a father's appeal, in *Re D (Contact: Reasons for Refusal)*.

> It is important to bear in mind that the label 'implacable hostility' is sometimes imposed by the law reporters and can be misleading. It is ... an umbrella term that sometimes is applied to cases not only where there is hostility but no good reason can be discerned either for the hostility or for the opposition to contact, but also where there are such good reasons. In the former sort of case the court will be very slow indeed to reach the conclusion that contact will be harmful to the child ... It is rather

[147] Bingham MR, *Re O (Contact: Imposition of Conditions)* n 141 above, 129-130.

[148] Waite LJ *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1, 7. In this case although the mother was considered to be 'implacably hostile' the father was denied contact. His slashing of the mother's clothes and intimidation of her mother by following her to work and waiting outside, and the mother's family, by appearing at injunction proceedings with 12 associates, had left the grandparents with "the indelible impression" that the father was "a thoroughly bad lot" (at 2).

[149] Interestingly, although perhaps unsurprisingly, 'implacable hostility' has only been applied to mothers who prevent fathers from seeing their children and not to fathers who stop mothers from so doing (Hale (1999), n 139 above, 383).

[150] Hale, *ibid*, 382.

different in the cases where the judge or the court find the mother's fears, not only for herself but also for the child, are genuine and rationally held.[151]

Her insights, described by Felicity Kaganas as beginning the "process of change",[152] have since been refined by Wilson J in his identification of three-fold analysis of 'rational' hostility in *Re P (Contact: Discretion)*[153] and by Wall J's movement of the judicial focus away from the mother and toward what the violent father might do to make amends.[154] Hale's contextual approach was affirmed and adopted by the Court of Appeal in *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)*, in which (co)incidentally Elizabeth Butler-Sloss P gave the leading judgment.[155]

It is no exaggeration to suggest that in her recognition of the importance of deeper judicial explorations of, and the need to peer behind, a mother's implacable hostility – Brenda Hale has initiated a change in ethos and approach to parental contact where there is evidence of domestic

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[151] Hale J (as she then was) n 140 above, 53.

[152] Kaganas, n 146 above.

[153] [1998] 2 FLR 696, 703-704. Indeed Kaganas suggests Wilson and Wall JJ, in allowing for 'genuine' anxieties that are not 'rational', go further than Hale J, although it remains to be seen whether this expansion has survived Butler-Sloss' emphasis on 'reasonableness' in *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 (*ibid*).

[154] *Re M (Minors) (Contact: Violent Parent)* [1999] 2 FLR 321.

[155] n 153 above. See further F Kaganas 'Case Commentary: Contact and Domestic Violence' (2000) 12(3) CFLQ 311.

violence. She has drawn the court's attention to the wider impact of domestic violence; highlighting the effect a father's violence toward a child's mother might have on that child, and the potential for a continuing cycle of violence encapsulated in a young boy's comment after visiting his violent father that when he was a daddy he might "strike the mother" too.[156]

Moreover, in her "recontextualisation" of non-resident (usually paternal) parental contact where there has been domestic violence, she has troubled the legal assumption of parental contact, exposing its contextual underpinnings in the traditional, heterosexual and patriarchal conceptions of the family and its exclusion of factors which might explain a mother's seemingly 'implacable hostility'. Thus, it is not that Hale has *introduced* 'context' or 'relationships' *per se* into these discussions but rather that she has *revealed* the extent to which abstract and universal legal assumptions can be seen to implicitly privilege certain contexts and some relationships to the exclusion of others. In so doing, her call for a 'deeper' contextual enquiry in relation to parental contact against a background of domestic violence, reveals not only possible explanations for a mother's hostility toward such contact, but also the hidden context within the judicial assumption of parental contact.

Nevertheless, whilst the courts may have begun to reassess their unspoken, but no less contextual, assumption that a father who abuses his

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[156] Wall J *Re M (Contact: Violent Parent)* n above, 328.

children's mother can still be a 'good father' to his children,[157] there is still more to be done. To this end, Brenda Hale suggests the courts might take the time to consider the purpose of parental contact more generally, exploring their assumption that it is more often than not beneficial for both parent and child. So that one day the courts might, while severing bad connections, perhaps seek to reinforce and establish good connections and relationships by making orders not only to compel a mother to allow her child to see their father, but also requiring absent fathers to see their child.[158]

Brenda Hale might perhaps respectfully disagree with the implications of my analysis here; accepting her approach as innovative and just, but as independent from her gender – evidence of her abilities as a judge as opposed to a reflection of her as a woman. However, although uncomfortable with suggestions of difference she nevertheless accepts that a more diverse bench might be better able to empathise and understand the variety of perspectives and experiences that come before them:

> I would like to think that a wider experience of the world is helpful: knowing a little about bearing and bringing up children must make some difference ... But there have been some wonderful family judges who have never changed a nappy or cooked a fish finger in their lives.[159]

[157] See, e.g., *Re L* (n 153 above).

[158] Hale (1999), n 139 above, 384. See also Kaganas, n 146 above.

[159] Hale (2001), n 139 above, 501. Similarly, Mrs Justice Black instinctively denied the distinctiveness of her gender, before going on to describe the process of judging as akin to tidying her children's bedrooms (in conversation with author at the Royal Courts of Justice, May 2002).

In her article 'Equality and the Judiciary: Why Should We Want More Women Judges?' Hale suggests four factors – her gender, her academic career, her reforming tendencies and experience, and her tendency to go native – all of which might impact on her "small offerings on the bench", hypothesising that the other three factors are "at least as influential" as her gender.[160]

> '[T]he power of the system to turn any free spirit into a conforming replica of those who went before is considerable, and it is often not long before the great new hope on the bench begins to look like the old vintage'. And I was never a particularly free spirit anyway.[161]

Acknowledging her tendency to go 'mermaid', she is "more than a little sceptical about arguments based upon the individual judge's ability or even willingness to make a difference".[162] Nevertheless, given her current record, it seems Hale may yet 'cork' the 'old vintage'.

All things considered, it is not immediately apparent whether Sandra Day O'Connor, Bertha Wilson and Brenda Hale are to be embraced as icons, pitied as mermaids or dismissed as tokens. Their voices, whilst perhaps distinctive, are not, it seems, all that *different*. The woman judge's different voice remains largely elusive; the extent to which it does or is able to mimic Amy's is unclear. However, whilst feminist legal scholars' application of the different voice to law may not reveal the little mermaid's siren call – indeed we

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[160] Hale, *ibid*, 500.

[161] Hale, *ibid*, quoting Helena Kennedy, *Eve was Framed: Women and British Justice* (London: Chatto & Windus, 1992) 266.

[162] Hale, *ibid*, 501.

might not understand or embrace it anyway – they do alert us to the presence of alternative ways of seeing, speaking, and judging. Their emphasis on difference throws a spotlight on the notion of adjudication *per se*, highlighting the limitations of current understandings of the judge, the adjudicative process, and perhaps of justice itself.

## Essentially Charlotte – Beyond Feminist Critiques of the Different Voice

> When a new idea is introduced, the first response is to say that it is so obviously false, it is hard to see how anyone could believe it; the second is to say that it is not original, and everyone has always known it to be true.[163]

Both these responses have been levelled at the different voice as part of a sustained critique by some feminist scholars. These include methodological concerns as to the articulation, development, origin and ambiguity of the different voice, as well as fears as to the possibility of ultimate integration and inexpedient appropriation.[164] Indeed, the hostility and antagonism displayed towards *In a Different Voice* seems somewhat at odds with its "elegant sensitivity" and "cool ... graceful and gentle ... emotional touch".[165] Gilligan and her narrative of the 'different voice' have, it seems, become some academics' – or "armchair-feminists'" – fall guy or stooge, their "ritualistic

[163] William James, *Pragmatism* (New York: New American Library, 1907) 131 in Gilligan, n 11 above, 324-325.

[164] See, e.g., L Kerber, C Greeno & E Maccoby, Z Luria, C Stack & C Gilligan 'On *In a Different Voice*: An Interdisciplinary Forum' (1986) 11(2) *Signs* 304 and J Auerbach, L Blum, V Smith & C Williams 'On Gilligan's *In a Different Voice*', (1985) 11(1) *Feminist Studies* 149.

[165] C MacKinnon in I Marcus *et al* 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buff L Rev* 11, 71-72.

denunciations [and] teasing, know-it-all dismissals [perhaps masking their] desire to avoid examining too closely the question of their own 'feminine' identities".[166]

Of these responses, Catharine MacKinnon's is, perhaps, one of most familiar. Her supposed "ambivalence" toward the different voice is, possibly, the result of the apparent tension between her "excitement" at the "deeply feminist" idea of listening to women's voices and her "infuriation" at its lack of politics, its failure to consider why women, rather than men, generally embody these albeit positive values and traits.[167] What "bothers" MacKinnon is not Gilligan's articulation of the different voice *per se*, but rather its assumed identification with women,[168] which she argues merely affirms the "qualities and characteristics of powerlessness", by embodying and valuing feminine traits which ultimately reinforce male dominance.[169]

> I do not think that the way women reason morally is morality 'in a different voice'. I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.[170]

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[166] Frug, n 11 above, 50.

[167] MacKinnon, n 165 above, 73-74; On the consequences of its lack of politics see further, Auerbach, n 164 above, 160.

[168] MacKinnon, n 165 above, 74.

[169] C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) 39.

[170] MacKinnon, *ibid.*

The different voice then, according to MacKinnon, is not intrinsically women's, but rather a product and expression of men's control over them. In this way, as an artefact of men's creation, the different voice is constrained and shaped by the 'foot on the throat' of the speaker, which prevents her from articulating her own authentic voice. MacKinnon's frustration at what she sees as Gilligan's failure to acknowledge the inherent power issues within the political potential of the different voice is captured in the conversation below.

> *MacKinnon*: Power is socially constructed such that if Jake simply chooses not to listen to Amy, he wins; but if Amy simply chooses not to listen to Jake, she loses. In other words, Jake still wins because that is the system. And I am trying to work out how to change that system, not just how to make people be more fully human within it.
>
> *Gilligan*: Your definition of power is his definition.
>
> *MacKinnon*: That is because the society *is* that way, it operates on his definition, and I am trying to change it.
>
> *Gilligan*: To have her definition come in?
>
> *MacKinnon*: That would be part of it, but more to have a definition that she would articulate that she cannot now, because his foot is on her throat.
>
> *Gilligan*: She's saying it.
>
> *MacKinnon*: I know, but she is articulating the feminine. And you are calling it hers. That's what I find infuriating.
>
> *Gilligan*: No, I am saying she is articulating a set of values which are very positive.
>
> *MacKinnon*: Right, and I am saying they are feminine. And calling them hers is infuriating to me because we never had the power to develop what ours really would be.[171]

[171] MacKinnon and Gilligan in I Marcus *et al* 'Feminist Discourse, Moral Values, and the Law – A Conversation' (1985) 34 *Buff L Rev* 11, 74-75.

In the same way, Linda Kerber suggests that whilst "Gilligan describes how women make lemonade out of the lemons they inherited, she does not tell how to transform the lemons into chocolate".[172] The different voice is perhaps not enough.[173] Indeed perhaps ultimately, it is little more than a "set-up" by which women are "shafted".[174]

Interestingly, MacKinnon's difficulty with the different voice is not its attempt to embody a female essence *per se*, but that it captures and represents the wrong essence. Amy's voice may indeed be different – possibly even feminine – however it is not *authentically* woman's; this, in the current male-dominated world, MacKinnon suggests, remains undiscovered, undeveloped, yet-to-be. Nevertheless, her belief in the possibility of the eventual invocation of a voice, which is distinctly and authentically woman's, has inevitably been subject to the same criticism as that levelled at Gilligan. Both writers have stumbled against the same hurdle – that of gender essentialism.[175]

According to anti-essentialist critics of Gilligan, the different voice is an essentialising myth with problematic connotations for those women who do

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[172] L Kerber 'Some Cautionary Words for Historians' (1986) 11(2) *Signs* 304, 310.

[173] Martha Minow in J Greenberg, M Minow & E Schneider 'Contradiction and Revision: Progressive Feminist Legal Scholars Respond to Mary Joe Frug' (1992) 15 *Harv Women's LJ* 65, 77.

[174] MacKinnon, n 165, above 74. See also C Greeno & E Maccoby 'How Different is the 'Different Voice'? (1986) 11(2) *Signs* 310, 315.

[175] See, e.g., K Abrams 'Feminist Lawyering and Legal Method' [1991] *Law & Soc Inquiry* 373 (Review of Catharine MacKinnon's *Feminism Unmodified* (n 169 above) and *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989).

not identify with its features. Thus, whilst the different voice pertains to have somehow captured the essence of the feminine, in actuality it excludes the polytonality of women's voices. It is seen to articulate a monotonic female voice, inevitably overlooking the plurality of female voices, silencing and excluding some, while privileging others.[176] This critique stems in part from increasing feminist unease with the ability of women-centred approaches to strategically identify 'woman'. Joanne Conaghan, in 'Reassessing the Feminist Theoretical Project in Law', suggests that any attempt to assume or discover the shared experience of women or a 'woman's point of view' may encounter the same difficulties as the male-dominated claims to universality it purports to challenge.[177] In this way, any attempt to invoke women's experience and to speak for *all* women risks perpetuating the exclusion and marginalisation of women who fall outside these assertions.

> So viewed, women-centredness is potentially as oppressive as the male-dominated discourse it seeks to displace in presupposing a female experience which is unitary rather than variegated – informed and shaped by a range of social, cultural and cognitive factors (race, class, sexuality, and so on).[178]

Indeed, perhaps identity and experience are ultimately so diverse that any attempt to locate women's *essence* inevitably flattens and silences difference.

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[176] See, generally, Drakopoulou, n 51 above, 212-213 and, e.g., in relation to women of colour, bell hooks *Ain't I a Woman: Black Women and Feminism* (London: Pluto Press, 2nd edn, 1983); A Harris 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stan L Rev* 581 and also in response to the presumed heterosexuality of feminist legal theory, P Cain 'Feminist Jurisprudence: Grounding the Theories' (1989-1990) 4 *Berkeley Women's LJ* 191.

[177] J Conaghan 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) *J Law & Soc'y* 351, 366-368.

Moreover, because of its association with attempts to invoke a feminine essence, the different voice continues to remain alien to those women who fail to relate to its "highly romanticised" female voice.[179] It privileges a voice that is "romantically oversimplified", whilst suppressing and ignoring the diverse perspectives, experiences and voices of women.[180] As such, some feminist legal scholars see it not only as inappropriately normative, prescriptive and reductive, but also as facilitative of an inverted hierarchy in which Amy's voice is prioritised over and deemed superior to Jake's.[181] This effectively constitutes a reductive and polarised duality or dichotomy, which ultimately threatens to limit the development and restrict the potential of a multi-faceted understanding of law, legal reasoning and adjudication. Feminist legal scholars seem destined to dice with the fate of Arachne,[182] caught by the appeal of Gilligan's imagery in which

> the modifying words 'of connection' euphemistically transform the sticky, trapping character of a spider's web into a more agreeable landing place,[183] [and which] expresses the contradiction in our yearning for something that both connects us to each other and traps us.[184]

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178 Conaghan, *ibid*, 367.

179 Auerbach, n 164 above, 156.

180 Kerber, n 172 above, 309.

181 Kerber, *ibid*, 309.

182 Berns, n 108 above, 29. Arachne was a Lydian maiden who, according to Greek Mythology, challenged Athene, the goddess of wisdom, to a weaving competition. When Athene found Arachne's work to be faultless, she destroyed it. After the terrified maiden had hung herself, Athene turned her body into a spider and the rope into a cobweb.

183 Frug, n 11 above, 59.

184 Liz Schneider, n 173 above, 72.

Gilligan's response to these critiques has been equally sustained and penetrating.

> My critics cannot make up their minds whether it is naïve or self-serving to think of women as caring or whether this is a fact so obvious that is does not need repeating. But as they elaborate these contentions, it becomes increasingly apparent that the book they are discussing it different from the book which I have written.
>
> They speak of the nineteenth-century ideal of pure womanhood and romanticizing of female care: I portray twentieth-century women choosing to have abortions ... reconsidering what is meant by care in light of their recognition that acts inspired by conventions of selfless, feminine care have led to hurt, betrayal, and isolation. My critics equate care with feelings, which they oppose to thought, and imagine care as passive or confined to some separate sphere. I describe care and justice as two moral perspectives that organize both thinking and feelings and empower the self to take different kinds of action in public as well as private life. Thus, in contrast to the paralyzing image of the 'angel of the house', I describe a critical ethical perspective that calls into question the traditional equation of care with self-sacrifice.[185]

Gilligan claims to be saying far more than the reductive critiques of an essential female voice allow for.[186] Her purpose and vision stem beyond and, she asserts, do not include the, perhaps ultimately impossible and inevitably self-defeating, articulation of a definitive female voice. Instead of representing the way *all* women *necessarily* speak, Amy's voice is the means through

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[185] Gilligan, n 11 above, 326-327. The 'Angel in the House' is a nineteenth-century icon immortalised in the poetry of Coventry Patmore (*Angel in the House* (London: George Bell & Sons, 1892)).

[186] See further, e.g., C Heyes 'Anti-Essentialism in Practice: Carol Gilligan and Feminist Philosophy' (1997) 12(3) *Hypatia* 142.

which Gilligan identifies and allows for the *possibility* of difference – of previously unarticulated, ways of seeing, reasoning and speaking.[187] Her ethic of care, far from being the passive reflection of "feminine goodness" – the virtue of an Angel "who acts and speaks only for others" – is the ethical and political equal of justice-based understandings of morality.[188] The different voice "energizes rather than anaesthetizes" conversations, liberating them from the restrictions of a unitary perspective; like "an adrenalin rush that wakes one up from the stupor of accepting the status quo without question or recognition of the choices involved".[189] In so doing, she seeks to "strangle" the Angel in the House, to silence the masculine articulation of false feminine voice, in order to enable women to speak for themselves.[190]

Moreover, her understanding of the delicate balance between care for others and care for self – the danger of self-annihilation that accompanies self-giving, and the recognition of the vulnerabilities peculiar to the ethic of care – allows for an understanding of care tempered by integrity.[191]

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[187] See also and compare, Pierre Schlag's exploration of the extent to which legal reason effects the "subjugation of the many to the one, of pluralism to monism, of polytony to monotony, of difference to sameness, and so on ..." (n 62 above, 44).

[188] Gilligan, n 6 above, x.

[189] Worden, n 9 above, 1144.

[190] Gilligan, n 6 above x. "I turned upon [the Angel in the House] and caught her by the throat. I did my best to kill her ... Had I not killed her she would have killed me. She would have plucked the heart out of my writing" Virginia Woolf 'Professions for Women' (1942) in J Goldman *The Feminist Aesthetics of Virginia Woolf: Modernism, Post-Impressionism and the Politics of the Visual* (Cambridge: Cambridge University Press, 1998) 63.

[191] R West *Caring for Justice* (New York: New York University Press, 1997) 79-84.

> That is a [conception of] selflessness rooted … in a genuinely empathic regard for other, rather [than] a harmful and injurious lack of regard for oneself: a sense of self-loathing, a lack of self-esteem or self-respect.[192]

The spider's web is transformed from "an image of death" and self-obliteration into one of care, life and self-giving.[193] In fact, rather than bracing themselves against the impending fate of Arachne, perhaps Gilligan and her defenders might be advised to embrace Charlotte's web instead.[194]

*Charlotte's Web* is well established in the canon of children's literature. It tells the story of a little girl called Fern, her pig, Wilbur, and Charlotte, a spider. It begins with Fern dramatically saving the runt of a litter of piglets from "the most terrible case of injustice" she had ever encountered.[195] She looks after and feeds Wilbur until he is big enough to sell to her Uncle Homer down the road. Although lonely at first without Fern, eventually Wilbur makes some good friends, including Charlotte, a spider who lived in the doorway of his barn. However, soon it becomes apparent that Uncle Homer wants to turn Wilbur "into smoked bacon and ham".[196]

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[192] West, *ibid*, 79.

[193] Schneider, n 173 above, 72.

[194] Ultimately, however, both Arachne and Charlotte suffer the same fate: death. Charlotte's sacrifice is considered further in chapter 6, 'Judging Differently', 295-360, below.

[195] White, n 5 above, 8.

[196] White, *ibid*, 52.

Wilbur burst into tears, "I don't *want* to die", screamed Wilber, throwing himself to the ground. "You shall not die", said Charlotte, briskly. "What? Really?" cried Wilbur. "Who is going to save me?" "I am", said Charlotte.[197]

And she did.

A few days later it was particularly foggy. Lurvy, one of the farm workers, went to feed Wilbur and as he did so he noticed one of Charlotte's webs, glistening with tiny drops of water. He could hardly believe his eyes – for in its middle, neatly woven in capital letters, were the words 'SOME PIG'. He called Uncle Homer to the barn who concluded that it must be a miracle, which meant that Wilbur must, without doubt, be a very special pig indeed.

"Well", said [his wife], "it seem to me you're a little off. It seems to me we have no ordinary *spider*". "Oh, no" said [Homer] ... "It's the pig that's unusual. It says so, right there in the middle of the web".[198]

Over the next few weeks, Charlotte left a number of messages for the farmer in her web making Wilbur one, very famous pig. And, of course, a famous – and incidentally prize-winning – pig is very unlikely to become either smoked bacon or ham.

Charlotte's miraculous webs literally articulate her concern and care for Wilbur and ensure his future security; her giving-self is defined through her relationship with him. Her care, like that described by Gilligan, is a proactive,

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[197] White, *ibid*, 54.

[198] White, *ibid*, 81.

empowering, challenging, involved and self-fulfilling process or activity "grounded [not] in universal, abstract principles [or indeed in her femininity] but in the daily experiences and moral problems of real people in their everyday lives" – in her wish to save Wilbur.[199]

Similarly, post-essentialist conceptions of the different voice attempt to disentangle it from restrictive and debilitating gender implications. They seek to free the ethic of care, embodied within the different voice, from the constraints and uncertainty of conversations exploring the relationship between gender, difference, essence, hierarchy and reduction. They arguably restore the transformative potential of Gilligan's narrative of the different voice, revealing its promise hidden beneath the dull and distracting taint of its association with an essential or angelic female voice.

Thus, subsequent insights and developments generated by Gilligan's work, for example, feminist work on the ethic of care, are carefully distanced from essentialising invocations of gender categories.[200] Joan Tronto suggests that care – released from its gendered implications and understood instead as an alternative moral theory that incorporates values traditionally associated with women – might initiate political change.[201] Similarly, Selma Sevenhuijsen

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[199] J Tronto 'Beyond Gender Difference to a Theory of Care' (1987) 12(4) *Signs* 644, 648.

[200] On the consequences of this for feminist legal scholarship, see further Drakopoulou, n 51 above, esp 216-221.

[201] Tronto, n 199 above. See also J Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (New York, London: Routledge, 1993) and review by Carrie Menkel-Meadow 'What's Gender Got To Do With It? The Politics and Morality of an Ethic of Care' (1996) 22

argues that a re-evaluation of care as a "normal aspect of human existence" might, perhaps, transform our conceptions of justice, morality and politics.[202] More specifically, it may also be that Charlotte's understanding of care offers new insights into the traditional, rights-based, rule-orientated, hierarchical, and adversarial modes that characterise our current conceptions of law, adjudication and decision-making.[203] Perhaps most importantly, it might allow us to imagine – with a view to making real – an adjudicative process where the judge sees her role as that of stepping inside the skin of the litigant, making his experiences her own; her judgment, like Charlotte's webs for Wilbur, becoming a voice for the litigant.[204]

**Conclusion**

Perhaps, then, Sandra Berns is right – maybe what these understandings of the ethic of care detached from considerations of women's morality and difference suggest is that "the whole idea of a different voice is part of the

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*NYU Rev L & Soc Change* 265 and J Tronto 'Care as a Basis for Radical Political Judgments' (1995) 10(2) *Hypatia* 141.

[202] S Sevenhuijsen *Citizenship and the Ethic of Care: Feminist Considerations on Justice, Morality and Politics* trans L Savage (London: Routledge, 1998). See also the collection of papers by Monique Deveaux, Carol Gilligan, Virginia Held, Uma Narayan, Annette Baier and Joan Tronto, from a symposium on 'Care and Justice' held by the American Political Science Association (Normative Political Theory Division) in September 1994 in (1995) 10(2) *Hypatia* 115 ff.

[203] On the possibilities for adjudication and law revealed through conversations about difference see, e.g., Drakopoulou, n 51 above, 216; and generally, Rush, n 110 above and West, n 191 above and chapter 6, 295-360, below.

[204] See Wilson, n 100 above.

problem".[205] The discussion surrounding the content of and identification with the different voice and the attempt to articulate the little mermaid's siren call – threatens to 'seduce' women away from what is really going on. It draws their attention away from trying to understand what happens to them as women when they claim their "right to participate authoritatively within an interpretative community which has, for most of its existence, been unproblematically male".[206] Perhaps, like the sun, we should not – if we wish to avoid disorientating blindness – look directly at the different voice. Rather, maybe we should explore its impact upon the dominant voice; what it reveals about "how all those men came to believe that they were speaking as judges in some universal and objective sense when they were simply speaking as men" and about how hierarchy, the privileging of knowledges, the flattening of difference and the suppression of polytonality, both affect and effect women.[207]

As the narrative of the different voice moves through the tales of the ecstasy at recognition and inclusion, to the despair of rejection and disillusion, and toward the hope of rehabilitation and restored potential, its story has become intertwined with that of the women lawyer and judge. Unwittingly, it is an insidious presence or menace within the opening chapters of my thesis. It stalks back-stage; a restless phantom or shadow, threatening to entrap the unfolding story within its haunting and haunted conversations of failed quests,

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[205] Berns, n 108 above, 13.

[206] Berns, *ibid*.

[207] Berns, *ibid*.

pulling my thesis toward the folly that is the pursuit of the little mermaid's lost voice.

However, this is not why I have re-told the story of the different voice. This is not a bid to restore the different voice to its former glory, to return it to centre stage beneath the spotlight. This is not a comeback gig, a chance to idolise or fetishise a past hero. Nor is this an attempt to atone for the severe and penetrating criticisms levelled at the different voice, to somehow massage its ego or present an opportunity to 'set the record straight'. Rather, through a sympathetic review of where we've been, my purpose has been to acknowledge the guiding light it continues to throw onto the path we are about to take, and in so doing to exorcise its ghostlike presence from the narrative of my thesis. So viewed, its story is simply a prologue to the tale I want to tell; the background and introduction to the characters and themes of the story that continues in the following chapter with a meditation on Portia, the perceived literary embodiment of the different voice, as the continued metaphor for the woman lawyer.

In fact, like Hercules or Portia, the narrative of the different voice is perhaps best seen and embraced as a myth.

> One of the disadvantages of the old-fashioned derogatory use of the word myth, to mean a foolish story or a false idea is the implication that myths are trivial. The reality is the reverse.[208]

The power of a myth lies in its unreality, beneath the surface of its story. Its purpose is found not in its literal, historic or even scientific 'truth' but rather in the ability of the myth to "impinge, sometimes with ungovernable force, upon the mind and feelings of its audience, and to illuminate aspects of our human condition";[209] the *story* of a myth is, "generally agreed to be fiction, but fiction which is full of meaning".[210] Thus, the recognition of the narrative of the different voice as a myth is not a prelude to its dismissal or rejection, but is rather to acknowledge its ongoing promise and potential behind its "fictitious clothing".[211] In fact, an understanding of the different voice as a myth or fictional device might enable feminist legal scholars to evade the crisis of subjectivity; its narrative or story, although perhaps generally agreed to be fiction is a fiction full of meaning, providing insights into reality and the opportunity to begin to imagine the previously unimaginable. So viewed, the different voice has delivered: although not necessarily in the way feminist and other commentators imagined.

Thus, while the little mermaid remains silent – the search for her siren call at least for the time being abandoned – the mythology of the different

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[208] Cavendish, n 4 above, 8. Although a myth is traditionally understood as a story, it can also be understood as a tradition, "which exerts a powerful influence on attitudes to life, but whose literal accuracy there is reason to doubt", e.g., the traditional Christian picture of hell (at 9).

[209] M Grant *Myths of the Greeks and Romans* (New York, 1962; Meridian edn, 1995) xviii.

[210] Cavendish, n 4 above, 8.

voice acts as a catalyst for disruption; it impacts upon the legal monotony, destabilising its taken-for-granted assumptions and uncovering possibilities for alternative ways of seeing and understanding the judge, justice and adjudication. Its continued potential lies in its ability to help render contingent particular (but dominant) forms of legal reasoning, as it highlights the limitations of conventional understandings of the legal process and adjudication, and provides techniques for destabilising the legitimacy of its claims and for questioning why these understandings *are* so restrictive. What is more, it not only reveals the inherent prejudices, bias, and hierarchy of traditional approaches to adjudication but also transforms our understanding of the adjudicative process by highlighting aspects – like, for example, the use of narrative, aesthetics and persuasion – not normally perceived as such. The narrative of the different voice creates the possibility for a fuller understanding of the processes of adjudication and the potential, through the application of these feminist and related insights, for the delivery of better – or at least improved – justice.

[211] Cavendish, *ibid.*

# Chapter 3

# REASSESSING PORTIA: THE ICONIC POTENTIAL OF SHAKESPEARE'S WOMAN LAWYER

## Introduction

*Portia: You see me Lord Bassanio where I stand*

*Such as I am …*

*… an unlesson'd girl, unschool'd, unpractised.*[1]

In Shakespeare's *The Merchant of Venice*, the implications and significance of connection, responsibility and fidelity are considered against a backdrop of economic and erotic exchange.[2] The central character within the ensuing web of financial and emotional relationships is Portia. Her story provides both the impetus and resolution of the play – in which a fairy tale heiress becomes a merchant's champion – and an essential contribution to images of the woman lawyer.[3] She is at once Shakespeare's heroine and an intrinsic part of (feminist) legal/cultural folklore as the perceived literary embodiment of Gilligan's different voice. Yet whilst a reference to Portia continues to most

[1] W Shakespeare *The Merchant of Venice* J R Brown (ed) (Arden edn: Methuen & Co Ltd, 1955) III.ii.149-150, 159. Hereinafter cited as *Merchant*.

[2] K Newman 'Portia's Ring: Unruly Women and Structures of Exchange in *The Merchant of Venice*' (1987) 38 *Shakespeare Quarterly* 19, 25.

[3] Indeed, the paradigmatic use of Portia is not restricted to female lawyers or judges. See, e.g., Lord Justice Russell in *Syndall* v *Castings Ltd* [1966] 1 QB 302 who, comparing himself to a 'Bassanio-like' Lord Denning, declared, "I am a Portia man" (at 321-322). However, note Lord Denning's response where he also described himself as a "Portia man": loyal to the law,

readers to be almost "immediately understandable" it has, of late, become somewhat ambiguous.[4] Her previously steadfast role within feminist legal scholarship has become increasingly uncertain and varied. Her continued status as the definitive image of woman lawyer appears to be in doubt.

This chapter explores the adoption of Portia by feminists as a metaphor for the woman lawyer. It suggests that Portia has both captured and is captured by some feminists' imagination. She is at once an idol, myth and icon. While to some, she is a "heroine"[5] – the personification of the woman lawyer's perceived difference, a mouthpiece for mercy and the different voice – to others she is a sham, her idolised reputation sullied in the rejection of her claim to difference and femininity. This constant and simultaneous idolisation and spurning of Portia threatens to silence and constrain conversations about the woman lawyer, as well as to limit and dull Portia's promise and potential. Thus, the final section of this chapter eschews this oscillation between uncritical idolatry and habitual denigration in order to establish Portia as an icon. By 'icon' I mean more than simply an image or picture, a popular figure or role-model, but rather icon in the traditional religious sense as that which

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yet willing when necessary, to construe the law so as to facilitate what "justice and equity require" (A T Denning *The Discipline of Law* (London: Butterworths, 1979) 30-31.

[4] C A Corcos 'Portia goes to Parliament: Women and their Admission to Membership in the English Legal Profession' (1998) 75 *Denv U L Rev* 307, 309.

[5] On Portia as a "literary", "feminist" and "feminist legal" heroine, see further J M Cohen 'Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction' (1990) 25(4) *Tulsa LJ* 657, esp 674-677.

"imitates" rather than "resembles", orientating the mind and the imagination toward the (re)imaging of previous insights and future perspectives.[6]

> Icons were not meant to instruct the faithful or to convey information, ideas or doctrines. They were a focus of contemplation ... which provided the faithful with a sort of window on the divine world.[7]

As such, Portia's iconic potential lies not in her *reflection* of the woman lawyer *per se*, but rather in the possibilities revealed in the contemplation of her perceived difference. Her story, understood as a myth or fairy tale, helps to uncover previously unimagined conceptions of the lawyering process.[8] So viewed, an iconic understanding of Portia becomes a 'window' through which feminist legal scholars can look onto altered adjudicative landscapes and diverse understandings of lawyering and adjudication.

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[6] C Douzinas 'Prosopon and Antiprosopon – Prolegomena for a Legal Iconology' in C Douzinas & L Nead (eds) *Law and the Image – The Authority of Art and the Aesthetics of Law* (Chicago, Ill.: University of Chicago Press, 1999) 36, 43; See also C Douzinas 'The Legality of the Image' (2000) 63 MLR 813, 820 and P Goodrich *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990) 248.

[7] K Armstrong *A History of God – From Abraham to the Present: The 4000 year Quest for God* (London: Vintage, 1999) 257.

[8] My focus here is not simply on Portia as a character in *The Merchant of Venice*. Rather I am looking at what Portia has become in feminist scholarship and, particularly, in feminist legal scholarship. In this context she has been described by commentators as a "myth" (I Ward 'When Mercy Seasons Justice: Shakespeare's Woman Lawyer' in C McGlynn (ed) *Legal Feminisms: Theory and Practice* (Aldershot: Dartmouth, 1998) 63, 66) and the play as a "fairytale" (Granville-Barker *Prefaces* (1930) quoted in J R Brown (ed) 'Introduction' to *The Merchant of Venice* (Arden edn: Methuen & Co Ltd, 1955) l) characterisations which themselves suggest a broader literary or aesthetic status for Portia and *The Merchant of Venice*. See further n 66 below and accompanying text.

## The Play

*The Merchant of Venice* opens with Bassanio asking a world-weary Antonio, the eponymous merchant, for a loan to enable him to travel to Belmont to pursue Portia, a beautiful heiress. The Merchant's fortunes are at sea yet he encourages Bassanio to borrow the money in Venice against his credit and trust. As a result, Antonio enters into a 'merry bond' with Shylock, a Jew, thereby furnishing Bassanio with the required 3,000 ducats.

> *Shylock*: This kindness I will show,
>
> Go with me to a notary, seal me there
>
> Your single bond, and (in a merry sport)
>
> If you repay me not on such a day
>
> In such a place, such sums or sums as are
>
> Express'd in the condition, let the forfeit
>
> Be nominated for an equal pound
>
> Of your fair flesh, to be cut off and taken
>
> In what part of your body pleaseth me.[9]

Meanwhile, in Belmont, at once the fairyland antithesis and "domestic complement" of commercial Venice,[10] Portia echoes Antonio's sadness; she ponders the terms of her father's will, whereby she is the trophy bride of his

[9] *Merchant* I. ii. 139-147. Antonio and Bassanio's relationship is ambiguous; although at times it is seems similar to that of a (surrogate) father and son or, alternatively, close to the Renaissance ideal of friendship, at other times it appears to be underpinned and complicated by implicit/explicit glimpses of (un)requited homosexual love. See, e.g., *Merchant* II. viii. 50 and IV. i. 278-283 and further, Cohen, n 5 above, 702-3 and A N Benston 'Portia, the Law, and the Tripartite Structure of *The Merchant of Venice*' (1979) 30 *Shakespeare Quarterly* 367, 383-384.

lottery, as she recalls previous (un)welcome and unsuccessful suitors. Happily, her – albeit reluctant – obedience and patience are ultimately rewarded as her favourite Bassanio arrives in Belmont, wins the lottery, and claims her as his bride.

Back in Venice however, the mood is very different. Shylock and Antonio's fortunes intertwine through their mutual loss of economic and/or erotic relationships: Antonio has lost his ships and has been forced to forfeit his bond, Shylock his daughter Jessica, who has stolen from him and eloped with a Christian.[11] These circumstances fuel the simmering personal, racial and religious hatred between them; Antonio, bound to Shylock by the terms of the bond, prepares for martyrdom as Shylock, hurt and angry, seeks his penalty – a pound of Antonio's flesh – to "feed fat the ancient grudge" he bears him.[12]

Bassanio rushes to Venice. In the Venetian court, secure in the justice of his claim, Shylock rejects the Christians' money and pleas for mercy. He shall have his bond. It seems that unless the Duke, the Venetian judge, can be persuaded to sacrifice the law Antonio will die. Thus, when Portia arrives in Venice, disguised as a lawyer, it is the law – as opposed to Antonio – that is in

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[10] Cohen, *ibid*, 684.

[11] The Jessica-Lorenzo sub-plot (important in the play's consideration of the relationship between Jew/Christian and father/daughter) and similarly the relationship between Nerissa and Gratiano (central to the resolution of the play in the 'ring-trick' of Act V) have little direct impact on Portia's contribution to the image of the woman lawyer. Consequently, neither of the two sets of lovers, which together with Portia and Bassanio form the play's triad of couples, receives any direct attention in this chapter.

imminent danger. In a dramatic turn of events, Portia re-interprets the bond, allowing Shylock his pound of flesh, but not one drop of Antonio's blood. She exposes Shylock's murderous intent toward Antonio and in so doing enables the Duke and Antonio to show Shylock the 'mercy' he refused – his life is pardoned, his wealth transferred by various means to his daughter and son-in-law and he is required to convert to Christianity. Portia succeeds where the Duke was about to fail: Antonio's life *and* the law are safe. The play ends in Act V with the restoration and re-affirmation of economic and erotic connections and responsibility in the so-called 'ring-trick', the final of the three trials; Portia, Bassanio and Antonio are united in a harmonious triad – the erotic and economic combined.[13]

### Creating an Idol

Portia, like many of Shakespeare's heroines, is a complex and often contradictory character. She is at once a dutiful daughter, a subservient wife, a jealous lover, and a complicated woman; she is a fairy tale heiress, an 'unlesson'd girl', an accomplished yet disorderly lawyer, an ally and protector. Portia's name has become almost synonymous with the woman lawyer as her multifaceted personality and diverse roles within *The Merchant of Venice* are

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[12] *Merchant* I. iii. 42.

[13] *The Merchant of Venice* has traditionally been seen as play of dichotomies – Venice/Belmont, law/mercy, Jew/Christian, love/friendship. There are, however, obvious difficulties with this approach, in particular, the ensuing negative list – Venice, the law, Jew, (male) friendship. In response, Alice Benton suggests the structure of the play is best understood as "tripartite" in which three trials, couples, caskets and rings are brought and held together by the central character of Portia (n 9 above, 383).

seen to adhere to and represent what "the woman lawyer has to endure with regard to the elision of identities".[14] Her multilayered existence is reassuringly familiar;[15] as is her story, 'read out' from the text of the play.[16] Inevitably, in this 'unravelling' of her story, some character traits are 'privileged' over others. Feminist scholars are understandably more enthusiastic about identifying themselves with certain aspects of her personality than others. As a result, a distorted understanding of Portia emerges in the feminist literature; her perceived feminine mercy is promoted over her cruel, and possibly racist, tendencies.[17]

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[14] Ward, n 8 above, 75. Ian Ward identifies Carol Gilligan's somewhat tangential reference in *In a Different Voice* – "in *The Merchant of Venice* ... Shakespeare goes through an extraordinary complication of sexual identity, dressing a male actor as a female character who in turn poses as a male judge, in order to bring into the masculine citadel of justice the feminine plea for mercy ... Portia, in calling for mercy, argues for a resolution in which no one is hurt ..." (C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982; repr 1993) 105) – as a possible catalyst for the "subsequent rash of references" within feminist legal literature, based largely on an uncritical image of Portia as successful, different, merciful and, most importantly, female (at 66). See, e.g., D Fossum 'A Reflection on Portia' (1983) 69 *American Bar Association Journal* 1389; S O'Connor 'Portia's Progress' (1991) 66 *NYU L Rev* 1546; F Burton 'What now Portia?' (1998) 21 *Sol J* 784; D Glass 'Portia in Primetime: Women Lawyers, Television and LA Law' (1990) 2 *Yale J L & Feminism* 371; C Menkel-Meadow 'Portia in a Different Voice: Speculations on 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 & L* 75; and Corcos n 4 above.

[15] On the woman lawyer's many and varied identities, see, e.g., Margaret Thornton's exploration of the images adopted by women lawyers to ensure their equivocal acceptance within the legal academy: the 'body beautiful', the 'adoring acolyte', the 'dutiful daughter' and the 'queen bee' (*Dissonance and Distrust: Women in the Legal Profession* (Oxford: Oxford University Press, 1996) 106-129).

[16] On the process of 'unravelling' or 'reading out' see further Cohen, n 5 above, 668-672.

[17] The indictment of Portia as a racist stems from her aside in relation to the Prince of Morocco, "A gentle riddance, - draw the curtains, go, – / Let all of his complexion choose me so" (*Merchant* II. vii. 78-79). It may be that this condemnation of Portia is based on a

In spite of and beyond these many and varied representations of Portia in both legal and literary scholarship, Jane Cohen identifies two conceptually diverse and opposed perspectives on her within feminist literary inquiries.[18] On the one hand, Portia is seen to reinforce "Shakespeare's essential conservatism and phallocentrism".[19] The vitality of Shakespeare's heroines is mistaken for power when, it is suggested, they should be seen instead to reinforce (as opposed to challenge) patriarchy as mere players in a "drama of the male psyche" and "objects in a male game".[20] So viewed, Portia's strength and impact within the play is dismissed as an illusion; she is seen simply as a foil used by Shakespeare to heighten the sense of the ridiculous.

On the other hand, Portia is "valorised as a feminist legal heroine".[21] Her masterful assertion and subversive personification of female mercy is seen to go beyond the strength and expectations of her sex,[22] as Shakespeare transforms the "enchantress" of his source story, whose power over men leads ultimately to their death, into "a woman with exemplary

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misunderstanding of the use of the word "complexion", originally used to refer to a person's temperament as opposed to skin tone.

[18] Cohen, n 5 above, 673.

[19] C G Heilbrun Book Review (1982) 8 *Signs* 182, 185 (reviewing C Lenz, G Greene, & C Neely (eds) *The Woman's Part: Feminist Criticism of Shakespeare* (1980); M French *Shakespeare's Division of Experience* (1981); and C Kahn *Man's Estate: Masculine Identity in Shakespeare* (1981)).

[20] Heilbrun, *ibid*, 183-185.

[21] Cohen, n 5 above, 665.

[22] Indeed in Act I (*Mechant* I. i. 166) Shakespeare explicitly links Portia to her lesser known name-sake – Brutus' Portia, Cato's daughter – reminding us of the latter's challenge: I grant that I am a woman; .../ Think you I am no stronger than my sex,/ Being so father'd and so husbanded? (*Julius Caesar* II. i. 294, 296-7).

knowledge in a male sphere".[23] Moreover, he reinforces this through his suggestion that she strengthens this "borrowed knowledge" by infiltrating it with her own "greatness" of learning, her own experience.[24] In Portia, Shakespeare confronts and undermines cultural gender stereotypes as he

> invokes the ideal of a proper Renaissance lady and then transgresses it; [Portia] becomes an unruly woman ... [who] interrogate[s] and reveal[s] contradictions in the Elizabethan sex/gender system.[25]

Unsurprisingly, it is this understanding of Portia as 'an unruly woman' which feminist legal scholars seek to invoke when establishing her as their figurehead of female lawyering. However, this adoption of Portia goes beyond that of promoting a mere archetype or idol, the resurrection of an inspirational heroine of distant school day memories as the benchmark for the would-be lawyer.[26] Rather she is seen by many to embody the woman lawyer's difference and to articulate a 'different voice', with its own ways of speaking, reasoning and listening. A voice that speaks of care and connection alongside

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[23] L Jardine 'Cultural Confusion and Shakespeare's Learned Heroines: "These are old paradoxes"' (1987) 38 *Shakespeare Quarterly* 1, 16, 12. On Shakespeare's source stories see, in particular, the first story of the fourth day in Ser Giovanni's, *Il Pecorone* (translated and reprinted in the Arden edition, n 1 above, 140-153) which is perhaps the closest version of the ancient flesh-bond narratives to *The Merchant of Venice* (Brown, n 8 above, xxvii-xxviii).

[24] *Merchant* IV. i. 156-157.

[25] Newman, n 2 above, 29-32.

[26] Cohen, n 5 above, 665.

principle, abstraction and rules; in fact, one that speaks like a more recent interrogatory feminine voice – that of 'Amy'.[27]

Thus, in the sound of silence – where Gilligan first heard Amy's voice – there are, it seems, echoes of Portia's story. Their stories and voices intertwine, mirroring each other until Portia emerges, in some feminist legal literature, as the visible and literary incarnation of Amy's different voice.[28] She is the symbol of women's transformative potential within the legal profession and system and of the hope that their inclusion might effect the metamorphosis of law's empire. Portia has become to some feminist legal scholars the

> feminist conception of the good lawyer – or, when a contrast with 'male' lawyering is being highlighted, a feminist conception of the *better* lawyer that the feminization of the legal profession will engender.[29]

She is seen to represent a renewed and re-imagined legal profession and system enriched by the differences, whether biologically or socially derived, which women bring to law. She embodies the promise that the woman lawyer might – through her incorporation of alternative values of care and connections – transcend and transform the alleged masculinity of law. She

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[27] Amy's voice is found in Carol Gilligan's exploration of moral reasoning, judging and decision-making in which she highlights the absence and devaluing of women's voices within traditional psychological theory (n 14 above). See further chapter 2, esp 70-77, above.

[28] See, in particular Menkel-Meadow (1985) and (1994), n 14 above.

[29] Cohen, n 5 above, 665. Although, note Gilligan's response in which she emphatically rejects this use of her work: "When I hear my work being cast in terms of whether woman and

posits the possibility that might, one day, enable a "resolution in which no one is hurt ... [just like in *The Merchant of Venice* where] the men are forgiven for their failure to keep both their rings and their word, [and] Antonio in turn forgoes his 'right' to ruin Shylock".[30]

The success of Portia in Act IV, the renowned trial scene, secures her status as the feminist legal scholar's idol. Her speech on the quality of mercy is seen as an eloquent plea for the infusion of masculine justice with feminine mercy and as such to be an expression of "her real, more female self" hidden behind her disguise.[31]

> *Portia*: Then must the Jew be merciful.
>
> *Shylock*: On what compulsion must I? tell me that.
>
> *Portia*: The quality of mercy is not strain'd,
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath: it is twice blest,
>
> It blesseth him that gives, and him that takes,
>
> 'Tis mightiest in the mightiest, it becomes
>
> The throned monarch better than his crown.
>
> His sceptre shows the force of temporal power,
>
> The attribute to awe and majesty,
>
> Wherein doth sit the dread and fear of kings:
>
> But mercy is above this sceptred sway,
>
> It is enthroned in the hearts of kings,
>
> It is an attribute to God himself;

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men are really (essentially) different or who is better than whom, I know I have lost my voice, because these are not my questions" ('Letter to Readers' n 14 above, xiii).

