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Texas Wesleyan Law Review

Volume 12 | Issue 1

Article 10

10-1-2005

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Erika Rackley, *When Hercules Met the Happy Prince: Re-Imagining the Judge*, 12 Tex. Wesleyan L. Rev. 213 (2005).

Available at: <https://doi.org/10.37419/TWLR.V12.I1.9>

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NARRATIVES IN JUDGING

WHEN HERCULES MET THE HAPPY PRINCE: RE-IMAGINING THE JUDGE

Erika Rackley†

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ABSTRACT

Although often dismissed as a myth, the image of the judge as a Herculean superhero whose mission is to apply the law in a straightforward way retains a tenacious grip on our understandings of the judge and judging. The relationship between Oscar Wilde's Happy Prince and Hercules is one of uncomfortable 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; our infatuation with this aesthetic image securing his position and role, his imposed beauty mirroring the golden façade of the Happy Prince. Yet, increasingly this image of the Herculean judge, like that of the Happy Prince toward the end of his story, is perceived to be somewhat shabby and in need of renovation. However, unlike Hercules, stripped of his aesthetic façade, the Happy Prince retains his appeal. Although this is not traditionally part of the Herculean myth, can we not look for it nevertheless? At the very least, we might seize the opportunity presented by Hercules's apparent need for renovation to envisage a judge with an appeal not dissimilar to Wilde's statue, to consider the importance of empathy and connection in judgment and, in so doing, begin to re-imagine the judge.

I. INTRODUCTION

Once upon a time, behind the high walls of the Palace of *Sans-Souci*, lived a Prince.¹ His courtiers called him the “Happy Prince” for, it was said, he did not know what tears were. He spent his days playing in the garden and his nights dancing in the Great Hall. 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:

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1. OSCAR WILDE, *The Happy Prince*, in OSCAR WILDE: COMPLETE SHORT FICTION 3 (Ian Small ed., 1994).

“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 prepared to fly away, he saw that the Happy Prince’s eyes were full of 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 the Palace 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. The next night, the Happy Prince asked the swallow to pluck out one of his eyes—a rare Indian sapphire—and take it to a frozen playwright who was faint with hunger in a garret on the other side of the city. The following night, he asked the swallow to give his other eye to a barefooted match girl who had dropped all her matches in the gutter and who was too scared to go home:

Her father will beat her if she does not bring home some money, and she is crying [said the Prince]. She has no shoes or stockings, and her little head is bare. Pluck out my other eye and give it to her, and her father will not beat her.⁴

The Happy Prince was now completely blind. After this, the swallow promised to stay with him forever. He flew over the city telling the Prince what he saw: “the rich making merry in their beautiful houses, while the beggars were sitting at the gates . . . [and] the white faces of starving children looking out listlessly at the black streets.”⁵ Having no more jewels to give, the Happy Prince asked the swallow to take them the gold leaf covering him; by the time the swallow had finished, the Happy Prince “looked quite dull and grey.”⁶ 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

2. *Id.*

3. *Id.* at 5.

4. *Id.* at 9.

5. *Id.* at 9–10.

6. *Id.* at 10.

Prince's shoulder, kissed the Happy Prince and fell dead at his feet. At that moment, a strange crack came from within the statue: the Happy Prince's heart had broken in two.⁷

Of course, the Mayor and Town Councillors knew nothing of all this. Early the next morning as they walked through the square they simply noticed how "shabby" the Happy Prince had become: "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."⁸ The Councillors agreed to pull down the statue of the Happy Prince. 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.⁹

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 are saving forces."¹⁰ The golden statue, the smitten swallow, the little match girl, the hard-working seamstress, her sick son, and the playwright are all presented as intimately entwined. From high above the city, the Happy Prince sees the sadness that envelops the people below. Bit by bit, he sheds his wealth and beauty—first, the large red ruby, then the brilliant sapphires, and finally, the gold leaf—his devoted swallow forsaking his future in Egypt to ensure that the connections between the Happy Prince and the townspeople are maintained. The Happy Prince literally gives himself away.

Yet, the Prince's actions pass unnoticed. His eyes are mistaken by the playwright as a gift of appreciation, and by the little match-girl as a "bit of glass"; the feverish child falls fast asleep unaware of the cool breeze created by the swallow's wings.¹¹ What is more, the more the Happy Prince gives, the uglier he becomes. Beauty, at least so far as the Mayor and Town Councillors are concerned, is only skin-deep; a dull, grey statue is not wanted. The aesthetic appeal of the golden prince has a practical value and significance, admonishing the unhappy and feeding the imagination of the thoughtful or despondent:

"I am glad there is someone in the world who is quite happy," muttered a disappointed man as he gazed at the wonderful statue. "He looks just like an angel," said the Charity Children as they came out

7. *See id.*

8. *Id.* at 11.

