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The Power of Feminist Judgments?

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Abstract

Recent years have seen the advent of two feminist judgment-writing projects, the Women's Court of Canada (WCC), and the Feminist Judgments Project (FJP) in England. This article analyses these projects in light of Carol Smart's feminist critique of law and legal reform and her proposed feminist strategies in Feminism and the Power of Law (1989). At the same time, it reflects on Smart's arguments 20 years after their first publication and considers the extent to which feminist judgment-writing projects may reinforce or trouble her conclusions. It argues that both of these results are discernible – that while some of Smart's contentions have proved to be unsustainable, others remain salient and have both inspired and hold important cautions for feminist judgment-writing projects.

Introduction

Recent years have seen the advent of two feminist judgment-writing projects, the Women's Court of Canada (WCC), and the Feminist Judgments Project (FJP) in England. A similar project is in the process of being launched in Australia. As a new method of legal critique and a new form of feminist legal strategy, judgment-writing projects are themselves ripe for critical analysis. This article analyses these projects in light of Carol

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Smart's groundbreaking feminist critique of law and legal reform and her proposed feminist strategies in Feminism and the Power of Law (1989). While Smart urged feminists to disengage with law, feminist judgment-writing projects do the opposite, but engage in terms that Smart may not have envisaged. At the same time, therefore, the article provides the opportunity for reflection on Smart's arguments 20 years after their publication, and for consideration of the extent to which feminist judgment-writing projects may reinforce or trouble her conclusions.

Feminist Judgment-Writing Projects

The WCC had its genesis in Canada's Women's Legal Education and Action Fund (LEAF), "a national charitable organization that works toward ensuring the law guarantees substantive equality for all women in Canada".[1] LEAF was established in 1985 to coincide with the coming into force of the Canadian Charter of Rights and Freedoms, and has focused its efforts on the implementation of the equality clause in s 15 of the Charter. It has intervened in over 150 s 15 cases and has "helped establish landmark legal victories for women on a wide range of issues from violence against women, sexual assault, workplace inequities, socio-economic rights, and reproductive freedoms".[2]

This success proved difficult to sustain, however, and by the early 2000s, the Canadian Supreme Court had become much less receptive to LEAF's substantive equality arguments. Writing of the position in 2004, Diana Majury noted:

[1] See the LEAF website: http://www.leaf.ca (accessed 25 November 2010).

[2] http://www.leaf.ca/about/index.html#target (accessed 25 November 2010).

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> Equality has experienced some terrible setbacks in recent Supreme Court of Canada decisions. The impact has been devastating, not only for the claimants and the issues before the Court, but also for equality jurisprudence and advocacy more generally. Although the rhetoric of substantive equality continues, the promise of genuine substantive equality is fading and the voices of equality advocates are being muted. More and more frequently, the courts are denying intervenor status to women's and social justice groups. They think they have heard what we have to say, even though, as new and complex equality issues continue to surface in these troubling times, we are bursting with new ideas and new directions to explore in the pursuit of equality. When we are allowed in, our arguments before the court are too often dismissed or ignored. (Majury 2006, pp. 1-2, footnote omitted)

In this context, a group of LEAF activists, lawyers and academics meeting to discuss future strategies, came up with the idea of rewriting the recent Supreme Court decisions that had got it wrong on s 15 (Majury 2006, p. 2). The WCC was conceived as a 'higher' court that would 'review' the Supreme Court decisions. Their focus was narrow: to rewrite the Supreme Court's equality jurisprudence in order to demonstrate how a more developed substantive equality analysis could be incorporated into the interpretation and

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application of s 15 of the Charter. The first six decisions of the WCC were published in vol 18 of the Canadian Journal of Women and the Law, and are also available online.[3]