[30] Gilligan, n 14 above, 105.

> And earthly power doth then show likest God's
> When mercy seasons justice: therefore Jew,
> Though justice be thy plea, consider this,
> That in the course of justice, none of us
> Should see salvation: we do pray for mercy,
> And that same prayer, doth teach us all to render
> The deeds of mercy.[32]

Portia, like the Duke, presents Shylock with a choice between mercy and law. However, it is not the unconditional Christian mercy favoured by the Duke, which seeks to replace justice with pity,[33] but rather a conception of mercy that prioritises "true justice" over law;[34] "be merciful" she asks Shylock. "Take thrice thy money, bid me tear the bond".[35] Kenji Yoshino suggests that Shylock's choice here between law and mercy mirrors that of Portia's suitors between the lead, silver and gold caskets, where the silver and gold caskets, like 'getting' or 'gaining' justice, were more immediately appealing than the lead casket which, like mercy, requires Shylock to "give".[36] Like Portia's unsuccessful suitors, Shylock makes a bad choice.

> Like Morocco, he falls into the trap of literalism. The law, like gold, is 'what many men desire', and Shylock is one of those: 'I crave the law'. The law, like silver, is what a man deserves, and like Arragon, Shylock falls into the trap of 'assuming desert',

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[31] Menkel-Meadow (1994), n 14 above, 102.

[32] *Merchant* IV. i. 178-198.

[33] *Merchant* IV. i. 26.

[34] S Cohen '"The Quality of Mercy": Law, Equity and Ideology in *The Merchant of Venice*' (1994) 27(4) *Mosaic* 35, 44.

[35] *Merchant* IV. i. 233-234.

> noting that '[t]he pound of flesh which I demand of him/Is dearly brought, is mine, and I will have it'. Like both suitors, Shylock is unable to see that the language of desire and desert will not procure salvation. In his desire to 'get' and 'gain' justice, he fails to see how he might 'give' mercy.[37]

His "stand for judgment" – which represents not only a threat to Antonio, but also to the law itself, the security and underpinnings of commercial Venice – fails.[38] Understood within this dichotomy, Portia's subsequent success is, perhaps inevitably, seen as a triumph of mercy over law, a victory for the different voice and the endorsement of an idol.

**(Mis)Understanding the Myth**

Although feminist legal scholars seeking to establish Portia as their idol or heroine – as the archetypal woman lawyer – tend to rely upon her achievement in Act IV, ultimately, this limited understanding of Portia as a literary personification of Amy's 'different voice' threatens to silence or constrain future conversations about not only Portia, but also the woman lawyer. The 'Portia idol' appears to have captured the imagination of feminist legal scholars like

> Fairy kings and Fairy queens, soap stars and media icons; fantasy figures who appear to 'touch' England, bless it and in so doing reaffirm an historical sense of

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[36] K Yoshino 'The Lawyer of Belmont' (1997) 9 *Yale JL & Human* 183, 207-208, comparing *Merchant* II. vii. 4-9 and IV. i. 178-193.

[37] Yoshino, *ibid*, 208 (footnotes omitted).

[38] *Merchant*, IV. i. 103.

national destiny which excuses its citizenry from taking any further responsibility for fashioning its own future.[39]

The image of Portia they sought to capture has arguably captured them by imprisoning them (and Portia) within the straightjacket of Amy's 'different' voice (understood as synonymous with mercy). It is perhaps not surprising therefore that their idolised heroine has been derided as "both over-confident descriptively and under-developed normatively", and their response to her characterised as both over-enthusiastic and under-considered.[40] Indeed the image of Portia as the essentially feminine embodiment of mercy has come under sustained and severe attack, with the superimposition of Portia's actions onto Amy's voice problematised and rejected. Ian Ward suggests that the substance and intonation of Portia's voice – its relationship with mercy and its articulation as female – "like all myths, on closer examination can be seen to be something of a sham".[41] He argues that the feminist legal scholars' interpretation of Portia as the feminine mouthpiece for mercy is, on the basis of literary evidence, unsustainable. Moreover, Portia's perceived difference is rejected and the relationship between the feminine and mercy reconsidered. Portia, it is argued, shows no mercy in her treatment of Shylock, invokes the law and not mercy in her re-interpretation of his bond and finally, distorts or silences her feminine voice, if indeed she ever had one, behind her masculine disguise.

[39] I Ward 'Fairyland and its Fairy Kings and Queens' (2001) 14(1) *Journal of Historical Sociology* 1, 17.
[40] Cohen, n 5 above, 667.

Cohen, in her representation of Portia as an adaptive, but "deeply flawed" heroine also rejects the perceived relationship and interconnection between the feminine, mercy and Portia.[42] Mercy, she argues, not only chronologically predates Portia within the context of the play and is ontologically born of religion, but is also performed by and associated with male characters, in particular the Duke and Antonio. Rather, she suggests Portia's treatment of Shylock denies him

> the accoutrements of a fair and dignitary process, one that would address him by his proper name and not … by abusive epithet: one that would give him a fair chance at backing down, by tutoring him as to the penalties that lie in wait for him, not by nurturing his ill-placed hope for murderous revenge … [it] would offer him … some recompense for his substantial monetary outlays; and … would remit the condition of his soul and his religious identity to his own autonomous charge.[43]

Portia actively rejects Bassanio's offer of settlement in Shylock's favour, eradicating the final opportunity for mercy and setting the wheels in motion for Shylock's utter humiliation.

> *Shylock:* I take this offer then - pay the bond thrice
>
> And let the Christian go.
>
> *Bassanio:* Here is the money.
>
> *Portia:* Soft!
>
> The Jew shall have all justice, - soft no haste!

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[41] Ward, n 8 above, 66.

[42] Cohen, n 5 above, 720-731.

[43] Cohen, *ibid*, 730.

> He shall have nothing but the penalty.[44]

The symbol of mercy seems to show none; "her zeal for rescue curdles into merciless revenge".[45] Moreover, not only does Portia fail to establish or represent the "female ancestry" of mercy but

> whether for reasons of naiveté, over-empowerment, self-interest, religious intolerance, or an unchecked desire for her own little piece of revenge ... [she] denatures any link between merciful activity and female action.[46]

Alice Benston, however, suggests the feminist legal scholars' confusion and disappointment following the exposure of Portia's merciless and self-interested revenge toward Shylock stems from their misunderstanding and failure to recognise that Portia does not and cannot represent mercy.[47] Although in Act IV an appeal to mercy seems to be the only way to avoid the equally horrendous alternatives – Antonio's inevitable death through the enforcement of the bond or the abrogation of Venetian law – it is in fact "justice – law – not mercy that prevails under Portia's direction".[48]

That said, Portia's understanding of law clearly differs from that of both Shylock and the Venetians. Whilst Shylock relies on a positive and formal conception of the 'old law',[49] the use of law for law's sake – a conception of

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[44] *Merchant*, IV. i. 313- 318.

[45] Cohen, n 5 above, 733.

[46] Cohen, *ibid*, 728.

[47] Benston, n 9 above, 375.

[48] Benston, *ibid*.

[49] *Merchant*, IV. i. 40-43.

law which, like him, is separated or detached from the community – the Duke and Antonio, suggests Ward, (mis)understand the law as a servant of the market.

> At the root of Antonio's predicament, and his ignorance, is the belief that the law of contract is private, and of no relevance to the wider interests of the 'public' community.[50]

Comparatively, Portia's response reveals and articulates the inherent justice *and* mercy within the "rationality of the common law".[51] In so doing, she understands and accepts the integrity and nature of the common law; she does not bend the law, nor does she oppose it or seek to replace it with mercy.[52] Instead, Portia shows Shylock's guilt to lie in the law he seeks to employ, capturing Shylock within his own tangled web of cruelty and hatred.

Shylock has "contrived against the very life" of Antonio.[53] He is therefore guilty not only of cruelty and an attempt to enforce a fraudulent contract, but also of attempted murder. Consequently, the law has another hold on him:

> *Portia*: If it be proved against an alien,
>
> That by direct, or indirect attempts

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[50] I Ward *Shakespeare and the Legal Imagination* (London: Butterworths, 1999) 131.

[51] Ward, n 8 above, 67-68.

[52] See, e.g., *Merchant* IV. i. 174-5, 180, 191. On the role of and relationship between equity and the common law, see e.g. and cf Ward, n 50 above, 32; Cohen, n 5 above, 727; and Cohen, n 34 above, 35.

[53] *Merchant* IV. i. 356-357.

> He seek the life of any citizen,
> The party 'gainst the which he doth contrive,
> Shall seize one half his goods, the other half
> Comes to the privy coffer of the state,
> And the offender's life lies in the mercy
> Of the Duke only, 'gainst all other voice.[54]

Shylock's use of the law for personal revenge, his disguise of his murderous intent behind metaphor and the terms of his 'merry' bond, represents an assault on the Venetian community.

> [J]ust as law and the state would be in jeopardy were Shylock not allowed his day in court, so both would be equally threatened were Shylock not punished for the implicit intent of his bond.[55]

His attempt on Antonio's life is a crime against the state. Therefore only the Duke, and not Portia, can pardon him and allow, once the guilty verdict is established, mercy in its rightful place to "season justice".[56]

> Antonio ... [is] saved, but he ... [is] saved by enforcing the law that protects his life, not by bending the law that protects his commerce.[57]

Portia "use[s] the law to save the law"; she invokes law and not mercy, displacing Shylock as the "spokesman [sic] for law".[58] In so doing, she

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[54] *Merchant* IV. i. 344-352.

[55] Benston, n 9 above, 378.

[56] *Merchant* IV. i. 193.

preserves both the law and the state; thwarting Shylock's attempted perversion of the law and challenging the Venetians marked indifference to the sanctity of contract.[59]

All in all it seems Portia's 'different' voice might not be all that different in substance from the stereotypical trial language of the traditional lawyer. Nor is it necessarily feminine in intonation. Whilst, to ensure the integrity of the trial scene, Portia must be unrecognisable as a woman – and, more importantly, as Portia – arguably her disguise serves to reinforce her limited difference. In so far as she dresses as a lawyer, Portia's choice is subversive. However that is the extent of her subversion – she is not dressed 'as a man'. In fact, Ward argues, Portia, when disguised, transcends gender identity. Her imitation of the "jurisprudentially desexed" is neither male nor female.[60] Seen in this way, Portia is unable to bring anything essentially feminine to the legal situation or to her role as a lawyer. She is recast with a "kind of asexuality; something intrinsically harmonising and transcendent", that denies and balances the "destabilising potential" of transvestism.[61] In fact, her disguise is

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[57] D H Lowenstein 'The Failure of the Act: Conceptions of Law in *The Merchant of Venice*, *Bleak House*, *Les Miserables*, and Richard Weisberg's *Poethics*' (1994) 15 *Cardozo L Rev* 1139, 1169.

[58] Benston, n 9 above, 379.

[59] Compare, e.g., Antonio's recognition of importance of (economic) contractual obligations with his manipulation of Bassanio at the end of Act IV when persuading him to part with Portia's ring – a symbol of her emotional contract with Bassanio – as token of his gratitude toward the young judge (*Merchant* III. iii 26-31; IV. i. 445-447). Indeed, even Shylock, who purports to stand on law, is prepared to break his commitments according to the dictates of self-interest (*Merchant* I. iii. 33-44; II. v. 14-5; Lowenstein, n 57 above, 1164).

[60] Ward, n 8 above, 71.

[61] Ward, *ibid*, 70. See further and compare R Kimbrough 'Androgyny Seen Through Shakespeare's Disguise' (1982) 33(1) *Shakespeare Quarterly* 17. There are many parallels

perhaps best understood not as a mask – hiding or obscuring her difference – but rather as a 'revelation'.[62] As such it reveals not only the centrality of Portia within the play and the extent to which the 'eclips[ing] of self' is endemic among those who adopt or play the role of lawyer, but also glimmers of her promise and iconic potential.[63]

The idolised image of Portia as the literary personification of the different voice and archetypal woman lawyer is exposed and discarded as a myth. Her relationship with Amy, it seems, is unable to withstand the revelations and insights uncovered by literary legal critics. Nevertheless, simply to abandon the feminist legal scholars' fallen idol and allow her to fade away is to miss the opportunity and potential of the 'Portia myth'. Before calling off the search for happy endings, it is perhaps time for Portia to be reassessed.

## Iconic Beginnings

The final chapter of Portia's story begins with the heroine, silent, confused and disorientated; exhausted by the events that have taken her from a symbol

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throughout the play, which may have been written as a "kind of valentine" (Cohen, n 5 above, 678) to Elizabeth I, between Portia and the 'Virgin' Queen. In particular, the ambiguity that surrounds Portia's sexual identity mirrors Elizabeth's transvestite image, which balanced "essentially female attributes – chastity and virtue – with distinctly male ones – strength, constancy and integrity", culminating in her description of herself at Tilbury as having the "heart and stomach of a king, and of a king of England too" (Ward, *ibid*, 70).

[62] Yoshino, n 36 above, 213.

[63] Ward, n 8 above, 71. On the lawyer's 'eclipsed self' see P Schlag *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 126-140 and chapter 2, 81-84, above.

of hope to failure, from difference to sameness, from sound to silence. She can't feel like a feminist legal heroine right now and, to be honest, she doesn't look much like one either. Yet, appearances can be deceptive. "All that glisters is not gold", as the Prince of Morocco learned to his cost when wooing Portia.[64] Perhaps the feminist legal scholar too has also somehow been duped into believing in appearances, into misunderstanding the myth and trusting the fairy tale. Perhaps there is "no more reality in Shylock's bond and the Lord of Belmont's will than in Jack and the Beanstalk"; after all, *The Merchant of Venice* is just a "fairy tale", a fantasy, reliant on improbabilities, wilfulness and romance; a childhood fancy, a foolish story lacking integrity or foundation.[65] So viewed, Portia is simply a character or heroine with unaccountable abilities – her actions akin to the wolf disguised as grandma, her voice analogous to the talking animals of fairy tales – hence she can be dismissed as a fiction or myth.

Yet, beyond the colloquial and often derogatory understandings of myths and fairy tales, what distinguishes them from trivial fiction is their hidden or veiled meanings, revealing "truth[s] of a different or deeper kind".[66] Fairy tales of magic beanstalks and talking wolves offer possibilities for insights, capturing and transforming the imagination, "disrupt[ing] the apprehensible world in order to open spaces for dreaming alternatives".[67]

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[64] *Merchant* II. vii. 65.

[65] Granville-Barker, n 8 above.

[66] R Cavendish (ed) *Mythology: An Illustrated Encyclopedia of the Principal Myths and Religions of the World* (London: Little, Brown & Company, 1992) 8.

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

They provide a literary pathway into another world, a window onto a previously unimaginable future. Consequently, to believe the *story* of a fairy tale or myth is to belie its intention and purpose. To accept on face value the mythical elements of Portia's story – where an 'unlesson'd' country girl travels to the city and successfully disguises herself as a gifted lawyer able to re-interpret the law in order to rescue her lover's friend – is to accord them importance and significance beyond their purpose. It is to misunderstand the 'Portia myth', allowing its story to constrain the imagination and ultimately obscure its deeper truth.

Indeed, once the fairy tale elements of Portia's story have been exposed, her "stand for mercy ... [rejected as] simplistic, superficial, and probably wrong", what remains is "an evocative symbol that may have its own life and usefulness".[68] Properly understood, the Portia myth establishes Portia as an icon. It seems feminist legal scholars must, like Bassanio, "choose not by the view",[69] but rather look behind the deceptive and distracting appearances of Portia's story. Perhaps her story, where endings are not teleology but 'promise', has only just begun: as an iconic understanding of Portia enables the imagining of diverse understandings and perspectives of lawyering and adjudication grounded in an alternative understanding of the story that began with Shylock and Antonio in Venice.[70]

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[68] Menkel-Meadow (1994), n 14 above, 106.

[69] *Merchant*, III. ii. 131.

[70] Menkel-Meadow (1994), n 14 above, 106.

In the Venetian court the sides are drawn:

> [Shylock], Jew, alien, alienated and alienating [stands alone against] all of the rest of Venice; its presiding Duke, its magnificoes, Antonio, and Antonio and Bassanio's friends and acquaintances – the Christian community.[71]

Given such unfavourable circumstances and odds it is a "[s]mall wonder" suggests Cohen "that Shylock's response is to stand on law – to flee to the reliable – he hopes – impersonality of law".[72] In fact, however, Shylock uses his stand on 'impartial' law not as an escape from the unfairness and prejudice of Venice, but in order to mask his desire for vengeance, to cloak his implicit end – Antonio's death – with the explicit legality of law. He exploits the apparent neutrality of the Venetian law, exposing the shroud of collective denial about law's instrumental and value-imbued application.[73] Shylock recognises that neither law nor adjudication are neutral or impersonal, but he also understands that, in order to secure the continued prosperity of commercial Venice, the *appearance* of neutrality must be maintained; the political, personal and partial are necessarily masked by a façade of neutrality which overlays contradiction and encourages denial.

> *Shylock:* The pound of flesh which I demand of him
> Is dearly brought, 'tis mine and I will have it:
> If you deny me, fie upon your law!

[71] Cohen, n 5 above, 710.

[72] Cohen, *ibid*, 711.

[73] Analysis of such denial continues to be apposite see, e.g., D Kennedy *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass.: Harvard University Press, 1997) and also, in relation to the Herculean judge of the legal imagination, chapter 1, 47-48, above.

> There is no force in the decrees of Venice:
>
> I stand for judgment, - answer, shall I have it?[74]

Similarly, the Duke, the Venetian judge, must also be seen to transcend his personal preferences – his personal, political and emotional allegiance toward Antonio, his hostility and hatred of Shylock – as he adopts the role of an impartial judge. He "frames" the legal dispute in terms of morality, whereby 'the world' requires Shylock to provide a 'gentle' (gentile) answer, by not only forgiving the bond, but a portion of the principal too.[75] However, the Duke's translation or framing of the dispute belies his hidden allegiance and implicit sympathy – or, put another way, bias – toward the wealthy Venetian merchant. The dice are loaded – the odds stacked against him – yet Shylock, unsurprisingly, remains implacably hostile toward the Duke's attempts to persuade, threaten or intimidate him into forgiving his bond, to move the dispute outside of the realm of law. Shylock refuses to show Antonio mercy: "[t]he villainy you teach me I will execute".[76] He remains committed to the justice of his claim – or at least the Duke's inability to defeat it without exposing the façade of judicial neutrality.

Indeed while the Duke may "hath ta'en great pains to qualify / ... [Shylock's] rigorous course", he "cannot deny the course of law".[77] He arrives in court torn between his personal preferences and his understanding of his

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[74] *Merchant* IV. i. 99-103

[75] *Merchant* IV. i. 16-34 On the judge's ability to 'frame' the issues involved in a particular case see further Schlag, n 63 above, 1-17 and also chapter 4, 219-222, below.

[76] *Merchant* III. i. 65.

[77] *Merchant* IV. i. 7; III. iii. 26.

judicial role, his allegiance toward Antonio and the necessary application of law. His understanding of the case is constrained by his "rulebook reasoning"[78] his acceptance of the necessity of separation and hierarchy, and his constructed dichotomisation of law and mercy, Christian and Jew, Antonio and Shylock. In his frustration the Duke threatens to reject his superhero role:

> *Duke:* Upon my power I may dismiss this court,
>
> Unless Bellario (a learned doctor,
>
> Whom I have sent for to determine this)
>
> Come here to-day.[79]

Refusing to judge by dismissing the court seems to be the better of two equally unpleasant alternatives: Antonio must live – even if the consequence of this is the abrogation of Venetian law. The Duke is prepared to make law, and not Antonio, the sacrificial object. Like Jake, he believes a "human life is worth more than money",[80] or perhaps, more specifically, that the life of a Christian merchant is worth more than the enforcement of a Jew's legal bond.[81] Prejudice and personal preferences triumph over the law and justice.

Ultimately, the Duke is a bad judge. He is unable to defeat Shylock's claim within his understanding of his judicial role and so he allows his personal preferences to supplant the law; his decision to save Antonio is as

[78] R M Fischl & J Paul *Getting to Maybe: How to Excel on Law School Exams* (Durham, NC: Carolina Academic Press, 1999) 11-17.

[79] *Merchant* IV. i. 104-107.

[80] Gilligan, n 14 above, 26.

[81] After all, as Shylock knows, the lives of the Venetians' slaves continue to literally have a price (*Merchant* IV. i. 90-98).

arbitrary and no better (or worse) than Gratiano's wish for Shylock to receive "[a] halter gratis, nothing else for Godsake!"[82] He believes his only alternative, if he is to save Antonio, is to reject his judicial role. His allegiance to Antonio and his understanding of the judge *both* require him to do so. His rejection of his judicial role stems from an understanding of it that is constrained by the Herculean ideal. His commitment to the ideal of an impartial judge acts as an impediment – his appreciation of the processes of adjudication constrained and limited by his infatuation with the either/or dichotomy of his rulebook reasoning. Yet, as in all good courtroom dramas, where disaster is averted by the arrival of an unexpected witness or new, previously thought impossible-to-find evidence, the impact of the Duke's proposed action is diverted by the entrance of a messenger bringing news of Portia's arrival in Venice.

Disguised as Balthazar, a doctor of laws, Portia appears, like the Duke previously, as impartial and disengaged – unrecognisable as a woman and, more importantly, as Portia. However, whilst her disguised appearance initially works to conceal her identity and interest, it also enables her to bring those very concerns to bear upon her decision-making while remaining true to the ideal of law, which the Duke has felt compelled to discard.[83]

Portia is intimately connected, both economically and emotionally, to Antonio; his money and friendship enabled Bassanio to woo her and

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[82] *Merchant* IV. i. 375.

[83] Yoshino, n 36 above, 213. On Shakespeare's use of disguise see generally, M Bradbrook 'Shakespeare and the Use of Disguise in Elizabethan Drama' (1952) 2 *Essays in Criticism*

establishes Antonio as "the semblance of [her] soul".[84] Considered within the framework of the Duke's dichotomisation of the law and Antonio, she appears to have a natural inclination toward ensuring Antonio's survival. However, unlike the Duke, Portia has an equally strong commitment to the law; her "previous behaviour indicates that, much as she values that half of her soul, she would not give up or subvert law, authority, or power".[85] She refuses Bassanio's plea to "Wrest once the law to [her] authority, – / To do a great right, do a little wrong".[86] Caught between her allegiance to Antonio and to the law – her subsequent outward conformity to the impartial juridical role belies her particular interest and potential difference.

In her approach to adjudication, she is neither a "loose cannon",[87] nor is she infatuated with the rulebook – neither 'Amy' nor 'Jake'. Instead, she is what Duncan Kennedy describes as a "constrained activist". She works toward her "conscious strategic goal of unsettling the obvious solution", whilst experiencing both internal and external constraint and denial.[88] She adroitly embraces the legitimacy and constraint of her impartial juridical role whilst 'working' the legal materials to achieve her desired outcome, that is, a result that complies with her personal preference to save Antonio without compromising the integrity of the law. As she pursues this goal, she is

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159 and S Baker 'Personating Persons: Rethinking Shakespearean Disguises' (1992) 43(3) *Shakespeare Quarterly* 303.

[84] *Merchant* III. iv. 20.

[85] Benston, n 9 above, 373-374.

[86] *Merchant* IV. i. 211-212.

[87] Fischl & Paul, n 78 above 11-17.

"anything but neutral".[89] She avoids entrapment within the Duke's dichotomy, seeking to problematise the established hierarchy between Antonio and Venetian law.

To this end, Portia offers an alternative interpretation of the conflict and relevant legal materials. Unlike the Duke, she does not appear to be torn between conflicting outcomes. She rejects his hierarchical and rigid rule-orientated reasoning, exploiting the malleability of legal rules as she manipulates them toward her strategic goal. Her approach whilst inclusive and diverse is somewhat disinterested. She does not attempt to mediate a solution between Antonio and Shylock; nor does she attempt to restore the social fabric of Venice. She does not seek to promote religious or ethnic tolerance or the acceptance of diversity and difference. Nor does she work to counteract the Duke's polarisation of Antonio and Shylock, morality and law, Christian and Jew through integration or combination. Rather, as a foil to Shylock's formal justice, she embraces and utilises the ambiguities that surround legal rules.[90] Her recognition and acknowledgement of her personal preferences – of her strategic goals – enables her successfully to negotiate her way around the context and relationships of the legal web creating space for strategically orientated alternatives inside the legal framework and within the constraint of her judicial role. This broader vision widens the scope of the inquiry and

[88] Kennedy, n 73 above, 163. On the 'constrained activist judge' see further chapter 1, 42-44, above.

[89] Kennedy, *ibid*, 183.

[90] Menkel-Meadow (1994), n 14 above, 114.

enables her to locate Shylock's bond within the context of his hatred of Antonio, thereby exposing his implicit murderous intent.

Her successful strategic application of law underlines the Duke's apparent impotence. He appears ineffective; the future of his ubiquitous authority is in doubt. His conventional deployment of law, paralysed by its own claims to neutrality, is unable to establish his preferred conclusion. Alongside this, Portia's open acknowledgement of her strategic goals and desired end is not only successful, but also deeply subversive. That said, Portia should not be seen as the Duke's replacement – there is no either/or choice to be made between them. Rather, their relationship should be seen as one between friendly rivals, companions journeying together toward exciting and novel understandings of lawyering and adjudication.

Nevertheless, her defeat of Shylock's claim reveals Portia to be a brilliant, albeit unconventional lawyer, for whom

> ... the letter of the law, the spirit of the law, the quality of mercy, love in friendship and in marriage, the ultimate hope for redemption – are not forces contending with one another. ...[but which] properly conceived ... work together.[91]

However, her success is distinct from – not despite of or dependent upon – her gender. Portia is not a perfect reflection of the *woman* lawyer, a "model" or "ideal".[92] Nor is she 'queen bee', an honorary male who "effectively

[91] Lowenstein, n 57 above, 1174.

[92] Ward, n 8 above, 74.

sustains the homosociability of the legal academy, [or profession] in addition to aiding in the reproduction of conventional legal knowledge".[93] Her gender, whilst important, is not all encompassing. It must not be allowed to sideline or explain away Portia or the success of her approach. Portia is exceptional – not an exception – as such she is metaphor or symbol of a (woman) lawyer, which represents a challenge to traditional understandings of the (fe)male lawyer.

Nevertheless, this is not to dismiss the significance of recognising Portia as a woman. It is because Portia is a woman that we both look for and find her 'difference'. The extent to which women lawyers and judges speak 'in a different voice' – although perhaps intuitively attractive – remains hotly disputed and, as yet, undecided amongst both legal academics and professionals.[94] However, what feminist critiques of lawyering and adjudication have revealed in the pursuit of difference is the contingency of traditional accounts of legal reasoning and adjudication and the possibility of alternative and diverse adjudicative voices, which are not necessarily feminine or feminist in intonation. Portia's disguise reveals and establishes her gendered difference as a lens or portal through which to discover and expose her distinctive approach to adjudication. It is because she is a woman that Portia gets our attention. Moreover, it is also because she is a woman that we look for and then endow her judgment with feminine traits instead of seriously considering what she is really doing. Nevertheless, the debate surrounding

[93] Thornton, n 15 above, 114-115.

[94] See chapter 2, 'The Different Voice and the Woman Judge', 90-110, above.

her difference eventually leads us to a much closer scrutiny of what we understand as law, mercy, justice and adjudication.

Thus, my goal here has not been to restore Portia to her former glory – to re-establish her as an idol for feminist legal scholars to look upon in admiration or for instruction. Rather, it has been to acknowledge Portia's iconic potential; to re-envisage her as a window onto alternative adjudicative landscapes; to represent her as a focus for contemplation and meditation. Although Portia *can* still simply be seen as a symbol – the archetypal woman lawyer whose story and actions are though to resonate with narratives of the woman lawyer – my understanding of Portia as an icon goes beyond this secular and limited conception.

In the orthodox Christian tradition

> [i]cons are highly stylised paintings of a sacred subject. Their purpose is not to display the creativity or virtuosity of an individual artist but to point to the sacred. Indeed, they do more than point; intended to be used in meditative prayer their purpose is to become windows to the sacred through which we 'see' God and God 'sees' us. They mediate the sacred by becoming transparent to that which is beyond, thereby making the beyond present.[95]

So viewed, Portia is not simply an idol to be worshipped. She is rather a means to as yet undefined ends, a window through which feminist legal scholars can re-imagine (with a view to transforming) lawyering and

[95] M J Borg *The God We Never Knew: Beyond Dogmatic Religion to a More Authentic Contemporary Faith* (San Francisco: Harper, 1997) 119.

adjudication. An iconic understanding of Portia illuminates routes toward a more complete understanding of adjudication, seeking to persuade not "through verisimilitude", but rather through the orientation of the mind and imagination towards previously uncontemplated views and unconsidered perspectives.[96] As "a foil, or as an alternative to a rigid system of rules and justice",[97] Portia enables feminist legal scholars to see beyond the confines of traditional and dominant conceptions of adjudication. Like Amy, she sees connection in separation, context in abstraction, and possibility in restriction. This enables her to be a highly effective juridical activist with a broader, bolder concept of justice, which is nevertheless faithful to law. Her reinstatement as an icon provides the impetus for feminist legal scholars to peer behind the attractive, yet inhibiting, imaginative hold of the Herculean judge, onto a multifaceted panorama of adjudication, in which we can not only uncover what really goes on when judges judge, but how we/they might do it better.

## Concluding the End of the Beginning

If endings are "only the beginning of a larger story",[98] it is perhaps timely as we near the end of this retelling of Portia's story to pause and consider not only the development of her story, but also the progress and continuing direction of the other story that is unravelling here, the imaginative sub-text of previous tales of adjudication.

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[96] Douzinas (1999), n 6 above, 43.

[97] Menkel-Meadow (1994), n 14 above, 114.

[98] Warner, n 67 above, xxi.

In chapter one, Hercules and Hans Andersen's little mermaid and vain and naked emperor were introduced as key characters in a reconsideration of images of the judge and, in particular, the position of the woman judge. It was suggested that despite his fictional status and the somewhat startling appearance of his alter ego, in the form of a naked emperor, the Herculean judge retains a tenacious and limiting grip on the legal imagination. What is more, a pervasive blindness to these fairy tale qualities or invisible clothes has ensured not only the normative survival of Hercules, but also the limited re-imagining of counter-images of judges. As a result, the woman judge has become almost a contradiction in terms; like the little mermaid, who sold her voice to walk alongside her prince, she is most typically a distraction (especially when she borrows the emperor's new clothes) who must forsake her siren call for partial acceptance within law's empire.

The little mermaid's brutal self-mutilation and sacrifice provided the impetus for chapter two. Beginning with an exploration of Gilligan's narrative of a 'different voice', the chapter tracked the, largely unsuccessful, search by feminist legal scholars for the woman judge's siren call, her perceived difference. In so doing, the purpose was to exorcise the invocation of an essentially different and feminine judicial voice, which haunts narratives of the woman judge. Thus, the different voice was established as a fictional device – akin to Hercules or the little mermaid – which becomes a portal through which to explore diverse, previously unimaginable adjudicative strategies and techniques, its promise encapsulated and reflected in the iconic potential of Shakespeare's woman lawyer.

Portia's story begins here with the creation of an idol, in which Shakespeare's heroine has become virtually synonymous with a particular conception of the woman lawyer. Increasingly, however the power of the idol has waned in the face of critiques of feminist naivety and a child-like fascination with their subject. The need for further re-evaluation became evident. My argument is that such reassessments lead not, as might be expected, to the writing of Portia's epitaph, but rather to a renewed and revitalised relationship between Portia and feminist legal scholarship. An alternative understanding of Portia begins to emerge which looks beyond the fantastical elements of her story, recognising its deeper wisdom and truth. In it Portia is no longer simply the ultimate woman lawyer, who leaves male lawyers trembling in her wake, but is rather an exceptional (woman) lawyer whose disingenuous use of law establishes not only her judicial ability, but also reveals her potential as an icon through which feminist legal scholars can envisage understandings of law and justice which, *inter alia*, do not compel the suppression of difference but rather its strategic re-deployment. At the same time, this iconic understanding of Portia reinforces the nagging suspicion that traditional accounts of adjudication are not telling the whole story; that there's much more going on when judges judge.

In fact, we have perhaps reached a watershed in this collection of adjudicative tales. The focus so far, on difference and the gendered effects of the legal imagination, has revealed the contingency of conventional accounts of the judge, adjudication and legal reasoning. As a result, the attraction of the Herculean judge is beginning to wane; increasingly he is seen not only as out

of reach, but also as not particularly desirable. Our comprehension of and interaction with the adjudicative landscape is beginning to change, as the promise of transformation and the novelty of innovation challenges us to reassess our childlike attachment to the security of myth, fairy tale and denial, and to peer through the icon.

The point is this. Once we abandon our denial-fuelled oscillation between the dismissal of and allegiance to the Herculean accounts of adjudication, we are able to see them for what they are – myths that seek to explain the unexplainable, to give an account for what cannot, in fact, be accounted for. Yet suppose there are other accounts: alternative adjudicative tales where narrative is persuasion and the aesthetic is strategically deployed. Where alongside the judge's explicit narrative a counter-tale reveals *his* story, the unsaid of his narrative exposing his understanding of his judicial role and where the judge can be seen to utilise the aesthetic in order to avoid both the constraining effects of his Herculean role and his debilitating 'self'-less existence. Moreover, what if that these tales formed a subversive sub-text to traditional accounts of adjudication: where would that leave Hercules? Might it, perhaps, be time to let go of the fairy tale and to re-imagine the judge who inhabits the legal imagination?

## Chapter 4

## UNPICKING THE JUDICIAL QUILT: SUBVERSIVE SUBTEXTS, NARRATIVE, PERSUASION, AND PSYCHIATRIC HARM

### Introduction

*INSTRUCTIONS No. 1*

*You need a large wooden frame and enough space to accommodate it. Put comfortable chairs around it, allowing for eight women of varying ages, weight, coloring, and cultural orientation ... Fix plenty of lemonade. Cookies are a nice compliment. When you choose your colors, make them sympathetic to one another ... Your needles must be finely honed so you do not break the weave of your fabric. The ones from England are preferable. And plenty of good-quality thread ... You will need this to hold the work together for future generations.*[1]

In this imaginative response to traditional accounts of adjudication, story and narrative combine. It is at once a story, an account of a "set of events that unfolds over time" and a narrative, "a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories".[2] It is a tale about the making of a judicial quilt, or more specifically, the composition and design of what Lord Steyn describes as "patchwork quilt of distinctions which are difficult to justify";[3] that represents the law on tortious recovery for negligently inflicted pure psychiatric harm. In it, the memorable and diverse circumstances and characters that form the backdrop of previous stories – hysterical mothers, agile window cleaners, runaway lorries, tragically

negligent crowd control, burst water mains and burning oil rigs – are "embedded" within the "frame story"[4] of *White and Others* v *Chief Constable of South Yorkshire Police and Others*.[5] These stories, sewn alongside each other, form a narrative of adjudication, shaped by the "cumulative effects of these separate stories as their aggregate meaning comes to light" and which in turn "interacts" and effects the stories as it fashions its own creative design.[6]

Thus, the following tale harnesses the political potential of storytelling in order to explore what really goes on when judges judge. It combines a descriptive retelling of the police officers' stories in *White* with an exploration of its subversive subtext. As the unsaid of the judges' story – their use of narrative as rhetoric and their deliberate 'framing' of events – reveals their understanding of their judicial role and their relationship with the 'subversive moment'. Storytelling and judging are woven together, as a close examination of the judicial quilts' medley of stories reveals more than was at first expected. In the unspoken of the judge's story we hear his subversive subtext and, through this, come to recognise and explore his understanding of his judicial role and the extent to which that affects and effects the judicial quilt. As story and narrative run side by side, reflecting and, occasionally, interrupting each other they form another tale entitled *Unpicking the Judicial Quilt: Subversive Subtexts, Narrative, Persuasion, and Psychiatric Harm.*

**Please note:**

As explained above, in this chapter two accounts of the event and aftermath of Saturday 15 April 1989 run alongside each other. The reader may choose either to read each narrative separately and in its entirety (perhaps starting at 'One'), or to move between the two by following the numerical order of the subheadings. To accommodate its presentation, all references in this chapter are contained in endnotes.

## 1. One

Hillsborough Stadium, Saturday, 15 April 1989. FA cup semi-final Sheffield Wednesday v Liverpool. 2.32pm – an outer gate 'C' is negligently opened without preventing access to pens three and four at the Leppings Lane end of the ground. 3pm – just past – 95 people are dead, hundreds more injured, one fatally. Crushed.

It was truly gruesome. The victims were blue, cyanotic, incontinent: their mouths open, vomiting: their eyes staring. A pile of dead bodies lay and grew outside gate three. Extending further and further onto the pitch, the injured were

## 2. Emotive Narration

Cast well, the "magic spell of a good story" can bewitch the reader. The enchanted narrative transports him beyond the ordinary, suspending disbelief, and capturing and enriching imagination. It offers a moment of escape, of detachment or freedom, feelings of inclusion, communication or belonging.[26] Stories inspire, restore, transform, rescue, exclude and disrupt. Storytelling opens windows "onto the worlds we do not and can not live in"[27] and provides alternative avenues "into reality" so as to explore the world in which we do.[28]

When we tell stories, we not only convey information, but we share a piece of history; we expand not only our knowledge of what happened, of what someone did, but also of why and how they did it, of how it felt, why it seemed necessary, how it fits into a worldview ... We learn what it is to walk in another's shoes, to experience another's pain, to anticipate another's pleasures, and by so learning we enlarge our own individual humanity and our society's sense of inclusion.[29]

The potential power and impact of a good story as a "strategy for survival",[30] should not be under-

> laid down and attempts made to revive them ... The scene was emotive and chaotic as well as gruesome.[7]

Inspector Henry White, Police Constables Mark Bairstow, Anthony Bevis and Geoffrey Glave, Sergeant Janet Smith and Detective Constable Ronald Hallam were all on duty during what has become known as the Hillsborough Stadium Disaster. Their stories and experiences, selected as representative of the varying tasks undertaken by some police officers that afternoon in the subsequent legal action against the chief constable of South Yorkshire police, form the

estimated. Stories encourage empathy and acknowledge diversity. They are not simply tales to pass the time but narratives constituted by and a component of their time, mechanisms for and of change. Thus, inevitably, perhaps,

> the notion that storytelling is ubiquitous in the law – and in human interactions generally – has recently attained something like the status of a truth universally acknowledged.[31]

Stories and narrative – especially among feminist legal theorists and critical race theorists – have been seen to have a political potential.[32] Counter-narratives have been strategically deployed in an attempt to challenge and expose the unacknowledged "stories, narratives, myths and symbols"[33] that construct the social and legal world.

> From the pleader's tales unravelled in Medieval Chancery and equity courts, to the tales white jurists rattle off to the masses, to contemporary law review releases, stories are part of a legal tradition ... for years, no one called them stories; they called them 'truth'.[34]

The telling of "outgroup" stories seeks to subvert

default backdrop of a judicial tale in three parts. It is a trilogy that encapsulates the tragedy, emotion, heroes, ghosts, hope and disappointment originally entitled *Frost and Others* v *Chief Constable of South Yorkshire Police and Others*.[8]

A recurring theme in both the judges' tale and the police officers' accounts of the events and aftermath of the Hillsborough Stadium Disaster is of participation and involvement. A number of the judges recount the police officers' description of the initial chaos; there was little for the police officers

or "shatter [the] complacency"[35] of the taken for granted, to expose the perspective and partiality of the storyteller and the ambiguity of notions of 'truth', 'universality' and 'neutrality'.[36] Stories and narrative become "iconoclastic tool[s] of persuasion for legal and social change".[37]

> Storytelling, one can conclude, is never innocent. If you listen with attention to a story well told, you are implicated by and in it.[38]

There is no such thing as an objective or 'true' story, told by a neutral or dispassionate storyteller, and heard by a detached or uninterested audience; all are intimately entwined, caught together under the storyteller's spell.

So viewed, when the judge is recognised as a storyteller, narrative is revealed as an adjudicative technique. His judgment is no exception to the manipulative power of stories. In fact, narrative becomes "an effective tool", shrouding judicial choice and seducing his audience toward his desired conclusion.[39] His

to do, they stood impotent, unwillingly ineffective and restlessly inactive, their feelings of helplessness and confusion perhaps reflected in the misplaced and obviously futile attempts by some to revive the already dead. The judges' acknowledge the

trauma of dealing with the dead bodies (and sitting with "your" body pending identification) in the gymnasium and later the police mortuary – the numbers of victims resulting in cramped conditions and loss of dignity for the dead: "You could not get the other without sliding the top ones over", and dealing with the bodies: "I tried to get the feet end, you don't remember feet".[9]

subsequent narrative is not only "a claim of knowledge ... [but also] a claim to absolute authority".[40] Moreover, while the judicial storyteller may wish for the illusion of innocence, yet his story and narrative – like his superhero's suit – exposes the man beneath; the "innocent maiden [who is] ... putty in the hands of duplicitous counsel" becomes the "brazen seductress" of the process of persuasion who legitimates her own seduction through the seduction of others.[41] The judge is both persuaded and persuader.[42] His judgment is understood as rhetoric distinguished from seduction or flattery; as "the art of persuasion",[43] rather than something

concerned primarily with style rather than substance, with persuasion rather than discovery of the better argument, with emotion rather than reason, with dazzling effect rather than rigorous analysis.[44]

His purpose is to persuade his audience as to the authoritative inevitability of his desired result, to transform ordinary stories into legal narratives that capture the imagination.[45] Judicial success is dependent ultimately upon the effectiveness of the magic spell cast by his narrative and rhetoric

The number and age of the victims, the distress of their family and friends and the hostility and abuse from the crowd, reinforced the police officers' feelings of "fear", "isolation", "guilt", "shame" "failure" and "senselessness". Whatever the police officers did, it could not be enough – whatever that might be – either in their eyes or, it seems, the eyes of (some) others. They were at once involved as participants within the tragedy and, albeit unwillingly, distanced from it, a part of and apart from, the events unfolding around them. Yet, whatever the specifics of – the extent to which his storytelling talent becomes bewitching.

Thus, the judge's use of, or indeed failure to use, narrative is revealing.

> [the] narrative path taken by the judge has a substantial impact on the readers of the final judgment ... it is the key for acceptance and acknowledgement of the final legal outcome.[46]

Robin West has explored the "powerful rhetorical force of narrative" and "narrative silence" as a means by which to assign or deny the responsibility of the defendant in a number of US Supreme Court death penalty and habeas corpus cases.[47] She highlights how in each case the majority dwells on an "irrelevant" retelling of the horrific and violent circumstances of the defendant's crime, revealing a not so hidden subtext that seeks to confer and reinforce individual responsibility. Whereas in comparison, the dissenting minority reject the subtext of the narrative voice in favour of 'rights talk' and narrative silence. West goes on to explore the significant flaws in each approach, suggesting

their positioning, the disaster clearly had a lasting impact on their history, present and, it seems, foreseeable future. Their "prolonged exposure to horrifying and uncontrollable circumstances",[10] accepted for the time being to have caused the police officers psychiatric harm in the form of post traumatic stress disorder and depressive illness, grounded their claim for damages against their chief constable.

Fifty-two serving police officers started proceedings. Fifteen subsequently abandoned their actions and liability was admitted, and

that both, on their own terms and as a response to each other, are "deeply dissatisfying".[48] In so doing, she not only reveals the power of the judicial storyteller but also our role within the story as both the judge's audience and as members of a community.

As a judicial method, the storytelling narrative of the Conservative majority is chillingly effective. Its purpose

> is not simply to convey information: here's what the defendant did. That ... is irrelevant ... Rather, these narratives create a palpable need to reassert responsibility and human agency for a momentous act and momentous deprivation, so that we can again feel in control of destiny.[49]

Thus, in the judge's narrative not only does responsibility for what seem to be violent, hideous and meaningless murders rest with the defendant, but in so doing it

> reestablishes, momentarily, order and meaning in a violently deconstructed world. Curtailment of [the defendant's] rights emerges as a small but necessary price to pay.[50]

damages assessed in relation to fourteen others who entered pens three and four and actively engaged in the removal of fans who were being crushed.[11] The six plaintiffs in *Frost* were representative of the others

> who were intimately involved with one or more aspects of the disaster itself, and were therefore exposed to the psychological trauma of that occasion to a varying but significant extent.[12]

They denoted those participants involved in the events of Saturday 15 April 1989, but about whom it was unclear, legally, as to whether they were involved

Against this background, the minority's "rights talk" seems insignificant and misplaced, perhaps even undesirable. Their decision to argue about rights, as opposed to narrate about responsibility, is, West argues, misguided and, more importantly, ineffective; sophisticated arguments about rights cannot, it seems, compete with or displace an apparently gripping yarn of senseless murder and individual responsibility.[51] In fact, the dissenting minority's failure to establish a counter-narrative, an alternative understanding of the defendant's actions, reinforces the majority's narrative account. It allows the judges' story to continue to capture their audience's imagination. The defendant remains depersonalised, his actions alien and the protection of his rights a little less important. Ultimately, the liberal dissent's failure to narrate

> underscore[s], rather than challenge[s], the public tendency to view these defendants, and not just their acts, as inexplicably alien, horrendous, and inhuman – and to view their lives as therefore expendable ... The liberal's narrative silence validates our societal self-delusion that the capital defendant's fate is not inextricably linked, through chains of causation, responsibility, commonality, and community, with

*enough*. Three of the officers were on duty at the ground; one had attempted to free spectators and the other two had attended the makeshift morgue in the gymnasium. Two other officers were among those drafted in later that afternoon and were, with the others, witnesses to the chaotic and gruesome scenes. The final officer had worked as a liaison officer at the hospital. The defendants, whilst accepting responsibility for the tragedy, denied the existence or breach of a duty of care arising out of either the police officers' status as analogous to that of employees or as

our own.[52]

The silence of the dissent is unable to humanise the defendant, to explain his actions or to (re)establish the connection between ourselves and his story; it denies the opportunity for "empathetic understanding"[53] and in so doing not only shields the defendant from responsibility but us too. Our role within his story is delimited, our complicity in his actions is lessened, and our responsibility toward him severed. Judicial storytelling is, it seems, from Robin West's account, at once highly emotive and political and inherently partial and necessarily distorted. The judge seeks both through his articulated and silent narratives to simultaneously exclude and involve, separate and connect his audience, as he attempts to catch them within his spell so as to persuade them as to the inevitability of his ending.

