

Feminist Judgments

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Rosemary Hunter, Claire McGlynn and Erica Rackley eds. (2010) [Feminist Judgments: From Theory to Practice](#) (Hart Publishing, Oxford).

'Before rules, were facts: in the beginning was not a Word, but a Doing. Behind decisions stand judges; judges are men; as men they have human backgrounds.' (Llewellyn 1931, p. 1222) Gender-neutralised, the sentiments contained in Llewellyn's famous words and the article which they introduce still hold – the human background of judges is important, and 'doings' or 'tangible realities' rather than words and abstractions, are what makes law dynamic, purposeful, and responsive (if slowly) to an even more dynamic social context.

How, then, might law be different if judicial decisions were routinely made by feminists? What would a 'female-gendered mark on the law' actually look like? (p. 8). *Feminist Judgments: From Theory to Practice* begins to answer these (and other) questions. It presents twenty-three alternative feminist judgments for actual cases, and commentaries to accompany the cases, written by feminist academics and activists. All of the cases were decided in England and Wales, and most (though not all) were decided relatively recently and reflect current law. The idea of re-writing judgments from a *feminist* perspective has a Canadian precedent in the Women's Court of Canada (see Majury 2006) while the idea of rewriting judgments (not necessarily feminist) has a US precedent in two books edited by Jack Balkin (2002; 2005, but see Majury 2006, n14). Whereas the Canadian cases focus on equality jurisprudence under the [Canadian Charter of Rights](#), the cases in *Feminist Judgments* deal with a very broad range of legal matters: consent to medical treatment, same-sex marriage, capacity to marry, the defence of provocation, refugee law, manslaughter by neglect, trespass to property, custody to children under family law, pregnancy discrimination, consent to bodily harm, evidence and many more. Some of these areas are framed by British and European equality and human rights law, but many rely on development of the common law or interpretations of statutory provisions. Some of the judgments affirm the decision made in the existing case but do so using a different reasoning process, while others reject the original decision.

There is a great deal that could be said about this project, and the three excellent introductory chapters to the book canvass a large number of questions associated with the idea of writing feminist judgments – what is the nature of judicial constraint and discretion in politically-charged contexts? Do women judge differently? What characterises a *feminist* judgment? Is gender (and racial and religious) diversity on the bench important and why? What doctrinal controversies are especially resistant to feminist judgment and what theoretical frameworks can be mobilised to deal with particular issues?

I just want to highlight three significant contributions to feminist and critical scholarship made by this book. First, as the editors note, the book 'represents a form of academic activism' (p. 8). The feminist 'judges' do not speak here primarily as scholars or critics (though a high level of scholarship and critique is evident) but as decision makers in difficult cases who are trying to make a difference to legal doctrine and policy. The project is one of 'law reform' in that the idea is to change law's accepted stories and assumptions and to promote a shift in legal consciousness. This is only possible by engaging with law, and operating with a critical consciousness of its constraints – certainly operating at the margins at times but also frequently offering a solid and persuasive alternative to ingrained legal narratives. Although some may express scepticism that such a project will actually make a visible difference to law, it is nonetheless one of several feminist strategies and one which, in my view has the power to show how law might actually be different in practice.

Second, the book is tangible evidence of the strength in feminist diversity. It will come as no surprise to anyone that there is no feminist blueprint or general theory which can be applied in these practical contexts. Feminist jurisprudence is clearly guided by general principles and attitudes designed to empower women, protect our autonomy, and prevent discrimination but there can be significant disagreements about policy and practical implementation. In many of the cases considered, there are no easy decisions and potential controversy about the answer that is reached, but the book illustrates that there is strength rather than weakness in such contestations.

Finally, the book reminds us of the importance of a process of fact finding and legal interpretation which is nuanced, open-minded and critical, sensitive to power, and attentive to the relations between people rather than reliant on stereotypes and two-dimensional characterisations. Common law legal method is based on the idea that legal principles are derived in part from the material realities of life – lived experiences and real relationships. Certainly there is a hierarchy, structure and history, a mass of legal baggage, which also precedes and constrains any decision but, nonetheless, common law requires a renewal and re-enactment of principle in response to each unique set of facts. In promoting ‘critically aware’ decision-making (p. 43), *Feminist Judgments* affirms the ability law has to reinvent itself, to shift its discourse in response to changing values, and to become something other than simply alienating and exclusive. Such a change might take time, but it nonetheless is a possibility, as this book shows.

The book has already had an impact in a practical setting. In early November 2011 Baroness Hale, the only woman and feminist on the UK Supreme Court, gave evidence to a [House of Lords Select Committee on the Judicial Appointments Process](#). She was asked what sort of difference a more diverse judiciary might make to the actual outcomes of cases. The ‘best answer I can give’ she said, describing the Feminist Judgments Project, is ‘go read that book.’ I would add – don’t just read the introductions and a few cases of interest. Read it all, because it is not in the individual contributions that it makes its most compelling argument, but in the collective enterprise of forming new stories and approaches to gendered questions.

References

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