The FJP, by contrast, adopted a much wider remit. Inspired by the WCC's example but lacking an equivalent constitutional or human rights focus, three English academics decided to set up a feminist judgment-writing project by calling widely for expressions of interest from feminist legal academics to write the 'missing' feminist judgment in a case of their choice. This call was predicated on the assumption that the law is full of decisions which feminists might perceive to be unjust, and that feminist legal scholars working in different areas would have their own particular examples which, in their view, cried out for rewriting. This assumption proved to be fruitful, and a substantial number of expressions of interest were received across a wide range of subject areas. Ultimately, the FJP resulted in the publication of 23 judgments in a book titled Feminist Judgments: From Theory to Practice (Hunter et al. 2010a).[4] The title reflects the broader objective of the FJP to demonstrate how feminist legal theory could be given practical effect in judgment form.

Although there are obvious differences between the WCC and the FJP, my interest here is to focus on their commonalities. Both projects represent a new and different kind of feminist intervention in law – a kind of hybrid form of critique and law reform project. Firstly, they engage in detailed criticism of the decisions in specific cases and present an alternative feminist analysis of the issues and legal principles involved. But this is not done simply as an academic exercise or for an academic audience. They

[3] See WCC website: http://womenscourt.ca/ (accessed 25 November 2010).

[4] See also the FJP website: http://www.feministjudgments.org.uk (accessed 25 November 2010).

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want their judgments to be taken seriously. They want activists, lawyers and judges to be influenced by their reasoning and so, indirectly, to change the law or at least to contribute to its development (Majury 2006, p. 6; Hunter et al. 2010b, pp. 27-28). Secondly, by appropriating legal personas and forms, they powerfully demonstrate that, at the time these cases were decided and with the legal and other materials then available to the court, the cases could have been reasoned and/or decided differently. In doing so, they expose the contingency and biases of existing decisions and disrupt the unique authority of the courts and legal decision-making. On the other hand, the legal forms they appropriate remain largely unquestioned. They accept judgment-writing as a particular genre subject to particular constraints and strive to operate within that genre and subject to the same constraints as those binding appellate judges, rather than attempting to open up legal forms or legal method (Majury 2006, p. 6; Hunter et al. 2010b, pp. 5-6).

It is also notable that the WCC and the FJP are both collective, collaborative enterprises. In each case, while individual judgments were drafted by one or two members, draft judgments were shared, discussed and debated collectively among a larger group. The WCC originally had 12, now 16 members. The FJP involved 29 judgment-writers, plus an additional 20 participants who wrote explanatory 'commentaries' on the cases and 14 further discussants who provided comments and feedback to the judgment-writers during project workshops. The collaborative nature of the work reinforced the sense of contributing to a shared feminist endeavour, notwithstanding significant differences of feminist analysis and approach that emerged in discussions over the cases (Majury 2006, pp. 7-8; Hunter et al. 2010b, pp 4, 12-13). Indeed, an important point emphasised by both projects has been the fact that feminism is

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not monolithic. There is not necessarily any single 'feminist perspective' available on a particular issue and as a corollary, there may be a diversity of possible feminist judgments that could be written in any given case (Majury 2006, p. 8; Hunter et al. 2010b, p. 13). In the FJP, this point was reinforced by the fact that five of the feminist judgments 'rewrote' decisions of Baroness Brenda Hale, a self-declared feminist judge (see, e.g. Hale 2008, 2010) and the only woman to sit on the UK's House of Lords.[5] One of the feminist judgments in the FJP disagreed with the result reached by Hale. The others arrived at the same result but by quite different reasoning.

Smart's Critique of Law

In Feminism and the Power of Law, Carol Smart mounted a sustained critique of law and, as a consequence, of feminist engagements with law. Following – and extending – Foucault, she argued that law is a powerful discourse which has exclusionary and damaging effects for women. The first strand of her argument is that law represents women and gender in a way that does not merely ignore or leave women out of account, but that actively disqualifies women's experience and knowledge (Smart 1989, pp. 2, 11, 21). Law's account of women drives out and delegitimises alternative accounts that

[5] Five of the six cases reconsidered by the WCC were decided by benches of judges including Justice Claire L'Heureux-Dubé – not a self-declared feminist, but one often claimed as a feminist judge. One of the cases also included another reputed feminist judge, Justice Louise Arbour. In three of the cases the WCC judgment disagreed with the conclusion of Justice L'Heureux-Dubé, while in two cases the WCC judgment agreed with the dissenting opinions of Justices L'Heureux-Dubé and Arbour but did so for different reasons.