Similarly, in *Frost* v *Chief Constable of South Yorkshire Police*[54] (as *White* was originally known) the judges' accounts are neither neutral nor complete but rather a reflection of their

rescuers. Given the extent of their involvement, they were, it was argued, mere bystanders and, as such, unable to recover.

Waller J, at first instance, agreed.[13] In order to recover, the police officers' activity and involvement must be that which

> would make it just and reasonable to place him within the area of proximity when a spectator who simply viewed the horrific scene would not be.[14]

They could not therefore be considered primary victims, exempt from the *Alcock* control mechanisms,[15] simply by understanding of their role as a judicial storyteller. Taken together they are a powerful example of the effective combination of narrative, narrative silence and counter-narrative. The majority judgments of Rose and Henry LLJ both begin with vivid and emotive accounts of the events at Hillsborough on Saturday 15 April 1989. Rose LJ opens almost immediately with a description of the "horrific" scene.

> Shortly after 3 pm, 96 football match spectators died and very many more were injured by crushing, sustained in pens three and four at the Leppings Lane end of the ground.[55]

As his judgment continues the events, tacitly and explicitly, frame and pervade his narrative, providing not simply an introductory explanation or history to his story, but an ongoing backdrop against which an exploration of the relevant legal principles is played out. He moves his audience through the submissions of the police officers and the chief constable, past an exploration of the relevant authorities toward his conclusion as to the applicable principles,[56] before returning his full attention and that of his audience once more to

virtue of their employment relationship with the chief constable. Although an employer can owe a duty toward an employee in respect of psychiatric harm, the position of a chief constable is distinguishable from that of an ordinary employer. He must be unrestricted in his deployment of his officers to possibly horrific situations, which carry with them the risk of 'nervous shock'. Moreover, there was no allegation that the employer had breached any direct duty of care toward the police officers; rather the case rested purely on his vicarious liability in relation to the negligent acts that

the police officers' stories. One by one, he describes their actions that afternoon.[57] His use of narrative as rhetoric is effective. It is immediately moving and profoundly compelling and persuasive. As he tells their stories, we are placed in the police officers' shoes, immersed in their experiences and pain, and able to identify with and, perhaps, better understand their actions. He surrounds his audience with the events of Hillsborough, refusing to allow us to maintain our uneasy, yet somehow reassuring, sense of detachment and alienation. His narrative at once encompasses and articulates the global picture and the intimacy of personal tragedy; bombarding our senses with the noise of the dead, dying and distressed, the 'chaos' and 'mayhem' and, in the next moment, with disquieting silence as we retreat with Anthony Bevis to the relative peace of one of the tunnel rooms. As his narrative moves from the panoramic to the particular, the gruesome to the mundane, so does the focus of his audience, enthralled by his story.

Similarly, Henry LJ begins his judgment

caused the tragedy.

It seemed that unless the police officers could be considered rescuers they would be unable to recover. Only Inspector White fell within this category. However, as a professional rescuer, through something akin to the 'fireman's rule', he was considered to be in possession of "extraordinary phlegm, hardened to events which would to ordinary persons cause distress" and so he too was denied recovery.[16] What is more, it was unclear as to what extent the police officers' psychiatric harm was, as Waller J thought necessary, "shock-

with a sustained and detailed account of the past, present and future impact of the tragedy on the police officers. He locates their feelings of "helplessness", "guilt", "isolation", "fear", "failure", "ineffectiveness", "futility", and "shame" within the confusion and chaos of Hillsborough.

The sheer number of deaths, the youth of the victims, the distress of relatives and friends, and the recognition of the senselessness of it all. The hostility and abuse from the crowd they were controlling, with incidents of looting, spitting at police, throwing coins at them, all resulting in feelings of fear, isolation and failure.[58]

His narrative then moves away from the Hillsborough Stadium to acknowledge the total and continuing impact of the events on the police officers' work, marriages, and relationships. His purpose is to establish the police officers as "direct victims" of the events on Saturday 15 April 1989 and, as such, able to recover.[59] His narrative juxtaposes the horrific uniqueness of Hillsborough alongside the ordinariness and obligations of the police officers, who "had no choice but to be there and be involved".[60]

induced". The police officers' claims were dismissed.

On appeal to the Court of Appeal, all but one of the police officers were successful as rescuers, employees or both.[17] Rose LJ, relying upon Lord Oliver's categorisation in *Alcock* of rescuers as participants, classified three of the claimants as rescuers. The remaining two claimants were successful as employees. They were owed a duty of care, coming within the range of foreseeable danger that had resulted from their employer's negligence, and so were able to recover for

If, by the end of his judgment and that of Rose LJ, to deny the police officers recovery is unthinkable, possibly almost inhuman, their narratives have achieved their purpose. The effect of a narrative saturated with emotive language and imagery is inescapable and unyielding – the judges' desired ending, it seems, inevitable.

In response, Judge LJ in his dissenting judgment relies upon the combination of narrative silence and counter-narrative. His abrupt dismissal of the police officers' stories at its outset sets the tone for the rest of his judgment.

In his judgment Rose LJ has set out the material facts, including the involvement of each individual plaintiff and the arguments advanced on his behalf. In summary, the plaintiffs, police officers on duty at Hillsborough Stadium, witnessed horrific scenes and some gave direct assistance to those who had already been injured or exposed to the risk of major or fatal injury. None of them was exposed or believed he (or she) was exposed to physical injury and the injuries actually sustained were psychiatric in nature.[61]

Set against the emotion and passion of the previous judgments this immediate silencing of

physical or psychiatric harm caused in the course of their employment, irrespective of whether they would otherwise be considered primary or secondary victims.[18] Henry LJ agreed; focusing on the employment argument he viewed police officers as primary victims – if indeed that label "matters" – directly and actively involved as a consequence of their employer's negligence, the foreseeability of psychiatric harm sufficient to create the necessary proximity.[19]

Accordingly, Ronald Hallam had done enough. His attempt to

narrative is incredibly powerful and effective. Judge LJ, it seems, is keen to establish his voice as reasoned, detached and objective, himself as the Herculean conduit and upholder of law. In his role as superhero judge, he plays down the heroic tendencies of others.

> Police officers acting in the course of their duties are expected to respond to unpleasant situations. They witness sights and accepts risks to which ordinary member of the public are not exposed.[62]

Thus, whilst they ought not be "disadvantaged" because of this, they should not expect more "favourable" treatment than, for example, civilian rescuers – however so defined.[63]

Yet, unsurprisingly, as the immediate effect of this silenced narrative begins to fade, the pull of storytelling and the emotive soon becomes too compelling. If his judgment is to continue to persuade then Judge LJ must offer an alternative or counter-narrative, to debunk or challenge the majority's story. He is caught in the unenviable position of having to demystify and forsake those portrayed and largely accepted – at least in the

revive an apparently dead boy and work alongside the increasing casualties and corresponding "mayhem" of fans, relatives and police in the gymnasium was sufficient to bring him "within the area of risk of physical or psychiatric injury ... [and expose him] ... to excessively horrific events such as were likely to cause psychiatric illness even in a police officer".[20] Geoffrey Glave was also able to recover. He was moved at 3pm to the end of the ground furthest from pens three and four where the bodies were brought before being moved to the gymnasium to which he had helped carry

earlier judgments – as heroes. He does this by introducing the, essentially irrelevant and deliberately iconoclastic, stories of others who were 'involved' in the Hillsborough Stadium Disaster, previously told in *Alcock*.[64] He presents their actions as the standard against which to measure those of the police officers. Thus, we stand in the shoes of Brian Harrison as he watches the incident unfold from the other end of the ground. With him, we gradually begin to understand that spectators in the pens where his brothers are standing are dead, dying and injured. We follow his unsuccessful search around the ground and are standing with him much later when he receives a telephone call informing him of his brothers' death.[65] Judge LJ continues:

> Robert Alcock's claim also failed. He was inside the stadium, witnessing and sickened by the unfolding incident. Because of a misunderstanding about the whereabouts of his brother-in-law he did not start to search for him until after leaving the ground. Much later, at about midnight, at the mortuary, he identified the body of his brother-in-law. The details of what he saw need no elaboration. The sights appalled him.[66]

three. He stayed on duty until 1.30am the next morning, surrounded by the "enormity of the tragedy", the youth and number of victims and the distress of relatives.[21]

Anthony Bevis [Rose LJ continued] was on patrol elsewhere and was summoned to the gymnasium from where he went on the pitch at the opposite end from pens three and four. He approached to within 20 yards of the pens' fencing and came across people lying dead. Bodies were being carried away. He applied mouth to mouth and heart massage to a boy who was already dead. He tried to resuscitate another man but he was also dead. The crowd were shouting and screaming and he was frightened. He went to a quiet room in the tunnel and stayed there for

Finally, he tells the story of John O'Dell who searched among the bodies for his nephew, helping or rescuing unknown spectators; his nephew happily was later found unharmed.[67] Neither Brian Harrison, Robert Alcock nor John O'Dell were able to recover damages for their psychiatric harm.

The purpose of these counter-narratives is to challenge the emotive hold of the majority's narratives. Here are people who did as much, and who were as, if not more, deserving than many of the police officers and who were unable to recover.[68] In so doing, Judge LJ utilises the power of storytelling, the ability of narrative to capture his audience's imagination and persuade them as to the necessity and inevitability of his conclusion. His counter-narrative deliberately mimics and mirrors the emotive narratives of Rose and Henry LJJ. Despite his initial attempt at detached objectivity, his judgment is ultimately no less emotive as it seeks to seduce, persuade and manipulate his audience. The only difference is that his alternative stories lead to a different ending. His Herculean dismissal of inappropriate

some time. Later he returned and helped form a line of officers controlling the crowd. Ultimately he helped clear the pitch of fans. He did not go into the gymnasium. On his way back to the police station, he had to deal with a fight in Hillsborough Park. The sheer number of dead and injured affected him and he suffered from guilt for the fact that he could not help the brother of the young man who had asked him to help. In my view he was a rescuer taking part in the immediate aftermath of the incident. He is entitled to recover.[22]

So too was Mark Bairstow, who arrived at the ground some time later. He went into pens three and four and saw the bodies on the pitch. He checked those he passed were dead and

storytelling is both ineffective and short-lived. He becomes the master of that which he sought to silence; content only to share the superhero spotlight with heroes of his own making, the majority's heroes are diminished, their appeal dismissed.[69]

Ultimately, all but one of the police officers are successful in the Court of Appeal and, of course, Judge LJ knew this before he began his story. His judgment was written as a dissent – a challenge or alternative to the dominant story. His role in *Frost* is akin to that of a maverick, a lone storyteller and rebel judge. The persuasive success of his counter-narrative is not therefore found in its acceptance as the official or judicial 'truth', instead it lies in the ability of his alternative conclusion to threaten the dominant understanding and decision, to distort and reduce the effectiveness of the majority's narrative and to weaken its hold on our collective imagination. The rhetorical strength of Judge LJ's counter-narrative reveals not only of the power of stories, but also the importance of the storyteller within the tale. Different judges tell different stories. The similarity

assisted other officers with their attempt to save a boy, before helping to remove bodies to protect them from interference. His feelings that day were of anger toward his superiors and at his own inadequacy.[23]

Finally, the Court of Appeal also held that Henry White was both a rescuer and an employee within the area of risk. He was on duty between 10am and 11pm as part of the team in charge of crowd control. On seeing the congestion at gate C, he worked with other officers to pull people out before entering the pitch where he saw "blue faces at the perimeter fence.

of plots, characters and context belies the underlying possibilities for diversity, the ability of the judge to shape his story, his judgment a strategic interpretation, rather than a neutral transcript, of events.

Yet although

> [t]he stakes of legal narrations are high ... However provocative and generative it may be to treat law as literature, we must never forget that law is not literature.[70]

Unlike in Chekhovian drama, the gun introduced in chapter one may not be used by chapter two, a headache are more likely to be a migraine than a brain tumour and the purchase of an insurance policy more likely to be followed by years of premium payments than by a murder.[71] The bewitching plots of narrative and storytelling must not distract from the inherent violence within the judge's story, which unlike that of an author or novelist, is far reaching. Nevertheless, the recognition of the individuality of the judge's story can be seen to expose its subtext. It allows us to see through his narrative and beyond his rhetoric and onto the judge himself. In this way, the

Two were obviously dead". He then joined a line of police officers helping to carry out the dead and injured. At 4.20pm, he "mustered" his distressed men and tried to comfort them before returning to the gymnasium to help identify victims.[24] The defendants appealed to the House of Lords.[25]

judge's tale becomes not only the story of others, but also the story of his self, shaped by his understanding of his judicial role and his encounter with the 'subversive moment'.[72]

*The* Crazy Quilt *… is comprised of remnants of material in numerous textures, colors; actually, you could not call the squares of a* Crazy Quilt *squares, since the stitched together pieces are of all sizes and shapes … You will find this work to be most revealing, not only in the material contributions to the quilt, but in who enjoys sewing them and who does not … Sometimes you can tell what is on their minds from what they avoid saying or the way in which they say it.*[73]

### 3. Two

In *White* v *Chief Constable of South Yorkshire Police*, Lord Steyn suggests that "[i]n order to understand the law as it stands it is necessary to trace in outline its development".[74] Thus, before we join the police officers in the House of Lords we need, perhaps, to spend some time exploring the older patches on the judicial quilt, listening for and reconciling similarities and differences in their stories, identifying common themes and outcomes and adapting to changes in technique and approach. The judges' uneasy relationship with distraught mothers, hysterical mothers-to-be and other emotionally vulnerable (wo)men is reflected in their oscillation between expansion and restriction of recovery for psychiatric harm.[75]

Traditionally, the courts have been reluctant to recognise negligently inflicted psychiatric harm, especially when it is caused by the threat of harm to another, as a head of damage. Thus, despite judicial acceptance

that an acute emotional trauma, like a physical trauma, can well

### 4. Subversive Patchwork

The judge's tale in *White* is both haunting and haunted, his account of the events of Saturday 15 April 1989 shaped and stalked by the ill-fated characters and horrendously memorable plots of stories past. These are stories complete in themselves, woven together as part of a larger on-going narrative of the law on psychiatric harm, shaped into "a patchwork quilt of distinctions which are difficult to justify".[133]

cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal psychological make-up,[76]

recovery for pure psychiatric harm caused by negligence remains severely restricted. It continues to be considered, by some, as somewhat less significant than physical harm.[77]

[T]here is ... no doubt that the public – crass and ignorant as it may be – draws a distinction between the neurotic and the cripple, between the man who loses his concentration and the man who loses his leg. It is widely felt that being frightened is less than being struck, that trauma to the mind is less than lesion to the body. Many people would consequently say that the duty to avoid injuring strangers is greater than the duty not to upset them. The law has reflected this distinction as one would expect, not only by refusing damages for grief altogether, but by granting recovery for other psychical harm only late and grudgingly and then only in very clear cases. In tort, clear means close – close to the victim, close to the accidence, close to the defendant.[78]

Underlying and reinforcing this legal and, perhaps lay, distinction between physical and psychiatric harm is an ongoing fear of a 'flood' of, possibly fabricated, claims.

The storyteller judge sits alongside others in a circle around the judicial quilt. Maybe in silence or with intermittent conversation, each judge works alone, concentrating on his particular patch or tale. As he tells his story and brings it to the quilt, sewing alongside the others, it becomes a part of a union of stories; a celebration of the fellowship among judicial storytelling quilters past and present represented in the judicial quilt. His tale is the latest addition to an anthology of judicial

> [I]n every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide file opened up for imaginary claims.[79]

Nevertheless, the Divisional Court in *Dulieu* v *White & Sons*[80] rejected the necessity of accompanying physical harm for claims of 'nervous shock'. The plaintiff was a pregnant barmaid who suffered a miscarriage and psychiatric harm after she was actually, or reasonably believed herself to be, imperilled by the defendant's negligent driving of a carriage, which crashed into the room where she was standing. Upholding her claim, Kennedy J was less pessimistic about the courts' ability to uncover fraudulent claims:

> I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim.[81]

stories on a similar theme, edited by the judge. Its conclusion is dependent in part upon his reading of and feeling of editorial constraint in relation to the earlier tales, the success of his tale lying partly in their diversity. The skill of the judge, like that of the quilter, rests in his ability to recognise similarity and difference, to utilise the contrasting and complementary within a seemingly incongruous collection of materials. His aim is not is not at this moment, even if it were possible, to fit the stories neatly

Recovery was extended to 'ricochet' victims in *Hambrook* v *Stokes Brothers*,[82] where a woman suffered psychiatric harm after seeing a driver-less lorry heading downhill, just out of her view, toward where she knew her children to be. She did not see the collision but was later told that a child fitting her daughter's description had been injured. The majority of the Court of Appeal, rejected the dictum of Kennedy J in *Dulieu* that shock must arise from "a reasonable fear of immediate personal injury to oneself", and allowed her to recover, despite the fact that her fear was for her children and not for herself.[83] This was not least because not to do so

> would result in a state of the law in which a mother, shocked by fright for herself, would recover, while a mother shocked by her child being killed before her eyes, could not, and in which a mother traversing the highway with a child in her arms could recover if shocked by fright for herself, while if she could be cross-examined into an admission that the fright was really for her child, she could not.[84]

The movement toward recovery for mere witnesses was restricted slightly in *Bourhill* v *Young*,[85] in which the House of Lords rejected a claim for psychiatric harm where the plaintiff was unrelated to the victim

together – to lay them side by side like a "timeless mosaic",[134] devoid of context and particularity, or to somehow find in his story the missing piece of the jigsaw, its shape and purpose already decided – but to achieve the random coherence of the crazy, judicial quilt.

As he tells his tale, the judge makes "strategic choices",[135] he shapes or 'works' the stories, emphasising some aspects and silencing others as he attempts to sew the patches together with invisible stitching so as to form

and had simply happened upon the scene of an accident; in so doing perhaps combining "what was in theory a simple foreseeability test with a robust wartime view of the ability of the ordinary person to suffer horror and bereavement without ill effect".[86]

However, by the 1960s the courts were beginning to adopt a more liberal approach toward recovery for psychiatric harm. In *Chadwick* v *British Railways Board*,[87] the window cleaner plaintiff was able to recover for psychiatric harm suffered because of his particularly harrowing and gruesome experience giving help and relief to victims of a severe rail crash over the course of twelve hours, despite having no relationship with them. Increasingly, it seemed that recovery for psychiatric harm might depend upon a simple question of foreseeability. Developing awareness as to the psychiatric impact of distressing events, especially those involving family members, meant that it became increasingly unclear as to "where the limits of liability could be drawn"[88] – the distinction between physical and psychiatric harm was gradually becoming untenable and even unjustifiable.[89] What was also unclear was the extent to which recovery

an aesthetically pleasing and effectively persuasive quilt. In so doing, the judge is able, indeed compelled, to make the story his own. His self necessarily affects and shapes his tale, creating space and potential for what Sandra Berns has described as

> the 'subversive moment' in law, the moment (if there is to be one) at which judgment becomes unique, becomes creative, in which boundaries are broken down although they are inevitably reinstated when judgment has been handed down ... Creativity and responsibility are united. The judge cannot escape either.[136]

was permitted for those who did not witness the event but who came upon it moments, or even minutes later; those whose psychiatric harm was not caused through the *communication* of the events by another, but through their happening upon the 'immediate aftermath' of the event.

*McLoughlin* v *O'Brian* raised just this issue.[90] Mrs McLoughlin suffered psychiatric harm after her husband and three children were injured (one fatally) in a serious car accident, caused by the defendant's negligence. She was not at the crash site. Instead, she was told about the accident an hour or so later by a friend, who then drove her to hospital, where she arrived approximately two hours after the accident. In a sympathetic judgment, the House of Lords held that she then encountered circumstances that were "distressing in the extreme and ... capable of producing an effect going well beyond that of grief and sorrow".[91] She found her husband and children upset, cut and bruised, still covered in the grime and dirt from the accident; she could hear her son, George, shouting and screaming in the room next door before he lapsed into unconsciousness.

The subversive moment releases the act of judgment from the constraints of calculation. It enables the judge to truly judge, requiring him to accept responsibility for his decision and us to recognise that to be before the judge is in fact to be before an individual.[137] Creating the space through which the personality, individuality and history of the judge can emerge, it challenges the superhero myth, our understanding of the detached impartial judge with no history, preferences, or prejudices. However,

However, although this radical extension of the "immediate aftermath", on "the margin of what the process of logical progression would allow",[92] enabled Mrs McLoughlin to recover, the decision threatened to distort somewhat the shape of the judicial quilt. The House of Lords left unresolved whether the courts should adopt a restrictive or expansive approach toward liability for psychiatric harm and, more specifically, what fell within and outwith the scope of the 'immediate aftermath'.[93] The representation, understanding and treatment of Mrs McLoughlin as a hysterical mother by the House of Lords simultaneously strengthened and undermined the judgments – their expansive creativity, in hindsight, perhaps naïve and myopic.

In this respect, Lord Wilberforce, is at best deliberately reassuring and at worst overly optimistic in his belief that,

> the scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of the flood of litigation may be exaggerated.[94]

He set out precise policy-centred criteria, which limited recovery according to factors such as the

the point is not to abandon Hercules battered and bruised at the foot of Mount Olympus, but rather to acknowledge the subversive moment as reinforcing and enabling judgment. It "does not threaten the judicial ideal. It makes it possible".[138] Indeed

> [if] the subversive moment were *not* possible, law would be something very different, something we would not wish to see within our polity ... if decisions could always be based upon clearly articulated precedents or unambiguous principles it 'would make [the] presence [of judges] more or less superfluous – computers in robes'.[139]

relationship between the plaintiff and the accident victim, their proximity to the accident and means by which the shock was caused.[95] In contrast, other members of the House of Lords, in particular Lords Scarman and Bridge, considered the reasonable foreseeability of psychiatric harm sufficient to establish a duty of care, despite the attendant risk of uncertainty.[96] Any limitations, for example, on policy grounds were understood to be necessarily arbitrary; the court should resist

> the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who ... ought to succeed, in the interests of certainty.[97]

Despite these differences in approach, *McLoughlin* encapsulated the judicial understanding of the time toward the continued extension of liability. However, darker clouds were beginning to build on the horizon, as generally the mood within the law of tort shifted towards a more restrictive approach toward the duty of care.[98] Then the unthinkable happened; a tragedy with multiple victims and a seemingly infinite number of potential claimants. The court's response was to abandon its aspiration to "provide a comprehensive system of corrective

Hercules, it seems, has more subversive tendencies than appearances might suggest.

Nevertheless, whilst we might not find the act of judgment *without* an element of the subversive particularly attractive, the subversive moment is, by its very definition, deeply unsettling. The explicit recognition of judicial choice or 'boundary breaking' is, to some, perhaps unthinkable. As a result, the perceived threat of the creative judge is "re-*presented*"; the subversive moment becomes

justice ... in favour of cautious pragmatism".[99]

Its setting identical to that of *Frost*, *Alcock* v *Chief Constable of South Yorkshire Police* is the story of the representatives of those friends and families of the victims of the Hillsborough disaster who fell outside the facts of *McLoughlin* and their attempts to recover for the psychiatric harm they suffered. Despite limited success at first instance, the Court of Appeal rejected all of their claims; by the time they reached the House of Lords only ten of the original sixteen stories were considered.[100]

Brian Harrison watched the horrifying scenes unfold from the West Stand with the knowledge that both his brothers would be in pens three and four behind the goal. He tried, without success, to find them after the match was abandoned; he did not know until 11am the following morning that they were both dead. Robert Alcock was also standing in the West Stand, along with his nephew. He was not initially concerned when his brother-in-law (his nephew's father) failed to meet with them after the game, however gradually he became increasingly worried and began his search. It ended tragically in

a voyage of discovery which, despite its radical appearance, merely makes explicit what had always been implicit within the law as it was ...[or] the exercise of inevitable and necessary judicial discretion, faced with a 'gap' in the legal texts ...[140]

In short, the subversive moment is hidden beneath the shroud of collective denial, becoming a little less subversive and a little more mainstream; Hercules' rebellious inclinations, akin to a family secret that everybody knows but no one is allowed to talk about.[141] Thus, although as a matter of fact and practice the

the temporary mortuary around midnight, where he identified his brother-in-law's body which was blue with bruising, his chest red. Mr and Mrs Copoc watched the scenes at the Hillsborough Stadium on live television. Mrs Copoc was told of her son's death at 6am; her husband, having travelled to Sheffield, learned this news at 6.10am. He later identified his son's body. Joseph Kehoe lost his 14-year-old grandson and his son-in-law. He did not know that they had gone to the match and so was not immediately worried when he heard of the disaster on the radio and watched television pictures. Denise Hough and Stephen Jones both learned in the early hours of Sunday morning that their brothers were dead. Denise Hough had previously fostered her brother, eleven years her junior, although he no longer lived with her. She knew he had tickets for the game and was told by a friend that there was trouble at the ground; she watched the television pictures and around 4.45am her mother told Denise of her brother's death. When she identified his body two days later, his face was bruised and swollen. Stephen Jones learned of his brother's death when he arrived at the temporary mortuary at Hillsborough at 2.45am Sunday morning and found his parents

judge necessarily reasons backwards – in that he has made his decision before articulating his judgment – we allow ourselves to follow him as he feels his way toward the 'right' answer. Unaware or perhaps unconcerned as to whether or not it is the road the judge actually travelled whilst making his decision, we sit back and enjoy the journey. His story, it seems, is more persuasive if portrayed as stemming from the illusionary 'seamless web' of law as, once again, we deny the subversive moment

there in tears. Catherine Jones was shopping when at 3.30pm she heard that there was trouble at the Hillsborough Stadium. At 4.30pm, she heard that people were dead. She arrived home at 5.15pm and listened to the radio for news. A friend called at 7pm to say that people at the hospital were describing someone who might be her brother. Her parents left for Sheffield at 9pm and at 10pm she watched recorded television footage looking for her brother, mistakenly thinking she saw him collapsed on the pitch. Her father returned at 5am the following morning and told her of her brother's death. Brenda Hennessy also lost her brother. She was not initially worried watching the TV pictures, as she believed him to be elsewhere in the ground. Unfortunately, he was not; members of her family, who had travelled to Sheffield, told her of his death at 6pm that afternoon. Alexandra Penk was engaged to Carl Rimmer. They planned to marry in late 1989 or early 1990. He too died at Hillsborough Stadium on Saturday 15 April 1989.

The claims of the friends and family of the Hillsborough victims failed in the House of Lords. The broad test of foreseeability established by Lords

and accept its (re)presentation as Herculean judging. In short, we continue to believe in superheroes.

However, this much we already knew when the little mermaid first wore the superhero's suit. This time it is personal. Whilst the subversive moment is unavoidable – the judge is a necessary part of the story he is telling and of the larger collection of tales told in the judicial quilt – at each moment the judge has to decide whether to "hide" his self "behind

Bridge and Scarman in *McLoughlin* was not deemed sufficient, independent of the 'control mechanisms' of Lord Wilberforce, to ground a claim.[101] Whilst accepting that

> the concept of "proximity" is an artificial once which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction,[102]

the House of Lords considered that the friends and family's involvement as "passive or unwilling witnesses", rather than mediate or immediate "participants" – as secondary rather than primary victims – meant that their relationship with the defendant lacked the required 'proximity', deduced from "the existence of a combination of circumstances" needed in order to establish a duty of care".[103] In so doing, the House of Lords in *Alcock* effectively established a number of largely arbitrary requirements grounded in "extraordinarily shallow and inadequate foundations", which seek to limit and restrain potential claimants and that must be satisfied if a secondary victim is to recover for psychiatric harm.[104]

presumptions, precedents, and conceptions of their professional role",[142] to (re)present himself as Hercules, or whether to embrace the act of boundary-breaking.[143] His decision to adopt the former, to wear the cloak of detachment and denial, rejecting the legitimacy of judicial creativity within the process of judgment, Berns suggests, goes far beyond his possible (lack of) response to his current story, and reflects his understanding of his judicial role, of what a judge should do.[144]

First, psychiatric harm must be reasonably foreseeable in a person of ordinary courage and fortitude or "customary phlegm".[105] However, once this has been established the defendant must take the plaintiff as he finds them, even if their reaction is beyond that which might have been anticipated.[106] There must also be what is described as 'proximity of relationship'; the relationship between the claimant and the accident victim must be sufficiently close to make it reasonably foreseeable that they might suffer psychiatric harm.

> The kinds of relationship which may involve *close ties of love and affection* are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe.[107]

Such a relationship may be rebuttably presumed between parent and child or husband and wife (including fiancé(e)s) but not apparently siblings and other relatives. The characteristics of sibling relationships, but not spouses, it seems are too varied: "The quality of brotherly love is well known to differ widely – from Cain and Abel to David and Jonathan".[108] Thus, neither Brian Harrison nor Robert Alcock, both of whom were present at the

However, by seeking to protect both his Herculean role and the authority of the law-as-it-is he, arguably, restricts his ability to judge. His actions as a judge are constrained; responsibility for his subsequent decision rests with the law alone.

Alternatively, the judge may choose to accept the subversive moment and engage

> in a profound and remarkable act of boundary breaking ... [as] the moment of subversion ruptures the process of judgment, sunders the tangled web even while its

ground, were able to recover; "in neither of these cases was there any evidence of particularly close ties of love or affection with the brother or brother-in-law", most likely because they did not realise this was necessary.[109] This requirement has been almost universally severely criticised.

That at present claims can turn on the requirement of 'close ties and affection' is guaranteed to produce outrage. Is it not a disreputable sight to see brothers of Hillsborough victims turned away because they had *no more* than brotherly love towards the victim? In future cases will it not be a grotesque sight to see relatives scrabbling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument?[110]

Moreover, the plaintiff also needs to establish proximity in terms of time, space and perception. Whilst, since *McLoughlin*, presence at the scene of the accident is not required, the plaintiff must happen upon its 'immediate aftermath'. In *Alcock*, however, the plaintiffs sadly arrived too late – the blood on the bodies in the temporary mortuary at Hillsborough Stadium was "too dry" to allow recovery.[111] Psychiatric harm must also follow as a result of *directly* hearing or seeing the accident or its

weaving continues.[145]

He rips open and sheds the superhero's suit to expose the man beneath. In his judgment, he reveals his self, his thoughts and emotions. His explicit presence within it is not only an effective rhetorical technique but also an "opportunity to judge the judgment of the judge".[146] Like dramatic and unpredictable events, such moments of judicial disclosure are rare and, perhaps, a little uncomfortable. Take Judge William Fernandez's raw, naked and human

immediate aftermath; on the facts of *Alcock*, television reports are not equivalent.[112]

The viewing of these scenes [on television] cannot be ... [compared] with the viewer being within 'sight or hearing of the event or its immediate aftermath' ... nor can the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system.[113]

However, these latter restrictions are, to some, a little misguided, if not arbitrarily superfluous, given the requirement that psychiatric illness must follow a shock, that is, "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".[114] This not only downplays but also ultimately negates the profound and possibly harmful impact the gradual accumulation of a combination of factors may have on an individual and the role of imagination in this.[115] Further, Harvey Teff argues the 'direct perception' of an event is increasingly seen as less significant than the relationship between the plaintiff and victim; the mode of perception is irrelevant and should not be "artificially divorced" from the "closeness of ties" between the parties.[116]

response to the heart-rending situation of Phillip Becker.[147]

I have read all of Phillip's admissible medical and nursing records. I note with mounting anguish the developing and growing course of his strangling cyanotic illness; and as I read, I weep uncontrollably at the struggles of this wee lad to survive. My soul reaches out to him and his labouring heart to try and give it ease, and in this time of grief, I think of Tiny Tim and what might have been but for old Marley's ghost.[148]

This is an unfamiliar image of the judge; Herculean superheroes are, perhaps, more commonplace than

It seems the common law in *Alcock* may have taken a "wrong turn",[117] Its decision and its aftermath have impacted upon the judicial quilt to such an extent that it threatens to distort its aesthetic shape and structure. Any attempt to smooth the fabric leads to

> an ugly ruck ... the *Alcock* control mechanisms stand obstinately in the way of rationalisation and the effect is to produce striking anomalies.[118]

The ghosts of *Alcock* stalk the background of later judicial tales; their insidious and unwelcome presence is seen most clearly in the judges' continuing infatuation with Lord Oliver's distinction between 'primary' and 'secondary' victims.

When *Page* v *Smith*[119] reached the House of Lords in 1996 it was already well established that a person who is physically injured, or placed in fear of an injury by another's negligence can, in principle, recover for psychiatric as well as physical harm.[120] In *Page* however neither party was physically injured. Rather, following a minor car accident, Mr Page suffered a recrudescence of an intense, chronic and permanent form of myalgic encephalomyelitis

naked judges in judgment, if not in the courtroom.

Judge Fernandez placed himself within the case by calling it "a case like ours" ... reveal[ing] his relationship with Phillip by breaking through the usual conventions of distance and anonymity ... implicat[ing] his own relationships to the child, to the two sets of parents, to his family and neighbours, and to the general public as well. The opinion gives an encouraging sense of a real human being struggling with his relationships to others in the face of moral complexities. It also gives a disturbing reminder that the law is a thin veneer on a justice system run by human beings.[149]

(ME).[121] The defendant denied that he owed Page a duty of care in relation to his illness. Although successful at first instance, the Court of Appeal allowed the defendant's appeal holding that the plaintiff's psychiatric injury was not reasonably foreseeable in a person of normal courage and fortitude. A bare majority of the House of Lords overturned the Court of Appeal's decision. As Page was owed a duty of care by the defendant not to cause foreseeable physical injury, the defendant necessarily also had a corresponding duty not to cause Page psychiatric harm, despite the fact it may or may not have occurred in a personal of normal fortitude. In essence, physical and psychiatric injury were both considered the same type of harm and the defendant, on the basis of the 'egg-shell skull' rule, was liable for the full extent of the damage.[122]

Lord Lloyd distinguished a primary victim – someone "directly involved" as a "participant" in the accident and to whom personal (physical/ psychiatric) injury was foreseeable – from a secondary victim who stands outside the range of foreseeable physical injury, although possibly within the range of psychiatric injury as a bystander or

However, my point here is not concerned with the judge's (re)presentation of his judicial role, his Herculean denial or human vanity, but rather what this presentation of self reveals about his *understanding* of relationship between the subversive moment and his role as a judge. Through the recognition of the subversive moment in law and judging, we are enabled to explore the subtext of the judicial tale, the hidden – or not so hidden – emotions of its author. In so doing, we might come to a

witness.[123] Thus, once the plaintiff is established as a primary victim it is only necessary to foresee personal injury. It does not matter if there is no physical injury or if only physical injury was foreseeable as there is no distinction between physical and psychiatric harm.[124] Further, a primary victim does not have to satisfy the principle of 'reasonable or customary phlegm' as there is no difference in principle between an eggshell skull than an eggshell personality.[125]

*Page* has led to considerable and significant confusion in later judgments as to the definition of a 'primary victim'. Indeed, the Law Commission has suggested that the distinction between primary and secondary victims is "more of a hindrance than a help", given the "confusing inconsistency" as to where the line should be drawn.[126] In *Page*, Lord Lloyd defined Page as "a participant ... directly involved in the accident, and well within the range of foreseeable physical injury. He was the primary victim".[127] However, Lord Oliver in *Alcock*, on whom Lord Lloyd purports to ground his decision, seemed to envision a wider class of primary victims, to include rescuers and unwilling participants.[128] In the

better understanding of the judicial storyteller and pick at the judicial quilt and uncover what really happens when judges judge.

Such a focus on narrative is an additional means by which we may understand Duncan Kennedy's point that while it is "*never necessary*", inevitably successful, or even identifiable, "it is always *possible* for the judge to adopt a strategic attitude toward the materials" in relation to his ideological preferences.[150] His

ensuing judicial uncertainty, some, for example, Lord Steyn in *White*, have understood Lord Lloyd's comments to suggest that it is necessary for a primary victim to be within the range of foreseeable physical injury.

> Lord Lloyd said that a plaintiff who had been within the range of foreseeable injury was a primary victim ... In my view it follows that all other victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the control mechanisms in *Alcock* ... the decision ... was plainly intended, in the context of pure psychiatric harm, to narrow the range of potential secondary victims.[129]

In contrast, others, for example Lord Goff in *White*, understand the intention of Lord Lloyd to be to accepting Lord Oliver's distinction between primary and secondary victims.[130] He argues that the consequence of establishing foreseeability of physical injury as a *necessary* requirement of a primary victim would be to exclude those previously categorised as such, in particular rescuers and so-called 'unwitting agents' in the position of Dooley in *Dooley* v *Cammell Laird & Co Ltd.*[131] Indeed, were Lord Lloyd's comments to have this effect,

aim, in part, is to explore the impact of ideology on the judge's understanding of his role from which it is, supposedly, excluded and to explore the pervasiveness of psychological denial or 'bad faith' in judging. Clearly, this is not my purpose here. Nevertheless, Kennedy's insights are instructive. His articulation of the possibility of strategic choice (albeit in terms of ideological preferences) and identification of alternative understandings of the judicial role, provides

the result would be remarkable. It would be that on the one hand *Page* v *Smith* expands recovery, by holding that foreseeability of physical injury justifies recovery in respect of unforeseeable psychiatric injury even though no physical injury is suffered, while on the other hand the same case restricts recovery, by precluding recovery in respect of foreseeable psychiatric injury unless physical injury is also foreseeable. This does not make sense.[132]

Ultimately, this judicial imprecision surrounding the categorisation of primary and secondary victims has had a profound impact on the judicial quilt; it has enabled later judges to pick at the flaws in the judicial stitching in the hope of creating holes – space for their own additions, their own patch and story – the opportunity to reshape, to re-imagine the quilt itself. It is with this in mind that we are about to arrive at the final part of the judges' trilogy – the House of Lords' decision in *Frost*, lately renamed *White* v *Chief Constable of South Yorkshire Police*.

a framework against which to explore the judge's relationship with the subversive moment, a lens through which to study the subtext of the judge's tale and begin to unpick the judicial quilt.

## 5. Three

As the police officers in *White* reached the House of Lords, it is clear that the law on tortious recovery for negligently inflicted pure psychiatric harm is in a "genuine doctrinal muddle".[151] Indeed Lord Steyn believed it to be so far beyond judicial repair that

> the only sensible general strategy for the courts is to say thus far and no further … to treat the pragmatic categories as reflected in the authoritative decisions such as the *Alcock* case … and *Page* v *Smith* as settled for the time being.[152]

In so doing, the House of Lords effectively

## 6. Revealing Subtexts

There is perhaps something reassuring about the endings of stories. They can provide a sense of completion or closure, a moment to pause and meditate on what has been said before moving on. At other times, they can be disappointing – unwelcome and final – as we are left to imagine what happened next or worse, when what happens next is not what we imagined. Maybe this is why the tradition of fairytales is to (re)present endings as beginnings, the conclusion of one story the opening of another. No matter how unlikely it is in reality, in fiction we are able to believe, should we wish to, that everyone lives happily ever after. The telling of this particular story may stop, but the story itself never ends. It continues as it lives on in our imagination and memory. In *White* each judge has, through the narrative of his never-ending story, cast his spell; he has attached his patch to the judicial quilt, his decision made. In so doing, each judge encountered the subversive moment and has revealed in the subtext of his tale a slightly different understanding of his role as a storytelling judge.

abandoned the police officers within a tangled web of largely arbitrary and illogical distinctions between physical and psychiatric harm, primary and secondary victims. Their deliberate inaction secured the police officers' eventual fate as 'losers' in the significant judicial confusion and evasion of responsibility. In short, the judges' acknowledged aim in *White* was one of damage limitation – the "search for principle" had been "called off".[153]

Historically, the judiciary has tended to respond positively to claims from those who

*Lords Steyn and Griffiths*

Interestingly, both Lord Steyn, for the majority, and Lord Griffiths, in dissent, can be seen to understand their judicial role as, in essence, requiring the simple application of the law. They both (re)present themselves as Hercules – intermediaries to and from the Gods and mere conduits for law. That they come to diverse, even opposing, decisions is revealing. In this manifestation of the subversive moment, judicial choice is exposed. They each play or adopt their superhero role in different ways, bringing alternative behavioural traits to their understanding of Hercules. Whilst Lord Griffiths' approach can be described as the principled application of law, his focus fixed and gaze secured, Lord Steyn's is more that of an *evasive* activist, he recognises his ability to manipulate the legal materials but prefers not to. He rejects the possibility of judicial creativity.

The short dissenting judgment of Lord Griffiths' is perhaps the most straightforward of all the judgments in *White*. His use of narrative is minimal. Unlike the other members of the House of

have rendered assistance to accident victims. Lord Oliver in *Alcock* noted,

> [it] is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing. The fact that the injury suffered is psychiatric and is caused by the impact on the mind becoming involved in personal danger or in scenes of horror and destruction makes no difference. 'Danger invites rescue. The cry of distress is the summons of relief ... the act, whether impulsive or deliberate, is the child of the occasion'.[154]

Hence, Mrs Chadwick's

Lords, he does not re-tell the story of *White*, nor does he "travel" the "historic ground" of previous case law.[183] His judgment has a sense, if not of urgency, of forthright compulsion. Significantly, the structure of his judgment means he begins with an exploration of the stories of *Alcock*. However, they have a completely different purpose to the one they served in Lord Justice Judge's judgment in the Court of Appeal.[184] So clear and certain is Lord Griffiths in his application of the law, they are not an emotive distraction, but rather a stepping-stone toward his conclusion. Pausing briefly to consider the "sensible development" in *Page* v *Smith*[185] he turns to the position of the police officers, refusing to allow them to be placed in a 'better' position to other bystanders by virtue of their employment relationship and so allowing the defendant's appeal in respect of PC Glave who relied on this.[186]

He then goes on to dismiss the appeal in respect of the police officers considered rescuers.[187] He rejects the distinction between physical and psychiatric injury; "[i]f it is foreseeable that the rescuer may suffer personal injury in the form of psychiatric injury rather than physical injury,

successful recovery of damages for her husband's "gallantry and self-sacrifice"[155] as he attempted to comfort and rescue victims of the Lewisham railway disaster.

However, in *White* these sentiments "collide" with the House of Lords' inclination to limit recovery for pure psychiatric harm.[156] Given the police officers' inability to establish a sufficiently close relationship with the victims of the Hillsborough Stadium disaster to succeed as secondary victims in accordance with the *Alcock* criteria, their

why should he not recover for that injury?"[188] Especially as such an injury will only be reasonably foreseeable in "exceptional circumstances" of a "particularly horrifying kind".[189] In support he relies on *Chadwick* v *British Railways Board*:[190]

> Mr Chadwick suffered his injury because of the terrible impact on his mind of the suffering he witnessed in his rescue attempt, and not because of any fear for his own safety ... What rescuer ever thinks of his own safety? It seems to me that it would be a very artificial and unnecessary control, to say a rescuer can only recover if he was in fact in physical danger. A danger to which he probably never gave thought, and which in the event might not cause physical injury.[191]

Lord Griffiths dismisses the overblown and emotive arguments concerning the necessity of artificial controls to prevent the opening of the floodgates to "unmeritorious claims".[192]

Moreover, it is only after he has secured and reinforced the authority and ability of the law to resolve this case and others that he returns implicitly to the *Alcock* families and friends.[193] In his postscript, he underlines his understanding of his judicial role as requiring the principled, blinkered

claims rested on their identification as primary victims,[157] by virtue of their analogous employment relationship with the defendant, their actions as rescuers, or both. Their arguments failed; the victim of the House of Lords' increasing zeal in favour of a restrictive approach toward psychiatric harm.

Relying on Lord Lloyd's narrow (mis)interpretation of Lord Oliver's definition of a primary victim in *Page*, Lord Steyn held that a rescuer could only be considered a primary victim if he "objectively exposed

almost, application of the law. Yet, his approach is not, as might be assumed, closed off, ignorant or unaware, but rather focused intently on the matter and stories at hand and not needlessly or dangerously distracted by previous tales. His timely and appropriate focus on the possibility of "offensive" distinctions between "disabling psychiatric illness" and the "grief of bereavement",[194] whilst possibly over-simplified, ultimately serves to strengthen his judgment and reinforce his creditability as a superhero judge.

> We are human and we must accept as part of the price of our humanity the suffering of bereavement for which no sum of money can provide solace or comfort. I think better of my fellow man than to believe that they would, although bereaved, look like dogs in the manger upon those who went to the rescue at Hillsborough.[195]

Similarly, Lord Steyn establishes at the outset of his judgment both his decision and his understanding of his role as a judge. In his view, the Court of Appeal was wrong in reversing Waller J, with whom he is in "substantial agreement".[196] Our responses to this and the Hillsborough Stadium Disaster are immediately checked by his

himself to [physical] danger or reasonably believed he was doing so".[158] On the facts, the police officers were never in any physical danger, actual or perceived, and so could be accorded no special status as rescuers. To do so would require the "unwarranted extension" of the category of primary victim which – unsurprisingly given the judicial inertia underlying the judgments in *White* – Lord Steyn refused to contemplate.[159] He eschewed responsibility for change, assigning any developments in the law to Parliament,[160] whilst arguing that in

consideration of the necessary and correct distinction between physical and psychiatric harm.