9. *See id.*

10. Isobel Murray, *Introduction to THE COMPLETE SHORTER FICTION OF OSCAR WILDE* 1, 11 (Isobel Murray ed., 1979).

11. WILDE, *supra* note 1, at 6–8.

of the cathedral in their bright scarlet cloaks, and their clean white pinafores.¹²

The vanity and ignorance of the Mayor and Town Councillors is set against the intensity of the relationship between a statue, a swallow, and the inhabitants of the city below. The folly of their infatuation with superficial appearances—represented in the University Art Professor’s belief that “[A]s he is no longer beautiful he is no longer useful”—is underlined by the self-less sacrifice of the Happy Prince and his swallow.¹³ Put another way, the Town Councillors are so fixated with the bejewelled image of the Happy Prince they are unable to see beyond it; their understanding of his aesthetic, understood broadly as “sensation or perception” as distinct from beauty, image—of what he ought to look like—prevents them from recognising his continuing, albeit less ostentatious, beauty.¹⁴

So viewed, Wilde’s exploration in *The Happy Prince* of deceptive appearances and bewitching aesthetics mirrors the difficulties some feminist legal scholars and others have with traditional understandings of the judge.¹⁵ The relationship between the Happy Prince and the Herculean understanding of the judge is one of uncomfortable 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 detached neutrality and unswerving justice, his position and role are secured by our infatuation with this aesthetic image, his imposed beauty and integrity mirroring the golden façade of the Happy Prince. However, unlike Hercules, stripped of his aesthetic façade, the Happy Prince retains his appeal—his true beauty revealed through his care for and connection with his people below is reflected in his shabby appearance. This is not traditionally part of the Herculean myth. Yet, can we not look for it nevertheless? At the very least, we might seize the opportunity presented by Hercules’s apparent need for renovation to re-imagine a judge with an appeal not dissimilar to Wilde’s statue; to look beneath the surface of the Herculean superhero and embrace attributes of the judge and judging often overlooked in conventional adjudicative narratives.

12. *Id.* at 3.

13. *Id.* at 11. Wilde is here referring pointedly to the contemporary debate concerning the relationship between art and utility within the Victorian aesthetic movement; in contrast to those, including socialist critic William Morris, who believed beauty should embrace utility, Wilde thought “all art [to be] quite useless.” WILDE, *supra* note 1, at 268 n. 7.

14. 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*. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002).

15. See generally SANDRA BERNS, *TO SPEAK AS A JUDGE* (1999); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1987–1988); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997).

This paper begins by exploring the attractive, yet ultimately suffocating, image of the Herculean judge. It argues that increasingly this image of the superhero judge, like the statue of Happy Prince, is seen by some to be somewhat shabby and in need of renovation. The detached, disembodied, impassive superhero has had his day; the aesthetic image of the Herculean judge is not only increasingly unattainable but also undesirable. Thus, in the tradition of fairy tales in which the ending of one tale is the beginning of another, this paper uses the image of a shabby Hercules as a starting point from which to re-imagine the judge using the insights provided by feminists, and others, in their critiques of adjudication. It goes on to consider the extent to which difference brings into sharp relief not only the extent to which prevailing images of the judge are enmeshed in notions of sameness and uniformity, but also attributes of the judge and judging currently hidden beneath his bejewelled exterior. Its focus on the strategic importance of empathy and connection as adjudicative techniques reveals the extent to which traditional accounts of adjudication have not been telling the whole story; that there is much more going on when judges judge. As the paper concludes, it is suggested that perhaps it is time to let go of the superhero and to begin to re-imagine Hercules as someone who is as caring as he is just, empathetic yet impartial, both detached from and connected to others, and who as he begins to judge, like the Happy Prince, “cannot choose but weep.”¹⁶

II. HERCULES, STRIPPED BARE

Hercules is, of course, among other things, the name given by Ronald Dworkin to his fictitious “super judge.” We first meet Dworkin’s Hercules in *Taking Rights Seriously*: “I have invented . . . a lawyer of superhuman skill, learning, patience, and acumen, whom I shall call Hercules.”¹⁷ His ability to find the “right answer,” to decide “hard cases” with “humility” and within an understanding of “law as integrity,” treating the law a “seamless web” while avoiding the sirens of “judicial originality” and personal preference, is without doubt the very stuff of superheroes.¹⁸ He reappears in *Law’s Empire* as, at least according to one critical voice,

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-dokey” As imperial acolytes,

16. WILDE, *supra* note 1, at 5.

17. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977). See generally Sandra Berns, *Hercules, Hermes and Senator Smith: The Symbolic Structure of Law’s Empire*, 12 *BULL. AUSTRAL. SOC’Y LEGAL PHIL.* 35 (1988) (discussing Dworkin’s *Hercules*).

18. DWORKIN, *supra* note 17, at 105–30.

when the going gets tough, we can rely on the tough Indiana Dworkin and incomparable Hercules to get us going.¹⁹

Indeed, given Hercules's mythological heroic credentials, Dworkin's portrayal and identification of his "superhuman" judge is unsurprising; his selection of a character of such massive mythical proportions for his judge is far from coincidental. As Dworkin 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 thrill-seekers and myth enthusiasts for generations:

[To] the Greeks of the sixth and fifth 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.²⁰

In more recent times, Hercules has been the subject of a Disney musical animation in which, in a rare moment of self-conscious parody, Hercules's transition from "zero to hero" is accompanied by a series of lucrative endorsements and commercial ventures including "Hercozade" sports beverages and "Air-Herc" sandals.²¹ Clearly Dworkin's invocation of the Herculean myth to support and reinforce his particular understanding of the ideal judge is strategic. He harnesses the power of myth to capture and subsequently constrain the legal imagination. He gives "Hercules the superhero" a twentieth century jurisprudential twist.

The image of the Herculean judge that stalks this paper draws on, as opposed to mirrors, both the Dworkinian and mythological Hercules. Thus, despite some similarities, I do not wish to contend that this Hercules is necessarily correspondent on all points with Dworkin's nor, indeed, with the hero of the Greek myth. In fact, rather than invoking Hercules 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.²² My goal is to high-

19. Allan C. Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 640 (1987) (reviewing RONALD DWORKIN, *LAW'S EMPIRE* (1986)).