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women themselves might put forward. This occurs as a result of law's ability to make persuasive claims to speak the truth about social experience. Because of the power of its truth claims, law's knowledge about women is taken to be true, and thus disqualifies competing knowledges which are unable to invoke such powerful backing for their truth-claims. The factor that invests law's truth claims with such a degree of power is legal method. The method judges use to decide cases – 'finding' and categorising the facts, 'discovering' the relevant legal principles through the selection of precedents and/or statutory interpretation, and applying the law to the facts to arrive at a conclusion – is presumed to be neutral (p. 21), objective and impartial, and always to produce the 'correct' decision (p. 10). In a similar vein, Mary Jane Mossman identified legal method as a major obstacle to feminist interventions in law, and argued that legal method is structured in such a way as to be impervious to a feminist perspective (Mossman 1987, p. 165).[6]

The feminist judgment-writing projects flatly contradict – or attempt to contradict – these arguments. Rather than accepting that legal method is impervious to a feminist perspective, they attempt to introduce a feminist perspective into law by means of legal method. While they accept that legal method does indeed confer considerable power upon law's claims to truth, they attempt to harness legal method precisely in order to qualify feminist knowledge about women, to transform it into legal knowledge and thereby to invest it with legal authority.

[6] Note, however, that Smart takes issue with what she perceives to be the defeatism of Mossman's argument, contending that it is important to stress not feminism's powerlessness in the face of legal method, but feminism's power to challenge and resist law in other ways, as discussed below.

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This move is encouraged by two points of divergence from Smart's position. First is the fact that legal method is considerably more open ended and produces less determinate results than Smart and Mossman suggest. Even within positivist jurisprudence, it has been recognised that there are points at which the law 'runs out' and judges are required to exercise unfettered discretion in deciding some cases (Hart 1961, pp. 123-124). More fundamentally legal realists and critical legal scholars have long argued that judges have a wide range of choices in decision-making and use legal method to justify the decisions they have reached for other (often political) reasons. Smart's own poststructuralism also maintains that language and meaning are fluid rather than fixed and determinate, and hence it would follow that legal method is unlikely to produce completely closed results. Rather, there is considerable (if not unlimited)[7] scope for judges to manipulate the tools of legal reasoning, categorisation, precedent and statutory interpretation.

Secondly, while Smart was writing at a time when feminist knowledge and legal knowledge clearly existed in separate spheres, there are now a number of feminist judges who have demonstrated the ways in which legal reasoning can incorporate feminist knowledge and legal method can be used to produce results that attempt to achieve justice for women. Examples include the concurring judgment of Hale LJ (as she then was) in

[7] For example, one of the feminist judges in the FJP ultimately concluded that it was impossible to interpret the Sex Discrimination Act 1975 in the way that she had initially envisaged to incorporate a more substantive understanding of discrimination: see McColgan 2010.