> The horrific events of 15 April 1989 at the Hillsborough Football Stadium in Sheffield resulted in the death of 96 spectators and physical injuries to more than 700. It also scarred many others for life by emotional harm ... In an ideal world all those who have suffered as a result of the negligence [of the chief constable] ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration as well as to the heads of recoverable damages. This results, of course, in imperfect justice but it is by and large the best that the common law can do.[197]

It seems his hands are tied; his decision dictated by the constraints of 'imperfect justice'. He emerges from his confrontation with his subversive moment not only (re)presented as the superhero judge but also bewitched by the ghosts of *Alcock*. Thus, whilst the House of Lords accepted in *Page* that there may be no

> qualitative difference between physical harm and psychiatric harm ... [he believed it] would, however, be an altogether different proposition to say that no distinction is made or ought to be made ... in tort.[198]

any event the suggested expansion of liability for psychiatric harm would be over-inclusive, disproportionate, unbalanced, distracting and overly complex.[161] Similarly, Lord Hoffmann was troubled by the proposed expansion of liability, and more particularly, by the appropriate definition of a rescuer once the control mechanism of physical danger was removed.[162]

In contrast to Lords Steyn and Hoffmann's fear and rejection of expansion, Lord Goff, in his dissenting judgment,

Moreover, there are compelling policy reasons for this to be the case, not least that the "awarding of damages to these police officers sits uneasily with the denial of the claims of bereaved relatives ... in *Alcock*".[199] It is clear that Lord Steyn understands his role as being to redress the "imbalance in the law of tort which might perplex the man in the Underground" introduced by the Court of Appeal in *Frost*.[200] Fortunately, given his superhero role, this can be done through the simple application of the law, the history of which he goes on to review. Accordingly, unlike Lord Griffiths, Lord Steyn construes *Chadwick* as authority for recovery for psychiatric harm only when the rescuer has exposed himself to personal danger, whether he was aware of it or not:

> Without such limitation one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover ... ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover.[201]

What is more, it emerges during the course of his judgment that not only does Lord Steyn believe the chief constable, as the police officers' analogous

highlights with disapproval the constrained and doctrinally flawed character of the majority judgments in *White*. It is, he argues, both "inconsistent" and "paradoxical" to suggest, without explanation, that foreseeability of physical injury is both a necessary and sufficient condition of liability for psychiatric harm.[163] To do so is not only inappropriately restrictive, but also in opposition to Lord Lloyd's expansive strategy in *Page* and Lord Oliver's categorisation of rescuers as primary

employer, does not owe his employees a duty of care in respect of psychiatric harm if there has been no breach in respect of physical harm, but also, in relation to where the justice lay, the police officers are already "better off" than the relatives in *Alcock* by virtue of their pensions:

> The claim of the police officers on our sympathy, and the justice of this case, is great but not as great as that of others to whom the law denies redress.[202]

To allow the police officers, presumably akin – at least in Lord Steyn's eyes – to 'ghoulishly curious spectators', to recover would require an "unwarranted extension of the law".[203] In refusing to do so, Lord Steyn most likely believes he is simply fulfilling his Herculean role, and applying the law as it is. Nevertheless, he does not leave his understanding of his judicial role at this. In the postscript to his judgment, he goes further and recognises the possibility that he is able to step outside his superhero role, to shape the legal materials. He sets out two theoretical solutions – to refuse recovery for all psychiatric harm in tort or alternatively to eradicate all restrictions in the recovery for pure psychiatric harm – and chooses

victims in *Alcock*.[164] The result of introducing what are, in effect, 'control mechanisms' akin to the highly criticised *Alcock* restrictions is the creation of "unacceptable" and "unjust" distinctions, distinguishing between plaintiffs according to their physical location:

Suppose [Lord Goff suggests] that there was a terrible train crash and that there were two Chadwick brothers living nearby, both of them small and agile window cleaners distinguished by their courage and humanity. Mr A Chadwick worked on the front half of the train, and Mr B Chadwick on the rear half. It so happened that, although

neither.[204] He evades both his responsibility as a judge and the possibility of judicial activism and creativity, retreating to what he sees as the "only prudent course" in accepting *Alcock* and *Page* as settled law. In saying "thus far and no further",[205] he remits the possibility for change elsewhere and seeks refuge in the security of his superhero role. Consequently, whereas Lord Griffiths' postscript reinforces his judgment, in so doing, Lord Steyn ultimately undermines the authority of his. Throughout he has portrayed himself as constrained within his judicial role, aware of its limitations, yet prevented from exercising his creative streak. Justice, as he established at the outset of his judgment, remains 'imperfect'. There is something particularly troubling about a judge who settles for imperfect justice. Law may be in chaotic disarray, however it is not, at least according to Lord Steyn, his responsibility to attempt to sort it out. 'Thus far and no further' becomes the mantra of a judge who refuses to judge; he throws a spotlight on the subversive moment and then steps back into the shadows – hiding behind the texts he believes to be flawed and the suit that exposes his nakedness.

there was some physical danger present in the front half of the train, there was none in the rear. Both worked for 12 hours or so bringing aid and comfort to the victims. Both suffered PTSD in consequence of the general horror of the situation. On the new control mechanism now proposed, Mr A would recover but Mr B would not. To make things worse, the same conclusion must follow even if Mr A was unaware of the existence of the physical danger present in his half of the train. This is surely unacceptable.[165]

Like Lords Steyn and Hoffmann, he albeit implicitly appeals to and implicates notions of distributive justice in his reasoning; however unlike his colleagues his purpose in so doing is

*Lord Browne-Wilkinson*

In contrast to the other judge's unremitting loquaciousness, Lord Browne-Wilkinson's laconic concurrence is unsettling.

My Lords, I have read in draft the speeches of my noble and learned friends, Lord Steyn and Lord Hoffmann. I agree that for the reasons they give these appeals should be allowed and the actions dismissed.[206]

He is, in effect, silent. He has, it appears, nothing to say. Yet, his silence is important for not only the resolution of the case (his judgment essential to the bare majority), but also for what it says about his understanding of his role as judge. His silence is without doubt disquieting and, perhaps, subversive. As such, it is evocative of that of Sir Thomas More at his trial for treason, where his silence was seen as "a sure token and demonstration of a corrupt and peruerse nature, maligning and repining against the Statute".[207] More's response to this is pertinent:

Truely, if the rule and Maxime of the ciuill lawe be good, allowable and sufficient then *Qui tacet, consentire videtur* ['he

to expand – as opposed to restrict – recovery, to unsettle the perceived significance and necessity of physical danger in a claim for psychiatric harm by a rescuer.[166] This requirement was considered "irrelevant" by Waller J in *Chadwick* and by Lord Goff himself, when contemplated alongside

the full horror of the disaster – the terrible injuries suffered by some of the victims, dead and alive, and the cries of the living for help.[167]

Mr Chadwick's psychiatric injury clearly was a direct result of the distressing scenes he witnessed; he was

that holdeth his peace seemth to consent'], this my silence implyeth and importeth rather a ratification and confirmation than any condemnation of your Statute.[208]

Perhaps, Lord Browne-Wilkinson's response would be similar. He has aligned himself alongside Lords Steyn and Hoffmann and his subsequent silence exemplifies his 'ratification' and 'confirmation' of their judgments. Perhaps he really does say it best by saying nothing at all. Maybe his rhetorical silence as an example of confident choice and not infantile evasion, of an opt-in not opt-out approach to judging, says more than an expansive judgment could. Perhaps, as it is we are left to infer from his silence his total commitment to the majority reasoning, which is no mean feat given the distinctions in substance, if not in conclusion, between them.

*Lords Goff and Hoffmann*

Both Lord Goff and Lord Hoffmann seek in their judgments to utilise the rhetoric of context and connection. Lord Goff seeks to avoid abstraction and detachment by focusing in his decision-making

neither aware of the risk of nor suffered any physical injury. The imposition of a requirement of fear of physical injury in such cases appears to be both capricious and misplaced.[168]

Ultimately if, as is suggested by Stephen Todd, the judges' "sole purpose ... [in *White* was] to limit the ambit of liability",[169] the House of Lords was successful. The outcome effectively revokes the special protection afforded to rescuers;[170] in the future rescuers will have to establish the presence of actual or perceived physical danger in order

on the individual plaintiff's web of relationships whilst remaining largely, although evidently not completely, within the boundaries of his (re)presentation as Hercules. Comparatively, Lord Hoffmann is perhaps the most flawed of all the superheroes. He sees himself as having a far more important mission, a higher goal or purpose than that of a mere messenger or conduit; as both an 'evasive activist' and an '(un)principled reconciler' he seeks strategically to shape or manipulate the legal materials into conformity with the principles of justice and fairness, whilst staying within his judicial role. Yet, as his enthusiasm and zeal threaten to jeopardise his principled stance, his misplaced allegiance alongside the ghosts of cases past remain a distraction from his current mandate or labour.

Lord Goff begins his lengthy and detailed judgment by locating his story within the events of Saturday 15 April 1989, reviewing the history of the stories of *White* and their progression through the lower courts.[209] He then considers the applicable legal principles, and in particular the impact of *Page*, drawing out the 'relevant' and distinguishing

to recover for psychiatric harm.

Alternatively, the police officers in *White* sought to ground their claims in their status as analogous to that of employees. In *Dooley*, an employee was able to recover for pure psychiatric harm suffered as a result of his fear that he had injured a fellow employee when, as a result of his employer's negligence, the crane he was operating dropped its load onto the hold below. Although he could not see if the load had hit anyone and no one was in fact hurt, he was a

the 'irrelevant' as he explores the pertinent case law.[210] His ordinary and expected judgment embodies the requisite detachment and Herculean neutrality, belying and reinforcing the extent to which his approach to judicial decision-making is extraordinary and, perhaps, subversive. His subtext prioritises the importance of the context, the (in)significance of involvement, (in)appropriate connections and established relationships. He is resolute in his specific and direct exorcism of the ghosts of *Alcock* and rejects the necessity, as a matter of policy, for new control mechanisms, which limit recovery for pure psychiatric injury to those within the range of foreseeable physical injury. Not only is the proposal an artificial barrier, contrary to well established authority

> the underlying concern is misconceived ... It is in any event misleading to think in terms of one class of plaintiffs being 'better off' than another. Tort liability is concerned not only with compensating plaintiffs, but with awarding such compensation against a defendant who is responsible in law for the plaintiff's injury. It may well be that one plaintiff will succeed on the basis that he can establish such responsibility, whereas another plaintiff who has suffered the same injury will not succeed because he is unable to do so. In such a case the first plaintiff will be 'better off' than the

primary victim or an 'unwilling participant'; the employment relationship was sufficient to create the necessary proximity.[171]

However, post-*White* it seems unlikely that there would be anything to gain in grounding a claim for pure psychiatric harm in the employment relationship. An employee can only recover for pure psychiatric harm if they were within the range or had a reasonable fear of foreseeable psychiatric injury, that is, if they were primary victims. Thus, although the chief constable in

> second, but it does not follow that the result is unjust or that an artificial barrier should be erected to prevent those in the position of the first plaintiff from succeeding in their claims. The true requirement is that the claim of each plaintiff should be judged by reference to the same legal principles.[211]

The purpose of the law of tort, Lord Goff suggests, is to ensure corrective as opposed to distributive justice, it should look backwards rather than forwards. The resolution of one case ought not to be dependent upon, (except, of course, in relation to precedent) a response to, dictated by or an apology for, another. Justice can and must not be achieved for one group of plaintiffs at the cost of injustice toward another. In short, the decision in *White* cannot ameliorate that of *Alcock*, nor should it attempt to do so; his judgment, whilst contextual, is restrained.

Lord Goff then goes on to consider the police officers' descriptions of their involvement that afternoon, eschewing any necessarily arbitrary summary: "it is no use just picking out particular events from these statements – they have to be read as a whole".[212] The police officers' actions cannot and should not be isolated from the events

*White* owed the police officers a duty of care to take reasonable steps to prevent physical harm, this did not extend to psychiatric harm in the absence of a breach in relation to physical harm. As such, it was no different to the general duty of care owed by anyone to people who their conduct might affect.[172] Further, the employer's duty of care was "conceptually distinct" from any claims by the police officers as secondary victims,[173] it is neither "parasitic on witnessing a particular event which causes harm to another" nor is it necessary or sufficient

in which they took place. Instead, he describes the impact their statements had on his understanding of their experiences and actions.

> Reading them as a whole, it is plain to me that each of them was, in the course of his duty as a police officer, involved in the aftermath of the terrible crushing which took place in pens 3 and 4 ... Sometimes they were involved in specific actions in relation to the victims of the disaster – trying to find out if a victim was still alive and, in the belief or hope that he was, applying mouth to mouth resuscitation or cardiac massage; transporting, or helping to transport bodies on makeshift stretchers to the gymnasium; laying out the bodies; standing by an individual body, identifying bodies, which involved looking in to their eyes and mouths; ... and so on.[213]

His use of context-filled narrative, right at the end of his judgment, is both rhetorical and emotive, a welcome antidote to the tedium of what has gone before. Yet, his recognition and reliance on context is not simply a narrative tool, but a mechanism through which to judge. It is not that he has stepped outside his superhero role, but rather that he has enriched, vitalised and nourished it through his focus on context and connections. His subtext reveals his understanding of the act of judgment as requiring attention to detail and circumstance. His

that the employer's negligence lead to the accident.[174]

Nevertheless, although the chief constable cannot be seen to be in breach of his duty of care toward the police officers simply by virtue of their exposure to the horrific scenes at Hillsborough, it might be argued that the police officers suffered *additional* distress and abuse from the crowd because responsibility for the disaster was attributed to other police officers. The accumulation of these highly stressful and horrific scenes could be seen to place

recognition of the police officers' web of relationships brings them within the "tangled web" of law.[214] He thinks outside his boundaries and acts within them. In so doing, he is able to truly judge, by "*looking at the picture as a whole*";[215] he recognises the requisite involvement of the police officers as stemming from context rather than actions:

> Some of their actions could be described as acts of rescue, but in my opinion that is not important, having regard to the nature and extent of the involvement in the present case ... Moreover ... we have to have regard not only to the nature of each officer's involvement, but also the context in which that involvement took place.[216]

His recognition of context and circumstance is not only a "potent" and "highly relevant" force in his analysis of the connection between employer and employee and any subsequent assessment of the reasonably foreseeability of psychiatric harm, but also, unsurprisingly, the underpinning of his restrained contextual judgment allowing the police officers to recover.[217]

Lord Goff's context-loaded restraint can be

the chief constable in breach of his duty of care.[175] Moreover, the approach in *White* also seems somewhat at odds with the decision in *Walker* v *Northumberland County Council*,[176] in which a social worker successfully sued his employer for causing his nervous breakdown through overwork. The court found that the employer had a duty of care in relation to both his employee's mental as well as physical well-being. Lord Hoffmann in *White* distinguished *Walker* on the somewhat dubious grounds that Mr Walker

contrasted with Lord Hoffmann's understanding of his judicial role as requiring (un)principled abandon. He (re)presents himself as a superhero judge with a superhero's mission – yet, unfortunately, he is not quite up to the job. His judgment is a minefield of contradiction, possible good intentions and evasion. It seeks simultaneously to address what he sees as the post-*Alcock* "retreat from principle" whilst avoiding "the dangers inherent in applying the traditional incrementalism of the common law to this part of the law of torts" and responsibility for effecting change.[218] Like Lord Steyn, he addresses proposals for reform, locating them within distinctions between corrective and distributive justice.

> If one starts from the proposition that in principle the law of torts is there to give legal force to an Aristotelian system of corrective justice, then there is obviously no valid distinction to be drawn between physical and psychiatric injury ... if [however] one starts from the imperfect reality of the way the law of torts actually works ... then questions of distributive justice tend to intrude themselves. Why should X receive generous compensation for his injury when Y received nothing?[219]

He 'frames' his judgment as a choice between

was in no sense a secondary victim. His mental breakdown was caused by the strain of doing the work which his employer had required him to do.[177]

As such, the harm suffered by Mr Walker was, he suggests, distinguishable from the harm suffered by the police officers in *White*, which was seen to stem from their witnessing of the death and injury of others, effectively combining the police officers distinct claims as employees and secondary victims.[178]

The police officers' claims failed. As we reach the end of their stories as retold in

distributive and corrective justice, his "ideal-grid judge" reasoning is both restrictive and highly political.[220] The principles of distributive justice are used to limit rather than, as is usual, to enable recovery. His audience is instinctively forced to choose between the two constructed options: either, according to the principles of corrective justice, the police officers are able to recover or, according to the principle of distributive justice and the decision in *Alcock*, they are not. It is presented as an either/or decision – a choice between the police officers and the families and friends in *Alcock*. So viewed, Lord Hoffmann seeks to prevent his audience from thinking outside his frame; they are effectively caught within his grid. The structure of his story works to limit the freedom of their choice.

This dichotomy underpins his refusal to allow employees, simply by virtue of their employment, to recover or to extend liability to rescuers not in physical danger, indeed the latter may not even fall within the remit of the House.[221] To so do, Lord Hoffmann argues, would be

*White* it is clear that the law on the recovery for pure psychiatric harm is "in a dreadful mess",[179] where the "silliest" rules now prevail.[180] What is more, the response of the House of Lords is somewhat "pusillanimous" given its role in establishing and perpetuating it.[181] The out-dated homely or artless charm of the patchwork quilt is fading – no longer fashionable alongside current trends of interior design. Various alternatives have been suggested: from doing away with it in favour of a more contemporary uniform covering, to the more adventurous submission

unacceptable to the ordinary person because (though he might not put it like this) it would offend against the notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the move deserving. He would think it wrong that policemen, even as a part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.[222]

Corrective justice has been abandoned in favour of "cautious pragmatism".[223] It soon becomes apparent that Lord Hoffmann's concern not to "ruck" the fabric of the judicial quilt requires him to treat unlike cases alike.[224] Lord Hoffmann, it seems, is prepared in *White* to allow the burden of distributive justice to fall on the police officers.[225]

It may be said that the common law should not pay attention to these feelings about the relative merits of different classes of claimants. It should stick to principle and not concern itself with distributive justice. An extension of liability to rescuers and helpers would be a modest incremental developments … and, as between these plaintiffs and these defendants, produce a just result … the search for principle was called off in *Alcock* … Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical

of going uncovered.[182] Nevertheless, it seems that, for the time being at least, we are stuck with it; an unwanted and anachronistic heirloom reliant upon its quirky incongruity and history for its continued appeal, its past securing its future. Its medley of stories incorporates, embodies and represents countless narratives whilst telling its own story. A close examination of the judicial quilt might reveal more than was at first expected. In the unspoken of the judge's story we might hear his own subtext and through this come to recognise and explore

attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which is fair between one citizen and another.[226]

Ultimately, however, what he claims is a "demand of fairness"[227] is, in fact, reminiscent of Kurt Vonnegut's imaginary society, similarly caught under the spell of distributive zeal; where ballet dancers are forced to wear weights around their ankles to make them clumsy and the intelligent have buzzers inserted in their brains to interrupt complicated thoughts.[228]

The insistence on consistency – consistent treatment of each member so as to reflect their equal moral worth – in the culture Vonnegut describes renders that culture a cruel one, albeit a consistent one, and it is a cruelty the weight of which is borne by the individuals that populate it.[229]

The police officers' case is sacrificed to ensure the continued authority of the law. Lord Hoffmann's judgment is almost taunting, his approach to judging akin to that of a superhero 'gone bad' who uses his powers and abilities to hurt rather than save, to enforce his own superiority as opposed to the service of others. He exercises his power as a judge, without responsibility,

his understanding of his judicial role and the extent to which that affects and effects the judicial quilt.

constraining the expansive tendencies of distributive justice to secure his desired conclusion. Yet, ultimately, his rhetoric appears, to some, as unpersuasive, his narrative spell ineffective. His understanding of his role as judge is complicated; he (re)presents himself as Hercules whilst simultaneously acknowledging and evading his ability to step outside his judicial role, refusing to engage in an act of boundary-breaking. He understands his role to be one of a principled reconciler whose mission is to ensure the reconciliation of both the case law and its conformity to the illusory principles of justice and fairness. Ultimately, these illusions are his downfall. In his attempt to reach them, he loses sight of his true purpose. In his conclusion, he becomes, at best bewitched and at worst, haunted by the ghosts of cases past. As a result – intoxicated and adrift – he seeks, despite protestations to the contrary, to transform the patchwork quilt of the law on the recovery for pure psychiatric harm into a coherent and timeless mosaic.[230]

**The Judicial Quilt, unpicked**

As the retelling of the story of *White* comes to an end, the patchwork quilt of the law on tortious recovery for negligently inflicted psychiatric harm is for the time being complete in its incompleteness, it is time, perhaps, to tie off and secure the loose threads of the tale of the judicial quilt. We must draw together the judge's story and its subversive subtext, which together tell the tale of the judicial quilt – an alternative account or story about what really happens when judges judge. In which storytelling is rhetorical, the framing of events political and the judge is both within and outside his story.

In *Unpicking the Judicial Quilt*, two narratives have run side by side. In an inevitably and deliberately disjointed exploration of narrative as an adjudicative technique, the power of storytelling is exposed in both its method and substance. The judges' retelling of the police officers' stories in *White* has been seen to be underpinned by a (not so) hidden subtext; a counter-narrative revealing the strategies the judge adopts when judging and his understanding of his judicial role. Moreover as the judge is revealed as a storyteller, his judgment as a story, his frame or plot as political, in his subtext are hints of another tale. A tale where the focus moves from narrative to the aesthetic, where appearances are at once everything and not what they seem, and where the judge, his story and the law are explored as aesthetic creations.

Meanwhile, my purpose here – like that of my thesis – has not been to explore the justice or otherwise of *White*, but rather to identify its subversive

subtext and the strategies the judges adopt within it, highlighted by feminist and other critiques of adjudication. My point is this: like a patchwork quilt, the judicial quilt is shaped by its designers, its patterns and contributions telling not only its story, but also *the stories of the quilters*, its random appearance belying its strategic design. Thus, despite representations to the contrary, *how* the judge tells his story – for example through his use of narrative – is neither neutral nor objective, but rather deliberately and strategically orientated and motivated. It is deeply subversive. This is "reveal[ed] not only in the material contributions [each brings to their] quilt", as explored here, "but [also through an exploration of] who enjoys sewing ... and who does not", that is through the judge's understanding of his role as a judicial storyteller, as it emerges through the unsaid of his narrative.[231]

*INSTRUCTIONS No. 1 (Revised)*

*Take nine narrators, each with their own subversive agenda, one football match, ninety-six deaths and countless injuries, unbelievable negligence, horror, fear and ongoing indescribable harm, six representatives of the many police officers and combine to form the backdrop to the gripping and now familiar tale of White – the tragedy in three parts that has unfolded before you over the last 60 pages or so. Add an alternative narrative or subtext of adjudication. Let it underlie or shadow the judge's retelling of White as its subversive or negative image. Listen attentively as each judge tells his story, in the knowledge that as he attempts to cast his spell and capture his audience within his web of persuasion, he silently, perhaps unknowingly, reveals part of himself. Consider the extent to which he enjoys telling his story. Allow this process to rest, until the judge's understanding of his judicial role emerges through the unsaid of his narrative and his framing of events. Encourage this insight. Take note of what he does not say. Delve deeper into the context and impetus of what he does. Gradually work the story and narrative – the spoken and the silent – together, urge them to intertwine so that the storytelling-judge becomes a part in his story. Ignoring any (re)presentations from the judge to the contrary. Watch as he weaves his self through his story as the designer becomes part of his design. Study the quilt carefully, itself a collection of many tales – a complex amalgamation of diversity, distinction and difference, pain, sadness, happiness, hope and despair – underpinned and sewn together an interactive and subversive narrative, which recognises the rhetorical power of storytelling. Finally, when you are ready, move on and wait for the next story.*

[1] W Otto *How to Make an American Quilt* (New York: Ballantine Books, 1992) 7-9.

[2] J B Baron & J Epstein 'Is Law Narrative?' (1997) 45 *Buff L Rev* 141, 147.

[3] Lord Steyn *White* v *Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509, 1547.

[4] Baron & Epstein, n 2 above, 148.

[5] *White* (n 3 above) on appeal to the House of Lords from *Frost and Others* v *Chief Constable of South Yorkshire Police* [1998] QB 254. Whilst the tragic and emotive facts of *White* are, perhaps, particularly conducive to an exploration of the use of narrative, my argument here is that narrative is, in fact, a common adjudicative technique that largely goes unnoticed in traditional accounts of adjudication. See, e.g., Sandra Berns' consideration of *Mabo and Ors* v *Queensland (No 2)* and of *Commercial Bank of Australia Ltd* v *Amadio* in *To Speak as a Judge: Difference, Voice and Power* (Dartmouth: Ashgate, 1999) 63-76, 176-183); Lisa Sarmas' exploration of the Australian High Court decision in *Louth* v *Diprose* in 'Storytelling and the Law: A Case Study of *Louth* v *Diprose*' (1994) 19 *Melbourne University Law Review* 701 extracted in R Graycar & J Morgan *The Hidden Gender of Law* (Sydney: The Federation Press, 2nd edn, 2002) 74-76.

[6] Baron & Epstein, n 2 above, 148.

[7] Rose LJ, *Frost*, n 5 above, 259 quoting Lord Justice Taylor's *Interim Report on the Hillsborough Stadium Disaster* Cm 765 (1989) 15.

[8] *Frost* (*White*) is, sadly, one of many stories of that fateful day. Others have become almost legendary representations of the so-called Hillsborough disaster – their names inextricably linked to tragedy – Bland, Alcock, Hicks (*Airedale NHS Trust* v *Bland* [1993] AC 789; *Alcock* v *Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057; *Hicks* v *Chief Constable of South Yorkshire Police* [1992] 2 All ER 65) – whilst others are left unsaid, unarticulated or unheard, perhaps simply too hard to begin to tell or lost in repressed memories, settlement, representation or death.

[9] Henry LJ, *Frost*, n 5 above, 270.

[10] Henry LJ, *ibid*, 269.

[11] Lord Goff, *White*, n 3 above, 1515.

[12] Henry LJ quoting Professor Sims' medical report for the plaintiffs (*Frost*, n 5 above, 269).

[13] This account of the unreported decision of Waller J on 10 April 1994 is taken from Lord Goff's summary in *White*, n 3 above, 1516-17.

[14] Lord Goff, *White*, *ibid*, 1516.

[15] On the *Alcock* control mechanisms see further below n 104 ff and accompanying text.

[16] Lord Goff, *White*, n 3 above, 1516.

[17] On *Frost* generally, see N Mullany & P R Handford 'Hillsborough Replayed' (1997) 113 LQR 410. Sergeant Janet Smith was not on duty at the ground but at the Northern General Hospital in Sheffield, where she had stripped and labelled bodies for the purposes of identification, completed casualty forms in the mortuary and had acted as a liaison officer between hospital staff and the casualty bureau. Although she later returned personal effects

to the gymnasium at the stadium, seeing there the photos of the victims and distressed relatives, the Court of Appeal held she had simply done what was expected of her as a police officer, which was sadly not enough to be considered a participant or rescuer (Rose LJ, *Frost*, n 5 above, 267).

[18] Rose LJ, *Frost*, *ibid*, 264-266.

[19] Henry LJ, *Frost*, *ibid*, 276. Judge LJ dissented. He rejected the assumption that the police officers as rescuers should automatically recover on the basis that, although not specifically defined as rescuers, many of the bereaved family and friends denied recovery in *Alcock* were *as involved* in the tragic events at Hillsborough as the police officers (n 8 above). Adopting Lord Lloyd's narrow definition of primary victim in *Page* v *Smith* [1996] AC 155, he classified the police officers, who did not fall within the range of foreseeable physical danger, as secondary victims; as such they were unable to satisfy the *Alcock* criteria or, therefore, succeed (*Frost*, n 5 above, 283-293).

[20] Rose LJ, *Frost*, *ibid*, 267. Although Detective Constable Hallam did not in fact appeal, the Court of Appeal nevertheless ruled on whether there was a breach of duty to police officers in his position.

[21] Rose LJ, *ibid*.

[22] Rose LJ, *ibid* 267-268.

[23] Rose LJ, *ibid* 268.

[24] Rose LJ, *ibid*.

[25] Sergeant Smith, unsuccessful in the Court of Appeal, did not appeal.

[26] G R Powell 'Opening Statements: The Art of Storytelling' (2001) 31 *Stetson L Rev* 89, 89-90.

[27] I Durst 'Valuing Women Storytellers: What They Talk About When They Talk About Law' (1999) 11 *Yale JL & Feminism* 245, 267.

[28] R Delgado 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1988) 87 *Mich L Rev* 2411, 2414.

[29] R West 'Narrative, Responsibility and Death' in *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993) 419, 425 tacitly invoking Atticus' advice to his daughter Scout that "You never really understand a person ... until you climb into his skin and walk around" (*To Kill a Mockingbird* (J B Lippincott Co, 1960; Arrow Books edn, 1997) 33). See further, chapter 6, 'At the end of our Affair(s), 333-353, below.

[30] C MacKinnon 'Law's Stories as Reality and Politics' in P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (New Haven & London: Yale University Press, 1996) 232, 235.

[31] J B Baron 'The Many Promises of Storytelling in Law: An Essay Review of *Narrative and the Legal Discourse: A Reader in Storytelling and the Law*' (1991) 23(1) *Rutgers LJ* 79, 79 implicitly mirroring the self-evident opening sentence of another story, Jane Austen's *Pride*

*and Prejudice*, that "[i]t is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife" (London: Penguin Classic, 1972) 51.

[32] See, e.g., from the increasingly prolific literature, Baron, *ibid*; L Martin-Bowen 'Words from a Teller of Tales: Can Storytelling Play an Effective Role in Feminist Jurisprudence?' (1997) 66 *University of Missouri-Kansas City Law Review* 95; K Abrams 'Hearing the Call of Stories' (1991) 79 *Cal L Rev* 971; K L Scheppele 'Foreword: Telling Stories' (1989) 87 *Mich L Rev* 2073; R Cover 'The Folktales of Justice: Tales of Jurisdiction' (1985) 14 *Cap U L Rev* 179; P Williams *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass.: Harvard University Press, 1991); N Cook 'Outside the Tradition: Literature as Legal Scholarship' (1994) 63 *U Cin L Rev* 95; R Delgado, n 28 above and 'Shadowboxing: An Essay on Power' (1992) 77 *Cornell L Rev* 813; and, generally, Brooks & Gewirtz, n 30 above, *passim* and review by Richard Posner 'Legal Narratology' (1997) 64 *U Chi L Rev* 737. For criticism of the use of storytelling and narrative see in particular, T Massaro 'Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?' (1989) 87 *Mich L Rev* 2099; A Austin 'Evaluating Storytelling as Type of Non Traditional Scholarship' (1995) 74 *Neb L Rev* 479; and D A Farber & S Sherry 'Telling Stories out of School: An Essay on Legal Narratives' (1993) 45 *Stan L Rev* 807 and rebuttals by J Baron 'Resistance to Stories' (1994) 67(2) *S Cal L Rev* 255 and R Delgado 'On Telling Stories in School: A Reply to Farber and Sherry' (1993) 46 *Vand L Rev* 665.

[33] Delgado (1992), *ibid*, 818. On the invocation of 'stock-stories' see further G López 'Lay Lawyering' (1984) 32 *UCLA L Rev* 1.

[34] Martin-Bowen, n 32 above, 109. On the unconsidered 'truth' of "white folk's tales" see R Hayman & N Levit 'The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality' (1996) 84 *Cal L Rev* 377. In relation to the development of particular jurisprudential forms and stories see, e.g., Maria Drakopoulou's exploration of ghost stories and 19th century jurisprudence, 'Ghost Stories and Imperial Comparisons: Some Reflections upon Victorian Jurisprudence' in P Fitzpatrick (ed) *Nationalism, Racism and the Rule of Law* (Dartmouth: Ashgate, 1995) 151.

[35] Delgado, n 28 above, 2414.

[36] On the role of storytelling in contemporary debates as problematising the neutrality of knowledge and facts see Baron & Epstein, n 2 above.

[37] S Winter 'The Cognitive Dimension of the Agony between Legal Power and Narrative Meaning' (1989) 87 *Mich L Rev* 2225, 2228.

[38] P Brooks 'The Law as Narrative and Rhetoric' in Brooks & Gewirtz, n 30 above, 14, 16.

[39] S Almog 'As I Read, I Weep – In Praise of Judicial Narrative' (2001) 26 *Okla City U L Rev* 471, 488.

[40] Almog, *ibid*.

[41] Berns, n 5 above, 38.

[42] Berns, *ibid*, 174.

[43] Baron & Epstein, n 2 above, 146-147.

[44] J M Balkin 'A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason' in Brooks & Gewirtz, n 30 above, 211, 211. On rhetoric and its relationship with law see, e.g. and cf, J Hollander 'Legal Rhetoric' in Brooks & Gewirtz, n 30 above, 176; J B White *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Wisconsin: University of Wisconsin Press, 1985); P N Leval 'Judicial Opinions as Literature' in Brooks & Gewirtz, n 30 above, 206; P Goodrich 'Rhetoric as Jurisprudence' in *Legal Discourse* (Basingstoke: Macmillan Press, 1987) and W J Witteveen 'The Rhetorical Labours of Hercules' (1990) 3 IJSL 227.

[45] "Audience" refers here to both the possible legal and lay audiences including, *inter alia*, lawyers, legal academics, judges, plaintiffs, defendants, victims, and journalists. On the importance of audience, see further, S Levinson 'The Rhetoric of Judicial Opinion' in Brooks & Gewirtz n 30 above, 187, 195-204.

[46] Almog, n 39 above, 487.

[47] West, n 29 above, 427-8. On judicial storytelling and narrative with reference to particular judgments see n 5 above.

[48] West, *ibid*, 434.

[49] West, *ibid*, 432.

[50] West, *ibid*, 432-3.

[51] West, *ibid*, 433.

[52] West, *ibid*, 436-7.

[53] West, *ibid*, 437.

[54] *Frost*, n 5 above.

[55] Rose LJ, *ibid*, 259.

[56] Rose LJ, *ibid*, 260-67.

[57] See n 20 above and accompanying text.

[58] Henry LJ, *Frost*, n 5 above, 270.

[59] Henry LJ, *ibid*, 283.

[60] Henry LJ, *ibid*, 275.

[61] Judge LJ, *ibid*, 283-4.

[62] Judge LJ, *ibid*, 284.

[63] Judge LJ, *ibid*.

[64] See further n 100 below.

[65] Judge LJ, *Frost*, n 5 above, 286.

[66] Judge LJ, *ibid*, 286-87.

[67] Judge LJ, *ibid*, 287.

[68] Judge LJ, *ibid*, in particular 293 although compare Rose and Henry LJJ (*ibid*, 266 and 283 respectively).

[69] Judge LJ, *ibid*, 292.

[70] P Gewirtz 'Narrative and Rhetoric in the Law' in Brooks & Gewirtz n 30 above, 5. See also R West 'Adjudication is not Interpretation: Some Reservations about the Law-as-Literature Movement' (1986) 54 *Tenn L Rev* 203.

[71] A M Dershowitz 'Life is not a Dramatic Narrative' in Brooks & Gewirtz, n 30 above, 99, 99-101.

[72] On the 'subversive moment' see Berns, n 5 above, 51 and n 136 below and surrounding text.

[73] Otto, n 1 above, 243.

[74] Lord Steyn, *White*, n 3 above, 1542.

[75] On the relationship between hysterical mothers and psychiatric harm and the gender dimension underlying the (historical) antipathy toward psychiatric harm see Martha Chamallas and Linda Kerber's interesting and provocative exploration in 'Women, Mothers, and the Law of Fright: A History' (1990) 88 *Mich L Rev* 814; and more recent feminist critiques of tort by E Handsley 'Mental Injury Occasioned by Harm to Another: A Feminist Critique' (1996) 14 *Law & Ineq J* 391; C Goodzeit 'Rethinking Emotional Distress: Prenatal Malpractice and Feminist Theory' (1994) 63 *Fordham L Rev* 175; and J Conaghan 'Tort Law and Feminist Critique' [2003] CLP *forthcoming.*

[76] Lord Bridge, *McLoughlin* v *O'Brian* [1982] 2 WLR 982, 1000.

[77] Moreover, a distinction is drawn between psychiatric harm that constitutes a *medically recognised psychiatric illness*, for example PSTD, pathological grief disorder and organic depression, and mere grief, sorrow and distress, which as "part of the common condition of mankind which we will all endure at some time in our lives" is not recognised as a head of damage (Lord Griffiths, *White*, n 3 above, 1515).

[78] T Weir *A Casebook on Tort* (London: Sweet & Maxwell, 8th edn, 1996) 88.

[79] Sir Richard Couch, *Victorian Railway Commissioners* v *Coultas* (1888) 13 App Cas 222, 225-6.

[80] [1901] 2 KB 669.

[81] *ibid*, 681.

[82] [1925] 1 KB 141.

[83] Kennedy J, *Dulieu*, n 80 above, 675.

[84] Lord Atkin, *Hambrook*, n 82 above, 157.

[85] [1943] AC 92.

[86] Lord Hoffmann, *White*, n 3 above, 1548. See also *King* v *Phillips* [1953] 1 QB 429 in which a mother who was looking out from an upstairs window when she saw her son's tricycle disappear under a reversing taxi and heard a scream, was held to be too far away from the scene of the accident to recover. She was, in effect, an unforeseeable plaintiff and so was unable to recover for her subsequent psychiatric illness. Although compare *Boardman* v *Sanderson* [1964] 1 WLR 1317 in which a father was able to recover for his psychiatric illness after he had *heard* and later come upon an accident involving his son.

[87] [1967] 1 WLR 912.

[88] Lord Hoffmann, *White*, n 3 above, 1549.

[89] On the unnecessary distinction between physical and psychiatric harm see, e.g., N Mullany & P Handford *Tort Liability for Psychiatric Damage* (Australia: Law Book Company, 1993).

[90] n 76 above.

[91] Lord Wilberforce, *McLoughlin*, *ibid*, 985.

[92] Lord Wilberforce, *ibid*, 988.

[93] M Lunney & K Oliphant *Tort Law: Text and Materials* (Oxford: Oxford University Press, 2000) 277. Although, Lord Wilberforce did suggest that the majority decision of the Australian High Court in *Chester* v *Waverly Municipal Council* (1939) 62 CLR 1 (since discredited) might "perhaps be placed on the other side of a recognisable line" (*McLoughlin*, *ibid*, 990). On *Chester*, see further Graycar & Morgan, n 5 above, 173-179.

[94] Lord Wilberforce, *McLoughlin*, *ibid*, 990.

[95] Lord Wilberforce, *ibid*, 989-991.

[96] Lords Scarman and Bridge and, to a lesser extent Lord Russell *McLoughlin*, *ibid*, 996-997, 1000, 1006, 1009-1010.

[97] Lord Bridge, *McLoughlin*, *ibid*, 1009.

[98] See, generally, J Conaghan & W Mansell *The Wrongs of Tort* (London: Pluto Press, 2nd edn, 1999) 11-21.

[99] Lord Hoffmann, *White*, n 3 above, 1549.

[100] Lord Keith, *Alcock*, n 8 above, 1096-1098.

[101] n 95 above.

[102] Lord Oliver, *Alcock*, n 8 above, 1113.

[103] Lord Oliver, *ibid*, 1110-1113.

[104] Conaghan & Mansell, n 98 above, 36. See, further e.g., Lord Oliver (*Alcock*, *ibid*) S Todd 'Psychiatric Injury and Rescuers' (1999) 115 LQR 345, 349.

[105] Lord Porter, *Bourhill*, n 85 above, 117.

[106] *Brice* v *Brown* [1984] 1 All ER 997.

[107] Lord Keith, *Alcock*, n 8 above, 1100. Interestingly, Lords Keith and Ackner both allowed for possible recovery by an unconnected bystander "if the circumstances of a catastrophe occurring very close to him were particularly horrific" (1100, see also 1106). However, it is unclear, given the facts of the Hillsborough tragedy, quite how horrific these circumstances must be. This practical difficulty, alongside the fear that any subsequent liability would simply be based on reasonable foreseeability lead the Court of Appeal to reject the extension of liability to mere bystanders in *McFarlane* v *EE Caledonia Ltd* [1994] 1 Lloyd's Rep 16.

[108] Lord Ackner, *Alcock*, *ibid*, 1108.

[109] Lord Keith, *ibid*, 1101. A later claim, also arising out of the Hillsborough tragedy was, however, successful. The plaintiff was shown to be part of "a very close-knit" family and to

have had a close tie of love and affection with his deceased half-brother (*McCarthy* v *Chief Constable of South Yorkshire Police*, unreported, *The Daily Telegraph*, 12 December 1996).

[110] J Stapleton 'In Restraint of Tort' in P Birks (ed) *The Frontiers of Liability: Volume 2* (Oxford: Oxford University Press, 1994) 83, 95. See further Lord Oliver, *Alcock*, *ibid*, 1120; M A Jones 'Liability for Psychiatric Illness – More Principle, Less Subtlety' [1995] 4 *Web JCLI*; A Unger 'Undue Caution in the Lords' 114 NLJ 1729; and K J Nasir 'Nervous Shock and *Alcock*: The Judicial Buck Stops Here' (1992) 55 MLR 705. The Law Commission has also criticised the *Alcock* criteria as "unduly restrictive" (Law Commission *Liability for Psychiatric Illness* No 249 (London: HMSO, 1998) para 6.10). Its recommendations include, *inter alia*, replacing requirement of a necessary close tie of love and affection with a formal, 'fixed list' of secondary victims to include spouses, parents, children, siblings and cohabitees (including those in homosexual relationships where the parties have lived together for more than 2 years) with the possibility for those outside the list to demonstrate 'a close tie of love and affection' (para 6.24-6.35). See further, Harvey Teff's consideration of the Law Commission's report in 'Liability for Psychiatric Illness: Advancing Cautiously' (1998) 61(6) MLR 849.

[111] Stapleton, *ibid*, 84. Compare *Hevicane* v *Ruane* [1991] 3 All ER 65 and *Ravenscroft* v *Rederiaktebolaget Transatlantic* [1991] 3 All ER 73; although these decisions were doubted by Lord Oliver in *Alcock* (*ibid*, 1120) and the latter was later reversed by the Court of Appeal ([1992] 2 All ER 470).

[112] Although compare Lord Ackner's agreement with Nolan LJ in allowing for the possibility that "simultaneous broadcasts" might found a claim, using the example of the transmission of "a special event of children travelling in a balloon ... [which] showed the balloon suddenly bursting into flames (*Alcock*, *ibid*, 1108).

[113] Lord Keith, *ibid*, 1101-1102.

[114] Lord Ackner, *ibid*, 1104. Thus, the psychiatric harm suffered by a father who watched his son die over 2 weeks whilst becoming increasingly aware of the hospital's negligence toward his son was considered by the Court of Appeal to be the result of a continual process as opposed to a sudden 'shock'; he was unable to recover (*Sion* v *Hampstead Health Authority* [1995] 5 Med LR 170). Although compare the Court of Appeal's decision in *North Glamorgan NHS Trust* v *Walters* ([2002] EWCA Civ 1792) where a mother suffered psychiatric harm following the death of her 10-month-old son due to the defendant's failure to diagnose and treat his acute hepatic failure, see further J Laing 'Clinical Negligence: Secondary Victims and recovery for 'Nervous Shock' (2003) 11 *Med L Rev* 121. The Law Commission has recommended that this restriction be abolished to enable recovery for those who suffer psychiatric illness because of caring for the victim of the defendant's negligence (n 110 above, para 5.33).

[115] Lord Bridge, *McLoughlin*, n 76 above, 1009; see also H Teff 'Liability for Psychiatric Illness after Hillsborough' (1992) 12(3) OJLS 440, 447-451.

[116] Teff, *ibid*, 447. See also Law Commission, n 110 above, para 6.10-6.18.

[117] Law Commission, *ibid*, para 4.2.

[118] Lord Hoffmann, *White*, n 3 above, 1553.

[119] n 19 above.

[120] *Dulieu*, n 80 above; see also *Meah* v *McCreamer (No 1)* [1985] 1 All ER 367, where the plaintiff recovered damages for his injuries following a car crash which included a personality change and his subsequent conviction and imprisonment for assault and rape.

[121] Also variously described as chronic fatigue syndrome or post-viral fatigue syndrome.

[122] Lord Lloyd, *Page*, n 19 above. Although see criticism of this use of the 'egg-shell skull' rule in Lords Keith and Jauncey's (dissenting) judgments (166-170 and 171-180 respectively) and also Lord Goff in *White* who describes it as a "principle of compensation and not of liability" (n 3 above, 1519).

[123] Lord Lloyd, *Page*, *ibid*, 184.

[124] Lord Lloyd, *ibid*, 197.

[125] Lord Lloyd, *ibid*, 189. Further, once it is established that a duty of care is owed, it does not matter that the plaintiff had a pre-existing condition, or that the illness is more severe than might have been expected (Lord Lloyd, *ibid*, 197-198).

[126] Law Commission, n 110 above, para 5.51, 5.45.

[127] Lord Lloyd, *Page*, n 19 above, 184.

[128] Lord Oliver, *Alcock*, n 8 above, 1110.

[129] Lord Steyn, *White*, n 3 above, 1544. For criticism of this approach see H Teff 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) 57 CLJ 91 and N J Mullany 'English Psychiatric Injury Law – Chronically Depressing' (1999) 115 LQR 30. Further, in *McFarlane* (n 107 above), Stuart Smith LJ held that Lord Oliver's understanding of a 'participant' also included someone who *reasonably believed* that they were in physical danger and suffered psychiatric harm as a result (at 23).

[130] Lord Goff, *White*, *ibid*, 1527.

[131] *Dooley* v *Camell Laird & Company Ltd and Mersey Insulation Company Ltd* [1951] 1 Lloyd's Rep 271.

[132] Lord Goff, *White*, n 3 above, 1528.

[133] Lord Steyn, *ibid*, 1547.

[134] Lord Hoffmann, *ibid*, 1550.

[135] D Kennedy *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass.: Harvard University Press, 1998) 157.

[136] Berns, n 5 above, 51.

[137] Berns, *ibid*, 57.

[138] Berns, *ibid*, 76 note 1.

[139] Berns, *ibid*, 57 quoting M Minow, & E Spelman 'Passion for Justice' in J T Noonan Jr & K I Winston (eds) *The Responsible Judge: Readings in Judicial Ethics* (Praeger, Westport: 1993).

[140] Berns, *ibid*, 52 (footnotes omitted).

[141] Kennedy, n 135 above, 191. See further Duncan Kennedy's exploration of the epidemic and paradox of judicial denial (at 191-212) and chapter 1, 47-49, above.

[142] M Minow 'Guardianship of Phillip Becker' (1996) 74 *Tex L Rev* 1257, 1259.

[143] Berns, n 5 above, 57.

[144] Berns, *ibid*, 53.

[145] Berns, *ibid*, 54.

[146] Minow, n 142 above, 1259.

[147] Phillip Becker was born with Down's Syndrome and a heart defect. On the advice of his doctors, his parent's institutionalised him shortly after his birth. They visited him rarely and consistently refused permission for various medical procedures in relation to Phillip's heart defect. A married couple named Heath who had befriended Phillip whilst volunteers at the institution, sought to become Phillip's guardians with the authority not only to care for Phillip, but also to approve his surgery.

[148] Judge William Fernandez *Guardianship of Phillip Becker* Superior Court of Santa Clara County, California 1981 No. 101981 (unpublished opinion) reprinted in full in M Minow (ed) *Family Matters: Readings on Family Lives and the Law* (New York: New Press, 1993) 288, 296 and discussed by Martha Minow, n 142 above and in *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) 341-349.

[149] Minow (1996) *ibid*, 1259-1260.

[150] Kennedy, n 135 above, 181 and, generally, chaps 7 and 8 and chapter one, 41-44, above.

[151] Conaghan & Mansell, n 98 above, 40.

[152] Lord Steyn, *White*, n 3 above, 1547. On *White* generally see J Williams 'Psychiatric Injury, Policy and the House of Lords' [1999] JPIL 102.

[153] Lord Hoffmann, *White*, *ibid*, 1557.

[154] Lord Oliver, *Alcock*, n 8 above, 1110 quoting Cardozo J in *Wagner* v *International Railway Co.* (1921) 232 NY 176, 180-181. See also the Law Commission's expression of concern that the reasoning in *McFarlane* (n 107 above) might have suggested otherwise (n 110 above, para 7.3)

[155] Lord Oliver, *Alcock*, n 8 above, 1111.