20. J. P. Kane, *Greece*, in MYTHOLOGY: AN ILLUSTRATED ENCYCLOPEDIA 120, 127–28 (Richard Cavendish ed., 1992).

21. HERCULES: ZERO TO HERO (Walt Disney Pictures 1997). On the 'Disneyfication' of the Herculean myth see further Dick Hebdige, *Dis-gnosis: Disney and the Re-Tooling of Knowledge, Art, Culture, Life, Etc.*, 17(2) CULTURAL STUD. 150, 152, 154–55 (2003).

22. 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*, JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION*

light the imagination as an important site of discursive and political struggle by showing how it may be harnessed to ideological purposes through the appeal of attractive but ultimately constraining images. Put another way, my purpose is to emphasise 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—and, more specifically, to expose the extent to which our understanding of the judge both captures and is captured by the legal imagination.²³ To show that—despite attempts to represent the image of the superhero judge as mere fiction—it retains a tenacious and exclusive grip upon our understanding of the judge and judging and continues to have regulatory effects, particularly when judges requiring a descriptive prefix begin to speak.

The Herculean judge is formed-in and clothed-by imagination: a man stripped of self, personality, history, and voice and re-clothed with the magical attributes of fairness, impartiality, and independence. He is at once a “demigod to whom objective truth has been revealed” and a kind of “legal pharmacist, dispensing the correct rule prescribed for the legal problem presented.”²⁴ Blind to personal distractions, he is an unswerving measure or plumb-line with an impenetrable attitude of restraint; his wig and gown effecting the miraculous transformation of a man into a judge, his identity mystically and symbolically eradicated—just like a superhero. This suits us just fine.²⁵

(1973), and Ian Ward in *Shakespeare and the Legal Imagination*, IAN WARD, SHAKESPEARE AND THE LEGAL IMAGINATION (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.” WHITE, *supra* 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, rests, in the final analysis, in our collective and individual political [or legal] imagination.” WARD, *supra* at 1–2. 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 follow[s] [his] own curiosity” and imagination (WHITE, *supra* at xxxv, 758)—to Mr. Micawber’s misapprehension that the lawyer’s “mind is not at liberty to soar in any exalted form of expression.” CHARLES DICKENS, DAVID COPPERFIELD 628 (Penguin Books, 2004) (1850). 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.

23. For a more detailed exploration of the Herculean judge and in particular his relationship with those considered “other” see Erika Rackley, *Representations of the (Woman) Judge: Hercules, the Little Mermaid and the Vain and Naked Emperor* 22(4) LEGAL STUDIES 602 (2002).

24. William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 4–5 (1988).

25. “Us” may capture a range of communities here including, of course, 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 DWORKIN, *supra* note 17, at 105–30; but also Pierre Schlag on the role of the idealised judge in legal education in PIERRE SCHLAG, LAY-

We can imagine the judge no other way; “[w]e expect our judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity.”²⁶ Like Wilde’s Mayor and Town Councillors we remain bewitched by appearances; the Herculean judge, like the Happy Prince, is an aesthetic creation whose continued existence depends on our unwavering infatuation and imaginative constraint. The difficulty is that while we recognise that the idealised superhero judge who inhabits the legal imagination is a myth or fairytale—that he is, if you like, a creature of our imagination—we fail to recognise that his status as fiction does not prevent him from having operative effects: constraining counter-images of the judge and judging. Hercules is not simply a superhero but a *superman*.²⁷

Hence, perhaps, the attempt by a New York law firm to disqualify Judge Motley, an African-American woman, from adjudicating in a sex discrimination trial because she was “strongly identified with those who suffered discrimination in employment because of sex or race.”²⁸ Or the somewhat bizarre complaint made against Madam Justice Southin of the British Columbia Court of Appeal for, *inter alia*, smoking in her office. The complaint alleged she:

[S]moked in her office and accepted changes to her chambers to accommodate a ventilation system. [And thereby] had brought the administration of justice into disrepute . . . [because] when cases

ING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 146–159 (1996). However, I am also suggesting that the Herculean judge, while perhaps not recognised as such, is also a feature of popular culture, see, for example, Jon Holbrook, *Bad Judgement*, SPIKED, July 18, 2003, <http://www.spiked-online.com/Articles/00000006DE69.htm>; KATE MALLESON, *THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM* 107–12 (1999). See also Duncan Kennedy’s discussion of public perceptions of adjudication in the U.S. in *A CRITIQUE OF ADJUDICATION*, *supra* note 15. 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.

26. GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* (5th ed. 2004).

27. On the exclusion of an awareness of the impact of gender in some traditional understandings and critiques of the superhero judge, see, for example, Joanne Conaghan’s engagement with Duncan Kennedy in Joanne Conaghan, Symposium, *Wishful Thinking or Bad Faith: A Feminist Encounter with Duncan Kennedy’s Critique of Adjudication*, 22 *CARDOZO L. REV.* 721 (2001). On Dworkin, see Hutchinson, *supra* note 19, at 652, and BERNIS, *supra* note 15.

28. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (quoted in Claire L’Heureux-Dubé, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 *WIS. WOMEN’S L.J.* 15, 22 (2001)). It is interesting to note in the examples that follow, exploring 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, e.g., CLARE MCGLYNN, *THE WOMAN LAWYER: MAKING THE DIFFERENCE* (1998); Regina Graycar, *The Gender of Judgments: Some Reflections on “Bias,”* 32 *U.B.C. L. REV.* 1 (1998); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 *WM. & MARY L. REV.* 1201 (1992); L’Heureux-Dubé, *supra*.

were argued before her by the provincial government or its Crown corporations, she would be beholden to the Attorney General for providing the changes in her chambers.²⁹

The image of the superhero judge may also play a role in judicial findings that the remark made by a black, female, Canadian judge that, *inter alia*, “police officers do overreact, particularly when they are dealing with non-white groups” gave rise to “a reasonable apprehension of bias.”³⁰ 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*,³¹ and the gaoling³² of Diane Fingleton, former Chief Magistrate of Queensland.³³

It seems, however hard she tries, the woman judge cannot easily wear Hercules’s bespoke suit; she simply does not look like a superhero.³⁴ Her unavoidable deviance from the aesthetic norm disrupts the homogeneity of the judiciary and troubles traditional understandings of legal authority. As a result, she is unable to speak as a

29. Both allegations were rejected by the Canadian Judicial Council. CANADIAN JUDICIAL COUNCIL, ANNUAL REPORT 2002–03, at 18 (2002–03), http://www.cjc-ccm.gc.ca/cmslib/general/CJC2002-2003_E.pdf.

30. *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 (Can.). See also Christine Boyle et al., *R. v. R. D. S.: An Editor’s Forum*, 10 CAN. J. WOMEN & L. 159, 164, 166 (1998); and Richard F. Devlin, *We Can’t Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.*, 18 DALHOUSIE L.J. 408 (1995).

31. See *The Queen v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.). See L’Heureux-Dubé, *supra* note 28, at 24–26; Press Release, Canadian Judicial Council, Council Releases Response to REAL Women of Canada, (April 1, 1999); Press Release, Canadian Judicial Council, Panel Expresses Strong Disapproval of McClung Conduct (May 21, 1999). See also a discussion by the REAL Women of Canada in *The Unravelling of Canada’s Justice System REALITY March/April 1999*, http://www.realwomenca.com/newsletter/1999_March_April/article_2.html; *L’Heureux-Dubé C A Supremely Forgetful Judge REALITY May/June 1999*, http://www.realwomenca.com/newsletter/1999_May_June/article_7.html; and *Speeches by Judges Create Controversy, REALITY March/April 2000*, http://www.realwomenca.com/newsletter/2000_Mar_April/article_11.html.

32. British spelling of jailing. See WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 575 (2d ed. 1986).

33. Rosemary Hunter, *Fear and Loathing in the Sunshine State*, 19 AUSTL. FEMINIST STUDIES 145 (2004).

34. This is not to suggest that female or “minority” judges can *never* speak as Hercules. Indeed, the presence of those who have “listen[ed] to the siren call that, having succeed in a male world, they are exceptional and truly blessed amongst women.” Helena Kennedy’s foreword to *The Women Lawyer: Making a Difference* is a cautionary tale for those searching for a “different” judicial voice. Helena Kennedy, *Foreword to McGLYNN, supra* note 28, at v–vii. See also, Rackley, *supra* note 23. Moreover, 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., Richard Collier, ‘Nutty Professors’, ‘Men in Suits’ and ‘New Entrepreneurs’: *Corporality, Subjectivity and Change in the Law School and Legal Practice*, 7 SOC. & LEGAL STUD. 27 (1998). Rather it is to draw attention to the “disturbing trend” of bias challenges against outsider judges as a route toward the exposure of hidden gendered assumptions in understandings of the judge and judging. Graycar, *supra* note 28, at 6.

judge unbracketed;³⁵ distance and authority collapse, and the legitimacy of her judgment, branded with the stigmata of difference, is always open to question.³⁶ Her presence on the bench acts as an irritant, challenging the “white male paradigm of what it means to be a judge” and ensuring the immediate and permanent confirmation of bias: “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.”³⁷ An “outsider judge,” it seems, can never be mistaken for Hercules. And yet, perhaps, this is no bad thing.

In fact, increasingly, what such challenges to the authority of the outsider judge have revealed is not inappropriate identification, “bigotry, prejudice, or intolerance”—what Patricia Cain terms “bad” bias³⁸—but rather the extent to which we are all implicated in the categories of sex and race. That “men as well as women have a sex, and whites as well as blacks have a race . . . [and that if] being implicated means bias, then everyone is biased, and perhaps then no one can judge.”³⁹ Put another way, the outsider judge reveals traditional understandings of the judge and of judging to be hopelessly inadequate and incomplete: “[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.”⁴⁰

Moreover, the Herculean understanding of the detached, neutral, and self-less judge is not only unattainable, but also undesirable. Thus, as the aesthetic appeal of the Herculean judge begins to diminish—his bejewelled exterior becoming increasingly shabby—the outsider judge acts as a pronouncement on that which is most frequently denied, that is, that *who* the judge is matters.⁴¹ This is deeply subversive:

If our particularity counts, it counts in ways that demolish traditional vocabularies of justice. If who we are as men and women of different racial and ethnic backgrounds, different religious traditions, different class backgrounds matters, conventional understandings of neutrality and impartiality are hopelessly inadequate. We

35. Sandra S. Berns & Paula Baron, *Bloody Bones: A Legal Ghost Story and Entertainment in Two Voices To Speak as a Judge*, 2 AUSTRALIAN FEMINIST L. J. 125, 127 (1994).

36. BERNs, *supra* note 15, at 33. See also Maryka Omatsu, *The Fiction of Judicial Impartiality*, 9 CAN. J. WOMEN & L. 1 (1997).

37. L’Heureux-Dubé, *supra* note 28, at 28.

38. Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945, 1946 (1988).