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Parkinson v St James and Seacroft University Hospital NHS Trust[8] concerning the harm to a woman of wrongful conception; Lady Hale's leading judgment in Yemshaw v London Borough of Hounslow[9] concerning the definition of 'domestic violence' for the purposes of homelessness legislation; Justice L'Heureux-Dubé's leading judgment in Moge v Moge[10] concerning spousal support following divorce, and her concurring judgment in R v Ewanchuk[11] concerning rape myths around the meaning of consent; Justice Gaudron's concurring judgment in Van Gervan v Fenton[12] concerning the valuation of full-time care provided by a wife to her injured husband; and Justice Neave's leading judgment in Giller v Procopets[13] concerning property division following a cohabiting relationship and damages for breach of confidence and assaults perpetrated by the appellant's former partner (see further, e.g. Sheehy 2004; Rackley 2006; Hunter 2008; Hunter 2011). Feminist judgment-writing projects draw upon these real-life precedents, but arguably extend them (see e.g. Hunter 2010) because they consciously set out to employ legal method for feminist ends. Their adherence to traditional legal forms and constraints is precisely intended to demonstrate the porosity of legal method and both the possibility and the legitimacy of taking a feminist approach to legal analysis.

[8] Parkinson v St James and Seacroft University Hospital NHS Trust [2002] QB 266. For an Australian feminist decision on this point, see McMurdo P in Melchior v Cattanach [2001] QCA 246.

[9] Yemshaw v London Borough of Hounslow [2011] UKSC 3.

[10] Moge v Moge [1992] 3 SCR 813.

[11] R v Ewanchuk [1999] 1 SCR 330.

[12] Van Gervan v Fenton (1992) 125 CLR 327.

[13] Giller v Procopets [2008] VSCA 236.

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Of course this endeavour is fraught with risks. One risk is that feminist arguments may fail as legal arguments. They may fail to persuade and hence be marginalised and continue to be excluded from the charmed circle of legal authority (see, e.g. Berns 1999, pp. 204-206). However, the experience of real-life feminist judges and feminist judgments suggests that this is by no means an inevitable result. Sometimes feminist judges are in dissent from the rest of the court,[14] but sometimes their opinions prevail, as in the leading judgments in Yemshaw v London Borough of Hounslow, Moge v Moge and Giller v Procopets noted above (see further, e.g. Hunter 2008, pp. 25-26; Hunter 2011; see also Sandland 1995, p. 34). Moreover, at what point should the 'success' of a judgment be measured? Today's dissent may become tomorrow's orthodoxy (see, e.g. L'Heureux-Dube 2000; Rackley 2006, p. 181; Hale 2008, p. 332; Hunter 2008, p. 25). In many cases, too, the issue is not the result but the reasoning by which it is reached. A feminist judge may agree with the rest of the court (or with the majority) on the outcome but may do so for different reasons, and in particular, may be concerned in the course of her judgment to put women's experience into legal discourse (see, e.g. Hunter 2010, 2011). This was the case, for example, in the feminist judgments in Parkinson v St James

[14] Well-known dissents include Justice L'Heureux-Dubé in R v Seaboyer [1991] 2 SCR 577 concerning the admissibility of sexual history evidence; Justice Ginsburg in Gonzales v Carhart [2007] 127 SCt 1610 on the Constitutional validity of a legislative ban on 'partial birth' abortions, and in Ledbetter v Goodyear Tire & Rubber Co [2007] 127 SCt 2162 concerning the applicant's ability to bring her equal pay claim; and very recently, Lady Hale in Radmacher v Granatino [2010] UKSC 42 concerning the status of pre-nuptial agreements in post-divorce property division in English law.

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and Seacroft University Hospital NHS Trust, R v Ewanchuk and Van Gervan v Fenton noted above, and in six of the 23 FJP judgments.

Another risk is that judges necessarily decide on a case by case basis, but from a feminist perspective, a good result for one woman may not serve the interests of all women, or may operate to the disadvantage of some women. This was an issue debated within the FJP, for example, in relation to the question of a woman's ability to use frozen embryos to have a baby without the consent of her former partner;[15] the provocation defence in criminal law;[16] the rules concerning post-separation contact between children and non-resident parents;[17] the question of capacity to consent to marriage;[18] the application of criminal law to sadomasochistic sexual activity;[19] and the question of whether a school could justifiably ban girls from wearing a strict form of Islamic dress.[20] In each case, the legal principles that would produce a just result for the individuals involved in the case would not necessarily serve the interests of some other women and girls. For the most part, the feminist judgment-writers grappled conscientiously with this risk, and attempted to craft principles that were sufficiently contextualised so as not to foreclose the possibility of a different outcome for differently-situated women. Nevertheless, this dilemma raises the serious issue that legal method sometimes forces

[15] Evans v Amicus Healthcare Ltd: see Hunter et al. (2010a, pp. 59-82).