[156] R Mullender & A Speirs 'Negligence, Psychiatric Injury, and the Altruism Principle' (2000) 20(4) OJLS 645, 645.

[157] As defined by Lord Oliver, *Alcock*, n 8 above, 1110.

[158] Lord Steyn, *White*, n 3 above, 1547.

[159] Lord Steyn, *ibid*, 1547.

[160] Lord Steyn, *ibid*.

[161] Lord Steyn, *ibid*, 1541-2.

[162] Lord Hoffmann, *ibid*, 1555-6. Despite the Court of Appeal having already addressed this in *McFarlane* v *EE Caledonia*, where it held that peripheral acts, for example moving blankets

and helping the walking wounded, were not sufficient to establish the plaintiff as a rescuer (n 107 above, 13).

[163] Lord Goff, *White*, *ibid*, 1528.

[164] Lord Goff, *ibid*, 1527-1528. Compare Lord Steyn (*ibid*, 1544).

[165] Lord Goff, *ibid*, 1535.

[166] Overall, however, the mood of his judgment is one of corrective justice (*ibid*, 1536 and see n 209 ff below, and surrounding text). See further Lord Justice Brooke's consideration of the import of distributive justice to tort law, specifically in relation to recovery for pure psychiatric harm in the context of wrongful birth in *Parkinson* v *St James and Seacroft University Hospital NHS Trust* [2002] QB 266, 274-276. On distributive and corrective justice generally, e.g., see G Williams 'The Aims of the Law of Tort' [1951] CLP 137; D Owens (ed) *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995) *passim*; and with specific attention to *White*, Mullender & Speirs, n 156 above. See further below n 220 ff and accompanying text.

[167] Lord Goff, *White*, *ibid*, 1532. On *Chadwick* see also Lords Griffiths, Hoffmann and Steyn (*White*, *ibid*, 1514, 1555-1556, 1516 respectively).

[168] An alternative way to distinguish *Chadwick* and *White* might be through the introduction of the so-called 'fireman's rule', whereby the police officers in *White* as 'professionals' would be considered to persons "of extraordinary phlegm" (Lord Goff, *ibid*, 1516) and recovery restricted accordingly (B S Markesinis & S F Deakin *Tort Law* (Oxford: Clarendon Press, 4th edn, 1999) 133). However, this rejected by both Rose and Henry LJJ in the Court of Appeal, and by Lord Hoffmann in the House of Lords (*Frost*, n 5 above, 261, 265 and 283 respectively and *White*, *ibid*, 1557). See also *Hale* v *London Underground* [1992] 11 BMLR 81 in which a fireman was able to recover for the psychiatric harm suffered as a result of his actions during the King's Cross underground station fire, despite the fact he was a professional and arguably hardened to horrifying scenes.

[169] Todd, n 104 above, 347, alluded to by Lord Goff throughout his dissenting judgment (*White*, *ibid*, 1515-1538).

[170] Markesinis & Deakin, n 168 above, 133.

[171] *Dooley*, n 131 above. It is unclear in *White* whether an unwilling participant in the position of Dooley falls within a special category of claimant. Lord Hoffman in *White* suggests, "there may be grounds for treating such a rare category of case as exceptional and exempt from the *Alcock* control mechanisms" (n 3 above, 1554). See further, *W* v *Essex CC* [2000] 2 All ER 237.

[172] Lord Steyn, *White*, *ibid*, 1544-1545.

[173] Markesinis & Deakin, n 168 above, 525.

[174] Markesinis & Deakin, *ibid*, 136.

[175] As argued by Lord Goff in his dissenting judgment (*White*, n 3 above, 1538).

[176] [1995] 1 All ER 737.

[177] Lord Hoffmann, *White*, n 3 above, 1552.

[178] Markesinis & Deakin, n 168 above, 136.

[179] Todd, n 104 above, 349.

[180] Stapleton, n 110 above.

[181] Lunney & Oliphant, n 93 above, 300.

[182] See, e.g. and cf, the arguments made in Mullany & Handford, n 89 above and Teff, n 110 and n 128 above, with those of Stapleton, n 110 above.

[183] Lord Griffiths, *White*, n 3 above, 1512.

[184] n 19 above.

[185] *ibid*.

[186] Lord Griffiths, *White*, n 3 above, 1513-1515.

[187] Lord Griffiths, *ibid*, 1515.

[188] Lord Griffiths, *ibid*, 1514.

[189] Lord Griffiths, *ibid*.

[190] n 87 above.

[191] Lord Griffiths, *White* n 3 above.

[192] Lord Griffiths, *ibid*.

[193] n 100 above.

[194] Lord Griffiths, *White*, n 3 above, 1515.

[195] Lord Griffiths, *ibid*.

[196] Lord Steyn, *ibid*, 1538-9.

[197] Lord Steyn *ibid*, 1539.

[198] Lord Steyn *ibid*, 1540.

[199] Lord Steyn, *ibid*, 1542. Other policy reasons include, the disincentive to 'get better', difficulties of definition, the traditional fear of opening the 'floodgates' and the wish to avoid 'crushing liability' (*ibid*, 1541-1542).

[200] Lord Steyn, *ibid*, 1542.

[201] Lord Steyn, *ibid*, 1546-7.

[202] Lord Steyn, *ibid*, 1545. Lord Steyn described this statement in his judgment in *McFarlane* v *Tayside Health Board* [2000] AC 59 as expressing "the language of distributive justice. The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometime has to be made between the two approaches" (at 83).

[203] Lord Steyn, *ibid*, 1546-7.

[204] Lord Steyn, *ibid*, 1547.

[205] Lord Steyn, *ibid*.

[206] Lord Browne-Wilkinson, *ibid*, 1512.

[207] P Ackroyd, *The Life of Thomas More* (London: Vintage, 1998) 383. Sir Thomas More was speaking at his trial for treason in 1534 for, *inter alia*, his perceived disagreement with the Act

of Sucession and his refusal to swear the Oath of Supremacy recognising Henry VIII as the Supreme Head of the Church of England. More was found guilty and beheaded on 6 July 1535.

[208] Ackroyd, *ibid*.

[209] Lord Goff, *White*, n 3 above, 1515-1518.

[210] Lord Goff, *ibid*, 1518-1529.

[211] Lord Goff, *ibid*, 1534-1536.

[212] Lord Goff, *ibid*, 1537-1538.

[213] Lord Goff, *ibid*, 1538.

[214] Berns, n 5 above, 2.

[215] Lord Goff, *ibid*, 1538 (emphasis added).

[216] Lord Goff, *ibid*.

[217] Lord Goff, *ibid*.

[218] Lord Hoffmann, *ibid*, 1554, 1553.

[219] Lord Hoffmann, *ibid*, 1550-1551.

[220] P Schlag *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 3-11 and on the 'ideal grid judge' see P Schlag 'The Aesthetics of Law' (2002) 115 *Harv L Rev* 1047, 1110-1112 and generally, chapter 5, 238-294, below.

[221] Lord Hoffmann, *White*, n 3 above, 1556.

[222] Lord Hoffmann, *ibid*, 1556-7.

[223] Lord Hoffmann, *ibid*, 1549.

[224] Lord Hoffmann, *ibid*, 1553.

[225] Although note Richard Mullender and Alistair Speir's defence of the decision in *White* on the principles of distributive justice, n 156 above.

[226] Lord Hoffmann, *White*, n 3 above, 1557.

[227] Lord Hoffmann, *ibid*.

[228] K Vonnegut Jr, 'Harrison Bergeron' in *Welcome to the Monkey House* (New York: Dell Publications, 1986) 7-13 discussed by Robin West in *Caring for Justice* (New York: New York University Press, 1997) 65.

[229] West, *ibid*.

[230] Lord Hoffmann, *White*, n 3 above, 1550. See also Lord Steyn who, in *McFarlane* v *Tayside Health Board* has replaced his image of the random coherence of the patchwork quilt with the straight lines and unchanging qualities of the mosaic (n 202 above).

[231] Otto, n 1 above, 9.

## Chapter 5

## AESTHETICS, VICARIOUS LIABILITY AND THE JUDGE

### Introduction

*A legal aesthetic is something that a legal professional both undergoes and enacts, most often automatically, without thinking. We can 'choose' to deploy an aesthetic in this or that moment. But by and large, the aesthetic operates through us – choosing us, enacting us, directing us. Meanwhile, as the aesthetics do their work, law happens.*[1]

This chapter continues the exploration of adjudicative techniques, often overlooked in traditional accounts of adjudication, revealed, *inter alia*, in feminist legal scholars' focus on difference and the gendered effects of the legal imagination. Drawing on the work of

[1] P Schlag, 'The Aesthetics of American Law' (2002) 115 *Harv L Rev* 1047-1115, 1053. The presentation of this chapter emulates Pierre Schlag's use of font size and shape in his *Harvard Law Review* article. My purpose is to draw attention the implicit aesthetic dimension to the presentation of this thesis, which, *inter alia*, I am told "must be typed or printed on one side of A4 paper of good quality with a margin of not less than 40mm on the binding edge of the page ...The size of character used in the main text ... must not be smaller than 10pt ...[and] the distance between successive lines of text should be about 8mm" (*Instructions to Candidates for Examination for the Degree of Doctor of Philosophy (PhD)* (University of Kent at Canterbury)).

Pierre Schlag, it considers the persuasive effects and strategic deployment of the aesthetic, against the backdrop of the development of vicarious liability in tort in response to and through the story of a boy known as Lister. It contends that as House of Lords retell his story, in which they recognise for the first time the vicarious liability of an employer for acts of sexual abuse by an employee, their judgments reveal as much about the persuasive appeal and ongoing attraction of particular legal aesthetics as about the law on vicarious liability.[2]

In 1979, Alexholme House opened as a boarding annex and home for around 18 boys attending Wilsic Hall School, Wadsworth, Doncaster. The school, which specialised in teaching children with emotional and behavioural difficulties, and annex were owned and managed as commercial enterprises by Hesley Hall Ltd. The purpose of Alexholme House was to provide these vulnerable young boys with a homely and caring setting – beyond and distinct from their school environment – in which to adjust to everyday living. To this end, Hesley Hall Ltd employed Mr and Mrs Grain as housemaster and mother to live with and take care of the boys. Often Mr and Mrs Grain were the only members of staff present at the home. Mr Grain was responsible for the discipline and day-to-day running of the house; alongside managing the other staff, he also supervised the boys at bedtime and in the

[2] *Lister and Others* v *Hesley Hall Ltd* [2002] 1 AC 215. See, generally, R Coe 'A New Test for Vicarious Liability' (2001) 151(6995) NLJ 1154 and C A Hopkins 'What is the Course of Employment?' [2001] CLJ 458.

mornings, making sure they got to and from school, administering their pocket money, and arranging their weekend leave and evening activities.

However, far from looking after the boys in his care, between 1979 and 1982, a number of boys were systematically physically and sexually abused by Grain. The abuse, which included mutual masturbation, oral sex and sometimes buggery, followed a period of

> 'grooming' to establish control over [the boys]. It involved unwarranted gifts, trips alone with the boys, undeserved leniency, allowing the watching of violent and X-rated videos, and so forth. What may have initially have been regarded as signs of a relaxed approach to discipline gradually developed into blatant sexual abuse.[3]

Mr and Mrs Grain left the school in 1982. In June 1995, following a criminal investigation, the housemaster was sentenced to seven years imprisonment for multiple offences involving sexual abuse.

[3] Lord Steyn, *Lister*, *ibid*, 220.

Mr Lister, now in his early 30s, is one of the boys abused by Dennis Grain. His surname personalises a deeply distressing and disturbing tale of institutional sexual abuse; his story, retold by the House of Lords in *Lister and Others* v *Hesley Hall Ltd*, is not only 'his' story, but also represents the stories of others abused by Grain. In fact, the specific details of Lister's story are – like his first name – unknown. What we do know inevitably falls silent at the exit of the House of Lords; we do not know what happened next – whether our protagonist lived happily ever after – perhaps not, but hopefully so. Any attempt to represent the success of his, against-the-odds, personal injury claim against Grain's employers, Hesley Hall Ltd, as a happy or bittersweet ending is naïve and insensitive. The facts of *Lister* defy sanitation: they resist brushing over as unsettling or uncomfortable and prevent the reduction of his story to yet another among many, or worse, to a ghoulish opening paragraph that enables the subsequent uncluttered exploration of the law on vicarious liability.

Lister's story is not easily dismissed. Its ghostly presence haunts this chapter just as it stalks the judgments of the House of Lords. As we listen to the judges' restrained yet effective retelling of Lister's story we are, from the outset, deliberately and explicitly placed in their shoes as they struggle to judge. We encounter their dilemmas, torn sympathies and divided loyalties, their narratives deliberately invoking in the reader the judges' feelings of discomfort and unease. As narrative falls silent, Lister's story continues to shadow their judgments, demanding recognition, empathy and ultimately compensation.

My purpose here, however, is not to offer a doctrinal exposition of the law on vicarious liability but rather, through a close analysis of the case law, is to consider *how* the House of Lords came to the decision they did, and to probe especially the role of particular legal aesthetics in shaping their decision. Thus, in the final section of this chapter, their decision to impose vicarious liability is framed as a choice between the application of established law on the one hand and a policy orientated response to the needs of the wronged individual on the other, between what Schlag terms the grid and energy aesthetics.[4] It suggests the House of Lords' re-articulation of Salmond's test as one of 'close connection' is, in fact, a ruse grounded in and dependent upon our ongoing denial and imaginative constraint, enabling the law lords to energise the law on vicarious liability, whilst ensuring it maintains its persuasive grid-like appearance.

[4] On the grid and energy aesthetics, see further Schlag, n 1 above, 1055-1080 and n 13 ff and surrounding text below.

## Schlag, *'Art'* and Aesthetics

> *Marc*: My friend Serge has brought a painting. It's a canvas about five foot by four: white. The background is white and if you screw up your eyes, you can make out some fine white diagonal lines ... Under the white clouds, the snow is falling. You can't see the white clouds, or the snow ... A solitary man glides downhill on his skis.[5]

In his exploration of law as "an aesthetic enterprise", Schlag suggests that

> [b]efore the ethical dreams and political ambitions of law can even be articulated, let alone realised, the aesthetics of law have already shaped the medium within which those projects will have to do their work.[6]

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[5] Y Reza *'Art'* trans C Hampton (London: Faber & Faber, 1996) 1, 63. Serge has brought a hugely expensive 'Antrios', which his friend Marc hates, he is unable to believe that a friend of his would like, let alone buy, such a work. As Serge and Marc's friendship begins to unravel, Yvan, a mutual friend, tries unsuccessfully to placate both sides. The play finishes with the friends agreeing to a 'trial period' in which to try and restore their friendship. *'Art,'* Yasmina Reza's dark, three-man comedy, received its British premiere in London in 1996. It explores the power of the aesthetic, the demise of (post)modernism and the appreciation of 'Art' through the disruption of the tacit mutual agreement which grounds Serge, Marc and Yvan's relationship; it asks the question – "Are you who you think you are or are you who your friends think you are?"

[6] Schlag, n 1 above, 1049.

So viewed, legal aesthetics affect our encounters with and apprehension of the law; constituting law and its possibilities in differing ways by shaping our understanding and a/effecting our responses through the appeal of attractive, yet ultimately constraining, images, forms and sensibilities. The sway of these legal aesthetics, understood as "perception or sensation", like the white picture, stems not from their immediate beauty or visual appeal, nor from any probative or definitive identification, but rather from what they enable to be 'seen' beyond the monochrome.[7] They enable us, as 'seers', to see significance in the insignificant, the unusual in the ordinary; as such their appeal lies in their ability to reveal, to uncover the extent to which the aesthetic not only shapes our, and more specifically the judges', experiences of law, but also the law itself.[8] The revelation of the aesthetics within which law is cast,

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[7] Schlag, *ibid*, 1050. In his use of the term aesthetic, Schlag is not appealing to any notion of the law's art or romantic beauty. See, e.g., D Curtis and J Resnik 'Images of Justice' (1987) 96 *Yale LJ* 1727 and J B White *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Wisconsin: University of Wisconsin Press, 1985). Rather he seeks to invoke a broader, less restrictive conception of the word aesthetic, which he grounds in its Greek etymology (*aisthetikos*). In so doing, he suggests his approach is perhaps closest to those developed by Duncan Kennedy *A Critique of Adjudication {fin de siècle}* (Cambridge, Mass.: Harvard University Press, 1997), Adam Geary *Law and Aesthetics* (Oxford: Hart Publishing, 2001) and Desmond Manderson *Songs without Music: Aesthetic Dimensions of Law and Justice* (Los Angeles, California: University Presses of California, Columbia and Princeton, 2000). On aesthetics and law, see further, C Douzinas & L Nead (eds) *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999) and P Goodrich 'Specula Laws: Image, Aesthetic and Common Law' (1991) 2(2) *Law & Critique* 233.

[8] A 'seer' or prophet according to ancient Hebrew understanding, "looked, observed, pondered and analysed situations. They did not limit themselves to predicting what would happen. Their views about the future arose from a deep and searching consideration of the relationship between god and his people in their present condition" (H Mowvley 'Prophecy in the Old Testament' in N McIlwraith (ed) *The Burden of Prophecy* (Birmingham: SCM Publications, 1982) 13, 14).

> awaken[ing] in the reader a sensitivity for and a recognition of the different aesthetics of law ... how it feels to enact or inhabit a particular aesthetic ... and how these aesthetics matter.[9]

To this end, Schlag identifies four (in)distinct and (in)dependent legal aesthetics – the grid aesthetic, the energy aesthetic, the perspectivist aesthetic and the dissociative aesthetic – which, once tactically deployed, act as unwitting influences, (un)knowingly shaping and enacting the legal self.[10] That said, these aesthetics rarely, if ever, appear in their pure form; the legal self is, more often than not, a representation of one of a number of hybrids, which emerge out of their interaction. What is more, although it is possible to choose to deploy a particular legal aesthetic, generally the aesthetic chooses us; the ability to change your default aesthetic, Schlag suggests, is somewhat more involved than, for example, changing your breakfast cereals – "one cannot

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[9] Schlag, n 1 above, 1054.

[10] This chapter focuses, in particular, on the relationship between the grid and energy aesthetics. On the perspectivist and dissociative aesthetics see further Schlag, *ibid*, 1081-1100.

simply give oneself instructions to become a grid man ... and expect the changes to take hold by morning".[11] The strategic allure of the aesthetic operates both to constrain and shape legal self within the matrix-like (un)reality of the legal world.[12]

The grid aesthetic is perhaps the most familiar to the legal academic and judge. It is "the aesthetic of bright-line rules, absolutist approaches, and categorical definitions",[13] where law is predictable, stable, certain, solid, boundaried, coherent, and determinate. The role of the judge (and, to a lesser extent, the legal academic) is to locate and 'police the boundaries' of the law, mapped or framed within a two-dimensional field, so as to "apply the law to the facts".[14] Like an "antiseptic", the grid shields the disembodied legal self and law from irritating distractions and prevents debilitating contamination, enabling the judge to find the 'right answers', seductively detached from the dumping ground that forms law's empire.[15]

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[11] Schlag, *ibid*, 1101.

[12] Where the matrix is the womb or cavity in which anything is formed or embedded or, alternatively, a monstrous computer game where reality is virtual reality and in which mankind is trapped until Thomas "Neo" Anderson (a leather-clad Keanu Reeves) figures out how to undo it (*The Matrix* (1999) film directed by Andy and Larry Wachowski, USA, Warner Home Video).

[13] Schlag, n 1 above, 1051.

[14] Schlag, *ibid*, 1058-1060.

[15] Schlag, *ibid*, 1060-1061.

Of course, one consequence of this antiseptic aesthetic is that its proponents are seen, by some, to be aloof, cold, disinterested and uncaring. Their grid, although perhaps attractively simple, is seen as too rigid, inert and restraining, with misguided illusions as to its own self-importance – "a puff taking itself for stonework".[16] Grids break down. They exclude, separate, define, overlap and imprison; things fall through the gaps and the bigger picture is lost in the minutiae of sub-sub categorisation.[17] Yet, in spite of this, the aesthetic appeal of the grid continues to flourish:

> It is easy to deride the grid aesthetic, but whatever its failings or naiveté, it exhibits a certain aesthetic coherence ... One can make fun of the grid, but nonetheless it remains part of the ... formatting of the legal mind.[18]

That said, it lacks the dramatic appeal of the energy aesthetic, where amidst the collision and conflict of principle, policy, values and politics law, energised with transformative potential, is on the move.

[16] Schlag, *ibid*, 1062.

[17] See further, P Schlag 'Following the Letter of the Law' in *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 1-17.

[18] Schlag, n 1 above, 1069-1070.

Within the energy aesthetic, law is seen to be "On a Mission ... [it] has power; it's charged".[19] Surrounded by the excitement of seductive unbounded energy, the judge acts as an inhibitor or resistor. Far from aloof, he is necessarily involved, connected and embodied. Law's ongoing dynamic and stability is ultimately dependent upon his sensitivity and intelligence as, once again, it seems, who the judge is matters.[20] His role, infused with the chaos of the dynamic, is to balance the conflicting and contradictory forces, to find the equilibrium in the erratic and grubby. The only problem is that energy aesthetic is missing crucial architecture.[21] Without some sort of framework or grid it is unclear what needs to be balanced, the outcome becomes dependent purely on what the judge puts in the scales. As a result,

> [the] energy aesthetic is necessarily parasitic on some extrinsic structure (for example, the grid). Another way to put it is that there is no such thing as balancing in the air.[22]

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[19] Schlag, *ibid*, 1072.

[20] Schlag, *ibid*, 1073; On the importance of who the judge is see generally S Berns, *To Speak as a Judge – Difference, Voice and Power* (Dartmouth: Ashgate, 1999) *passim* and chapter 1, 'Undressing the Judge', 50-60, above.

[21] Schlag, *ibid*, 1075-1078.

[22] Schlag, *ibid*, 1076.

One, not entirely satisfactory, response to this is to deliberately combine the two aesthetics: to merge the energised grid and stabilised dynamic into a schizophrenic hybrid.[23] Although this is perhaps, in the short-term, aesthetically pleasing, in the long-term this compromise is unworkable, the tentative truce collapses as one aesthetic inevitably champions the other. As the dust settles, the energy aesthetic risks self-annihilation or depletion to be always on the move – always going somewhere – the hare to the grid's tortoise who continues slowly but surely, line by line, category by category, grid by grid to the finish – wherever that may be.

Schlag's grid and energy aesthetics have in their very nature (and indeed name) immediate distinct and related aesthetic appeal, the security and familiarity of the grid complementing the dynamic flow of the energy aesthetic. Their contrasting aesthetic appeal – the stability, predictability and uniformity of the grid aesthetic against the dynamism and colour of the energy aesthetic – captures the legal imagination, the "self-fulfilling truth" of each aesthetic effecting not only our apprehension of the present law, but also our ability to imagine its future.[24] The frame is set. Like the judge, we become bewitched by the aesthetic, caught in the ebb

[23] Schlag, *ibid*, 1075-1080. See, in particular, Schlag's discussion of the attempts by Hart and Dworkin to 'mediate this tension' by 'blurring the boundaries' of the grid or by 'yoking' energy to it (at 1078-1080).
[24] Schlag, *ibid*, 1107.

and flow of the energy aesthetic and rendered an impotent spectator by the grid, as he stands in the middle of this battlefield and begins to judge.[25]

**Obstruction Ahead**

> Vicarious liability is the creation of many judges who have had different ideas of its justification or social policy, or no idea at all. Some judges may have extended the rule more widely, or confined it more narrowly than its true rationale would allow; yet the rationale, if we can discover it, will remain valid so far as it extends.[26]

To date the 'true rationale' underpinning the imposition of vicarious liability in tort (if indeed one exists)[27] has remained elusive. Vicarious liability is, perhaps, best understood as having grown not from "any very clear, logical or legal principle but from social convenience and rough justice";[28] a rule which seems since its conception to have been "founded on public policy and

[25] Schlag, *ibid*, 1104-1108.

[26] G Williams 'Vicarious Liability and the Master's Indemnity' (1957) 20 MLR 220, 231.

[27] Doubted by Tony Weir *Tort Law* (Oxford: Oxford University Press, 2002) 96.

[28] Lord Pearce *Imperial Chemical Industries Ltd* v *Shatwell* [1965] AC 656, 685.

convenience".[29] As such, the imposition of vicarious liability is, in essence, a policy decision. It is a choice "as to who should bear the loss of the wrongdoing and how best to deter it",[30] located within an array of diverse, *ex post facto* rationales, which attempt to allay judicial discomfort and to justify the imposition of liability for the often intentional wrong of one party on an apparently fault-less other.

Understandably, when the intentional wrong involves child and/or sexual abuse, the assuaging effect of these theoretical explanations and eleventh-hour motivations becomes crucial. The contemplation even of the imposition of vicarious liability in such circumstances stands seemingly at odds with the belief that

> sexual abuse is a particularly offensive and criminal act of personal gratification on the part of its perpetrator and can therefore be easily described as the paradigm of those acts which an employee could not conceivably be employed to do.[31]

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[29] J Story *Agency* (London, 1839) in D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford University Press, 1999) 182.

[30] McLachlin J *Bazley* v *Curry* [1999] 2 SCR 534, para 26.

[31] Lord Hobhouse, *Lister*, n 2 above, 238.

The judges' feelings of unease stem from two conflicting sources – their disquiet at holding an apparently morally innocent party liable for the exceptionally unpleasant acts of another and their wish to allow a horribly wronged person redress.[32] In such situations, torn between their concern for both the abused and the employer, they can be seen to distance themselves from the policy aspects of their decisions by representing themselves as constrained or 'gridlocked', the outcome of each case unavoidably determined elsewhere. In so doing, they purport to eschew policy considerations in favour of the professed application of legal principle; their tenacious allegiance to the so-called Salmond test – simultaneously rigid enough to give the appearance of dictating their decision yet flexible enough to allow for necessary judicial manipulation – shields them from any negative association with the undesirable.[33] Nevertheless, before the illusion of the grid is activated, it is necessary to consider its energised nemesis in more detail.

John Fleming has identified two key policy concerns – the provision of a just and practical remedy for harm and the deterrence of future wrongdoing – that lie at the heart of vicarious liability.[34] The first, an understanding of vicarious liability as a

[32] Although, cf, Margaret Hall's challenge to the assumed moral innocence of employers particularly in the context of institutional child abuse in 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' (2000) 22(2) *J Soc Wel & Fam L* 159 and further n 133 below.

[33] On Salmond's test see below n 44 and surrounding text.

[34] J Fleming *The Law of Torts* (Sydney: LBC Information Services, 9th edn, 1998) 409 as discussed by McLachlin J in *Bazley* (n 30 above, para 26-36).

remedy for harm sustained as a result of the actions of another's employee, stems from the traditional view that an employer has some sort of control over their employees, akin to that of a keeper of animals or the occupier of premises.[35] This notion of the employer's responsibility and assumption of risk, is embedded in the belief that

> a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise.[36]

It also incorporates and enables another policy objective of vicarious liability: the effective compensation of those who are harmed through another's quest for profit. The ability of the victim to be able to recover from deeper pockets of the employer, from 'a purse worth opening',[37] is perhaps indicative of the fact that the "law is so concerned to see that the plaintiff gets his money that it does not worry overmuch about who pays it".[38] As such, vicarious liability might, like tort itself, be better seen as essentially a loss

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[35] Weir, n 27 above, 96.

[36] Fleming, n 34 above, 410.

[37] Williams, n 26 above, 232.

[38] P S Atiyah *The Damages Lottery* (Oxford: Hart Publishing, 1997) 78.

distributing or spreading device, through which "the cost of tort liabilities is spread very thinly over a substantial part of the public and a period of time".[39]

Similarly, employers are often in a position to reduce the likelihood of harm, including intentional wrongdoing, by their employees through, for example, imaginative supervision, effective organisation and efficient administration. In this way, it is hoped that the imposition of liability on non-negligent employers might encourage increased diligence in their attempts to prevent their employees' wrongdoing and, in so doing, facilitate what Fleming identifies as the second of his key policy concerns – the deterrence of future harm. This is of particular import in the context of institutional sexual abuse.

> If the scourge of sexual predation is to be stamped out, or at the very least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not ... be sufficiently supplied by the likelihood of

[39] See, e.g., Lord Millett, *Lister*, n 2 above, 243; P S Atiyah *Vicarious Liability* (London: Butterworths, 1967) in M Lunney & K Oliphant *Tort Law: Text and Materials* (Oxford: Oxford University Press, 2000) 676-677 and P Cane *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 6th edn, 1999) 85.

liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.[40]

Thus, whilst the failure to adopt innovative measures may not be negligent *per se*, if the employer is responsible not only for his own negligence but also vicariously for that of his employees he might be more willing to reduce the risk of future harm through effective and imaginative work-based strategies.

In this way, the policy concerns of fair compensation and deterrence can be seen to work together to exemplify, if not the 'true rationale' of vicarious liability, at least one that enables and facilitates the search for principle and in so doing ensures that on occasion the judge dispenses – albeit rough – justice.

*Salmond's Test*

In order to establish a claim of vicarious liability against an employer the claimant must show that the employee, under a contract of service, has committed a tortious wrong during the course of their employment.[41] Whilst the courts tend to approach vicarious

[40] Wilkinson J *Jacobi* v *Griffiths* [1995] BCJ No. 2370 (QL) British Columbia Supreme Court para 69 quoted by McLachlin J in dissent in *Jacobi* v *Griffiths* [1999] 2 SCR 570, para 6. See also B Feldthusen 'Vicarious Liability for Sexual Abuse' (2001) 9(3) *Tort Law Review* 173, 177.

liability in a rather impressionistic way,[42] for almost a century, they have relied upon a statement by the nineteenth century jurist, Sir John Salmond, as the applicable test to guide, frame and legitimate their decision.[43] As an anchor and decoy, the so-called Salmond test simultaneously secures the judges' return and covers the tracks of their expedition into the colourful and exotic aesthetic inhabited by the sirens of policy, principle and justice. In so doing, it offers a place of retreat and security, a hiding place from the unnerving and uncomfortable pressures associated with balancing apparent need against justifiable liability. Its grid-like familiarity and masculine authority is perhaps akin to a judicial comfort blanket.

Accordingly, Salmond states, a wrongful act falls within the course of employment if it is

> either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master.[44]

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[41] On vicarious liability generally see, further e.g., Lunney & Oliphant, n 39 above, 675-710 and B S Markesinis & S F Deakin *Tort Law* (Oxford: Clarendon Press, 4th edn, 1999) 532-558.

[42] Markesinis & Deakin, *ibid*, 547.

[43] On the historical development of the law of vicarious liability, pre-Salmond and, particularly, in relation to what falls within an employee's course of employment see Ibbetson, n 29 above, 69-70.

[44] J Salmond, *Law of Torts* (London: Steven & Haynes, 1st edn, 1907) 83 (and in the current edition by R F V Heuston & R A Buckley *Salmond & Heuston on the Law of Torts* (London: Sweet & Maxwell, 21st edn, 1996) 443) cited with approval by all the judges in the House of Lords (*Lister*, n 2 above, 223-224, 232,

Despite its longevity, Salmond's test is "not happily expressed".[45] It is at best deliberately obscure, at worst hopelessly convoluted; the need to establish an employee's intentional wrongdoing as a 'wrongful and unauthorised mode' or method of performing a previously authorised act is seen by Lord Millett in *Lister* as requiring the judge to "stretch language to breaking-point".[46] Nevertheless, these apparently requisite judicial linguistic acrobatics belie the inherent flexibility within the Salmond test. It seems its rigid and restrictive appearance shrouds an intrinsic pliability, evidenced in Salmond's often-overlooked clarification:

> A master ... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes – although improper modes – of doing them.[47]

So elucidated, the problematic and unhappy expression of unauthorised modes/conduct is eschewed in favour of a more general and explicitly malleable test of 'close connection'. The Salmond test has, if you like, a double identity; beneath its strict and inflexible exterior, overly concerned with semantics, lies the dynamism of unrestricted promise. As a result, Salmond's test

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241, 244). The first strand of his test (a) is relatively unproblematic, despite criticism relating to the extent to which it refers to the employer's direct or primary, rather than vicarious, liability. See, e.g., Lord Millett, *Lister*, n 2 above, 244; Markesinis & Deakin, n 41 above, n 544; Hopkins, n 2 above, 458.

[45] Lord Millett, *Lister*, *ibid*, 244.

[46] Lord Millett, *Lister*, *ibid*.

[47] Salmond, n 44 above, 83-84.

simultaneously limits and delimits the judge's actions, providing him with the security of freedom within constraints alongside the appearance, when necessary, of (un)willing inertia. Unsurprisingly, the effect of this judicial oscillation between constrained activism and restricted superheroism is reflected in the case law, which is "notable for one thing, its inconsistency very often with an immediately preceding case".[48]

**Judicial Gridlock**

The articulation of a definitive or universal criterion as to what is considered to be a wrongful or unauthorised act falling within the course of an employee's employment is perhaps unrealistic.

> It is probably not possible and it is certainly inadvisable to endeavour to lay down an exhaustive definition of what falls within the scope of employment. Each case must depend to a considerable extent on its particular facts.[49]

[48] Comyn J *Harrison* v *Michelin Tyre Co Ltd* [1985] 1 All ER 918, 920.

[49] Clyde LP *Kirby* v *National Coal Board* [1958] SC 514, 532.

The Salmond test is, it seems, somewhat easier to state that it is to apply.[50] With this in mind, Lord Clyde in *Lister* nevertheless identifies three aspects of previous applications of Salmond's test deserving of attention.[51] Each reveals a slightly different aspect of the judiciary's ability, should they wish, to manipulate the grid so as to come to what is, more often than not, a tacit policy decision in favour of a sympathetic plaintiff.

First, a broad approach should be adopted when considering whether the employee's action falls within the course of his employment. The employee's particular action is to be considered within the context or circumstances it took place. Thus, whilst an employee's lighting of a cigarette and throwing away the match would, in and of itself, seem to fall outside the scope of his employment, when placed within the context of transferring petrol from a lorry to a tank it becomes a negligent and connected act for which his employers are vicariously liable.[52]

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[50] Heuston & Buckley, n 44 above, 522.

[51] Lord Clyde, *Lister*, n 2 above, 234-237.

[52] *Century Insurance Co Ltd* v *Northern Ireland Road Transport Board* [1942] AC 509.

One consequence of this approach, once established, is that an employer might also be vicariously liable for the expressly prohibited action of an employee. A distinction is drawn between a prohibition that limits the sphere of employment and one that simply deals with conduct within it. Lord Justice Diplock in *Ilkiw* v *Samuels* suggests that

> the decision into which of these two classes the prohibition falls seems to me to involve first determining what would have been the sphere, scope, course (all these nouns are used) of the servant's employment if the prohibition had not been imposed. As each of these nouns implies, the matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer?[53]

For example, in *Williams* v *A & H Hemphill Ltd*,[54] the employers of a driver who, whilst on an explicitly prohibited and substantial detour, was involved in an accident for which he was at fault, were vicariously liable for his negligence. The presence of the passengers, the "transport" of which remained "the dominant purpose of the authorised journey", was enough to keep the employee's, albeit unauthorised, action within the scope of his employment and not a frolic of his own.[55]

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[53] [1963] 1 WLR 991, 1004.

[54] [1966] SC (HL) 31, HL (Sc).

[55] Lord Pearce, *Williams*, *ibid*, 46. Lord Pearce continued, "their transport and safety does not cease at a certain stage of the journey to be the master's business ... merely because the servant has for his own purposes chosen some route which is contrary to his instructions" (at 46).

Secondly, it seems that although the time and place of the employee's actions are always "relevant", they may not be "conclusive".[56] Whilst actions committed outside the hours of employment may well fall outside the sphere of employment, the fact that an act took place 'at work' may not be sufficient to establish vicarious liability. The employee's actions may be so unconnected to his employment as to be best considered "a frolic of his own".[57] Acts of passion and resentment or personal spite are unlikely to fall within the sphere of employment,[58] although, interestingly, physical violence may.[59]

Finally, it appears that there must be a sufficient connection, beyond providing the mere opportunity to commit the act, between the employee's wrongdoing and employment.

> 'Mere opportunity' to commit a tort, in the common 'but-for' understanding of that phrase, does not suffice ... When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability.[60]

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[56] Lord Clyde, *Lister*, n 2 above, 235.

[57] Parke B *Joel* v *Morison* (1834) 6 C & P 501, 503.

[58] See, e.g., *Deatons Pty Ltd* v *Flew* (1949) 79 CLR 370 and *Irving* v *Post Office* [1987] IRLR 289 respectively.

[59] See, e.g., *Dyer* v *Munday* [1895] 1 QBD 742; *Poland* v *John Parr & Sons* [1927] 1 KBD 236; *Daniels* v *Whetstone Entertainments* [1962] 2 Lloyd's Rep 1; *Vasey* v *Surrey Free Inns plc* (CA transcript 5 May 1995) although cf *Warren* v *Henlys Ltd* [1948] 2 All ER 935.

[60] McLachlin J, n 30 above, para 40.

Thus, in *Lloyd* v *Grace, Smith & Co,*[61] the employers of a managing clerk who defrauded a client by persuading her to transfer property to him and disposing of it to his own advantage were held vicariously liable, despite the fact the fraud was committed for his own and not, as was previously thought necessary, for the employer's benefit.[62] His position as the firm's representative had enabled his dishonest actions, thereby establishing a sufficient degree of connection. If, however, he had simply stolen from her handbag his employers would not have been liable – his employment would simply have provided the opportunity for his actions.[63] Similarly, in *Heasmans* v *Clarity Cleaning Co Ltd,*[64] the employer had merely provided the opportunity for the employee to misuse the telephones he was employed to clean and so was not considered vicariously liable – "the unauthorised use of a telephone cannot properly be regarded as the cleaning of it in an unauthorised manner".[65]

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[61] *Lloyd* v *Grace, Smith & Co* [1912] AC 716.

[62] The belief that a master must benefit from his servant's actions in order to determine vicarious liability established in *Cheshire* v *Bailey* ([1905] 1 KB 237) was derived from a misunderstanding of a remark by Willes J in *Barwick* v *English Joint Stock Bank* ((1867) LR 2 Ex 259, 265). Although exposed as a "heresy" in *Lloyd* v *Grace*, *Cheshire* (*ibid*) it was considered 'good' law until *Morris* v *C W Martin & Sons Ltd* ([1966] 1 QB 716), 50 years later. Despite this, Lord Millett in *Lister* (n 2 above, 246) believed "regrettable traces" of it appeared in the Court of Appeal decision *ST* v *North Yorkshire County Council (Trotman* v *North Yorkshire County Council)* [1999] IRLR 98, 102.

[63] Lord Millett, *Lister*, *ibid*, 246.

[64] [1987] IRLR 286

[65] Nourse LJ [1987] IRLR 286, 289. See also *Irving* v *Post Office* (n 58 above) and *Makanjuola* v *Commissioner of Police for the Metropolis* [1990] Admin LR 215.

Overall it seems Richard Townshend-Smith is, perhaps, correct in his conclusion that Salmond's test is "neither intellectually convincing nor effective as [a] predictor of outcome".[66] The employer can, it seems, do very little to avoid responsibility for the intentional wrongdoings of his employee, which somehow happen to fall within the somewhat arbitrary confines of Salmond's test.

> [It] is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.[67]

Indeed, recourse to precedent simply provides a rather arbitrary array of illustrations on either side of the line.[68] While throwing away a lit match, fraud and giving a child a lift on your milk float might fall within the course of an employee's employment,[69] running up a large unauthorised telephone bill, writing racially offensive messages on the back of envelopes, throwing a pint in a customer's face, sexual assault and the theft of a mink fur might not.[70] This capriciousness is perhaps most easily explained

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[66] R Townshend-Smith 'Vicarious Liability for Sexual (and other) Assaults' (2000) 8 *Tort Law Review* 108, 111.

[67] Lord Millett, *Lister*, n 2 above, 248.

[68] Salmond & Heuston, n 44 above, 522.

[69] *Century Insurance* (n 52 above); *Lloyd* (n 61 above); *Rose* v *Plenty* [1976] 1 WLR 141(on *Rose* see further n 109 below and surrounding text).

[70] *Heasmans* (n 64 above); *Irving* (n 58 above); *Deatons* (n 58 above); *Makanjuola* (n 65 above) and *Morris* (n 62 above).

through the understanding of the imposition of vicarious liability as essentially a policy decision concerned with the deepness of pockets, the distribution of loss and the deterrence of future harm. With this in mind, we might find solace rather than sorrow in the (albeit misperceived) degeneration of what

> was once presented as a legal principle ... into a rule of expediency, imperfectly defined, and changing its shape before our eyes under the impact of changing social and political conditions.[71]

## Unlocking the Grid

*Trotman* v *North Yorkshire County Council*[72]

The Court of Appeal in *Trotman* is a clear and pertinent example of the ability of a restricted understanding of the Salmond test to constrain the principled application of law; as such it is a germane illustration of Lord Millett's warning

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[71] Cooper LP *Kilboy* v *South Eastern Fire Area Joint Committee* [1952] SC 280, 285.

[72] n 62 above. The Court of Appeal's decision in *Trotman* preceded that of the House of Lords in *Lister*. As will become apparent, the facts of *Trotman* and *Lister* are very similar, both requiring the courts to consider the circumstances when an employer might be vicariously liable for the acts of sexual abuse by an employee.

> that in borderline situations, and especially in cases of intentional wrongdoing, recourse to a rigid and possibly inappropriate formula as a test of liability may lead the court to abandon the search for legal principle.[73]

The plaintiff in *Trotman*, who was mentally handicapped and epileptic following a head injury as a child, attended a special school in North Yorkshire run by the County Council. In May 1991, aged sixteen, he joined eight other pupils on a school trip to Spain. As he required overnight supervision, it was agreed that he would share a room with the deputy headmaster, by whom, two months after his return, Trotman claimed to have been sexually assaulted on several nights during the school trip. The deputy headmaster was subsequently convicted, following a police investigation, of seven counts of indecent assaults on teenage boys, not involving the plaintiff.

Trotman's sole claim was against the deputy headmaster's employers – the North Yorkshire County Council – who, he argued, were vicariously liable for the deputy headmaster's actions. Somewhat surprisingly there was no secondary claim in negligence against the council for a breach of its own duty of care toward him.[74] At first instance, Spittle J found for Trotman.

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[73] Lord Millett, *Lister*, n 2 above, 244.

[74] Indeed, both Butler-Sloss and Chadwick LJJ *Trotman* (n 62 above) indicate that this line of argument *might* have been successful (at 101 and 103 respectively). Nor, less surprisingly, was there a personal claim against the deputy headmaster himself.

> The acts of the deputy head were so connected with his authorised responsibilities that they can be regarded as modes, albeit improper modes, of performing his authorised duties.[75]

The defendants appealed.

In the Court of Appeal counsel for Trotman relied, *inter alia*, on the decision in *Morris* v *C W Martin & Sons Ltd*, in which an employee's theft of a mink fur he was charged with cleaning was seen to be a dishonest act falling within the course of his employment.

> If the master is under a duty to use due care to keep the goods safely and protect them from theft and depredation, he cannot get rid of his responsibility by delegating his duty to another. If he entrusts that duty to a servant, he is answerable for the way in which the servant conducts himself therein. No matter whether the servant be negligent, fraudulent or dishonest the master is liable.[76]

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[75] Spittle J quoted by Butler-Sloss LJ in *Trotman*, *ibid*, 99.

[76] Denning MR, *Morris* n 62 above, 725.

In the same way, counsel argued, the deputy headmaster's conduct was "a perverted form of his duty of care towards the child, a flagrant breach of duty in a flagrant way".[77] Butler-Sloss LJ rejected this argument. Distinguishing *Morris* as a minor offshoot of the law on vicarious liability restricted in its application to bailment cases,[78] she continued

> ... it is useful to stand back and ask: applying general principles, in which category in the *Salmond* test would one expect these facts to fall? A deputy headmaster of a special school, charged with the responsibility of caring for a handicapped teenager on a foreign holiday, sexually assaults him. Is that in principle an improper mode of carrying out an authorised act on behalf of his employer, the council, or an independent act outside the course of his employment? His position of caring for the plaintiff by sharing a bedroom with him gave him the opportunity to carry out the sexual assaults. But availing himself of that opportunity seems to me to be far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it is a negation of the duty of the council to look after children for whom it was responsible.[79]

Chadwick LJ agreed, finding it

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[77] Butler-Sloss LJ, *Trotman*, n 62 above, 101.

[78] Butler-Sloss LJ, *Trotman ibid*, relying on Denning MR's limited reasoning in *Morris* solely on the principles of bailment. Compare the approach of Diplock and Salmon LJJ, (*Morris* n 62 above at 736-7 and 738 respectively) grounded in the employee's conversion of the fur, adopted by the House of Lords in *Lister*, relying on the extremely brief and obiter comments in the judgments of Lords Wilberforce and Salmon in *Photo Production Ltd* v *Securicor Transport Ltd* ([1980] AC 827, 846 and 852 respectively) to defeat Denning's restrictive reasoning in *Morris*.

[79] Butler-Sloss LJ, *Trotman*, *ibid*.

impossible to hold that the commission of acts of indecent assault can be regard as a mode – albeit, an improper or unauthorised mode – of doing what ... the deputy headmaster was employed by the council to do ... Rather, it must be regarded as an independent act of self-indulgence or self-gratification.[80]

The reasoning of the Court of Appeal in *Trotman* has since been described as "rather restricted and technical".[81] Its terminologically narrow approach is seen to be overly concerned with semantics; the deputy headmaster's actions unnecessarily detached and abstracted from his duties toward Trotman and confined within a strict application of Salmond's test. In so doing, the Court of Appeal eschews the contextualised approach of the earlier case law in favour of the linguistic acrobatics surrounding the identification of unauthorised modes and conduct, ultimately failing to "confront the underlying policy of vicarious liability, preferring to reason that sexual abuse was closer to the store clerk's assault than to a solicitor's clerk's theft".[82]

Throughout the Court of Appeal judgments in *Trotman* it is clear that the judges are uncomfortable with what they believe they are being asked to do. This is perhaps understandable. Nevertheless, making difficult decisions is what we expect our judges to do: in *Trotman*, they arguably fail fully to tackle this. Instead they can be seen to retreat to the security and the aesthetic appeal

[80] Chadwick LJ, *Trotman*, *ibid*, 102.

[81] Lord Steyn, *Lister*, n 2 above, 228.

[82] McLachlin J *Bazley* n 30 above, para 23-24 referring to *Warren* v *Henlys Ltd* (n 59 above) and *Lloyd* (n 61 above).

of the grid, through a restricted application of Salmond's test, in order to justify and explain what has since come to be seen as unjustifiable and unexplainable.