39. Minow, *supra* note 28, at 1208.

40. BERNs, *supra* note 15, at 34.

41. See *id.* at 8.

need a new vocabulary of justice, and a new understanding of what it means to judge.⁴²

In fact, what we need is a judge who embodies the previously disparaged traits of the outsider. A judge with so-called “good bias,”⁴³ that is, preferences and affections that “facilitate the gathering of knowledge . . . [and] lead us to the truth,”⁴⁴ a judge who is willing to be open “to the possibility of surprise . . . to use what [they] know but to suspend [their] conclusions long enough to be surprised, to learn.”⁴⁵ A judge who recognises impartiality not as “some stance above the fray, but [rather] the characteristic of judgments made by taking into account the perspectives of others in the judging community,”⁴⁶ who judges with connection infusing his justice with care, and who, like the Happy Prince, sheds his skin as he walks in the shoes of others.

III. RE-IMAGINING HERCULES

[W]hat we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment. Obviously, this is not an easy role for the judge—to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge. But we have to do it; or at least make an earnest attempt to do it⁴⁷

This is, perhaps, an unfamiliar and somewhat unsettling image of the judge. An understanding of the judge as someone who, like the Happy Prince, seeks to connect imaginatively with others is a far cry from that of a detached superhero who judges from the safety of Mount Olympus. Indeed, even those who in their more candid moments might accept that this aesthetic image of the Herculean judge is somewhat shabby that the judge is *too* remote—“[Judges] just don’t know what is going on in the world”; “They’re out of touch”—seem, at the same time, unwilling to let the image go.⁴⁸ Our default image of the judge as someone who dispenses his justice with “authority, fairness, [and] power,” and incites feelings of “trepidation and intimidation” among those he judges, retains a tenacious grip on the legal

42. *Id.* at 210.

43. Cain, *supra* note 38, at 1946.

44. Louise M. Antony, *Quine as Feminist: The Radical Import of Naturalized Epistemology*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 185, 215 (Louise M. Antony & Charlotte Witt eds., 1993).

45. Minow, *supra* note 28, at 1215–1217.

46. Jennifer Nedelsky, *Embodied Diversity and the Challenges to Law*, 42 *MCGILL L.J.* 91, 107 (1997) (discussing her interpretation of HANNAH ARENDT, *LECTURES ON KANT’S POLITICAL PHILOSOPHY* (Ronald Beiner ed., 1982)).

47. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 *OSGOODE HALL L.J.* 507, 521 (1990) (quoting in part Cain, *supra* note 38, at 1954).

48. Lindsay Hermans, *Public Perceptions of Working Court Dress in England and Wales*, *ORC International* 11–12 (2002).

imagination.⁴⁹ So viewed, it is not simply that there seems to be little room in the judge's remit for empathetic or connected judging, but rather that their inclusion within his arsenal of judicial strategies and techniques appears "counterintuitive," as something separate to and distinct from traditional understandings of the judge and judging.⁵⁰

This is not the case. Lynn Henderson's consideration of the relationship between legality and empathy highlights the role of empathy as both a contrast to and an essential part of Herculean certainty, predictability, and principle.⁵¹ Understood variously as "feeling the emotion," "understanding the situation," and "experiencing the distress" of another, and distinguished from emotion, intuition, care, projection, sympathy, and other "nice" words; empathy, Henderson suggests, facilitates judicial understanding.⁵² Empathy offers an alternative appreciation of legality; "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."⁵³ In this way, empathy, recognised as a process or method rather than an outcome or goal, is not only inevitably part of judgment but also a means of ensuring *better* judgment:

Empathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility. It also reminds us of our common humanity and responsibility to one another. We could do worse—indeed we have done worse—than to employ the knowledge empathy imparts to us.⁵⁴

Consider, for example, Lady Justice Hale's (as was) judgment in *Parkinson v. St. James and Seacroft University Hospital NHS Trust*⁵⁵ allowing limited recovery for the wrongful conception of a disabled child, in which Hale describes the invasiveness of pregnancy and its impact on a woman's autonomy:

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

49. *Id.* at 12, 21.

50. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987).

51. *See id.*

52. *Id.* at 1576, 1579.

53. *Id.* at 1576.

54. *Id.* at 1653.

55. *Parkinson v. St. James & Seacroft Univ. Hosp. NHS Trust* [2001] EWCA (Civ)

530, [68]–[69], [2002] O.B. 266, 286 (Eng.).

thereafter. The process of giving birth is rightly termed “labour.” It is hard work, often painful and sometimes dangerous.⁵⁶

In her detailed description of physical and psychological effects of pregnancy, Hale not only recognises the reality of the situation of those before her, locating them within the context of their everyday life, experiences, and relationships, but also in so doing allows them to have an impact on her judgment. Hale’s use of empathetic narrative—that is, the “description of concrete human situations and their meanings to the persons affected in the context of their lives”⁵⁷—provides her with an opportunity to follow the litigant’s “footprints” and to engage fully with her story. Hale’s appeal to context and relationships, later described, as a reflection that “could not have been written by a male member of the Court of Appeal,”⁵⁸ is strategic. She deliberately troubles the classification of such cases as pure economic loss:

Left to myself . . . I 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.⁵⁹

In so doing, Hale opens a window onto new adjudicative landscapes and previously unimaginable ways forward, encouraging her judicial companions to look at such cases in a completely new light.⁶⁰

What is more, while subverting judicial abstraction and detachment, empathetic narratives disrupt “the usual conventions of distance and anonymity” between the judge and judged.⁶¹ They allow judicial integrity and impartiality, as traditionally understood, to be tempered by the revelation of previously unacknowledged relationships and connection, seen here in the story of Philip Becker.⁶²

Phillip Becker was born on October 16, 1966 with Down’s Syndrome. On the advice of his doctors, he was institutionalised six days after his birth. His parents rarely visited him and consistently refused permission for various medical procedures in relation to a heart defect, from which he suffered since birth. Following the Beckers’s suc-

56. *Id.*

57. Henderson, *supra* note 50, at 1592.

58. Margaret Brazier interviewed in *WOMEN IN THE LAW: STRATEGIC CAREER MANAGEMENT* 74 (Elizabeth Cruickshank ed., 2003).