*(1) L (2) B (3) L* v *Hesley Hall Ltd in the Court of Appeal*[83]

In 1997, three of the boys, including Lister, abused by Dennis Grain initiated personal injury proceedings against his employer, Hesley Hall Ltd. Their claim that the employers had been directly negligent in their care, selection and control of the housemaster failed at first instance and was not pursued further. Their alternative claim, that Hesley Hall Ltd was vicariously liable for their employee's torts, was more problematic. Whilst the relationship between Hesley Hall Ltd and Grain was clearly one where vicarious liability could arise, the extent to which the housemaster's actions fell within the course of his employment was less clear. Moreover, the recent Court of Appeal judgment in *Trotman* appeared to stand ominously in the way of success. Happily however, its application was neatly avoided by the innovative, albeit somewhat "artificial", reasoning of Judge Walker,[84] who held that

[83] *(1) L (2) B (3) L* v *Hesley Hall Ltd* 1999 WL 808994 (CA).

[84] Swinton Thomas LJ, *ibid.*

although Hesley Hall Ltd could not be considered vicariously liable for the housemaster's *acts* of sexual abuse, they were liable for his failure to *report* either his intention to abuse or its subsequent harm on the children.[85]

Hesley Hall Ltd successfully appealed. Despite the Court of Appeal's recognition that

> the principles underlying the doctrine of vicarious liability have always been somewhat elusive, and to an extent the law has proceeded on a pragmatic basis,[86]

the respondents' attempt to eschew the application of *Trotman* was unsurprisingly and unimaginatively rejected. The Court of Appeal refused to endorse the trial judge's 'manipulation' of the principles of vicarious liability,[87] relying on the interpretation of Salmond's test in the decisions of *Heasmans* v *Clarity Cleaning Co* and *Bell & Another* v *Lever Brothers Ltd and Others*.[88]

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[85] Swinton Thomas LJ, *ibid*. Although the House of Lords, on the facts of *Lister*, largely concurred with the Court of Appeal's interpretation of Walker J's reasoning, Lords Steyn and Hobhouse did not wish to exclude the possibility of this argument succeeding on different facts (*Lister*, n 2 above, 230, 262).

[86] Swinton Thomas LJ, *Lister*, n 83 above.

[87] Parker J, *Lister*, *ibid*.

[88] *Heasmans*, n 64 above and *Bell & Another* v *Lever Brothers Ltd & Others* [1932] AC 161, 228 in which it was held, *inter alia*, that whilst a servant owes his employer a duty not to steal, he does not have a superadded duty to confess that he has stolen.

> The simple point in this case is that if wrongful conduct is outside the course of employment, a failure to prevent or report that wrongful conduct cannot be within the scope of employment so as to make the employer vicariously liable for that failure when the employer was not vicariously liable for the conduct itself.[89]

The claimants appealed to the House of Lords.

*Bazley* v *Curry*[90]

Meanwhile, in the interim, the Canadian Supreme Court encountered two cases – *Bazley* v *Curry* and its companion case *Jacobi* v *Griffiths*[91] – with similar factual circumstances and corresponding difficulties in relation to both the application of Salmond's test and the underlying rationale of vicarious liability itself. Their opposing outcomes are perhaps reflective of the continuing and international judicial unease and discomfort with the issues at hand.[92] Yet, despite the ongoing disquiet among the judiciary as to

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[89] Waller LJ, *Lister*, n 83 above.

[90] *The Children's Foundation, the Superintendent of Family and Child services in the Province of British Columbia and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing* v *Patrick Allan Bazley* (indexed as *Bazley* v *Curry*) n 30 above. See generally P Cane 'Vicarious Liability for Sexual Abuse' (2000) 116 LQR 21.

[91] *Randal Craig Jacobi and Jody Marlane Saur* v *Boys' and Girls' Club of Veron and Harry Charles Griffiths* (indexed as *Jacobi* v *Griffiths*) n 40 above.

[92] Interestingly, *all* the Supreme Court justices in *Jacobi* adopted the innovative approach of McLachlin J in *Bazley* (n 30 above). On the facts, a bare majority held that the Club's 'enterprise' had not 'materially increased the risk of harm' occurring – the sexual abuse was only possible once the perpetrator, Griffiths,

the moral implications of the imposition of vicarious liability on an employer for the acts of sexual abuse by his employee within an institutional setting, the imaginative reasoning of McLachlin J in *Bazley* offers the possibility of an alternative approach. By explicitly engaging with the perceived policy objectives of vicarious liability claims, she deliberately and effectively eschews the linguistic awkwardness of the Salmond test, re-energising it as a test of 'close connection'.

Mr Curry was employed by the Children's Foundation, a non-profit organisation, to work in their Vancouver home, which cared for emotionally troubled children between the ages of six and twelve. Curry was to care for the children emotionally, physically and mentally; he was to do everything a parent would do, including intimate duties like bath and bedtimes. Unknown to the Foundation, Curry was a paedophile.

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had subverted the public nature of the Club's activities; although the Club *might* have provided the *opportunity* for the abuse, its activities were not sufficiently *connected* with it beyond a chain of 'but for' steps. L'Heureux-Dubé, McLachlin and Bastarache JJ in dissent, however, agreed with the evidence and findings of the trial judge, that the employment 'materially and significantly enhanced the risk' of the sexual assaults that occurred (McLachlin J, *Jacobi*, *ibid*, para 12-20). See further Bruce Feldthusen's criticism of the (in)ability of the courts to impose vicarious liability for sexual abuse and, *inter alia*, the decision in *Jacobi* (n 40 above).

> Into this environment … came … Patrick Bazley, young and emotionally vulnerable. Curry began a seduction. Over the months, step by subtle step, bathing became sexual exploration; tucking in in a darkened room became sexual abuse.[93]

In 1992, Curry was convicted of nineteen counts of sexual abuse, two of which related to Bazley, who subsequently sued the Foundation for compensation for the injuries he suffered while in their care. In 1998, his claim reached the Canadian Supreme Court.

McLachlin J begins her leading judgment with a consideration of Salmond's framework and, in particular, the ongoing difficulties surrounding the distinction between an unauthorised act – which does not – and an unauthorised mode – which does – ground a claim of vicarious liability. In response, she proposes that

> [the] second branch of the *Salmond* test may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.[94]

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[93] McLachlin J, *Bazley*, n 30 above, para 3.

[94] McLachlin J, *Bazley*, *ibid*, para 15.

As "precedent [more often than not] does not resolve the issue",[95] her second step, grounded in the belief that policy might provide "the best route to enduring principle", perhaps inevitably, assumes greater importance.[96] To this end, she suggests the courts "should openly confront the question of whether liability should lie against the employer rather than obscuring the decision beneath semantic discussions of 'scope of employment' and 'mode of conduct'".[97] In so doing, she argues that liability should only be imposed when there is a 'close connection' between the employee's employment and the harm.

> The test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee [has] materially increased the risk of the sexual assault and hence harm. [Moreover] the test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence.[98]

The sensitive, as opposed to mechanical, application of these principles enables the judge to embrace the dynamic of the energy aesthetic from within the security of a manipulated grid. In this way, the judge is able to represent his actions, *his* decision, as the application of a test – of close connection or otherwise – and as restrained by the framework within which he makes his decision.

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[95] McLachlin J, *Bazley*, *ibid*, para 25.

[96] McLachlin J, *Bazley*, *ibid*, para 27.

[97] McLachlin J, *Bazley*, *ibid*, para 41.

[98] McLachlin J, *Bazley*, *ibid*, para 46. Nor should non-profit organisations be exempt from this (*Bazley*, *ibid*, para 47-56).

*His* decision becomes *the* decision according to the dictates of the law or grid, the right answer. The 'constrained activist' is represented as Hercules, when in fact

> [e]ach judge must look at the facts and decide personally whether or not they satisfy the close connection test. Once this has been done, all that remains for the judge is to provide an interpretation of the facts which justifies the preferred conclusion in terms of the relevant legal principles. Whether you or I agree with the conclusion is neither here nor there, because the job of the judge is precisely to reach his or her *own* conclusion.[99]

In this way, McLachlin J can be seen to have encapsulated and harnessed the spirit of Salmond's test; enabling the judge to keep his distance from both his 'subversive moment' and his ongoing discomfort about the decision he is about to make, shrouding his ultimate decision with the requisite authority.[100] As such it is, as Peter Cane suggests, a "genuine advance on the unauthorised conduct/unauthorised mode distinction".[101] The grid is transformed; sustained and infused with dynamic energy yet retaining its aesthetic appeal and continuing to capture the imaginations of both the judge and her audience. However, unlike her colleagues overseas, McLachlin J is not caught within or constrained by the law. She is able to think outside its boundaries; she is, perhaps,

[99] Cane, n 90 above, 23. On the 'constrained activist' judge see Kennedy, n 7 above, 182-184 and chapter 1, 42-44, above.

[100] On the subversive moment see Berns, n 20 above, 51-53 and also chapter 4, 'Subversive Patchwork', 161-237 above.

[101] Cane, n 90 above, 24.

grid-located, rather than gridlocked. That said, it remains to be seen whether she has in fact breathed new life into the Salmond test – or compromised it utterly.

*Lister* v *Hesley Hall Ltd in the House of Lords*

By the time Lister's story reached the House of Lords in March 2001, it seemed that the adjudicative landscape in relation to the law on vicarious liability was on the cusp of dramatic change.

> The facts in *Lister* shouted vicarious liability so loudly the outcome was obvious the moment the Lords freed themselves from the wooden reading of the Salmond test.[102]

It appears that it was not so much a question of *if*, but rather *how*, Lister's claim would succeed and, in particular, the extent to which the House of Lords would follow the Canadian Supreme Court's lead. However, despite the impending air of inevitability, confirmed in their effective transformation of the adjudicative landscape, the judgments themselves appear relatively mundane.

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[102] Feldthusen, n 40 above, 177.

> Beyond the result in *Lister*, there is nothing else in the speeches of much interest. The reasoning consists largely of case review and parsing, artfully done but unenlightening.[103]

Their effect, Bruce Feldthusen implies, is more remarkable than their form. Possibly. Or, perhaps once again appearances are deceptive – the uninspiring guise of the House of Lords' judgments, a ruse to hide their strategic deployment of the dynamic; a shroud, perhaps, for what is, in fact, the Canadian-influenced transformation of the grid without the explicit adoption of the allied policy considerations. Either way, it seems opportune to review the 'evidence', so as to enable a later exploration of the judgments' possibly hidden depths.[104]

In his leading judgment Lord Steyn is without doubt "greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court".[105] Motivated by his wish to deliver "principled but practical justice",[106] he seeks to establish Salmond's statement as "at the most ... a broad ... [or] practical test serving as a dividing line between cases where it is or is not just to

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[103] Feldthusen, *ibid*, 173.

[104] See further n 126 ff and surrounding text.

[105] Lord Steyn, *Lister*, n 2 above, 230. Lord Hutton concurring at 238.

[106] Lord Steyn, *Lister*, *ibid*, 24.

impose vicarious liability".[107] As such its "usefulness" is dependent upon the identification by the judge of the "right" act of the employee and subject to curtailment in the "pitfalls of terminology".[108] To illustrate this he relies on the decision of the Court of Appeal in *Rose* v *Plenty*, in which the employers of a milkman were held vicariously liable for the physical injuries of a child hurt while helping the milkman on his rounds in express contradiction of their orders. Adopting a broad interpretation of the milkman's job, Lord Scarman held that although the milkman was clearly not employed to – and in fact was expressly prohibited from – giving the child a lift, he was nevertheless still acting in the course of employment, his actions an unauthorised mode of doing an authorised act.[109]

So viewed, Lord Steyn suggests Grain's acts of sexual abuse were "inextricably interwoven" with and fell clearly within the scope of his employment.[110]

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[107] Lord Steyn, *Lister*, *ibid*, 226.

[108] Lord Steyn, *Lister*, *ibid*, 226.

[109] n 69 above, 147-148. Although cf *Twine* v *Bean's Express Ltd* (1946) 175 LT 131 (not discussed in *Lister*).

[110] Lord Steyn, *Lister*, n 2 above 230.

> It becomes possible to consider the question of vicarious liability on the basis that the employer undertook to care for the boys through the services of the warden [house master] and that there is a very close connection between the torts of the warden and his employment. After all, they were committed in the time and on the premises of the employers while the warden was also busy caring for the children.[111]

Similarly, Lord Millett suggests that Salmond's test should be seen not as a statement of circumstances in which liability may or may not arise, but rather as a "guide to the principled application of law to diverse factual situations".[112] Vicarious liability may therefore be imposed

> where the unauthorised acts of an employee are so connected with acts which the employer has authorised that they may properly regarded as being within the scope of his employment ... [thereby according] with the underlying rationale of the doctrine ... without straining the language to accommodate cases of intentional wrongdoing.[113]

Of all the law lords, Lord Clyde came the closest to acknowledging the hindering impact of the array of rationales, policies and doctrines underlying the law imposing vicarious liability, and their restriction of a principled and coherent judicial response.

[111] Lord Steyn, *Lister*, *ibid*, 227.

[112] Lord Millett, *Lister*, *ibid*, 245.

[113] Lord Millett, *Lister*, *ibid*. See also Lord Clyde, *Lister*, *ibid*, 232.

> I am not persuaded that there is any reason of principle or policy which can be of substantial guidance in the resolution of the problem of applying the rule in any particular case. Theory may well justify the existence of the concept, but it is hard to find guidance [in relation to a particular case] from any underlying principle.[114]

As a result he adopts a relatively unconstrained approach to decision-making, enabling him to infuse his application of Salmond's test with a contextual understanding of the imposition of vicarious liability, in which "the particular acts [Grain] carried out on the boys [are] viewed not in isolation but in the context and circumstances in which they occurred".[115] This can be contrasted with the Herculean approach of Lord Hobhouse who eschews the dynamic decision-making of the other law lords. He argues that the exposition of a rule's underlying policy objectives is not enough:

> Legal rules have to have a greater degree of clarity and definition than is provided by simply explaining the reasons for the existence of the rule and the social need for it, instructive though that may be.[116]

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[114] Lord Clyde, *Lister*, *ibid*.

[115] Lord Clyde, *Lister*, *ibid*, 237.

[116] Lord Hobhouse, *Lister*, *ibid*, 242.

Instead, he grounds the imposition of vicarious liability in a more deliberately logical and restrictive formulation of Salmond's test, in which the existence of an employer's liability depends upon the identification of the particular duty the employee was employed to do and the extent to which the employee's act amounted to a breach of this duty.[117]

All in all, it seems the law lords in *Lister* were keen to align their judgments alongside a revised understanding of Salmond's test, distancing themselves from its previous limited and somewhat maligned interpretations. Their purpose is clear. It is to utilise the appeal of the aesthetic by cloaking their acts of boundary breaking with the legitimacy of Salmond's test whilst tacitly energising it; ensuring the appearance of judicial gridlock, as they speed down the open road of subversive (policy) decision-making.[118]

## The judge, a White Canvas and Vicarious Liability

> *Marc*: Imagine a canvas about five foot by four ... with a white background ... completely white in fact ... with fine white diagonal stripes ... you know ... and maybe another horizontal white line, towards the bottom ...

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[117] Lord Hobhouse, *Lister*, *ibid*, 241-242.

[118] On the subsequent developments of the law on vicarious liability, for example, the application of *Lister* in *Mattiss* v *Pollock* [2002] EWHC 2177 and *Weir* v *Bettison* [2003] All ER (D) 273, see Mike Griffiths 'Vicarious Liability Revisited' (9 May 2003) NLJ 721.

*Yvan*: How can you see them?

Marc: What?

*Yvan*: These white lines. If the background's white, how can you see the lines?

*Marc*: You just do. Because I suppose the lines are slightly grey, or vice versa, or anyway there are degrees of white! There's more than one kind of white![119]

In his designation of the grid, energy, perspectivist and dissociative aesthetics, Schlag seeks to ascertain the images, forms, perceptions, sensibilities and sensations that shape, enact and identify all human interaction and specifically the law.[120] In so doing, he reveals the extent to which this is effected by aesthetics, operating through us and often automatically or unconsciously impacting upon what we see. As they choose, enact, and direct us, these aesthetics shape not only our thoughts, but also our everyday encounters.[121] In this way, the responses of his readers, like those looking at the white canvas described above, are shaped according to their aesthetic preference. They will see and react to different things. Whilst its classic law review outline layout might appeal to the grid-lover, its emphasis on the movement and relationship between each aesthetic will perhaps tempt a

[119] Reza, n 5 above, 7.

[120] Schlag, n 1 above, 1050-1051.

[121] Schlag, *ibid*, 1053.

reader more in tune with her energy aesthetic. The perspectivist might respond that each aesthetic is but one particular way of seeing, whilst the dissociative reader is most likely to remark on the impossibility of the project the article attempts to invoke.[122]

> [Moreover] though each reading provides a unique angle on this work, each one in isolation is necessarily incomplete and skewed. While it is true, of course, that any of these aesthetics can be ruthlessly deployed to subordinate all the others, this subordination is contingent. (It works until it doesn't).[123]

Each view is simply one of any number; the white canvas at once a picture of solitary man skiing as the snow is falling, an illustration of the many shades of white, and a monochrome canvas. It is not possible to establish one interpretation as correct, or indeed any better than another, for the criteria against which each is judged is inevitably infused with the same, or a possibly conflicting aesthetic. Stalemate seems inevitable, until "one aesthetic ... subordinate[s], envelop[s], disrupt[s], abstract[s], [or] otherwise verb[s] another".[124]

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[122] Schlag, *ibid*, 1100-1101.

[123] Schlag, *ibid*, 1101.

[124] Schlag, *ibid*, 1102.

Nevertheless, the point is this; once the appealing characteristics and insights of each aesthetic are identified they can be used, not only to begin conversations, but also as tactically deployed rhetoric. That is, once the law is understood as aesthetic creation, this can be used to strategic effect. Yet again appearances are everything. If judgment is to persuade, the judge must utilise his aesthetic advantage so as to ensure that as many of his audience as possible are, in Schlag's words, "taken in by the aesthetics of law".[125] In this way, the judgments of the Court of Appeal in *Trotman* and *Lister*, the Canadian Supreme Court, the trial judges at Darlington and Dewsbury County Courts and the House of Lords can be seen as a battle not only between the grid and energy aesthetics, but also for the hearts and minds of their audiences.

So viewed, the judgment of Butler-Sloss LJ in *Trotman* can be seen as gridlocked. Although she would like to help – and would if she could – sadly she can't; her hands are tied.

> In coming to [my] conclusion, I am very much aware of the serious consequences to the plaintiff and to his mother from the events in Spain and I am very sorry that they will be unable to receive financial redress for the results of those actions. It is a very sad case but, on the basis of the case set out in the pleadings which is the only issue before this court, the blame for these events cannot be laid at the door of the council.[126]

[125] Schlag, *ibid*, 1112.

[126] Butler-Sloss LJ, *Trotman*, n 62 above, 101.

Her actions are constrained by both the law and the pleadings; there is very little – or, more specifically, nothing – she can do. The antiseptic law shields her from the fallout of her decision, as the stability and security of the grid soothes her uncomfortable and uneasy choice between two essentially innocent parties.[127]

Likewise, the Court of Appeal in *Lister* refused to "manipulate the principles applicable to vicarious liability" so as to come to perhaps a more immediately appealing decision.[128] Instead they illustrate their "ideal grid judge" credentials by opting to police the boundaries of the aesthetically appealing grid.[129] Their judgments invoke and evoke the grid. Its boundaries are clearly defined. The question is framed: is it possible to distort the principles of vicarious liability so that an employer who is not vicariously liable for their employee's actual wrongdoing, may nonetheless be liable for his failure to prevent or report them? Apparently not.

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[127] If, as Sandra Berns suggests, who the judge is really does matter (n 20 above, 8) then it must then matter that the judge here is Elizabeth Butler-Sloss. It does; it matters not that she is a woman, but that she is a *woman judge*. Her deliberate, and, to some, unconscionable, allegiance to the grid perhaps reflects her fear of non-conformity or an awareness of her irritant potential. Her lack of imagination evidences here a cautionary tale for feminist legal scholars still searching for the little mermaid's lost siren call.

[128] Parker J, *Lister*, n 83 above.

[129] Schlag, n 1 above, 1111.

> If it is right, as was found in ST's case [*Trotman*], that the employer cannot be made liable for the acts of indecent assault because they are outside the course of employment, so likewise, it seems to me, it must in reality inevitably follow that the grooming, the failure to desist and the failure to report are also independent acts outside the course of employment for which the employer cannot be held vicarious responsible.[130]

The innovative ending of Judge Harry Walker sitting in Dewsbury County Court to Lister's story is rejected. It does not fit within the grid, or perhaps it simply falls through its gaps.

Like most rhetoric, the grid aesthetic works until it doesn't. Ultimately, it breaks down. The grid's aesthetic advantage is lost. The impact of its somewhat narrow and restrictive reasoning, overly concerned with semantics at the cost of the underlying policy issues, is encapsulated in the imposition of vicarious liability

> in respect of the security of a mink fur handed to the employee of a fur cleaner or a parcel of diamonds handed to the Post Office, but not in respect of the security and integrity of children in pastoral care.[131]

When diamonds and furs are more adequately protected than children, something (the grid, perhaps) has to give.

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[130] Swinton Thomas LJ, *Lister*, n 83 above.

[131] R Maxwell QC & R Coe for the appellants, *Lister* n 2 above, 217 referring to *Morris* n 62 above and *R* v *Levy Bros* (1961) 26 DLR (2d) 760.

And subsequently – in *Bazley* – it did. McLachlin J sitting in the Canadian Supreme Court clearly feels distinctly uncomfortable within the confines of the grid aesthetic. Faced once again with the empty choice between holding an innocent party responsible for another's wrongdoing and denying a horribly wronged individual redress, she breaks free. Frustrated by the limitations and hypocrisy of the grid, she throws it off in favour of the dynamic energy aesthetic where "things are happening: "Law is on the march ... Reform is on the way. The kettle is boiling".[132] Principle through policy is prioritised over linguistic acrobatics and inconclusive precedent, as she seeks to balance conflicting considerations ensuring fair compensation for Patrick Bazley and the deterrence of future harm.

In her transformative approach to vicarious liability McLachlin J recognises the sad reality whereby some systems of institutional care giving not only as "honeypots" for rogue paedophiles, bullies and predators, but also as "crucibles".[133]

> Because of the peculiar exercises of power and trust that pervade such cases as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.[134]

[132] Schlag, n 1 above, 1071-1072.

[133] Hall, n 32 above, 159.

[134] McLachlin J, n 30 above, para 46.

Her focus shifts, moving beyond the deranged and cruel acts of the individual to the responsibility of the institution that created the risk, so as to enable liability to be imposed on an employer who has materially increased or enhanced the risk of wrongdoing.[135] Her contextual and connected approach allows institutional sexual abuse to be seen for what it is: a collective, as well as an individual, wrong, an "institutional abuse *syndrome* rather than discrete and unconnected – if similar – crimes".[136] Her recognition that institutions can act as "crucibles of abuse", enables a paradigm shift in conceptions of institutional sexual abuse.[137] What was once seen as an individual 'accident', an uncontrollable (un)natural disaster – where the paedophile is akin to a bee drawn to a honeypot – is seen instead, like other man-made disasters, as preventable, once the nature of the risk is adequately perceived.[138]

Nevertheless, despite her energetic approach, McLachlin J retains some vestiges of the grid, by locating the origins of her energised test of close connection in Sir John Salmond's original statement on vicarious liability. In order for her decision in *Bazley*

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[135] McLachlin J, *ibid*, 41-46. On the application of a 'material increase of risk' approach in the context of causation in the UK see further the recent House of Lords decision in *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305, discussed by C Fenny, P Laleng & D Cooper in 'Mesothelioma, Asbestos and Causation' (2003) JPIL 1.

[136] Hall, n 32 above, 161.

[137] Hall, *ibid*, 171.

[138] Hall, *ibid*. See further on the economic implications of this risk-based approach R Weber '"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by their Employees' (1992) 76 *Minn L Rev* 1513.

to persuade, it cannot be seen as 'her' decision. The fairytale must be maintained. It seems Schlag is right; however much we mock or disparage the grid it is difficult to let it go. The grid retains its aesthetic appeal; we remain "hungry [grid-dependent] ghosts", the unwitting victims of Stockholm syndrome, caught within the paradox of denial.[139] Moreover, Schlag is also correct in his observation that "it is hard to be taken in by an aesthetic when someone throws it in your face".[140] The aesthetic is most attractive when you don't know it is there. McLachlin J's explicit, almost blatant, strategic deployment of the aesthetic in *Bazley* threatens to expose the illusion; to reveal the gridlocked judges as not only caught in a grid of their own making, but by their own choice.

Unsurprisingly, the House of Lords in *Lister* appear slightly more reticent. They purport to evoke and invoke the grid as opposed to the energy aesthetic – supposedly embarking along a different road to the Canadian Supreme Court, albeit one which nevertheless arrives at the same conclusion – with, it seems, some success.[141] Rachel Crasnow, for example, sees their adoption of McLachlin J's energised test of close connection as simply the confirmation of the "correct", Convention-compatible,

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[139] Schlag, n 17 above, 126. 'Stockholm Syndrome' is the name given to the condition where people (usually hostages) form an emotional attachment to the very people who threaten their lives as a means by which to endure their violence. On the 'paradox of denial' see Kennedy, n 7 above, esp ch 8 and chapter 1, 47-49, above.

[140] Schlag, n 1 above, 1111.

[141] Feldthusen, n 40 above, 178.

interpretation of Salmond's test and not the extension of liability into a new area.[142] Like the Court of Appeal in *Trotman*, the House of Lords appears gridlocked – the only difference being the direction in which they are heading.

Nevertheless, their retreat to the grid, in response to the energy of McLachlin J, is not without difficulties. Indeed, Paula Giliker suggests

> [b]y importing the Canadian test of 'close connection' without its policy justifications, the House of Lords achieves a 'just' result for the victim, but at the expense of uncertainty.[143]

Their pragmatic approach, albeit intently focused on the needs of 'practical justice', misses the opportunity to establish a clear rationale and structured underpinning to the imposition of vicarious liability and, perhaps more worryingly, fails to distinguish clearly between the employer's primary and vicarious liability.[144] Moreover, their failure to incorporate McLachlin J's focus on the extent to which the employer had materially increased the risk alongside their test of close connection, ultimately ensures that "imposing

[142] R Crasnow 'Case Reports – Vicarious Liability' (2001) 2 *Edu LJ* 158.

[143] P Giliker 'Rough Justice in an Unjust World' (2002) 65 MLR 269, 279.

[144] Giliker, *ibid*, 272, 275.

vicarious liability for sexual abuse remains far more difficult than it ought to be".[145] As such the judges in the House of Lords in *Lister* are playing with fire, seemingly unaware of the implications of their ongoing relationship and necessary fixation with the grid and increasing infatuation with the dynamic of the energy aesthetic.

Nevertheless, perhaps their invocation and evoking of the grid aesthetic says more about us than it does about the judge. In short, we prefer our judges to appear gridlocked, rather than energised and always on the move, even if this means believing in deceptive appearances. It is, perhaps, far more in keeping with the Herculean judge of our imagination to think of him calmly policing the boundaries of his grid, rather than dashing around on some sort of mission. My point is this: whilst this image of the judge remains, if you like, a creature of our imagination, his status as fiction does not prevent him from having aesthetic effects. The judge of our imagination – Hercules – is as much an aesthetic image as it is political, or fictional. Appearances, even deceptive ones, are essential. The judge, it seems, is at his most persuasive when he is willingly caught within his energised grid – for then we might not recognise the aesthetic at all.

[145] Feldthusen, n 40 above, 173; See also Giliker, *ibid*, 277-278.

And the judge knows this. He knows that, like him, we are bewitched by the aesthetic and that its spell, like all magic, is most persuasive when it goes unnoticed, when the aesthetic forms part of what we take for granted. Hence our discomfort when the aesthetic is thrown in our face, when its subtly forsaken for performance. In his strategic deployment of the grid, the judge seeks to utilise its persuasive effects. He manipulates the enchantment of the aesthetic, persuading us to deny what we see in order to believe, albeit whilst not believing, in our imaginative creation. If, as Schlag suggests, law is indeed an aesthetic creation then so too, it seems, is the judge who inhabits the legal imagination. As with the white canvas, the point is not *what* you see, but that you see – that you look for the aesthetic whilst recognising that it is at its most effective when it is hidden, operating on and through us both with and without our knowledge. In fact, perhaps what Schlag's identification of the grid, energy, perspectivist and dissociative aesthetics in law reveals is a space in which a seer can not only see the obvious, but also the potential in circumstances, the significance of the invisible, and "the solitary man glid[ing] downhill on his skis ... who moves across a space and disappears".[146]

[146] Reza, n 5 above, 63.

## Conclusion

This chapter has considered the effect of the aesthetic – understood, in accordance with Schlag, as sensation or perception – on the judge and judicial decision-making in the context of the imposition of vicarious liability for sexual abuse. It suggests that the House of Lords in *Lister* can be seen to have adopted a somewhat dubious compromise between the Herculean requirement to apply the established law on vicarious liability on the one hand and their, perhaps equally heroic, wish to respond to and assist a tragically wronged individual on the other. The law lords' desire to retain the appearance of the grid aesthetic, whilst at the same time infusing it with the energy-orientated framework of the Canadian update of Salmond's test, appearing to some, at best misguided, and at worst, futile. Their invocation of McLachlin J's test of close connection, devoid of its policy foundations, appears in danger of becoming a Trojan horse within the law on vicarious liability.

Nevertheless, whilst the development of the law on the imposition of vicarious liability for sexual abuse in *Lister* might ultimately prove to be unstable and ineffective, importantly what an exploration of the case law has revealed is the role of the aesthetic in both framing and legitimating judicial decision-making. It has exposed the strategic deployment of the aesthetic by the judge in order to strengthen the persuasive e/affect of his judgment on not only his audience, but also on the judge himself. So

viewed, the evocation of the grid aesthetic enables some judges to distance their 'hungry' selves from the impact of their sanitised and antiseptic restraint on the judged, whilst allowing others to distract the attention of their audience from the satiated glow of their self, spent by interaction with the dynamic allure of the sirens of energy, policy and change. Thus, as the appeal of the aesthetic is e/invoked to simultaneously reinforce and undermine adjudicative fairy tales, once again nothing is as it seems: appearances remain at once deceptive and everything.

# Chapter 6

## JUDGING CONNECTION – TOWARD A CONCLUSION

### Introduction

> *If you can learn a simple trick, Scout, you'll get along better with all kinds of folk. You never really understand a person until you consider things from his point of view ... until you climb into his skin and walk around in it.*[1]

It should by now be apparent that traditional accounts of adjudication don't tell the whole story. There is much more going on when judges judge. The Herculean judge who inhabits the legal imagination is simultaneously recognised and denied as Hans Andersen's vain and naked Emperor. Yet although he is dismissed as a myth, he continues to have operative effects. His fictional status enhances his power as an aspiration; his allure is as much aesthetic as it is political. As a result, the woman lawyer, like the little mermaid, must sell her voice to enter his empire. Although the search by feminist legal scholars for Portia's different voice has largely been called off, their strategic undressing of the judge has, perhaps unintentionally, provided a window on to current and future alternative adjudicative landscapes and judicial strategies. They reveal the judge, particularly in situations of intimacy, as a storyteller seeking to persuade his audience with narrative, and responding to his subversive moment whilst framing his tale in accordance with the necessary aesthetic. Increasingly, the Herculean judge is seen to be

[1] H Lee *To Kill a Mockingbird* (J B Lippincott Co, 1960, London: Arrow Books edn, 1997) 33.

not only unattainable but also undesirable – the detached, disembodied, impassive superhero has had his day. Thus, in this final chapter, Oscar Wilde's fairy tale, *The Happy Prince*, and the story of two sisters, Jodie and Mary Attard, combine to provide a pertinent starting point from which to explore feminist critiques of adjudication and, in particular, their emphasis on the importance of an empathetic, caring, and connected judge – a re-imagined Hercules.

**One Last Fairy Tale**

Once upon a time behind high castle walls, surrounded by beauty and pleasure lived a Prince called, by those who knew him, the 'Happy Prince'. When he died a beautiful golden statue of him, with bright blue sapphires for eyes and a large red ruby in the hilt of his sword, was placed high above the city. Children believed him to be an angel, parents a paragon:

> "Why can't you be like the Happy Prince?" asked a sensible mother of her little boy who was crying for the moon. "The Happy Prince never dreams of crying for anything".[2]

One winter's night a swallow, on his way to meet his friends in Egypt, came to rest beneath the statue. Just as he was about to fall asleep a large drop of water hit him. He looked up at the clear sky bewildered by the Northern European climate and as he did so it happened again, and again. As he

[2] O Wilde 'The Happy Prince' in I Small (ed) *Oscar Wilde: Complete Short Fiction* (London: Penguin, 1994) 3, 3.

prepared to fly away he saw that the Happy Prince's eyes were filled with tears: the statue was crying.

> "Who are you?" he said
>
> "I am the Happy Prince"
>
> "Why are you weeping then?" asked the Swallow; "you have quite drenched me".[3]

It transpired that from his position high above the city the Happy Prince was able to see the pain and misery of the people below, obscured during his lifetime by his castle's walls. His previous illusions and ignorance had been shattered; he could now see too much to be happy. Unable to move, for his feet were fastened to a pedestal, he asked the reluctant swallow to take the ruby from his sword's hilt and give it to an overworked seamstress, whose feverish child lay restless in the corner of her room. This continued during the next few nights; the swallow gave the Happy Prince's sapphire eyes to a frozen playwright and a barefooted match girl who was too scared to go home, and the gold leaf that covered him to the beggars sitting at the gates of beautiful houses. The Happy Prince was now completely blind and "looked quite dull and grey".[4] After this the swallow promised to stay with the Happy Prince forever. The snow came and then the frost and still the swallow did not leave his Prince. He became colder and colder until one day he flew up onto the prince's shoulder to say one last goodbye; he kissed the Happy Prince on the lips and fell dead at his feet. At that moment, it is said that a strange crack came from within the statue as the Happy Prince's heart broke in two.

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[3] Wilde, *ibid*, 5.

[4] Wilde, *ibid*, 10.

Of course the Mayor and town councillors knew nothing of all this. As they walked by the following morning they looked up and remarked on the Happy Prince's shabby appearance: "he is little better than a beggar!" ... "And here is actually a dead bird at his feet! ... We must really issue a proclamation that birds are not to be allowed to die here".[5] It was agreed that the statue of the Happy Prince should be pulled down and the metal reused for a new statue – for as the Art Professor at the University said, "[a]s he is no longer beautiful he is no longer useful".[6] Meanwhile, as the Town Councillors continued to argue as to which of them should replace the Happy Prince, God asked one of his angels to bring him the two most precious things in the city; the angel returned to heaven with the Happy Prince's broken heart and the lifeless body of the swallow.

In her introduction to Wilde's tale, Isobel Murray writes that, through the relationship between the Happy Prince, the swallow and the city below, "love and sacrifice come to be seen as saving forces".[7] The golden statue, the smitten swallow, the little match girl, the hard-working seamstress and her feverish son, the student playwright are all presented as intimately connected; their histories, present and futures are intertwined. From his position high above the city the Happy Prince 'sees' and feels the pain of the people below. His vision no longer restricted by his castle walls and selfish happiness, he is able to recognise the connection between himself and his subjects and to

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[5] Wilde, *ibid*, 11.

[6] Wilde, *ibid*.

[7] I Murray (ed) 'Introduction' to *Oscar Wilde: Complete Shorter Fiction* (Oxford: Oxford University Press, 1979) 1, 11.

identify with them in a way he was unwilling or unable to do when he was alive. In response he literally gives himself away. Bit by bit he sheds his wealth and beauty – first, the large red ruby, then the brilliant sapphires, and, finally, the gold leaf – as his devoted swallow forsakes his future to enable and ensure that these bonds are maintained.

Sadly, although perhaps unsurprisingly, the Happy Prince's internal beauty is no longer reflected in his external appearance: the more he gives away, the more ugly he becomes. Moreover, whilst the Happy Prince and swallow might find their reward in heaven, on earth their sacrifices pass unnoticed – his eyes are mistaken by the playwright as a gift of appreciation and by the little match-girl as "a lovely bit of glass"; the feverish child falls unaware into a "delicious slumber", cooled by the breeze created by the swallow's wings.[8] However, the effect of the Happy Prince's actions on his appearance is not overlooked; a shabby Prince is, it seems, 'no longer useful'. He must be beautiful. His aesthetic appeal has a practical value and significance, admonishing the unhappy and feeding the imagination of the thoughtful or despondent.[9] However, an empty plinth is just as disconcerting: He must be replaced.

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[8] Wilde, n 2 above, 8, 9, 6.

[9] Wilde is here referring pointedly to the contemporary debate concerning the relationship between art and utility within the Victorian aesthetic movement; in contrast to William Morris, who believed beauty should embrace utility, Wilde thought "all art [to be] quite useless" (Small, n 2 above, 268). See further, C Cruse 'Versions of the Annunciation: Wilde's Aestheticism and the Message of Beauty' in E Prettlejohn (ed) *After the Pre-Raphaelites: Art and Aestheticism in Victorian England* (Manchester: Manchester University Press, 1999) 167.

> "We must have another statue, of course [said the Mayor] ... and it shall be a statue of myself" "Of myself", said each of the Town Councillors, and they quarrelled. When I last heard of them they were quarrelling still.[10]

As Wilde deliberately contrasts the Town Councillors' infatuation with superficial appearances with the sacrifice of the Happy Prince and the swallow, the vanity and ignorance of the Town Councillors is exposed and ridiculed by the intensity of the relationship between a statue, a swallow and the inhabitants of the city below. The Town Councillors were so fixated with the bejewelled image of the Happy Prince they were unable to see beyond it, their aesthetic understanding of what he ought to look like ultimately prevents them from recognising his continuing – albeit less ostentatious – beauty. In this way, Wilde's exploration in *The Happy Prince* of deceptive appearances and bewitching aesthetics – understood broadly as "perception or sensation"[11] as opposed to simply beauty – can be seen to reflect the difficulties some feminist legal scholars and others have with traditional understandings of the judge. The relationship between the Happy Prince and Hercules is one of (dis)comforting similarity and difference. Like the Happy Prince, the Herculean judge who inhabits the legal imagination stands alone high upon Mount Olympus. Invisibly clothed with the appearance of neutrality and objectivity, his position and role are secured by our infatuation with this aesthetic image, his imposed beauty mirroring the golden façade of the Happy Prince. Yet, increasingly, this aesthetic image of the Herculean judge, like that of the

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[10] Wilde, n 2 above, 11.

[11] This broader understanding of the aesthetic as sensation or perception, as opposed to simply beauty, is Pierre Schlag's in 'The Aesthetics of American Law' (2002) 115 *Harv L Rev* 1047, 1050. See further chapter 5, esp 244, above.

Happy Prince, is perceived to be somewhat shabby and in need of renovation; Hercules, it seems, might have more in common with vain and naked emperors than with superheroes.

However, unlike Hercules and despite the views of the Town Councillors, stripped of his aesthetic façade the Happy Prince retains his appeal – his inner beauty is revealed through his care for and connection with his people below. This is not traditionally part of the Herculean myth. However, can we not look for it nevertheless? At the very least, we might seize the opportunity presented by Hercules' apparent need for renovation to re-imagine a judge with an appeal not dissimilar to Wilde's statue. The story of Jodie and Mary Attard provides a context for this creative act. In a tale of physical intimacy at its most extreme, of intense connection, and the ultimate sacrifice, narrative and narrative silence are strategically deployed as a response to ineffective understandings of the judge, adjudication, and the individual. As the tales of the Happy Prince and the Attard sisters combine it becomes apparent that it is perhaps time to let go of the superhero judge and to see beyond our aesthetic image; to re-imagine the Herculean judge as caringly just, empathetic, (im)partial, and (dis)connected, who as he begins to judge "cannot choose but weep".[12]

[12] Wilde, n 2 above, 5.

## In *Re A*[13]

Jodie and Mary Attard were born on 8 August 2000 at St Mary's Hospital, Manchester, as ischiopagus tetrapus conjoined twins – connected at the ischium, the lower end of their spine and spinal cords fused together – sharing a bladder and, crucially, a common aorta.[14] At three weeks, Jodie was "very sparkling really, wriggling, very alert, sucking on a dummy and using her upper limbs in an appropriate manner, very much a with-it sort of baby".[15] The outlook for her sister Mary, however, was "really extremely poor"; she was unable to cry, her brain was "very poorly developed", her neurological responses were abnormal, and her heart and lungs were unable to oxygenate or pump blood around her body.[16] As a result, Mary's survival was completely dependent upon her continued connection to her twin, Jodie; her very existence and continued life wholly sustained by her bond with her sister – "she wouldn't be alive if they were separate twins".[17] Consequently, any attempt to separate them – to break this physical union through the severing of the artery enabling Jodie's heart to pump blood around Mary's body –

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[13] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480.

[14] Gracie and Rosie Attard were known throughout the course of the trial as Jodie and Mary respectively following an injunction granted by the trial judge, Johnson J, "preventing the publication of anything calculated to lead to the identification of the parties or even their addresses ... includ[ing] for the avoidance of doubt the country in which they live" (Ward LJ, *ibid*, 488 quoting Johnson J). Hereinafter, all extracts from Johnson J's judgment in the Family Division (*Central Manchester Healthcare Trust* v *Mr and Mrs A and a Child* (25 August 2000, unreported) and *Re A (Children) (conjoined twins: surgical separation)* (2000) 57 BMLR 1) are taken from Ward LJ's judgment in the Court of Appeal.

[15] Neonatologist, in evidence to Johnson J on 22 August 2000 (*Re A*, *ibid*, 492).

[16] *ibid*, 494.

[17] Cardiologist, in evidence to Johnson J on 22 August 2000 (*Re A*, *ibid*, 494).

would automatically and unavoidably lead to Mary's, albeit "mercifully quick", death.[18] Her connection to her sister was Mary's best (only) chance of (short term only) survival.

Sadly, this connection would ultimately be fatal. Jodie's organs could not sustain herself and her sister indefinitely; unless the twins were separated Jodie's heart and lungs would get progressively weaker and when they eventually failed, within an estimated six months to two years, both twins would die. If, in the meantime, Mary were to die it would be necessary to perform an emergency separation procedure to save Jodie. This would be far more dangerous for her, the mortality risk increasing from the estimated six per cent risk that accompanied earlier elective surgery to a sixty per cent risk of mortality. Timely separation from her sister was, it seemed, Jodie's best option for the chance, should she survive the operation, of a "relatively normal" long-term future.[19]

The twins' parents, Rina and Michaelangelo Attard, faced a terrible and heart-rending decision; to attempt separation, thereby ending Mary's life in the hope of saving Jodie's, or to allow their daughters to die together within a relatively short time. In choosing the latter, they refused

[18] Ward LJ, *Re A*, *ibid*, 501.

[19] Johnson J, *Re A*, *ibid*, 507.

> to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive. That is not what we want ...[20]

Had the doctors at St Mary's Hospital accepted their decision, it appears the court may never have had to adjudicate this dreadful dilemma.[21] They did not. On 22 August 2000, the Central Manchester Health Area NHS Trust, issued an originating summons, entitled "In the exercise of the inherent jurisdiction of the High Court and in the matter of the Children Act 1989", seeking

> a declaration that in the circumstances where [the children] cannot give valid consent and where [the parents] withhold their consent, it shall be lawful and in [the children's] best interests to (a) carry out such operative procedures not amounting to separation upon [Jodie and/or Mary], (b) perform an emergency separation procedure upon [Jodie and/or Mary] and/or (c) perform an elective separation procedure upon [Jodie and Mary].[22]

On 25 August 2000, Johnson J, in what he considered to be "effectively an *ex tempore* judgment",[23] granted the declaration.

> If, which I do not, I were to balance the interests of Jodie against those of Mary then Jodie's chance of a virtually normal life would be lost in order to prolong the life of Mary for those few months ... I conclude that the few months of Mary's life if not

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[20] Parents' statement to the court (*Re A*, *ibid*, 504).

[21] Ward LJ, *Re A*, *ibid*, 506. On this point see further, e.g., Andrew Bainham 'Resolving the Unresolvable: The Case of the Conjoined Twins' (2001) 60 CLJ 49, 52 and Barbara Hewson 'Killing off Mary: Was the Court of Appeal Right?' (2001) 9 *Med L Rev* 281, 287-290.

[22] *Re A*, *ibid*, 506.

[23] *Re A*, *ibid*, 508. Indeed Ward LJ, in the Court of Appeal noted a "slight sense of unease that there may have been a rush to judgment" (at 491).

separated from her twin would not simply be worth nothing to her, they would be hurtful ... to prolong Mary's life for these few month would ... be very seriously to her disadvantage.[24]

He went on to characterise the separation surgery as an omission, the withdrawal of Mary's blood supply analogous to the lawful withdrawal of food and hydration in *Airedale NHS Trust* v *Bland*, itself a somewhat controversial and legally contrived decision.[25]

The parents, together with the Official Solicitor acting on behalf of Mary, appealed to the Court of Appeal on the grounds "that the judge erred in holding (i) that the operation was in Mary's best interest, (ii) that it was in

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[24] *Re A*, *ibid*, 507.

[25] [1993] AC 789. In April 1989, Anthony Bland was severely injured in the tragedy at Hillsborough Football Stadium. As a result, he was in a persistent vegetative state (PVS). In 1992, the NHS Trust caring for Tony, with the support of his family, sought a declaration that the attending doctors might "(i) lawfully discontinue all life-sustaining treatment and medical support measures designed to keep [Mr Bland] alive in his existing persistent vegetative state including the termination of ventilation, nutrition and hydration by artificial means; and (ii) lawfully discontinue and thereafter need not furnish medical treatment to [Mr Bland] except for the sole purpose of enabling [Mr Bland] to end his life and to die peacefully and with the greatest dignity and the least of pain, suffering and distress" (at 807-808). This was subsequently granted (with minor amendments) by Sir Stephen Brown P in November of that year. Subsequent appeals by the Official Solicitor to the Court of Appeal and House of Lords failed. The decision in *Bland* has since been subject to sustained academic criticism; this has focused, *inter alia*, on the judicial determination of 'best interests', the relevance of the *Bolam* test (*Bolam* v *Friern Hospital Management Committee* [1957] 2 All ER 118), the possible existence of a duty *not* to treat, the principle of the sanctity of life and the extent to which food and drink can be considered medical treatment or care. See further, A Grubb *I Kennedy and A Grubb: Medical Law* (London: Butterworths, 3rd edn, 2000) 2127-2155; I Kennedy and A Grubb 'Withdrawal of Artificial Hydration and Nutrition: Incompetent Adult' (1993) 1 *Med L Rev* 359; and J Keown 'Restoring Moral and Intellectual Shape to the Law after *Bland*' (1997) 113 LQR 481.