59. *Groom v. Selby* [2001] EWCA (Civ) 1522, [31] (Eng.). See also Brenda Hale, *The Value of Life and the Cost of Living – Damages for Wrongful Birth*, 7 *BRIT. ACTUARIAL J.* 701, 755 (2001).

60. See J. K. Mason, *Wrongful Pregnancy, Wrongful Birth and Wrongful Termination*, 6 *EDIN. L. REV.* 46 (2002). See also *Rees v. Darlington Mem’l Hosp. NHS Trust* [2003] UKHL 52, [2004] 1 A.C. 309 (House of Lords) (Eng.).

61. Martha Minow, *Guardianship of Phillip Becker*, 74 *TEX. L. REV.* 1257, 1259 (1996).

62. See *In re Phillip Becker*, (Cal. Super. Ct. 1981) (*unpublished opinion*), reprinted in *FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW* 288 (Martha Minow ed., 1993).

cessful defence of dependency proceedings, brought by the state on the grounds of neglect, Mr. and Mrs. Heath, who had befriended Phillip whilst volunteers at the institution, sought to become his guardians with the authority not only to care for Phillip, but also to approve surgery to repair his heart.⁶³ In his decision, allowing the Heaths to assume responsibility for Phillip's daily care and decision-making without severing the Beckers's parental rights, Judge William Fernandez avoids an either/or—win/lose—solution. Instead, he places Phillip at the heart of his judgment—invoking a “platonic dialogue” to determine who (were he able) he would choose to live with, “Phillip's preference being ascertain from the more logical choice”—while seeking to maintain relationships and restore connections between the parties.⁶⁴ Although clearly dismayed by the Beckers's apparent lack of parenting or even genuine concern for Phillip—“[t]heir expectations for Phillip and his future is none”—Fernandez encourages continued contact between them and their son, urging them “that it is time for them to change” so that “Phillip may have a better life by having two sets of parents.”⁶⁵ His raw, human response to Phillip's heart-rending situation underpins his empathy-infused judgment as he acknowledges his own relationship with Phillip:

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.⁶⁶

This is an unfamiliar image of the judge. Fernandez eschews his superhero role preferring the *superhuman* actions of a judge who refuses to hide his personal response behind the traditional detached impassivity of his judicial role. In one of many extended footnotes, he considers the reaction of his audience to this particular aspect of his judgment:

[T]he cynic might . . . suggest . . . “Judge, isn't that just a little bit subjective, if not maudlin and trite?” My answer is no. . . . Judges are humans and not machines. . . . I believe that we prefer to be judged by a real person with emotions, common sense, and all those other important characteristics of a Homo sapien. A computer somehow does not fit any person's conception of a dispenser of justice.⁶⁷

63. *Id.*

64. *Id.* at 294.

65. *Id.* at 293, 297.

66. *Id.* at 296 n.7.

67. *Id.* at 298 n.9.

Maybe not—but what of the judge who cares too much, who allows the act of self-giving to lead, as in the tale of the Happy Prince, to self-annihilation? Or what of the judge who empathises with the “wrong” person, who comes to a “bad” decision, whose empathy becomes bias?

Perhaps Robin West might be able here. In the opening chapter of *Caring for Justice*,⁶⁸ West seeks to problematise the traditional understandings of adjudication in which integrity, detachment, impartiality, and consistency are prioritised over relationship, nurture, connection, and compassion.⁶⁹ Through an “imagistic” comparison of deeply familiar images, justice and care, she seeks to establish each as “*necessary conditions of the other*.”⁷⁰ Understood as neither antagonistically oppositional nor conciliatorily complementary, but rather as interdependent and interrelated, “justice must be caring if it is to be just and . . . caring must be just if it is to be caring.”⁷¹ Put another way, it is not that the judge may or should “choose” to act with care, rather that he *must* if he is to truly and fairly judge. There is no choice to make—no either/or alternative. Judgment unconstrained by care fails as both a matter of justice and of care; it is as much unjust as it is uncaring.

Similarly, the effect of absent or misplaced empathy can be devastating. To empathise without care is to manipulate or distort—to judge badly. Empathy should be used with caution not complacency. With apologies to Henry Wadsworth Longfellow, like the girl with the curl in the middle of her forehead, when empathy is good it is very, very good; but when it is bad, it is horrid—the most notorious judgments becoming the stuff of folklore.⁷² Take, for example, Bob Dylan’s retelling of the murder of Hattie Carroll—a black maid who was killed by William Zanzinger, her millionaire employer, “[w]ith a cane that he twirled around his diamond ring finger/At a Baltimore hotel society gath’rin’”—in *The Lonesome Death of Hattie Carroll*.⁷³ To Dylan, the real villain is not Zanzinger [sic], but the unknown judge who sentenced Zanzinger to a mere six months in jail. Zanzinger’s grotesque crime is superseded by the judge’s misplaced empathy. As West points out:

While the crime itself was ugly, the *sentence* exposed even deeper villainy . . . it evidenced the dual standards of criminal sentencing

68. ROBIN WEST, *CARING FOR JUSTICE* (1997).

69. *Id.* at 22–23.

70. *Id.* at 24. Crucially, what she understands by the terms “justice” and “care,” beyond and apart from these images, is never precisely defined. Michael T. Cahill, Book Review, 96 MICH. L. REV. 1884, 1889 (1998) (ROBIN WEST, *CARING FOR JUSTICE* (1997)).