Jodie's best interest and (iii) that in any event it would be legal".[26] The Court of Appeal whilst upholding the decision of Johnson J that the surgery was lawful, disagreed with his conclusion that it was in Mary's best interest and rejected his "valiant and wholly understandable", albeit "utterly fanciful", representation of the operation as an omission.[27] Instead, the effect of the Court of Appeal's lengthy consideration of the complex family, medical and criminal law principles was somehow to balance the opposing interests of the twins, whilst prioritising and deciding in favour of Jodie's best interests. The legality of the operation to separate the twins was grounded in a combination of the doctrines of necessity and double effect, and the invocation of a quasi self-defence argument. Neither the twins' parents nor the Official Solicitor for Mary appealed to the House of Lords, despite, it appears, the opportunity to do so.[28] Jodie and Mary underwent an operation to separate them on 6 November 2000. As expected, Mary died in the operating room. Happily, her sister Jodie survived and returned home, in July 2001, to Gozo with her parents.

Jodie and Mary's story – their tale of sacrifice, death, mutation and love set against a backdrop of law, morality, and religion – captured the legal and

[26] *Re A*, n 13 above, 508.

[27] Ward LJ, *Re A*, *ibid*, 522.

[28] Barbara Hewson, junior counsel for the Director of the Pro-Life Alliance in *Re A (No 2)* (below), suggests that Ward LJ was reassured, before giving his judgment, that a panel of seven Law Lords were ready to hear an appeal (n 21 above, 283). The decision by the Official Solicitor not to appeal was subsequently challenged, albeit indirectly, by the director of a pressure group campaigning for the absolute respect for innocent human life who sought (unsuccessfully) to be appointed in his place as *guardian ad litem* for Mary (*Re A (Conjoined Twins: Medical Treatment) (No 2)* [2001] 1 FLR 267).

popular imagination in the autumn of 2000. It has since inspired a large and growing amount of academic commentary and debate.[29] It seems the implications of their story go beyond the personal and immediate; the fate of two little girls from Gozo has had a lasting impact on our adjudicative landscape. My purpose here, however, is not so much to map the somewhat novel and hostile legal terrain itself, but rather to consider the strategies employed by the Court of Appeal judges in order to negotiate it. In so doing, it quickly becomes apparent that the judges' difficulties arise not simply from the hostility of the terrain itself, that is, what they are being asked to do, but from their lack of adequate preparation or effective equipment to assist them in traversing it. By this I mean the inability of an understanding of law and a conception of legal reasoning grounded in the traditional, autonomous, isolated, liberal individual and the associated assumption of separateness, to comprehend and engage with the essential and inherent connection, reliance

[29] See, e.g., special edition of the *Medical Law Review* 9 [2001] 201-280; J Appel 'English High Court Orders Separation of Conjoined Twins' (2000) 28 *J L Med & Ethics* 312; Bainham, n 21 above; V Munro 'Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights' (2001) 10(4) *S & LS* 459; S Michalowski 'Sanctity of Life – Are Some Lives More Sacred Than Others?' (2002) 22(3) LS 377; B Clucas and K O'Donnell 'Conjoined Twins: the Cutting Edge' [2002] 5 *Web JCLI*. The primary, but not exclusive, focus of this debate can be seen to fall into 3 distinct and interconnected starting points. First, the legality or otherwise of the Court of Appeal's decision, including explorations of the apparent distortion of legal principles (Michalowski, above) and practical concerns as to its future implications (J McEwan 'Murder by Design: The "Feel-Good Factor" and the Criminal Law' (2001) 9 *Med L Rev* 246); Second, its ethical basis – the intersection of law and morality, definitions of personhood and the role of physical integrity within this (J Harris 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 *Med L Rev* 221; H Watt 'Conjoined Twins: Separation as Mutilation' (2001) 9 *Med L Rev* 237). Finally, the literature focuses on alternative approaches that might have been taken – including one that recognises Mary's right to dignity in death (M Freeman 'Whose Life is it Anyway?' (2001) 9 *Med L Rev* 259) or the connection between Jodie and Mary as an 'item' (Hewson, n 21 above; Munro, above).

and dependence embodied in Jodie and Mary's relationship. The intimacy of their connection undermines traditional constructions of the individual and seriously troubles liberal legal strategies:

> Armed with ideology which conceives of the legal person as radically autonomous, disinterested and self-referential, prevailing rights analysis is ill-equipped to deal with the complexities of the situation of conjoined twins. It simply does not have the requisite frameworks within which to fence such experiences of connection or to render them intelligible.[30]

That said, the judges in the Court of Appeal initially seemed relatively unfazed by, or perhaps unaware of, the fundamental and significant difficulties ahead of them. Unsurprisingly, they immediately and without question attributed legal personhood to both twins,[31] despite strong ethical arguments to the contrary, including evidence doubting Mary's ability to feel pain or self-awareness and suggestions that, had she been born a singleton, she would almost certainly have been stillborn.[32] Although perhaps intuitively correct, such accreditation was not self-evident. The uncritical, almost instinctive, rejection by the Court of Appeal of opposing arguments in this context effectively closed the door on the opportunity for a simpler assessment of the

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[30] Munro, *ibid*, 469.

[31] Ward LJ, Brooke LJ, and Robert Walker LJ, *Re A*, n 13 above, 513, 545 and 574 respectively. Indeed perhaps, as Sally Sheldon suggests, no other option was available to the judges, given the legal principle that 'a legal person is created as the moment when she is born alive' (S Sheldon and S Wilkinson '"On the Sharpest Horns of Dilemma": *Re A (Conjoined Twins)*' (2001) 9 *Med L Rev* 201, 206).

[32] See e.g., Harris, n 29 above, and cf, Watt, n 29 above.

legality of the operation, based on the best interests of the stronger twin, Jodie.[33]

The fundamental difficulty with the Court of Appeal's identification of Jodie and Mary as "two separate persons"[34] is that they were not two separate persons, but rather two intimately dependent and connected persons. Such an observation might seem somewhat trite, yet may nevertheless be necessary given the Court of Appeal judges' apparent blindness, or strategic oversight, in this respect. Put simply, the effect of poor preparation, inadequate equipment and the indiscriminate privileging of 'separation' over 'connection',[35] was that each judge had already intellectually separated and represented the twins as separate, autonomous, detached individuals. Their ultimate decision, even if not yet made, was thus from the outset almost inevitable:[36] "'[o]nce twins are separated verbally it is only a matter of time before that are separated surgically': it becomes assumed that separation *ought* to take place".[37] The intellectual and verbal separation of Jodie and Mary, a reflection of the judges' understanding or 'framing'[38] of the dilemma before them is, perhaps, most explicit in Ward LJ's judgment:

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[33] Munro, n 29 above, 465.

[34] Robert Walker LJ, *Re A*, n 13 above, 574.

[35] R West 'Jurisprudence and Gender' (1988) 55(1) *U Chicago L Rev* 1, esp 53-61.

[36] Michalowski, n 29 above, 397.

[37] G J Annas 'Conjoined Twins: The Limits of Law at the Limits of Life' (2001) 344 *New England Journal of Medicine* 1104, 1108 in Clucas & O'Donnell, n 29 above, part 1.

[38] P Schlag *The Enchantment of Reason* (Durham, NC: Duke University Press, 1998) 3-11.

> This is a court of law, not of morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us.[39]

Like Jodie and Mary, law and morality are juxtaposed; they are established as separate and distinct. In so doing, the judges were able, at least in their minds, to transcend their sense of discomfort and unease with the "seemingly irreconcilable conflicts of moral and ethical values".[40] Had they simply been deciding the moral or ethical "point at which life becomes 'worthless'" their decision might well be as arbitrary as that of, in the words of American Supreme Court Justice Scalia, "people picked at random from the Kansas City telephone directory".[41] Yet, by framing their decision as requiring the application of law, the judges were able to believe that they were not simply finding *an* answer but *the* "one right answer",[42] that their decision was legal rather than moral or ethical. Their frame defines and dictates, effects and affects the resolution of their case, setting the boundaries of judgment they locate themselves, their decision and the twins' future within it. In law, Jodie and Mary are represented and understood as autonomous individuals with competing needs. They are pitted against each other – "the 'good' twin [against] the 'poorer' twin ... Jodie/Mary; Good/Bad; Attractive/Ugly; Hard-working/Inert; Worthy/Unworthy; Giving/Taking; Viable/Non-viable"[43] – as the

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[39] Ward LJ, *Re A*, n 13 above, 488.

[40] Ward LJ, *Re A*, *ibid*, 487. Cf, Clucas & O'Donnell's detailed and insightful exploration of the interdependent issues of law and morality within *Re A* (n 29 above, esp parts 4 and 5).

[41] *Cruzan* v *Director, Missouri Department of Health* (1990) 110 S Ct 2841, 2859 quoted by Ward LJ, *Re A*, *ibid*, 487.

[42] Ward LJ, *Re A ibid*.

[43] Hewson, n 21 above, 294.

law responds to Jodie and Mary's intimacy and connection by disturbing, disrupting, and ultimately destroying it.

## Strategic Judging

Once Mary and Jodie were intellectually represented as separate, autonomous rights-bearing individuals the application of the law was, perhaps, relatively straightforward; the judges' ultimate decision was constrained, their role clearly defined, the outcome effectively and exclusively framed. Ward, Brooke, and Robert Walker LJJ all came to the same, maybe inevitable, conclusion, albeit in differing ways. As each negotiated the established boundaries of the adjudicative landscape, strategically deploying varying techniques to ensure Jodie and Mary's story had the 'correct' ending, they all did so within the framework established in the leading judgment of Ward LJ.

This was, in essence, a two-stage test. The court had first to establish its authority to override the parents' wishes in what the court perceived as the best interests of the child, in accordance with the principles of medical and family law. Its ultimate decision and any subsequent action was then conditional upon and subject to the outcome of the second stage of the court's inquiry as to the legality or otherwise of the proposed operation. On this basis, there were four key issues:

> 1. Is it in Jodie's best interests that she be separated from Mary? 2. Is it in Mary's best interests that she be separated from Jodie? 3. If those interests are in conflict is

> the court to balance the interests of one against the other and allow one to prevail against the other and how is that to be done? 4. If the prevailing interest is in favour of the operation being performed, can it be lawfully performed?[44]

Ward LJ established at the outset a multiple doctrinal framework in which family law principles intersected and combined with those of criminal and medical law.[45] The result was, in effect, to create a checklist or set of hurdles upon which the case might succeed or fall. Accordingly, the decision assumed its own momentum and feeling of inevitability, as each hurdle was passed and each point checked off the list.[46]

*Ward LJ*

The three judges were unanimous in their agreement with Johnson J that an operation to separate Jodie from her sister was in her limited and undefined 'best interests'.[47] However, the judges were divided as to whether, in the words of one of the surgeons involved, "killing off Mary"[48] was in her best interests. Ward LJ, whilst agreeing with Johnson J that Mary's position was

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[44] Ward LJ, *Re A*, n 13 above, 513.

[45] Interestingly, although Ward LJ in *Re A* (*ibid*) saw "shades of *Bland's* case in the way Johnson J framed his [judgment]" (at 517), the decision in *Re A* is not explicitly framed in accordance with tort law principles of duty, breach and causation. In fact, Ward LJ later distinguishes *Bland* and reframes the question asked by the trial judge away from the provision of life-sustaining treatment and toward the performance of the operation, the inevitable consequence of which is that Mary will die (at 522).

[46] As noted and criticised by Barbara Hewson in relation to Lord Justice Brooke's conclusion (n 21 above, 295-296).

[47] Ward LJ (*Re* A, n 13 above) commending, but failing to adopt, Butler-Sloss P's contextual definition of best interests as not limited to "best medical interests" but encompassing "medical, emotional and all other welfare issues" (*In re MB (Medical Treatment)* [1997] 2 FLR 426, 439; *In re A (Male Sterilisation)* [2000] 1 FLR 549, 555) (at 513).

[48] *Re A*, *ibid*, 502.

"utterly dire for she exists pathetically on borrowed time",[49] believed Johnson J had erred in his conclusion that separation was in her best interests; believing "Mary's life, desperate as it is, still has its own ineliminable value and dignity".[50] Further, any attempt to represent the operation to separate Mary from her sister as restoring her bodily integrity and human dignity was

> wholly illusionary ... she will be dead before she can enjoy her independence and she will die because, when she is independent, she has no capacity for life.[51]

Separation from Jodie was clearly not in Mary's best interests; "It cannot be. It will bring her life to an end before it has run its natural span".[52] It seems that, at least to Ward LJ, death – even to save your sister – can never be in your best interests.

This meant that whilst the operation was in the best interests of one twin, it was not in the best interests of the other; put bluntly "[f]or Jodie separation means the expectation of a normal life; for Mary it means death".[53] Yet, as separate individuals, both Mary and Jodie had an equal right to life. Ward LJ's previous intellectual separation of the twins necessitated his subsequent balancing of the life of one twin against the other.[54] This

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[49] Ward LJ, *Re A*, *ibid*, 516.

[50] Ward LJ, *Re A*, *ibid*, 520.

[51] Ward LJ, *Re A*, *ibid*, 516.

[52] Ward LJ, *Re A*, *ibid*, 523; Brooke LJ concurring, *Re A*, *ibid*, 538 and Robert Walker dissenting, *Re A*, *ibid*, 591.

[53] Johnson J, *Re A ibid*, 507.

[54] In the absence of statutory principle, to do so the judge relied upon the approach of House of Lords in *Birmingham City Council* v *H* [1994] 2 AC 212 (*Re A*, *ibid*, 523).

presented him with a difficult decision. He was required to "strike a balance between the twins and do what is best for them":

> If a family at the gates of a concentration camp were told they might free one of their children but if no choice was made both would die, compassionate parents with equal love for their twins would elect to save the stronger and see the weak one destined for death pass through the gates.[55]

This choice is not as unproblematic as Ward LJ perhaps assumed.[56] Yet, it is clear that he believed Jodie and Mary's parents had their chance to make the right decision, to choose what Ward LJ saw as the lesser of two evils and had, in their failure to choose, made the wrong decision. His castigation of their failure to participate in his scheme and his inability to recognise, as they did, the death of *both* twins as a lesser evil than the sacrifice of one reveals the significant coercive underbelly of his judgment.[57] The parents were, in his eyes, being deliberately obtuse. What is more, in their refusal to treat Mary's death as an, albeit tragic, means to a welcome end they had shown themselves to be unable – or unwilling – to face up to their responsibility to Jodie.[58]

A hard choice had to be made and the balance, Ward LJ argued, came down in favour of giving Jodie the chance of life.[59] Yet despite rhetoric which

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[55] Ward LJ, *Re A*, *ibid*, 529.

[56] They may choose to save the weaker child over the stronger or they might choose for both to die, see further Michalowski, n 29 above, 391 and Hewson, n 21 above, 294-5.

[57] Hewson, *ibid*, 295.

[58] *Re A*, n 13 above, 532.

[59] *Re A*, *ibid*, 530.

attempted to distinguish an assessment of the worthwhileness of treatment from an assessment of the value of a human life, ultimately

> the balancing exercise … carried out [by Ward LJ] depend[ed] [up]on value judgments about the quality of life which detract from the absolute nature of the right which is at stake: the right to life.[60]

His conclusion that although Mary "may have a right to life … she has little right to be alive" is, to some, unpersuasive.[61] It is surely impossible to distinguish between a right to life and the right to be alive; the former is effectively worthless without the latter, which is itself dependent on the right to life. Ward LJ's ability to articulate such "a distinction without difference"[62] – a distinction, which "it is astonishing that anyone should entertain … for a moment"[63] – is emblematic of his feelings of unease and constraint. Its application not only undermines his previous assertions of Mary's legal personhood but also reveals the ineffectiveness of his grid reasoning.

As his framework collapsed around him he sought to reinforce his decision with emotive narrative.

> [Mary] is alive because and only because, to put it bluntly, but none the less accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie. She will survive only so long as Jodie survives. Jodie will not survive long because

[60] Clucas & O'Donnell, n 29 above, part 3.3c. See also Harris, n 29 above, 225-6, 228-9.

[61] Ward LJ, *Re A*, n 13 above, 530. See, e.g., Harris, *ibid*; Clucas & O'Donnell, *ibid*; and Hewson, n 21 above.

[62] Lord Lowry, *Bland*, n 25 above, 877.

[63] Harris, n 29 above, 225-226.

> constitutionally she will not be able to cope. Mary's parasitic living will be the cause of Jodie's ceasing to live. If Jodie could speak, she would surely protest, "Stop it, Mary, you're killing me". Mary would have no answer to that ... nobody but the doctors can help Jodie. Mary is beyond help.[64]

Mary is "designated for death";[65] there is nothing anyone can do to prevent it. Moreover, she threatens to take Jodie with her "as surely as a slow drop of poison".[66] Ward LJ's message is clear. There is no alternative: Mary must die. She is a "parasite",[67] growing at the expense of Jodie.[68] Mary "exists pathetically on borrowed time",[69] which is "a debt she can never repay".[70] She is "poison", akin to a vampire "draining [Jodie's] lifeblood" to ensure her own survival.[71] These distastefully memorable images confirm and reinforce her "monster"[72] status and inevitable sacrifice – after all, debtors go bankrupt, parasites are eliminated and vampires end up staked. His use of emotive narrative is a deliberate attempt to persuade his audience as to the correctness of his decision, to justify the prioritisation of Jodie's interests over Mary's; his rhetorical judgment a response to the inadequacy of the law's ability to address the issues raised.

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[64] Ward LJ, *Re A*, n 13 above, 530. See, further, Suzanne Uniacke's suggestion as to Mary's response in 'Was Mary's Death Murder?' (2001) 9 *Med L Rev* 208, 212.

[65] Ward LJ, *Re A*, *ibid*, 529. See further Harris, n 29 above, 230-232.

[66] Ward LJ, *Re A ibid*, 536.

[67] Ward LJ, *Re A*, *ibid*, 530.

[68] Ward LJ, *Re A*, *ibid*, 493.

[69] Ward LJ, *Re A*, *ibid*, 516.

[70] Ward LJ, *Re A*, *ibid*, 495.

[71] Ward LJ, *Re A*, *ibid*, 536.

[72] On George Annas' 'monster approach' see Alice D Dreger 'The Limits of Individuality: Ritual and Sacrifice in the Lives and Medical Treatment of Conjoined Twins' (1998) 29(1) *Stud Hist Phil Biol & Biomed Sci* 1, 22 and also Hewson, n 21 above, 282 ff.

After establishing that the operation to separate the sisters should go ahead, Ward LJ turned to the principles of criminal law to determine its legality, the fourth and final issue on appeal. In his view, Johnson J had erred in his categorisation of the doctors' acts as an omission; the separation of the twins was only intelligible as an act.[73] Nevertheless whilst largely deferring to Brooke LJ's detailed exploration of the criminal law issues, Ward LJ concluded that the operation would be lawful as both the lesser of two evils and also as a means of protecting Jodie from an "unjust attack".

> The reality here – harsh as it is to state it, and unnatural as it is that it should be happening – is that Mary is killing Jodie ... How can it be just that Jodie should be required to tolerate that state of affairs?[74]

Jodie is under attack from Mary, who must be stopped. Like the six-year-old who indiscriminately shoots at his playmates, Mary is not acting unlawfully. She does not need to. Just as

> *in law* killing that six-year-old boy in self-defence of others would be fully justified and the killing would not be unlawful ... so [too are] the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining of her lifeblood.[75]

Once again Ward LJ relies on emotive narrative as persuasion. The effectiveness of his quasi self-defence defence is dependent upon the acceptance of the inevitability of the conflicts fostered through his initial

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[73] *Re A*, n 13 above, 522.

[74] Ward LJ, *Re A*, *ibid*, 536.

[75] Ward LJ, *Re A*, *ibid*.

framework, the intellectual separation and competing rights of Jodie and Mary, the distinction between law and morality, and the either/or dichotomy of his grid reasoning. Without this, his narrative is unpersuasive and ineffective, his decision as arbitrary and no better (or worse) than that of people picked at random from the Kansas telephone directory.

*Brooke LJ*

In Brooke LJ's judgment narrative is largely silent. Yet, its immediate appearance of rationality and reasonableness, in sharp contrast to the emotive persuasion of Ward LJ, deliberately shrouds his utilisation of the allure of the aesthetic to manipulate and infuse his grid-like reasoning with the dynamism of the energy aesthetic.[76] Indeed Brooke LJ welcomed, but did not explicitly respond to, the recognition that

> it is difficult to accommodate the proposed treatment [i.e. elected separation] which ... it is recognised the court may well consider to be desirable, within the framework of established legal principle. It might be argued that the basic principle of medical law cannot be applied to these facts ... [and that] in these circumstances, the court may wish to explore the possibility of a development of the law ...[77]

In so doing,

> [he came] closer than Ward LJ [and indeed Robert Walker LJ] to acknowledging that the court felt free to do whatever it liked ...'Compulsion by necessity is one of the

[76] On the 'grid' and 'energy' aesthetics see Schlag, n 11 above and also chapter 5, 245-250, above.

[77] Brooke LJ referring to the written judgment made on behalf of Mary by Mr Harris QC (*Re A*, n 13 above, 551-2).

> curiosities of the law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient'.[78]

Put simply, not only is the doctrine of necessity itself somewhat vague, "there are no rules which specifically relate to conjoined twins nor to the killing of one to save another".[79] As a result, Brooke LJ had a choice: either to treat the twins as non-conjoined in order to apply established legal principle, or to manipulate current legal rules so as to recognise their conjoined state. In short, he could either mutate the twins or distort the law. In effect, he did both and neither as he sought to "twist" established legal principles, infusing them with the energy aesthetic, so as to achieve his strategic goal.[80] His actions were constrained by his internalisation of Ward LJ's characterisation of Mary as monstrous and of her death as being unequivocally in the best interests of her twin.[81]

His judgment, which happily deferred to Ward LJ's assessment of the relevant family law principles and adopted his framework, for the most part concentrated on the criminal law aspects of the case, and in particular the application of the doctrine of necessity.[82] It has long been established that necessity can never provide a legal justification for murder.

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[78] Hewson, n 21 above, 295 quoting Brooke LJ in *Re A*, *ibid*, 556.

[79] Clucas & O'Donnell, n 29 above, part 3.2.

[80] This insight is reinforced by Sabine Michalowski's suggestion that otherwise "the law points unequivocally in toward the conclusion that the operation could not be lawfully performed" n 29 above, 397.

[81] Hewson, n 21 above, 296.

[82] *Re A*, n 13 above, 538-539.

> Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own.[83]

Whilst cases involving conjoined twins – particularly where there is an obvious sacrificial twin – are perhaps distinguishable from the largely arbitrary murder and cannibalisation of a cabin boy,[84] the application of the doctrine of necessity to such circumstances has previously been seen to justify "too much" and has been dismissed as "wildly permissive".[85] Nevertheless, Brooke LJ concluded in this case that there were sound reasons, not least the perceived rarity of Jodie and Mary's situation, to consider the three requirements of the doctrine of necessity identified by Sir James Stephen that,

> (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; (iii) the evil inflicted must not be disproportionate to the evil avoided

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[83] Lord Coleridge CJ *R* v *Dudley and Stephens* 14 QBD 273, 286-8. Recently confirmed in the Court of Appeal in *R* v *Pommell* [1995] Cr App R 607 and endorsed by the House of Lords in *R* v *Howe* [1987] 1 AC 417.

[84] *Dudley and Stephens*, *ibid*.

[85] S Sheldon and S Wilkinson 'Conjoined Twins: The Legality and Ethics of Sacrifice' (1997) 5 *Med L Rev* 149,169. In their seminal article, referred to by the judges in *Re A*, Sally Sheldon and Steven Wilkinson consider the apparent inconsistencies in the treatment of (non)conjoined twins, when one sibling might be sacrificed to save another. After an exploration of the application of the doctrine of double effect, the act/omission argument and the defence of necessity, they conclude, *inter alia*, that if we are to be consistent in our treatment of (non)conjoined twins, "we should either not permit sacrifice in the case of conjoined twins, or be willing to permit sacrifice in other types of case [i.e. non conjoined siblings] as well" (at 169).

as met.[86]

However, the apparent inevitability and incessant momentum of his judgment is, to some, unpersuasive.

> It does not follow that because family law would wish to reach a certain outcome, therefore necessity applies. It does not follow that it is in a child's best interests to kill its sibling, anyway. And it does not follow that the death of conjoint twins, from natural causes, is an inevitable for irreparable evil. It is very sad, but hardly evil.[87]

Brooke LJ is seen here to embrace his 'subversive moment' engaging in a profound, although constrained, act of boundary breaking in order to achieve his desired result;[88] the relative calmness of his judgment, enabling him to achieve his strategic goal under the guise of Herculean restraint.[89] "Given that the principles of family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary",[90] an operation to separate them becomes both lawful and essential. It is clear that Brooke LJ has "twisted legal principles in order to find a legal basis for [his] view that it

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[86] Brooke LJ, *Re A*, n 13 above, 573.

[87] Hewson, n 21 above, 296; See further Michalowski, n 29 above, 388-392 and McEwan, n 29 above.

[88] On the subversive moment see, S Berns *To Speak as a Judge – Difference, Voice and Power* (Dartmouth: Ashgate, 1999) 51 and also chapter 4, 'Subversive Patchwork', 182-201, above.

[89] On the judge as a constrained activist, see D Kennedy *A Critique of Adjudication {fin de siècle}* Cambridge, Mass.: Harvard University Press, 1997) chap 8 and chapter 1, 42-44, above.

[90] Brooke LJ, *Re A*, n 13 above, 573.

was better to save one twin than let the lives of both of them come to an early end".[91]

*Robert Walker LJ*

After the dramatic narrative and constrained activism of the previous judgments, Robert Walker LJ seemed to evade the possibility of his subversive moment. His matter of fact approach is somewhat different to the other Court of Appeal judgments. Whilst adopting Ward LJ's framework, he largely, but not completely, eschewed his use of narrative as well as Lord Justice Brooke's contortion of the legal principles, preferring simply to adopt his Herculean role:

> Much of this judgment has necessarily been rather technical, and I am conscious that some of it may seem rather remote from the deeply troubling dilemma which Jodie's and Mary's condition presents. Every member of the court has been deeply troubled by this case, but we have to decide it in accordance with the principles of existing law as we perceive them to apply this unprecedented situation.[92]

In separation, he believed both Jodie and Mary would find the bodily integrity and human dignity, which "by a rare and tragic mischance" had been denied to them.[93] His implication is clear, their abnormality was a mistake – the failure of monozygotic twins to fully separate – which can and ought to be rectified.

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[91] Michalowski, n 29 above, 397.

[92] Robert Walker LJ, *Re A*, n 13 above, 591.

[93] Robert Walker LJ, *Re A*, *ibid*. Robert Walker LJ is keen to establish at the outset of his judgment the unusual nature of Jodie and Mary's situation. Conjoined twins occur once in approximately 100,000 births – of which over half are stillborn, a further third dying within 24

Yet clearly "Mary had never possessed an independent existence, she had never had an independent physical integrity that could have been restored".[94] The effect of Robert Walker LJ's approach is not to restore Mary's bodily integrity but to destroy and (re)create it – at the cost of her life. In so doing, bodily or physical integrity, understood as separation, independence and isolation, is valued over misshapen life – his "arbitrary" appeal to bodily integrity akin "to defending a right to a food to which the subject of the right is fatally allergic".[95]

His conclusion is clearly influenced by Johnson J's uneasy description of Mary "being dragged around"[96] as Jodie became more mobile, unable to show pain or to cry, which Ward LJ suggests, may be a little difficult to sustain, given the "uncertainty of the extent to which [Mary's] primitive brain can register pain".[97] Once the operation was established as in the best interests of both the twins, his decision seems eerily straightforward. There is no conflict, no choice or decision to be made: "The surgery would plainly be in Jodie's best interests, and in my judgment it would be in the best interests of Mary also".[98] In short, her position was "pitiful".[99] As a result, it would, according to Robert Walker LJ, be in Mary's best interests to die.

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hours. Only 6% are classified as ischiopagus and only 2% as ischiopagus tetrapus twins (at 573).

[94] Michalowski, n 29 above, 380. See also A Grubb 'Conjoined Twins: *Re A* Down Under' (2002) 10 *Med L Rev* 100, 101 (a case note on *Queensland* v *Nolan* [2001] QSC 174).

[95] Harris, n 29 above, 229.

[96] Robert Walker LJ, *Re A*, n 13 above, 578.

[97] Ward LJ, *Re A*, *ibid*, 516.

[98] Robert Walker LJ, *Re A*, *ibid*, 591. See also Freeman, n 29 above.

[99] Robert Walker LJ, *Re A*, *ibid*, 588.

> Continued life, whether long or short, would hold nothing for Mary except possible pain and discomfort, if indeed she can feel anything at all ... to prolong Mary's life for a few months would confer no benefit on her but would be to her disadvantage.[100]

The first two of Ward LJ's hurdles cleared and the third neatly avoided, Robert Walker LJ overcomes the final hurdle – legality – by relying on the doctrine of double effect, whilst endeavouring to treat Jodie and Mary. Mary's death would not be the purpose of the operation, "she would die not because she was intentionally killed but because her body could not sustain life".[101] The apparent 'good' effect – the restoration of Mary's bodily integrity – would outweigh the 'bad' – her inevitable death.[102] And with that, he joins Ward and Brooke LJJ at the finishing post.

**Confronting our Demons**

As expected, all of the judges' narratives, albeit by somewhat diverse and at times contradictory strategic means, ultimately reach the same conclusion – Jodie and Mary can and should be lawfully separated. Despite differences in approach, all three judgments reflect the Court of Appeal judges' uneasy response to, and apparent inability to accept, the twins' conjoined state. Their underlying – albeit explicitly denied – assumption is that their form is a

[100] Robert Walker LJ, *Re A*, *ibid*, 592, 579.

[101] Robert Walker LJ, *Re A*, *ibid*, 592.

[102] Significantly, both Ward LJ and Brooke LJ (*Re A*, *ibid*, 531-532 550 respectively) refused to extend this doctrine to cover situation where the good and bad effect of the same act affected two different individuals (Michalowski, n 29 above, 385). See, further Sheldon & Wilkinson, n 85 above, 158 and Grubb, n 94 above, for criticisms of this approach.

mistake, an abnormality in need of correction.[103] More poisonously they, like others, view Jodie and Mary as "fascinatingly horrible freaks of nature",[104] who on first impression give rise to "almost numbing surprise" – the "initial shock" followed by "desperate sadness and sympathy" for their plight.[105] Whilst our modern day sensibilities might discourage or even condemn the exhibition of the "anatomically unusual" in P.T. Barnum-esque freak shows,[106] they sadly do not prevent their display and exploitation in the circus-like realm of medicine and the media.[107] It seems, that despite our apparent politically correct acceptance of difference and diversity, the anatomically unusual remain simply *too* different.

Conjoined twins defy our deep-seated cultural norms and aesthetic image of the individual and challenge our understanding of what it is to be considered human.[108] Hence, our perhaps instinctive desire to separate or – more exactly – to 'humanise' them. Their conjoined state is

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[103] See, e.g., *Re A*, n 13 above, 515, 525, 546, and 575.

[104] P Toynbee 'Two into One' *The Guardian* 8 September 2000.

[105] Ward LJ, *Re A*, n 13 above, 490.

[106] P T Barnum coined the moniker "Siamese twins" – the colloquial term for conjoined twins – for the 'original' conjoined twins Chang and Eng Bunker. Born in 1811, in Siam (now Thailand) Chang and Eng Bunker were displayed for profit in both life and death; their widows kept their body in a cool cellar in North Carolina during January 1874 and charged, until the authorities arrived in mid-February to claim it for medical science, 25 cents to those who wished to see it (Dreger, n 72 above, 1-3).

[107] See, e.g., Dreger, *ibid*, 24; J Foster 'We used to be so close' *The Mirror* 28 January 2003; T Reid 'Separated Twin Goes Home to Row over £1m Media Deal' *The Times* 18 June 2001; S Morris, 'Jodie and Mary: the Point where the Law, Ethics, Religion and Humanity are Baffled' *The Guardian* 9 September 2000.

[108] Dreger, *ibid*, 4, 22-3.

> so grotesque that they are not really human. Therefore, we are justified in doing anything medically reasonable to make at least one of them 'human', even if it will very likely result in both of their deaths.[109]

Indeed, when conjoined twins are seen as 'monsters' – the weaker twin as a vampire or parasite – separation, at whatever cost, seems a price worth paying:

> [S]ince for the twins to remain alive and conjoined in the way they are would be to deprive them of the bodily integrity and human dignity which is the right of each of them.[110]

The assumption, made by all the Court of Appeal judges that Jodie and Mary can only achieve bodily integrity through separation, represented here in the remark of Lord Justice Robert Walker, at best undermines and at worst ignores the fact that they already have it. It seems their conjoined state is unrecognisable – or perhaps, more accurately, unacceptable – as a form of bodily integrity,[111] an understanding reinforced and validated by, but not dependent upon, the fragility of their existence and uncertainty of their conjoined future. Put simply, their conjoined state is perceived as problematic, beyond and distinct from the fatal consequences that stem from it. The vulnerability of their continued connected existence – the evident immediacy of their death should they remain together and the possibility of Jodie's long-

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[109] G J Annas 'Siamese Twins: Killing One to Save the Other' (1987) 17 *Hastings Center Report* 72 in Dreger, *ibid*, 22.

[110] Robert Walker LJ, *Re A*, n 13 above, 591.

[111] Hewson, n 21 above, 297. See also, Watts, n 29 above; Harris, n 29 above; and Clucas & O'Donnell, n 29 above, part 3.3b.

term survival if separated – are an added dimension, which simply strengthens and perhaps justifies, rather than constitutes or explains, the judges' instinctive hostility to their conjoined state.

Bodily integrity and dignity are equated with separation and detachment. The aesthetic image of the liberal individual is of an isolated, autonomous and boundaried self, akin to a Neolithic standing-stone, who dreads intimacy and fears dependency.[112] Conjoined twins unavoidably disrupt the liberal aspiration and understanding of every man as an island. Like the little mermaid, they act as an irritant, reacting against (un)stated and (un)acknowledged norms and highlighting the extent to which differing ways of being, embodying interdependence, connection, and relatedness, are overlooked or downplayed.

> The paradoxical fact is that *being conjoined is part of conjoined twins' individuality*. If we singletons cannot understand that – if we cannot comprehend a life of two consciousnesses in one continuum of skin – that says something more about us than about them. For we need only look to history to see that they, too, manage to be human, that they, too, manage to eke out an individualised existence in a very connected world.[113]

Indeed most, if not all, conjoined twins think of themselves as unique individuals and many "*express a desire never to be separated* because it will

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[112] J Conaghan 'Tort Law and Feminist Critique' [2003] CLP *forthcoming*; J Nedelsky 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale J L & Feminism* 7, 12 and 'Law, Boundaries and the Bounded Self' (1990) 30 *Representations* 162; and R West (1988) n 35 above.

[113] Dreger, n 72 above, 26.

result in such a profound change of identity … they seem to be as disinclined to be separated as singletons are to be joined".[114] Their understanding of their individuality through togetherness and connection problematises the aesthetic of separate and bounded individuals, and troubles the inadequacy of traditional conceptions of humanity; the difference of the anatomically unusual exposes the comforting exclusivity of 'normality'.

> Conjoined twins can be seen as inhabiting an intermediate category of embodiment between one and two, yet exist in a society which seems unable to contemplate with equanimity the degree of blendedness and interrelatedness which conjoined twins exhibit, or the idea that such intermediate categories may exist or need to be constructed.[115]

This inability to accommodate conjoined twins' relationships of interdependency and relatedness is perhaps nowhere more apparent than in the courtroom. In law, particular notions of legal personhood are premised upon an understanding of a separate, autonomous and rights-bearing liberal individuals with clear boundaries and bodily confines,[116] where the purpose of adjudication is to balance competing claims between distinct individuals rather than meaningfully to resolve complex dilemmas.[117] Hence, perhaps, the difficultly and unease of judges in relation to claims for psychiatric harm; their

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[114] Dreger, *ibid*, 9-10. Although see, e.g., Laleh and Ladan Bijani aged 28 who see themselves as "completely different individuals who are stuck to each other … [and who cannot] stand it any longer". Joined at the skull, Laleh and Laden have recently travelled to Singapore in the hope of undergoing an operation to separate them (BBC News, 30 May 2003, http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pascific/2949624.stm).

[115] Clucas & O'Donnell, n 29 above, part 2.2.

[116] Nedelsky (1989), n 112 above.

[117] Munro, n 29 above, 462; Sheldon & Wilkinson, n 85 above, 151.

focus on the harm suffered by the individual, as opposed to the loss of connection and relationship.[118] Hence too, the "superimpos[ition] of a highly abstract and individualistic rights framework onto the embodied pregnancy experience", for example, in the construction of the perceived conflict between maternal-foetal rights in the judicial enforcement of an unwanted caesarean.[119]

Similarly, the intimacy and complexity of Jodie and Mary's relationship, incompatible with legal understandings of the bounded self, is redefined as hostile takeover; the parasitic Mary analogous to the invasion of an unwanted foetus.[120] The instinctive privileging of separation over connection, of abstraction over relationship, independence over interdependence is indicative of an understanding of self that dreads rather than values intimacy. As a result their relationship is recast as one of conflict rather than compromise in which rights are protected over relationships and difference is eradicated by normality. The twins' connection and interdependence is rendered unintelligible and as such vulnerable to mutation and destruction. Mary is pitted against Jodie; she is cast as a soulless vampire, who sucks Jodie's lifeblood, to be destroyed or staked. The physical and emotional bond between the sisters is problematised, strategically redefined and ultimately severed.

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[118] Conaghan, n 112 above.

[119] Munro, n 29 above, 472-474, 473. See further, e.g., E Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart Publishing, 2001) 131-140; C Wells 'On The Outside Looking In: Perspectives on Enforced Caesareans' in S Sheldon and M Thomson *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing Ltd, 1998) 237.

[120] Munro, n 29 above, 466; West, n 35 1988 above, 26-34.

Nevertheless, although

> dominant rights analysis is fundamentally ill-equipped to deal adequately with rights-bearers whose peculiar confines of embodiment are incompatible with the bounded self and self-containing ideal ... The central problem ... is not that they are inherently limiting but that they have operated within a limited institutional and imaginative arena.[121]

Increasingly, it seems that what we in fact need is a little less separation and a little more connection; a little more conversation and a little less abstraction. Alternative understandings of individuality, rights and autonomy grounded in relationships and interdependence have begun to emerge. In particular, Jennifer Nedelsky has articulated an account of autonomy, which is derived from her recognition of our "embeddedness in relations".[122] So viewed, autonomy stems not from isolation and alienation, but from relationships and cooperation: "the self is experienced through relationship with another and we realise ourselves as autonomous only through social relations".[123] In this way, relational autonomy is achieved through connection with others. Autonomy, like identity, is socially constituted and, like the Neolithic stone, the individual is intelligible only as a part, or remnant, of community.

This approach enables a deeper and more contextual understanding of Jodie and Mary's best interests; their physical and emotional intimacy is

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[121] Munro, *ibid*, 475.

[122] Nedelsky (1989), n 112 above, 10.

[123] C Stychin 'Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self' in S Sheldon and M Thomson, n 119 above, 211, 221.

recognised and valued, their rights are understood as relationships,[124] and their autonomy realised through their relationship with each other. Vanessa Munro identifies three possible outcomes that might flow from a more "honest analysis of the relevance of relationship and context".[125] First, it might allow for the consideration of wider interests and concerns that are currently excluded. This may include the "centrality of religious belief systems to the community within which a child may be raised".[126] Second, the recognition of Jodie and Mary's relationship as one of connection and mutual support rather than conflict might be seen to undermine the legitimacy of the automatic assumption of separation underpinning the parasitic construction of the weaker twin. Finally, it might provide an alternative to the necessarily detached, insular and autonomous individual by

> permit[ing] a more flexible approach to the identification of non-distinct rights-bearers whose interests could not be located strictly within the confines of bounded parameters of embodiment.[127]

That is, an understanding of the individual as connected, interdependent and indistinct, grounded in their relationships with others, and whose interests stem beyond their unbounded self. In this way, whilst the ultimate outcome might remain the same, the invocation of a relational approach informs an understanding of 'Jodie's heart' – or at least the aorta – as functioning as "a

[124] On rights as relationships see J Nedelsky 'The Practical Possibilities of Feminist Theory' (1993a) 87 *Nw U L Rev* 1286, 1290 and also 'Rights as Relationships' (1993b) 1(1) *Review of Constitutional Studies* 26.

[125] Munro, n 29 above, 478.

[126] Munro, *ibid*.

[127] Munro, *ibid*.

common asset".[128] Both Jodie and Mary relied upon it; its identification as 'Jodie's' is grounded in and dependent upon the acceptance of largely arbitrary bodily boundaries and the imposition of cultural norms of individuality, on the twins' distinct form of embodiment. The representation of it as a "shared organ" subverts the Court of Appeal's construction of the twins' relationship as antagonistic,[129] perhaps enabling the decision to separate Mary from Jodie to be grounded in Mary's implied consent instead:[130]

> by permitting the attribution to Mary of an interest, located in the closeness of her relationship to Jodie and in the inevitability of her own death, in ensuring the continuation of her sister's life.[131]

The decision to separate them emerges as the result of a broad assessment of each twin's best interests as individual rights-bearers within the context and in light of their specific relationship, whereby Mary's sacrifice and death is not only in Jodie's best interests but might also be in her own best interest too. The release of individuality from its confinement within the bounded self, the understanding of autonomy within connection and the exploration of rights through relationships, enables Jodie and Mary to be viewed together as autonomous, non-distinct individuals to be accorded equal dignity, integrity, and respect. Their monstrous form is then a little less intimidating and a little

[128] Hewson, n 21 above, 297.

[129] Clucas & O'Donnell, n 29 above, part 3.1.

[130] Hewson, n 21 above, 298.

[131] Munro, n 29 above, 478-479. See, e.g., and cf, *Re Y* ([1997] 2 WLR 556) in which an incompetent woman was legally compelled to undergo harvesting procedure to abstract some of her bone marrow for her terminally ill sibling, on the basis of her best interests (as opposed to those of her ill sibling's) discussed further by Munro at 471-472.

more human. Our fascination with the anatomically unusual is understood as a reflection more of our own deep-seated unease and discomfort with, than their actual, difference.

Meanwhile, as Mary and Jodie begin to emerge from these alternative understandings as beautiful freaks, the Court of Appeal judges are not so lucky. Their own freaky judicial tendencies revealed in the form, as opposed to the substance, of their judgments have become somewhat less attractive. Their understanding of the judge as requiring the imposed isolation and mutated abstraction of self and the deliberate and brutal destruction of relationship and connections is exposed in the demon-fixated underbelly of their judgments. Their narratives of hostility, conflict and enforced sacrifice are unpersuasive; their judicial strategies are, like Hercules' style, radically in need of updating.

**At the End of our Affair(s)**

Hercules is by now a familiar figure; at once the superhero judge who has captured and is captured by the legal imagination and a vain and naked Emperor invisibly clothed with impartiality, fairness and denial. Although dismissed as a myth he continues to stalk and effect the legal imagination, retaining a tenacious grip on our understanding of adjudication as our default judge. Attempts by feminist legal scholars to identify a different adjudicative voice have largely fallen silent – the little mermaid's siren call is lost, unheard, or perhaps simply unrecognisable in the deafening silence – yet their search

has not been without notable success. Their exploration of attempts to dress the little mermaid in the Emperor's new clothes have (albeit unexpectedly) revealed traditional understandings of the Herculean approach to adjudication to be somewhat shabby and in need of renovation. As the aesthetic appeal of a detached, boundaried, isolated, and impartial judge begins to diminish, an alternative understanding of Hercules as connected, empathetic, and caring, has begun to emerge – of a princely judge at ease with intimacy and who is willing to shed his skin to walk in the shoes of others – an exploration of which begins here with Robin West.

In her opening chapter of *Caring for Justice*, West considers whether given the increasing recognition by some of 'care' as an ethical, rather than simply emotional or instinctive, response to decision-making, traditional understandings of legal justice – whatever they might be – ought to continue as the uncritical and singular goal or aim of adjudication.[132] Through an "imagistic" comparison of deeply familiar images of justice and care,[133] she problematises traditional understandings of adjudication, which continue to prioritise the values of justice over those of care; where integrity, detachment, impartiality and consistency overshadow relationship, nurture, connection, and compassion. Her belief that whilst care can inform legal judgment it rarely does, establishes a project that is

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[132] R West *Caring for Justice* (New York: New York University Press, 1997) 22-93. See also book reviews by Michael Cahill 'Caring for Justice. By Robin West' (1998) 9 *Mich L Rev* 188 and Linda McClain 'The Liberal Future of Relational Feminism: Robin West's *Caring for Justice*' [1999] *Law & Soc Inquiry* 477.

[133] What she understands by the terms 'justice' and 'care' beyond and apart from these images is never precisely defined (Cahill, *ibid*, 1887-1888).

more descriptive than prescriptive: she seeks to highlight the system's improper prioritization of justice over care to the detriment of both, not to give the final word on how that system might properly synthesize the two.[134]

She highlights the reciprocal relationship between justice and care in which judgment unconstrained by care fails as both a matter of justice and of care; it is as much unjust as it is uncaring. Justice and care are to be seen as "necessary conditions of each other", neither antagonistically oppositional nor conciliatorily complementary, but rather interdependent and interrelated.[135] In short, "justice must be caring if it is to be just, and ... caring must be just if it is to be caring".[136] Together they are established as the joint goals of good judgment as the focus of adjudication shifts and the superhero judge is re-imagined as both caring and just, a combination – if you like – of Hercules and the Happy Prince.

West begins by considering three images of legal justice – a plumb line, cupped hands or a blindfold – identified by Father William Byron.[137] She then goes on to identify these images and the virtues they represent – institutional consistency, personal integrity and universal impartiality – constituting the "foundational elements" our legal imagination.[138] It is then

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[134] Cahill, *ibid*, 1890.

[135] West, n 132 above, 24.

[136] West, *ibid*.

[137] A Jesuit Priest and former president of Catholic University, who argues "that such images might serve as guides for Catholic University Law School's mission of teaching social justice" ('Ideas and Images of Justice' in *Quadrangle Considerations* (1989) 102, 112-113 in R West 'Justice and Care' (1996) 70 *St John's L Rev* 31, 32. See also West, *ibid*, esp 25-38.