71. WEST, *supra* note 68, at 24.

72. Henry Wadsworth Longfellow, *There was a Little Girl*, in *BEST-LOVED POEMS* 23 (Neil Philip ed., 2004).

73. BOB DYLAN, *The Lonesome Death of Hattie Carroll*, on *THE TIMES THEY ARE A-CHANGIN’* (Columbia Records 1964).

applied to perpetrators of crimes against black and white victims, and between rich and poor defendants . . . Thus, only in the last verse, when Dylan relates the *sentence*, not the crime itself does he admonishing his listeners: “Bury the rag deep in your face/For now is the time for your tears.”⁷⁴

However, my point here is not simply to show that the judge’s decision fails “to show that all’s equal and that the courts are on the level,”⁷⁵ to adhere to the “plumb-line” of legal justice—although clearly it does. Nor it is to remark on the aptness of Dylan’s title, to decry a judgment, sadly, reflective of the attitudes of the time.⁷⁶ Rather, it is to highlight the danger of a judge who empathises without care; a judge who infuses his judicial narratives with bigotry, prejudice, and hate. A judge who, for example, justifies reducing the sentence for the murder of two homosexuals to 30 years because he would “put prostitutes and gays at about the same level. And [would] be hard put to give somebody life for killing a prostitute.”⁷⁷ Or who dismisses an allegation of rape because the alleged victim was wearing jeans and he understood it to be “‘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.’”⁷⁸

It is to expose the menace of a judge who imposed a probationary term, rather than a jail sentence, on a male baby sitter who sexually interfered with a “sexually aggressive” three-year-old girl.⁷⁹ In fact, Nedelsky suggests what is truly shocking about this last case is not simply that it fails as a matter of justice, which, of course, it does, but also the judge’s adoption of undesirable “somatic markers.”⁸⁰ He fails to identify the appropriate effect in relation to the events before him: “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.”⁸¹

The point is that once empathy is understood as a process, as opposed to an end, it becomes clear that just as good empathy can lead us to good judgment, so too can bad empathy lead us to bad. So viewed, the point is not *who* you empathise with but rather *where* that empathy leads you, that is, how it affects judgment. Put another way,

74. WEST, *supra* note 68, at 28.

75. DYLAN, *supra* note 73.

76. Ian Frazier, *Life After a Lonesome Death*, Guardian, Feb. 25, 2005, available at <http://www.guardian.com.uk/arts/fridayreview/story/0,,1424244,00.html>.

77. Nedelsky, *supra* note 46, at 105 (citing Michael A. Kroll, *How Much is a Victim Worth?*, N.Y. TIMES, Apr. 24, 1991, at A25).

78. John Tagliabue, *Where Jeans are a Rape Defense*, N.Y. TIMES, Feb. 14, 1999, § 4, at 42.

79. Nedelsky, *supra* note 46, at 103.

80. *Id.* at 102.

81. *Id.* at 103.

it is not simply that the judges in these cases have empathised with the “wrong” person—although, clearly, they have—but rather that their misplaced empathy leads them to bad judgment. They judge without care; their judgments, unrestrained by integrity, consistency, or connection, are steeped in and moulded by hate, prejudice, and hostility. Thus, empathy, like bias, can be both good and bad. Without question, bad empathy, that is, empathy infused with bigotry, hate, or prejudice really is very, very bad. Indeed, Henderson would rather omit what she, and others, term “contrast empathy” from the discussion altogether, “because it appears to encompass something other than a perversion of empathy.”⁸² This is true; bad empathy not only fails as a matter of justice or fairness but also as empathy itself. However, despite this, it would be a mistake to think that the solution lies in the blanket exorcism of empathy *per se* from judicial reasoning. We should not rush to throw out empathy as an adjudicative technique. Patricia Cain puts it like this:

To the extent a bias [or empathy] 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 . . . 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.⁸³

To this end, the tale of the Happy Prince serves as a timely warning. It cautions against the temptation to begin a quest to restore Hercules’s golden façade, of using instances of bad empathy or bias as an excuse to revert to the security of an impartial superhero judge who has no preferences or interests and who is unconnected from those he judges. In drawing our attention to the ability of bewitching aesthetics to overshadow alternative aspects of the Herculean judge that we, like the Town Councillors, might be in danger of overlooking and devaluing, Wilde’s tale advocates the benefits of thoughtful renovation over piqued destruction and presents an opportunity to consider alternative understandings of the judge.

So viewed, rather than denying its existence or dismissing its presence as evidencing bad or shabby judging, we might instead seek ways of exposing bad empathy or bias—empathy that leads us away from good judgment, which restricts rather than facilitates judicial understanding—while embracing the good. That is, empathy that reveals previously unconsidered ways forward and promotes better judgment requires the judge to “move beyond [his] private idiosyncrasies and preferences” and be open to the possibility of persuasion.⁸⁴ Put another way, instead of dismissing the presence of empathy as evidenc-

82. Henderson, *supra* note 50, at 1638.

83. Cain, *supra* note 38, at 1946.

84. Nedelsky, *supra* note 46, at 107.

ing a judge's inability to meet the Herculean ideal of detached impartiality, we might welcome it not only as an essential component of good judgment but also as a route toward re-imagining the judge. We might embrace the extent to which it compels the judge to "enter into the skin of the litigant,"⁸⁵ as he seeks through his judgment to maintain "life-affirming" connections and sever those that are "invasive and overpowering . . . that diminish rather than enlarge the individual who participate in them."⁸⁶ We might cherish the judge who infuses his justice with care and his care with justice. The judge who refuses to close his eyes as he follows the footsteps of an empathetic narrative so that he might "learn what it is to walk in another's shoes, to experience another's pain, to anticipate another's pleasures."⁸⁷ A judge who, like the Happy Prince, seeks to make some small part of the stories of those he judges his own, letting their experiences penetrate him fully so that he can engage in the detachment required by judgment and, only then, begin to judge.⁸⁸

IV. LETTING GO OF THE SUPERHERO: A BRIEF CONCLUSION

The trouble with having Hercules as the embodiment of the judge who inhabits the legal imagination is that we have for so long been dazzled by his superhuman exploits that we have forgotten about the man behind the myth. Like the latter day Bruce Wayne and Peter Parker, Hercules was not always a superhero.⁸⁹ In fact, in its simplest form, Hercules's story is of a man struggling to fulfil his destiny, to overcome his mortal inadequacies and failings so that he can achieve immortality and join his father on Mount Olympus. In the same way, the heroic tendencies of the Herculean judge—his seamless webs and magical attributes—have captured the legal imagination to such an ex-

85. Wilson, *supra* note 47.

86. WEST, *supra* note 68, at 2.

87. ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 425 (1993).

88. MITCH ALBOM, TUESDAYS WITH MORRIE 103 (Time Warner, paperback ed. 2003) (1997).

89. Bruce Wayne and Peter Parker are, of course, the alter egos of the modern day superheroes Batman and Spider-Man. Their stories have both been the subject of recent Hollywood blockbusters. *BATMAN BEGINS* (Warner Bros. Studios 2005); *SPIDER-MAN* (Sony Pictures 2002). In Christopher Nolan's *Batman Begins* an orphaned Wayne "travels the world seeking the means to fight injustice and turn fear against those who prey on the fearful . . . [before returning to Gotham as] a masked crusader who uses his strength, intellect, and an array of high tech deceptions to fight the sinister forces that threaten the city." *Batman Begins*, <http://www2.warnerbros.com/batmanbegins/index.html> (last visited Oct. 2, 2005). In the first of the Spider-Man films, Parker gains superhuman strength and the spider-like ability to cling to any surface after being bitten by a genetically modified spider. Like a true superhero, "he vows to use his abilities to fight crime, battling his arch-enemy the Green Goblin, and comes to understand the words of his beloved Uncle Ben: 'With great power comes great responsibility.'" *Spider-man: The Official Movie Website*, <http://spiderman.sonypictures.com/> (follow "The Movies" hyperlink; then follow "The Story" hyperlink) (last visited on Oct. 2, 2005).

tent that we find it difficult to imagine the judge in any other way. Although we recognise that Hercules is a creature of our imagination, we continue to believe—albeit while not believing—in superheroes. What is more, the tiniest glimmer of “difference”—the slightest distortion of the superhero judicial aesthetic—threatens to render unstable the whole edifice of law, introducing unsavoury elements of arbitrariness and partiality into a system that rests on its distance from such human and system failings. Hence, the importance of preserving the mythological dimension of the adjudicative process so as to ensure its distance from the concerns of mere mortals. In short, it seems the judge has to be seen as *superhuman*. We even make him dress up in his own kind of cape and mask—well, wig—his own “superhero” outfit.

The difficulty is that increasingly this image of the superhero judge is seen, at least by some, to be somewhat shabby and in need of renovation. The Herculean understanding of the disengaged judge dispensing justice from the coolness of Mount Olympus is not only unattainable but also increasingly undesirable. It seems the image of the judge as detached and disinterested, who seeks to deny connections and relationships in order to attain his superhero status, has had his day. What is more, at the same time it has become apparent that our infatuation with Hercules’s heroic qualities have allowed judges to eclipse their more human attributes; that traditional accounts of adjudication do not tell the whole story, that there is, in fact, much more going on when judges judge.

In fact, maybe it is time to explore the humanity of Hercules. To recognise the story of his struggle to meet the challenge of the tasks that would make him a hero as the story of every-man. Thus, as fairy tale and myth combine—“disrupt[ing] the apprehensible world in order to open spaces for dreaming alternatives”⁹⁰—they provide literary pathways into another world and windows onto previously unimaginable futures. So viewed, the tales of Hercules and the Happy Prince encourage us to consider what it really means to be a hero, to peer beneath the surface of Hercules’s bejewelled façade and interrogate the man behind the myth in order to identify and affirm the human aspects of the Herculean judge. And to recognise, with Justice Brennan, that:

the task of human judgment is not to transcend the self or human nature, but to use all helpful aspects of it; not to close off reactions but to reflect upon them; not to give in to all intuitions but to test them, and then test the tests, against their meanings in the actual lives of others.⁹¹

90. Marina Warner, *FROM THE BEAST TO THE BLONDE: ON FAIRY TALES AND THEIR TELLERS*, at xvi (Farrar, Straus, & Giroux 1995).

91. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 *CARDOZO L. REV.* 37, 48 (1988) (discussing Brennan, *supra* note 24).

In so doing, we might begin to discover attributes of the judge and judging previously overlooked in our need to rise above human frailties and believe in superheroes. Wilde's fairy tale challenges us to look beyond bewitching aesthetics, to see beauty in shabbiness, connection through distance, and the heroic in the human; to recognise that since meeting the Happy Prince, Hercules has not really been himself.

And so, perhaps it is time to let go of the superhero and re-imagine the judge, to seek in the judicial amalgamation of myth, fairy tale, and imagination an alternative image of the judge. A judge who happily infuses his Herculean qualities with Princely virtues as he seeks connections, who judges with care and embraces empathy, and who steps into the skin of those before them, weeping silently as he begins to judge.