[138] West, n 132 above, 30.

unsurprising that they also inform the expected characteristics of the judge who inhabits our legal imagination. The Herculean judge is at once fair, just and impartial; he is seen to be both blind to personal distractions, an unswerving measure with an impenetrable attitude of restraint, and a fiction or myth who effects and restricts the imaginary domain.[139] In an attempt to relax his grip and limit the exclusionary effects of legal justice, West strategically contrasts these understandings of justice and the judge with counter-images of care. The image of the curved embrace of mother and child is placed alongside and envelops the certain straightness of the plumb line:

> To nurture and protect she makes herself an "O" ... provid[ing] care, protection, warmth, comfort and love through the interwoven, interdependent strength of the circle of care, not through the independent linearity of the erect, principled, morally upright pillar of strength.[140]

The image of a judge with cupped hands, holding his self – like the waters of justice – in his own hands, is placed next to one of a grieving Catholic sister. Her arms are open wide, her tears spilling down her face, in an act of sacrifice and giving: "The waters of care, one might say, unlike the waters of justice, flow freely".[141] The judicial blindfold is lifted to reveal a judge whose eyes are wide open; his focused and protective gaze is that of a judge who refuses to close his eyes.[142]

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[139] See further, chapter 1, 'Hercules: The Superhero Judge who inhabits our Legal Imagination', 34-59, above.

[140] West, n 132 above, 31.

[141] West, *ibid*, 31.

[142] West, *ibid.*

West seeks to destabilise the uncritical acceptance of these images as polarised, which establishes those of care as not simply different to, but as incompatible with, traditional understandings of legal justice and the judge, so as to create space for the dreaming of unrestrained alternatives. It is not that the judge may or should 'choose' to act with care, rather that he *must* do so if he is truly and fairly to judge. In short, there is no choice to be made. There is no either/or alternative; justice and care are understood as essential components of each other.

> West does not offer an exhaustive account of the relationship between justice and care or of how best to harmonise the two, either in abstract or in terms of their practical application. West's imagistic explanations of the concepts of justice and care leave the definition of the terms themselves ambiguous, compounding the difficulty of understanding the way in which they interact.[143]

Nevertheless, in so doing she establishes an alternative understanding of the judge and a new judicial job description; his superhero's assignment is updated, his professional mandate is revised as the goal of good judgment becomes the effective combination of nurturing consistency, compassionate integrity, and connected impartiality through steadfast kindness, indiscriminate protection, and open integrity.

All in all, West's care-infused understanding of adjudication has led us a long way from the Herculean coolness of Mount Olympus and to the beginning of a new adventure or story line in the tale of our imagined judge. It

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[143] Cahill, n 132 above, 1889.

is a tale of empathy, care and connection, of integrity, impartiality and justice, of a beautiful statue, in memory of a past prince, who from his position high above the city 'sees' and weeps for the pain and ugliness below. Both a part of and apart from the life of the city below, his relationship with its inhabitants is one of an acknowledged stranger and unknown saviour. Their lives intimately, yet (un)knowingly, (un)connected; he walks in their shoes, feeling their pain, fear, and suffering, and empathising with their longing for warmth, recognition and security.

Lynne Henderson, in her consideration of the relationship between legality and empathy, highlights the necessity of empathy as a contrast or balance to the assumed importance of Herculean certainty, predictability and principle. Empathy is established not as an alternative to, but as an essential part of, legality. Like West, she rejects their perceived "mutual exclusivity", whereby empathy is seen as "counter-intuitive" to the perceived rationality of the legal world. Instead empathy, distinguished from emotion, intuition, care, projection, sympathy and other 'nice' words, is understood as

> 1. feeling the emotion of another; 2. understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; 3. action brought about by experiencing the distress of another,[144]

and, as such, is seen to facilitate judicial understanding. It provides

[144] L Henderson 'Legality and Empathy' (1987) 85 *Mich L Rev* 1574, 1579.

> a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.[145]

Empathy becomes a means to a previously less-accessible end – *a process or method rather than an outcome or goal* – which enables better judgment. As Henderson establishes the subversive potential and unacknowledged reality of empathetic judicial decision-making and empathetic narrative, an alternative understanding of legality, infused with the revolutionary and transformative power of empathy, begins to take shape.[146]

At the same time Henderson dismisses a number of “myths” that surround and distort understandings of empathy.[147] Empathy is not essentially or exclusively feminine. Nor is it an ‘easy’ option. It does not inevitably lead to the loss of self, moral paralysis, or paternalism. It does not condone or excuse. Thus, although we might find it easier to empathise with ‘people like ourselves’, it is as important to acknowledge those with whom we find empathy difficult, or even impossible, and to ask ourselves why this is, at the same time accepting that to understand is not necessarily to forgive. Finally, empathy does not ensure a caring response; whilst I may grimace when you hit your thumb with a hammer, I will not necessary offer to finish the job you are doing. However, significantly to empathise without care can be to manipulate or distort, to judge badly. Overall, it seems empathy should be

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[145] Henderson, *ibid*, 1576.

[146] Henderson, *ibid*, 1575-1577, 1593-1650.

[147] Henderson, *ibid*, 1582-1587.

used with caution, not complacency; like the girl with the curl in the middle of her forehead, good empathy is very, very good, but when it is bad, it is horrid.[148]

On the one hand, empathy can facilitate good judgment. It works to 'humanise' situations preventing people from being treated as mere objects on the "field of pain and death", locating them within the context of their everyday life, experiences and relationships.[149] Empathetic narratives provide opportunities for the judge to follow the litigant's "footprints" and to engage with the telling of stories.[150] Their transformative power explodes, reinforces and establishes connections, as judicial integrity and impartiality are tempered by the revelation of (un)acknowledged relationships between and beyond the judge and judged. On the other hand, when empathy is absent or misplaced its effects can be devastating. The judge is able to retreat back to the security of detached and disembodied legality, his/her most notorious judgments destined to become the stuff of folklore. Consider, for example, the judge who had found in his experience that "no often subsequently means yes";[151]or the judge who would "put prostitutes and gays at about the same level. And [would] be hard put to give somebody life for killing a prostitute".[152] Further,

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[148] Henry Wadsworth Longfellow, *There was a Little Girl* in N Philip (ed) *Best-Loved Poems* (London: Little, Brown & Company, 2003) 23.

[149] R Cover 'Violence and the Word' (1986) 95 *Yale LJ* 1601, 1601.

[150] Henderson, n 144 above, 1592. On judicial storytelling see further chapter 4, 161-237 and esp, 'Emotive Narration', 164-181, above.

[151] R Graycar 'The Gender of Judgments: An Introduction' in M Thornton *Public and Private: Feminist Legal Debates* (Oxford: Oxford University Press, 1995) 262, 271.

[152] M A Kroll 'How Much is a Victim Worth?' *The New York Times* 24 April 1991 in J Nedelsky 'Embodied Diversity and the Challenges to Law' (1997) 42 *McGill LJ* 91, 105.

compare the judge who understood as "'common knowledge' that 'jeans cannot even be partly removed without the effective help of the person wearing them' and that it is 'impossible, if the victim is struggling with all her force'",[153] and the judge who believed that all the rape victim needed to do was "keep her legs together"[154] with the judge who when dismissing the appeal of a man convicted of sexually assaulting and bludgeoning to death a 16 year old girl still felt it necessary to gratuitously remark on the victims alleged sex-life.[155]

Indeed, in Bob Dylan's retelling of Hattie Carrol's story – a black maid who was beaten to death in a fit of pique by her millionaire employer, William Zanzinger – the real villain is not Zanzinger, but the unknown judge who sentenced him to a mere six months in jail. The grotesqueness of Zanzinger's crime is superseded by the lack of judicial empathy and the social acceptance of his actions.

> While the crime itself was ugly, the *sentence* exposed even deeper villainy ... it evidenced the dual standards of criminal sentencing applied to perpetrators of crimes against black and white victims, and between rich and poor defendants.[156]

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[153] J Tagliabue 'Where Jeans are a Rape Defence' *New York Times* 14 February 1999 in I Karpin 'She's Watching the Judges: Media Feedback Loops and what Judges Notice' in M Thornton (ed) *Romancing the Tomes: Popular Culture, Law and Feminism* (London, Cavendish Publishing Ltd, 2002) 47,47.

[154] J Dalrymple 'Judges in the Dock', *Sunday Times News Review* 13 June 1993 in K O'Donovan 'Fabled Explanations of Bias' in C McGlynn (ed) *Legal Feminisms: Theory and Practice* (Dartmouth: Ashgate, 1998) 49, 49.

[155] J Toobin 'Women in Black: Female Judges are More Compassionate than Men the Theory Goes. Not in Texas' *The New Yorker* 30 October 2000.

[156] West, n 132 above, 28.

His decision was neither an act of justice nor care. What is more, not only did the judge fail to empathise with the suffering of Hattie Carrol, he compounded this with his over-identification with the defendant. His, perhaps instinctive, misplaced empathy is ultimately, if not contemporaneously, perceived as unjust. The difficulty is not that the judge stood necessarily in the 'wrong' shoes, that he empathised with the 'wrong' person (although perhaps he did), but rather the extent to which this (poor) positioning or (wrong) footwear effected and affected his judgment. In short, his inappropriate empathy – at least to modern eyes – exposes his 'bad' bias.

Patricia Cain draws this distinction between 'good' and 'bad' bias.

> To the extent a bias is a personal preference, something a person has affection for, it is something we want to acknowledge and celebrate about human personality. Can you imagine a person with no preferences? On the other hand, to the extent a person's bias constitutes bigotry, prejudice, or intolerance, we certainly do not want to celebrate it. Thus, we might say that whereas we want judges who have affection for things, we do not want judges who are prejudiced. We want the good bias, but not the bad one.[157]

So viewed, judicial invocations of both 'good' and 'bad' bias, and indeed empathy, are, it seems, not only inherently and necessarily diverse – at once compassionately nurturing and deliberately distorted – but also an inevitable and unavoidable part of judgment. Attempts to exclude or deny their role

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[157] P Cain 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *S Cal L Rev* 1945, 1946. See also J Resnik 'On the Bias: Feminist Reconsiderations of the Aspirations for our Judges' (1988) 61 *S Cal L Rev* 1877.

within judicial decision-making stem from a misunderstanding of not only of impartiality, but also of bias itself. Once impartiality, understood as neutrality or objectivity, is recognised as unattainable, and bias, free from prejudice, bigotry and intolerance, as inevitable empathy becomes essential and inescapable to 'good' judgment – whatever that may be. At the same time, bad or inappropriate empathy – that which hinders rather than facilitates, harms rather than enables judgment – is rejected. Moreover, if "[b]iases are good when and to the extent that they facilitate the gathering of *knowledge* – that is, when they lead us to the truth … [and] are bad when they lead us *away* from the truth",[158] perhaps before beginning to judge the judge might glance down to check he is standing in the 'right' shoes, that is those of 'good' empathy and bias, able to walk with him in the direction of good – or at least better – judgment.

Jennifer Nedelsky within her exploration of the challenges 'embodied diversity' presents to law considers the impact of misplaced empathy or affect.[159] In the development of her argument, she draws upon the neurological research of Antonio Damasio, in order to explore the essential interrelationship between emotion and reason.[160] The patients in Damasio's study had suffered severe yet highly particular brain damage which meant

[158] L M Antony 'Quine as a Feminist: The Radical Import of Naturalised Epistemology' in L M Antony and C Witt (eds) *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Boulder, CO.: Westview Press, 1993) 185, 215. See also M Minow 'Foreward: Justice Engendered' (1987) 101 *Harv L Rev* 10.

[159] Nedelsky, n 152 above, 101-106.

[160] A R Damasio *Descartes' Error: Emotion, Reason and the Human Brain* (New York: Putnam, 1994) in Nedelsky *ibid.*

that whilst they retained their previous intelligence, memories and perceptual abilities, they

> showed a startling flatness of affect in relating past events of (what would ordinarily be) a highly emotional nature. And although they displayed normal skin-conductive responses ... to immediate stimuli that startle ... they showed none of the normal responses when shown pictures of scary, horrific or disturbing events. They could describe the pictures precisely later, and even identify the kinds of emotions that are associated with such events, but they seemed not to feel the emotion.[161]

As a result they were unable to exercise judgment in a way that took into account the feelings of those around them. Although they understood or knew how they *ought* to be feeling in response to the various situations they somehow did not *feel* it. Their "somatic markers", their learnt emotional responses to certain images, had been damaged. This meant they were unable "to sort through the otherwise overwhelming array of possible actions" or responses necessary in order to distinguish bad experiences from good.[162] As a result they were unable to rely upon their somatic markers "to learn from bad experiences ... becoming lost in the details of even routine decision-making".[163] The damage to the "partnership" between their emotion and reason meant that their emotions are unable to affect their reasoning, which subsequently, in absence of emotion, became ineffective.

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[161] Nedelsky, *ibid*, 101-2.

[162] Nedelsky, *ibid*, 102.

[163] Nedelsky, *ibid*.

In her application of Damasio's study to failures in judicial judgment, Nedelsky is not suggesting – however tempting it might be – that the culprits are somehow brain damaged. Rather, she argues that they have adopted undesirable somatic markers. They have failed to identify the appropriate affect in relation to the events before them. How else, she suggests, can a judge's understanding of the sexual interference of a "sexually aggressive" three-year-old girl by her male baby sitter and his subsequent imposition of a probationary rather than a jail term be understood?[164] What is truly shocking about this case, Nedelsky suggests, is not simply that it fails as a matter of justice or logic, but the deeply disturbing absence of 'affect', 'empathy' and 'care' in the judge's response to the child.

> The story is shocking because the judge is not shocked. He seems more attuned to what he sees as the child's misbehaviour than to the horror of the man's actions.[165]

What is more, the judge not only fails to empathise with the abused, but also inappropriately does so with the abuser. In his judgment there are echoes of judicial identification with the expectant-father-rapist, the cuckolded-murderer, the piqued-employer and the vampire-sustaining twin. His somatic markers are inexpedient, his invocation of empathy misguided. His subsequent judgment is neither caring nor just; the inappropriate affect of compassion and relationship untempered by integrity and an understanding of impartiality ultimately, establishing both uncaring justice and unjust care. In short, judgment is always implicated with empathy, emotion, and/or affect. However,

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[164] Nedelsky, *ibid*, 103-106.

[165] Nedelsky, *ibid*, 103.

the point is not to attempt to excavate or deny it, but rather to recognise and harness its promise and potential. Empathy, it seems, can be both good and bad and, with apologies to Patricia Cain, what we want is the good empathy and not the bad.[166] We want empathy infused with care, which enables the judge to walk in the shoes of the judged and in so doing to recognise and embrace connection.[167]

Connections too can be both 'good' and 'bad'. Whilst we may instinctively fear the prospect of losing those that are valuable and life-affirming, positively reinforcing and enabling, connections can also be "invasive and overpowering ... diminish[ing] rather than enlarg[ing] the individuals that participate in them".[168] As illustrated in *The Happy Prince*, when care and connection are not balanced against the recognition of personal integrity, the act of self-giving becomes one of self-annihilation.[169] Just as care must temper justice, justice too must temper care. Increasingly it is not only unrealistic, but also undesirable to imagine the judge as unconnected, as disengaged, impartial and independent. The aesthetic appeal of a Herculean understanding of a judge without preferences and personality, unwilling to empathise and unable to weep is beginning to fade. It is seen as akin to the folly of erecting a golden statue high above a city where people are too cold to write, too scared to go home and where the rich make

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[166] Cain, n 157 above, 1946.

[167] See, e.g., S Rush 'Feminist Judging: An Introductory Essay' (1993) 2 *S Cal Rev L & Women's Stud* 609 and R West 'Taking Preferences Seriously' (1990) 64 *Tul L Rev* 659, 680.

[168] West, n 132 above, 2.

[169] West, *ibid*, 79.

"merry in their beautiful houses, while the beggars sit at the gates".[170] Rather, what we want is a judge who is at home with intimacy and comfortable with care. A judge who gives himself away, who seeks to maintain good connections and who rejects the bad, who follows the footsteps of empathetic narrative and who understands the role of good bias as "a line diagonal to the grain of a fabric" in ensuring a "smoother fit" and better judgment.[171] Put another way, we want a judge who combines the best of Hercules with the best of the Happy Prince, who is at once (un)connected, (dis)engaged, (im)partial and (in)dependent and who, like the climber in the opening scene of the Hollywood movie *Vertical Limit*, recognises and embraces good connections and severs the bad.[172]

High up on an isolated rock face three climbers are joined together by a single rope. The leading climber stumbles and falls, his momentum pulling the second climber with him. They both now hang from the rope; the remaining climber looks on as the krab fixing their rope to the rock begins to move. It becomes apparent that the rope cannot hold their combined weight. With his sister on the rock above him and his father dangling from the rope below, the hero has a choice: to cut the rope, severing the almost inevitably fatal connection with their father in order to save himself and his sister, or to wait until the three of them fall together.

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[170] Wilde, n 2 above, 9-10.

[171] Resnik, n 157 above, 1881.

[172] *Vertical Limit* (2000) film directed by Martin Cambell, USA, Columbia Pictures.

It is, of course, a classic dilemma, which made for an interesting walk home from the cinema.[173] A choice must be made, even if it is one not to choose and to let 'fate' decide. The family dynamic here is an added twist, which plays an essential, yet unknown, part in the hero's decision-making process: are you more likely to cut the rope of the father you despise or love deeply? In fact, his final decision is unimportant, the point has been made: not all connections or relationships are the same. There is a difference in the connection between father and son, father and daughter, brother and sister, between emotional family ties and the physical connection of the rope. Some connections need to be maintained whatever the cost, whilst others must be severed at all costs. Choices must be made. The perceived value of each connection effects and affects judgment. The denial of their difference is a failure of justice, care, and ultimately to judge; "the 'plumb line' of justice [and consistency] ... the flat, horizontal line of death when divorced from the compassion that otherwise animates it".[174]

In the same way, the judge's recognition and acknowledgment of the ubiquity and inevitability of relationship and connection enables him "to listen with connection before engaging in the separation that accompanies judgment".[175] His eyes wide open, he looks for and engages with connection. Pursuing relationship – the bonds between himself and the (un)judged – as he

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[173] Interestingly, both Brooke (at 559-560) and Robert Walker LJJ (at 585) refer to a similar dilemma in their consideration of *Re* A, n 13 above.

[174] West, n 132 above, 49.

[175] Cain, n 157 above, 1954.

seeks some small part of their story that he can make his own,[176] "enter[ing] the skin of the litigant ... mak[ing] his or her experience part of [his] experience and only [then beginning to] ... judge".[177] As the stories of the judge and judged intertwine he becomes both a part of and apart from the decision-making process; his attitude toward judgment one of consistent nurture, his (un)restricted decision-making and his (dis)connection enabling him to judge truly.

With this in mind, it seems we have once again reached the point at which the realisation that there is more going on when judges judge – that the judge is at once (un)connected, (dis)engaged and (im)partial – is unavoidable. The aesthetic appeal of the Herculean superhero is diminishing; the superficiality of his cool detachment and aloof manner a little tired and somewhat overshadowed by the compassionate benevolence of his princely nemesis. As our infatuation begins to wane, perhaps it is time for us to end our Herculean affair. Yet, as we turn to say goodbye, his new clothes tantalisingly reveal the promise and potential of the man beneath. It appears that Atticus might have been right all along, that you

> never really understand a person until you consider things from his point of view ... until you climb into his skin and walk around in it.[178]

After all, it was only once the little mermaid started walking around in Hercules' bespoke clothes that their invisibility became apparent. They simply

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[176] Cain, *ibid*, 1954-1955.

[177] B Wilson 'Will women judges really make a difference?' (1990) 28 *Os HLJ* 507, 521.

[178] Lee, n 1 above, 33.

did not fit; as a result her visible difference became too much of a distraction, her presence was too irritating to deny. Undressed and exposed, Hercules' superhero reputation was in tatters and to be honest he hasn't looked much of a superhero since. Yet, perhaps it is time to be honest with ourselves about his lack of traditional superhero tendencies. To recognise his inability to be truly impartial, disengaged, unbiased, unconnected, to embody or represent the Herculean virtues of the plumb line, the cupped hands and the blindfold, and to accept that, stripped of his superhero suit, he is simply a man.

This revelation is neither particularly tragic nor surprising. In fact, we've known it all along. Now is perhaps the time to stop denying, and to begin acknowledging, the judge's humanity – to let go of the superhero and to embrace the prince beneath.[179] In this way, as we start to listen for his story, we might begin to recognise in his ability to care justly and to nurture consistently with compassionate integrity and steadfast kindness, the infusion of his Herculean virtues with princely characteristics. We might be able to re-imagine, in the combination of the Herculean judge who inhabits the legal imagination and story of the Happy Prince, a fantastic understanding of the judge. This might, perhaps, be an image of a superhero – or heroine – who is ready for action, waiting to help the hopeless, defeat the bad guys and save the world according to limits of her/his updated professional mandate.[180]

[179] Resnik, n 157 above and also J Resnik 'Feminism and the Language of Judging' (1990) 22 *Arizona St LJ* 31 paper given as part of a panel on 'Compassion and Judging' at the Annual Meeting of the Association of American Law Schools, San Francisco, January 1990.

[180] The choice of visual image(s) for the re-imagined image is yours – you might want to imagine a lycra-suited Christopher Reeve or Lynda Carter. Alternatively you may prefer the leather jacket of Angel, Buffy the Vampire Slayer's knee high boots, Batman's car or

Where the success of her/his mission is judged by the kindness s/he shows, the extent to which s/he is able to combine justice and care and her/his ability temper personal and professional integrity with compassion. Maybe the Emperor's magical – albeit invisible – clothes are redesigned in light of the new season's unisex trends; understandings of impartiality as a blank slate, an empty or closed mind, replaced with a vibrant, rough and uneven alternative created through the weaving together of difference, the infusion of sameness with diversity and the recognition of embodied perspectives. Perhaps, the superhero(ine)'s footwear might no longer be, if indeed they ever were, purely a fashion statement, but may instead serve practical purpose, enabling easy walking through the murky waters of compassion and context that surround judgment and contextualised decision-making. Finally, superhero(ine)'s traditional disguise might be replaced with an up to the

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Spiderman's webs. On the other hand, instead of these 20th/21st century pretenders to superhero(ine) crown, you might prefer a more mature or mythical image for your superhero(ine) – King Arthur and the Knights of his round table, the literary figure of Atticus, or perhaps a more human, less heroic, image of a wo/man. Maybe even a hybrid of a number of these images might come together to form your fantastic image of the judge who inhabits the legal imagination. On images of lawyers and judges in film, television and fiction see generally, S Greenfield, G Osborn & P Robson *Film and the Law* (London: Cavendish Publishing Ltd, 2001) and C Menkel-Meadow 'The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft' (1999) 31 *McGeorge L Rev* 1; on Atticus, see e.g., S Lubet 'Reconstructing Atticus Finch' (1999) 97 *Mich L Rev* 1339 and collection of symposium papers on 'To Kill a Mockingbird' and 'Picturing Justice: Images of Law and Lawyers in the Visual Media' in (1994) *Ala L Rev* 389 and (1996) 30 *USFL Rev* 1131 respectively; On Buffy the Vampire Slayer see A Bradney 'Choosing Laws, Choosing Families: Images of Law, Love and Authority in "Buffy the Vampire Slayer"' (2003) 2 *Web JCLI*; and finally, on the 'real' lawyer/judge see J Lawrence *Lawyerland* (New York: Farrar Straus & Giroux, 1997) and collection of review papers in (2001) 101 *Colum L Rev* 1733.

minute adaptation (think, possibly, eyes cut out of a blindfold), which remains, as it always was, an (in)effective disguise that facilitates (dis)engagement.

On the face of it, this imagistic portrayal of the judge doesn't seem to be all that different from Hercules, the original superhero judge. However, as always, appearances can be deceptive. Our re-imagined Hercules is exactly that: Hercules re-imagined, not replaced. His mission is redefined, his superhero powers are updated, and his outfit is redesigned. The effect of our brief flirtation with the Happy Prince has been to reaffirm Hercules as the judge who inhabits our imagination, by revealing the human and princely characteristics of the superhero. By this I mean, the tale of the Happy Prince serves as a timely warning as to aspects of the Herculean judge that we, like the Town Councillors, might be in danger of overlooking and devaluing; it reveals the ability of bewitching aesthetics, alongside vanity and ignorance, to overshadow the somewhat shabby beauty of care, connection and empathy. In this way, it tempers the temptation, once Hercules had been exposed as the vain and naked Emperor, simply to pull him down and replace him. What the little mermaid wearing the Emperor's new clothes reveals is the judicial self; an alternative understanding of Hercules, devoid of superhuman powers, yet imbued with princely virtues. The promise of an alternative aesthetic image of a naked Hercules, willingly able to judge intimately with care and empathy is soothed with his superhero attributes of (dis)engagement, (im)partiality and (dis)connection. As, from the somewhat unlikely combination of a mythological hero and a golden statue, emerges a fantastic alternative; a judicial amalgamation of myth, fairy tale and imagination, which ensures that

adjudication will never be the same again. At the end of our princely and Herculean affairs we leave behind a new understanding of an old judge. A dreaming alternative of a superhero who combines integrity with compassion, constancy with unpredictability, consistency with nurture, restrained sacrifice with heroic humanity. A re-imagined Hercules who strives for justice and care, impartiality and good bias, isolation and connection, empathy and understanding, who sees the rainbow in white light and who silently weeps as he begins to judge.

**Judging Differently**

It is clear as we reach the end of this imaginative and real life tale of sacrifice, loss, hope, tragedy, revelation, courage, care, giving and relationships that tales of adjudication might never be the same again. It is perhaps time at the end of our story of dreaming alternatives and fantastic adaptations – where heroes are lost and found, the leaden hearted weep and sisters might be able to do it for each other rather than for themselves – to consider albeit briefly how our re-imagined judge might frame her decision-making and tell her stories. In short, to explore what difference, if any, this understanding of the judge might have on the strategies and narratives she employs and the make up of the judicial quilt and adjudicative landscape.

Take, for example, the tales of *White* and *Alcock* – the story of Inspector Henry White, for example, on duty during the Hillsborough Tragedy, who attempted to rescue those trapped behind the perimeter fence. Or, the

tale of Anthony Bevis, another police officer who, in the confusion, attempted to revive a child who was already dead; or the fateful search by Brian Harrison and Richard Alcock for their brothers and brother-in-law, respectively, that same afternoon. Consider their stories of tragic connections and severed relationships, which combine with many others to form the backdrop of their unsuccessful claims for compensation for negligently inflicted pure psychiatric harm.[181] Perhaps, their stories might be reconceived as the focus of the judge is directed away from the criteria of formal relationship and the harm suffered by each individual, toward the tragedy of these lost or unwanted bonds.[182] Perhaps, context – being there and being involved – might be prioritised over the immediacy of danger or the closeness of, officially defined, ties of love and affection. Maybe contextual relationships might be acknowledged alongside the traditional or formal, allowing for the recognition of those, which, at the moment, fall outside of the *Alcock* criteria. Perhaps the formal might give way to the informal, the need for categorisation of relationships abandoned, enabling the legal recognition of not only the relationship between brothers, but also the brief, yet long-lasting, connection between Anthony Bevis and the child he attempted to resuscitate, and between Henry White and the nameless faces of those trapped behind the metal fence. The individual might be understood within, rather than abstracted from, relationships and circumstances. In short, rather than focusing on the individual psychiatric harm suffered by Brian Harrison, Richard Alcock, Anthony Bevis and Henry

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[181] *White* v *Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509; *Alcock* v *Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057. See further chapter 4, 161-237, above.

[182] See further Conaghan, n 112 above.

White and others, the re-imagined judge might instead focus on the harm of severed connections and shattered relationships – the loss of a brother and the effect of witnessing the death of those you are employed to protect or rescue.

Maybe a judge who recognises the reality of 'rights as relationships' might tell Lister's tale of abused trust, misplaced authority and vicarious liability in a different way.[183] She might reject the current frame provided by the law of negligence in relation to sexual abuse altogether. Alternatively, she might, like the House of Lords seek to adapt or manipulate it, reinforcing the test of close connection by means of an assessment as to the extent to which the employer has materially increased the risk of the tortious act. Widening her focus beyond that of the employer/employee relationship and the individualistic conception of a 'frolic of his own' to explore the enforcement of rights through the relationships they promote or effect, she might seek to ensure that the law on vicarious liability promotes healthy, wanted connections and rejects those that are detrimental and unwanted. When seeking to establish a relationship between the parties, she might consider the effect the denial of vicarious liability may have; enforcing liability when its negation would encourage a relationship of inequality and irresponsibility, as she seeks to foster autonomy through the promotion of autonomy-enhancing, and the discouraging of autonomy-inhibiting, relationships.[184] Acknowledging the importance of context and relationships, and the ongoing impact of unwanted and enforced intimacy, she might recognise that autonomy

[183] *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215. See further chapter 5, 238-294, above.

[184] See further, Nedelsky (1993a), n 124 above, 1290.

is not a static or innate quality, rather a person's capacity to make meaningful choices ... [which] may fluctuate according to a complex matrix of social, economic and psychological factors. [That autonomy is] 'a capacity that requires ongoing relationships that help it flourish; it can wither or thrive through one's adult life'.[185]

Finally, a judge who is (dis)connected, justly caring and who utilises his nurturing empathy might understand the intimacy of Jodie and Mary's relationship somewhat differently. Perhaps, Mary's self might be appreciated as a part of, as opposed to apart from, Jodie. Her physical connection to her sister might be recognised as integral to each twins' sense of self emotionally, intellectually, intuitively and, perhaps, even spiritually, so that Mary might, if able, choose to negate a part of herself to save the rest. Or, put another way, perhaps the judge might recognise that Mary may wish, like E B White's Charlotte, to seek to maintain her connection and to secure her relationship with Jodie through the severing of destructive connections in the sacrifice of her physical self.[186]

In fact, almost inadvertently, this thesis has been haunted by the themes of sacrifice, mutilation, mutation and death. Their ghostly presence has emerged uninvited in its stories and imagery, where the brutality of mutilation, the violence of sacrifice and the annihilation that accompanies death are offset and tempered by bewitching images of unboundaried,

[185] Jackson, n 119 above, 6 quoting Nedelsky (1993b), n 124 above, 8.

[186] See further, Hewson, n 21 above, 298; Munro, n 29 above; Clucas & O'Donnell, n 29 above and generally n 166 ff above and surrounding text.

connected and giving selves; as death, sacrifice and mutilation shadow and tacitly effect narrative, imagination and self.

In the opening chapter, for example, the image of the disembodied Herculean judge who inhabits the legal imagination, a self-less superhero with unaccountable abilities, magical attributes and invisible clothes, was placed alongside the story of the little mermaid who exchanges her voice for long legs. As she waits silently for the prince to fall in love with her, it becomes apparent that her self-mutilation will be ultimately futile. On the morning of the prince's wedding to a neighbouring princess after refusing her sisters' call to rise up and kill her prince, she throws herself into the sea where she is transformed into a spirit of the air, neither mermaid nor woman. Similarly, Charlotte, the eponymous heroine of *Charlotte's Web*, who we met at the end of chapter two, dies exhausted and alone.

> 'Good bye!' she whispered. Then she summoned all her strength and waved one of her front legs at him. She never moved again. Next day, as the Ferris wheel was being taken apart ... Charlotte died. The Fair Grounds were soon deserted. The shed and buildings empty and forlorn ... Nobody, of the hundreds of people that had visited the Fair, knew that a grey spider had played the most important part of all. No one was with her when she died.[187]

She kept her promise: Wilbur is safe. In fact, he has become 'some pig' indeed, 'radiant', 'terrific' and 'humble' just as Charlotte had predicted in her

[187] E B White *Charlotte's Web* (London: Puffin Books, 1963) 163.

miraculous webs. Yet, as the story ends, her self-sacrifice for Wilbur – unlike her webs – passes unnoticed by everyone except those closest to her.[188]

Comparatively, in *The Merchant of Venice* death, sacrifice and bloody mutilation are spurned in favour of justice, mercy and the law. Portia's arrival in Venice thwarts not only Shylock's thirst for Antonio's flesh, but also Antonio's attempted self-(serving) sacrifice.[189] She eschews the Duke's imminent sacrifice of the law and ensures the survival of the play's hero and anti-hero, alongside the Venetian law. Death and tragedy pervade the stories of the patchwork quilt of the law on the tortious recovery for negligently inflicted pure psychiatric harm. Whereas in Lister's story, death is more tangential, it is found in his loss of innocence and childhood at the hands of those charged with protecting him. In *Re A*, despite representations to the contrary, Mary's sacrifice is imposed on her by the courts in order to save her twin Jodie; their conjoined state brutally mutilated by the surgeon's knife. The hero in *Vertical Limit* chooses to cut his father free from the rope attaching himself, his sister and father to each other and the rock, and finally, Oscar Wilde's Happy Prince sacrifices – or, if you like, mutilates – his external beauty, the smitten swallow forsaking his future to stay and help him.[190]

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[188] "Wilbur often thought of Charlotte. A few strands of her old web still hung in the doorway. Everyday Wilbur would stand and look at the torn, empty web, and a lump would come to his throat ... Wilbur never forgot Charlotte. Although he loved her children and grandchildren dearly, none of the new spiders even quite took her place in his heart" (*ibid*, 164, 175).

[189] "*Antonio*: I am a tainted wether of the flock/ Meetest for death, - the weakest kind of fruit/ Drops earliest to the ground, so let me;/ You cannot better be employ'd Bassanio,/ Than to live still and write my epitaph" (*The Merchant of Venice* IV. i. 114-118).

[190] "Then the Swallow came back to the Prince. 'You are blind now' he said, 'so I will stay with you always' ... and he slept at the Prince's feet" (Wilde, n 2 above, 9).

Yet also in these tales, sacrifice, mutilation and death ensure life and future, as separation reinforces connection, detachment exposes context and autonomy is found in relationships. Antonio's self-sacrifice is prevented, the little mermaid kills herself rather than her prince; Charlotte dies for Wilbur, as does the father in *Vertical Limit* for his children. Mary dies for Jodie and the swallow for his prince. My point here is not to romanticise death or to downplay the brutal and, at times futile, mutilation of self in sacrifice. Nor am I attempting to deny the violence of these images; the thud as the father falls to the ground, the clamping and severing of Jodie and Mary's shared artery, the abuse of childhood in *Lister*, the appalling negligence and waste of life in *White* or the pain of the little mermaid whose "every step ... feels as if she were treading on pointed swords".[191] In each of these images self – understood as detached, boundaried, isolated and unconnected – is annihilated, autonomy is lost. Moreover, our feelings of discomfort and unease in relation to these images are increased because they seem to have been enforced or imposed;[192] the participants have little or no real choice. We are reminded that care without justice is not care at all.[193]

Alternatively however, sacrifice, mutilation, mutation and even death can, in these stories, be seen to *reinforce* self, relationships and connections; Charlotte dies knowing both Wilbur and her children are safe, Jodie and her

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[191] H C Andersen 'The Little Mermaid' in N Lewis (trans) *Hans Andersen's Fairy Tales* (London: Penguin, 1981) 41, 63.

[192] Indeed, in law one is unable to consent to self-sacrifice; "because one cannot consent to an operation to remove an organ which is vital to sustaining life: one cannot consent to one's own death" (Sheldon & Wilkinson, n 85 above, 157).

[193] West, n 132 above, 22-93 esp 79-84.

parents returned home to Gozo, and presumably the prince and his princess and Bassanio and Portia, live happily ever after. Self – understood as connected, unboundaried, and interdependent – is maintained and reinforced; autonomy, conceived and embedded in relationships, is ensured, and interconnection seen to be as fundamental as "loving your right hand ... a part of you ... [and a] ... part of that giant collection of everybody".[194] In fact what these stories and images of sacrifice, mutilation and death disclose are alternative ways of understanding and framing adjudication, particularly in situations of intimacy. The Herculean judge who inhabits the legal imagination is undressed and exposed, his inability to judge effectively in such situations and his recourse to narrative and the aesthetic as persuasion is uncovered. his place, stands re-imagined Hercules. S/he is a judge who is able to find a balance between necessary detachment and appropriate connection, between 'good' empathy and 'bad' bias, between stepping into the skin or standing in the shoes of the litigant and establishing enough distance to be able to encounter daily the field of violence and pain. S/he is also a judge who is transparently a/effected by what s/he sees, who recognises self through relationships and connection, who openly weeps and who, when necessary, is prepared to grapple with the contradictions in death, life, sacrifice, mutilation, care and justice ... and only then begin to judge.

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[194] Claire, a participant in Gilligan's 'rights and responsibilities' study in C Gilligan *In a Different Voice – Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982; repr 1993) 57.

# Conclusion

This collection of tales about mermaids and superheroes, storytelling, aesthetics and judging emerged out of a sense that the hushed conversations and subtly bewitching imagery of traditional accounts of adjudication do not tell the whole story – that, put simply, there's much more going on when judges judge. It is, in essence, a counter-narrative; an imaginative yet subversive subtext of what had gone before. It is an anthology of tales of difference, diversity and lost voices – of patchwork quilts, strategic frameworks, justice, care, 'art', empathy and connection – which together challenge the deadening imaginative grip and deafening silence of conventional accounts of adjudication to form an alternative story in which the imagination and the role of the aesthetic are central.

Throughout this thesis narrative, aesthetics, difference and imagination have combined to fashion the backcloth before which each tale is played out: lurking in the wings when, for example, Hercules appeared naked and the little mermaid put on the emperor's new clothes; or hiding in the shadows as Carol Gilligan and her allies swapped Arachne's web for Charlotte's, when Portia emerged as an icon, and when the Happy Prince became a superhero's mentor. They become visible too when tortious recovery for the negligent infliction of pure psychiatric harm was viewed in terms of the judges' needlework and the imposition of vicarious liability for sexual abuse was enmeshed in questions of art and artistry. The literary characters and stories that feature in this thesis have been offered as unconventional adjudicative

images and tales. Although at times inexplicably perturbing, deliberately irritating and perhaps, to some, somewhat fey, they have served to challenge and disrupt the more familiar and reassuring – but no less aesthetic or imaginative – images of law, justice, and adjudication.

Moreover, the tactical adoption of literary techniques has revealed the judge to be, *inter alia*, a storyteller who strategically deploys and seeks to persuade through narrative and the aesthetic. It has become clear that who the judge is matters, affecting both the way stories reach the law and law reaches the stories, (in)forming the tale that is ultimately told. Similarly, the aesthetic dimension to law's authority has been brought to the foreground. In particular, the extent to which our acceptance of and engagement with law is, to a significant degree, shaped by its aesthetic appeal has become apparent in the dissection of the aesthetic composition of particular legal decisions, demonstrating that artistry is as integral to the judicial role as sophistry; that legal reasoning is, as much as anything, about skilful packaging (or clever dressing).

In this context, the story of the woman judge – an ongoing narrative of difference, exclusion, mutation and silence set against a backdrop of calls for a more diverse judiciary – has provided a pertinent starting-point for an exploration of the judge who inhabits the legal imagination. It seems that despite general agreement as to the perceived need for more female judges, or for that matter other groups currently underrepresented within the judiciary, the implicit assumption which underpins such agreement – that is, that women

judges might make a difference – has rarely been fully confronted. Nevertheless, what the recognition of a gender dimension and the *possibility* of difference (whatever it might be) within adjudication have revealed is the particularity and contingent status of traditional understandings of the judge and judging. Debates about difference have presented the opportunity and means through which to imagine dreaming alternatives and diverse adjudicative voices. Neither necessarily feminine nor feminist in intonation, these imaginative creations have emerged in this thesis through judicial unease with (un)wanted relationships and intimacy in stories concerning severed family relationships, parental contact in the context of domestic violence, enforced sexual intimacy, and extreme physical connection.

As central themes, narrative as technique and rhetoric, embodied imagination, strategic aesthetics, and difference as method, have become windows on to the possibility of previously unimaginable adjudicative landscapes. Underlying and weaving together at times seemingly disparate images and stories of spiders, sacrifice and judicial quilts, their combined role is akin to that of anchor, ballast, rudder and sails. Put simply, if the identification of an alternative tale of adjudication was the 'what' or subject of my thesis, then the use of narrative, aesthetics, difference, and imagination can be seen as its method or 'how'. As traditional understandings of the judge and judging have been challenged and explored through fairy tale imagery, storytelling and myth, the counter-images that have emerged cannot be substantiated in any probative sense; instead their purpose has been to act as

catalysts or icons to provoke thought and stimulate debate about the nature and role of law, justice and adjudication.

During the course of my explorations, it soon became clear to me that the distinction between subject and method, between the 'what' and the 'how', of my thesis was unsustainable: narrative, aesthetics, difference and imagination were, within my approach, both method *and* subject. By this I mean more than simply to acknowledge the dynamic and interactive relationship between subject and method – that process necessarily effects and affects content – rather, I mean to reiterate the importance of recognising the implications of a substantial literary, artistic and creative dimension to law, in particular, the extent to which the legal imagination is harnessed to ideological purposes through the appeal of attractive, yet ultimately constraining, images. What my study reveals is that narrative, aesthetics, difference and imagination are not merely tools through which to consider the role of judge and adjudication, but rather are an integral component of them.

This insight was developed in the opening chapter, which reconsidered representations of the judge and, in particular, the position of the woman judge through fairy tale and myth. The chapter began by exploring the actuality of women's exclusion within the judiciary, traditional explanations for this, and the impact of recent changes, before going on to consider the image of the Herculean judge. It argued that whilst we may view him as an ideological construct or fairy tale, we routinely deny this to ourselves and to others. This not only ensures the normative survival of Hercules but also

constrains counter-images of judges including that of the woman judge who, faced with the need to shed her difference and fit the fairy tale, becomes a contradiction in terms. Like Hans Andersen's little mermaid, the woman judge must trade her voice for partial acceptance in the prince's world. The chapter explored a paradox in current discourses of adjudication, where, 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 and, on the other, judges are supposed to be *without* perspective, thus suggesting there is little need for a representative judiciary. In response, it 'undressed' the judge, flushing out images of adjudication, which deter or prevent women from joining the judiciary and constrain their potential within it, while highlighting both the role of the imagination in existing conceptions of adjudication and the increasing necessity for a re-imagined Hercules.

Beginning with an exploration of Carol Gilligan's narrative in *In a Different Voice*, chapter two sought to exorcise the haunting and distracting presence of the 'different voice' as it reflected on the (perceived) difference of the woman judge and the continuing challenge the different voice presents to law. It endeavoured to utilise the aching familiarity and inevitability that pervades and threatens to stifle conversations kindled by the possibility of a different judicial voice. Rejecting as fruitless attempts to identify and articulate the little mermaid's siren call, it offered instead an understanding of the different voice as a fictional device through which to re-imagine the judge and the process of adjudication. Through the story of *Charlotte's Web* it became clear that the potential of the different voice lies not in its identifiable

difference *per se* (as some feminist and other legal commentators had imagined), but rather in its ability to render contingent particular (but dominant) forms of reasoning and to point the way towards new (or previously overlooked) approaches to moral and legal problem-solving, new conceptions of what (legal) reason might entail.

This theme was further developed in the following chapter, through the different voice's doppelganger: Portia, the wily heroine of Shakespeare's *The Merchant of Venice*. Considered by some feminist scholars as the definitive – or at least most immediately recognisable – metaphor for the woman lawyer, her presence within the thesis, given its method and focus, was from the outset perhaps almost inevitable. Tracking her supposed rise and fall – her reification as an idol and dismissal as a myth – it was suggested that her constant and simultaneous idolisation and denigration threatened not only to silence and constrain conversations about the woman lawyer and judge, but also to eclipse her promise and potential. In response, Portia was (re)established as an icon; her story, understood as a myth or fairy tale, was seen to reveal previously neglected aspects of the legal and judicial process, in this way clearing a path for re-imagined possibilities of the (woman) lawyer. An iconic understanding of Portia became a window through which feminist legal scholars could begin to imagine, with a view to making real, new conceptions of lawyering and adjudication.

In fact, as Portia's story came to an end, it was becoming increasingly apparent that it was time to reassess our childlike attachment to the security

of fairy tale, myth and denial, to peer through the icon. Debate about difference had revealed the gendered effects of the legal imagination and, at the same time, highlighted the contingency and inadequacy of conventional understandings of the judge and judging. They had provided a window onto a bolder, broader exploration of the range of adjudicative techniques deployed by the judge, in particular, the role of narrative and the aesthetic in shaping and giving weight to particular legal decisions.

In this vein, the judgments of the Court of Appeal and House of Lords in *White* v *Chief Constable of South Yorkshire Police*, considered in chapter four, formed a backdrop against which to explore the role of narrative and storytelling in adjudication. Lord Steyn's striking image of a legal quilt was pursued with a view to unravelling traditional accounts of adjudication and to find out what is really going on when judges judge. The alternative account that emerged combined a descriptive retelling of the police officers' stories in *White* with an exploration of its hidden, yet subversive, subtext, the unsaid of the judge's story – in particular his use of narrative as rhetoric and his political 'framing' of events – exposing both his understanding of his judicial role and relationship with the 'subversive moment'. Side by side, in the intersection of law and narrative, the beginnings of a counter-tale of adjudication and with it a deeper understanding of the judge, started to take shape.

This was followed by a (sideways) look at the relationship between the judge and the aesthetic. Combining the House of Lords' decision in *Lister* v *Hesley Hall Ltd* with the insights of Pierre Schlag it was suggested that the

law lords' judgments revealed as much about the persuasive appeal and ongoing attraction of particular legal aesthetics, as they did about the law on vicarious liability. Their decision was framed as a choice between the application of the law on the one hand or policy objectives on the other – between the so-called 'grid' and 'energy' aesthetics – their invocation of the aesthetic appeal of the grid or frame, a/effecting understandings of the issues involved. Their (re)presentation of themselves as the Herculean judge who inhabits the legal imagination – it too an aesthetic creation – dependent upon our continued infatuation and imaginative constraint, enabled the law on vicarious liability in relation to institutional sexual abuse to be infused with the dynamism of energy aesthetic whilst maintaining the illusion and persuasive appeal of the antiseptic grid.

The concluding chapter returned to feminist critiques of the judge and adjudication and, in particular, to their emphasis on the importance of judicial care, connection and empathy. Against the backdrop of Oscar Wilde's fairy tale, *The Happy Prince,* and the story of Jodie and Mary Attard, it became clear that the Herculean judge is not only unattainable, but also, increasingly, undesirable. It seems the image of the judge as autonomous and isolated, who seeks to deny connections and relationships in order to attain his superhero status of the detached, disembodied, and impassive superhero – ineffective and impotent in the face of competing conceptions of self and personhood understood through connection and relationships – has had his day. In his place an alternative picture of the judge has begun to emerge; one who seeks connections and judges with care, who embraces empathy and

who steps into the skin of those she judges, who is transparently affected, weeping silently as she begins to judge.

And so, as this alternative story of adjudication draws to a close, it is hoped that our understandings of the judge and judging are expanded, transformed, perhaps never to be the same again. In fact, what this collection of diverse and unruly adjudicative tales has sought to highlight is the significant extent to which the imagination is involved in our perceptions and evaluations of law, justice and adjudication. Through the deployment of difference, aesthetic, literary stories, characters and techniques, this thesis has sought to unsettle and weaken the restrictive hold of particular images and narratives about law, specifically those which surround and infuse debates about the judge, adjudication and the legal decision-making process. It undresses the judge, opening, and then stepping back from, a window on to diverse adjudicative landscapes. Where we go from here is – I imagine – the beginning of another story.

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