[16] Attorney-General for Jersey v Holley: see Hunter et al. (2010a, pp. 292-307).

[17] Re L (A Child) (Contact: Domestic Violence): see Hunter et al. (2010a, pp. 114-133.

[18] Sheffield City Council v E: see Hunter et al. (2010a, pp.346-362).

[19] R v Brown: see Hunter et al. (2010a, pp. 241-254).

[20] R (Begum) v Governors of Denbigh High School: see Hunter et al. (2010a, pp. 329-345).

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the feminist judge to make invidious choices and may not be capable of responding appropriately to the variety and complexity of women's lives. This in turn brings us to the second strand of Smart's critique in Feminism and the Power of Law.

Smart observes that law not only makes claims to truth, but also claims to be a force for good. It represents itself as having the power to right wrongs and to achieve justice (1989, pp. 11-12). She argues, however, that as far as women are concerned, this claim is a false one. Law is more likely to generate harms for women than to engender beneficial social change (p. 81). In the area of rape law, for example, the law is deeply implicated in the wider phallocentric discourse which renders women's experience of sexual abuse incredible. Thus, "[w]e should not make the mistake [of thinking] that law can provide the solution to the oppression that it celebrates and sustains" (p. 49). Yet, Smart argues, feminist law reformers have been seduced by law's claim to be a force for good and have failed to notice law's far more strongly juridogenic potential (pp. 12, 160).

The argument that law is more likely to be harmful than useful for women is based on two forms of evidence. First, according to Smart, the history of feminist law reform efforts reveals law's failure to legitimise women's claims (p. 81). This would certainly appear to be true of several of the attempted reforms discussed in Feminism and the Power of Law, such as successive efforts to revise the law of rape, or Catharine MacKinnon's anti-pornography ordinances. In other areas, however, reforms have perhaps not been such a failure. Laws against sex discrimination and sexual harassment may not have eliminated these behaviours from all workplaces, but they have transformed the landscape of women's employment. Domestic violence non-molestation orders are by no means a panacea for abused women, but in some cases they do stop the

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violence and assist women to extract themselves from damaging relationships. Similarly, legislation such as the Civil Partnership Act 2004 and the Gender Recognition Act 2004, which resulted from law reform campaigns by other traditionally excluded groups, are open to all sorts of critiques, but they have delegitimised some forms of discrimination and conferred symbolic recognition in place of stigmatisation.

Sandland (1995) suggests a need to resist an overly pessimistic reading of legal reforms – that they always ultimately fail to shift the maleness of law and simply reconfigure it. He argues that there is no one, essential reading or meaning of any given reform, and that one may acknowledge, for example, that a reform has symbolic value regardless of its 'success' in achieving material change (Sandland 1995, pp. 32-33). Perhaps, then, it is Smart who concedes too much in asserting the futility or the ultimate danger of feminist law reform efforts.

Another element of Smart's empirical argument about the harm caused by feminist law reform is the harm that may be caused to feminism by such activities. As she notes, controversial examples of law reform such as MacKinnon's anti-pornography ordinances have exacerbated differences within feminism (or turned those differences into liabilities rather than productive possibilities) (p. 115) and has forced feminists into alliances with "groups and social attitudes often antithetical to feminism's other values and goals" (p. 116). Although it is difficult to argue with the specific example, this does point to one advantage of feminist judgment-writing over feminist legislative reform. Judgments – even those of the highest courts – are by their nature never fully comprehensive and final. At lower levels they are open to appeal. At the top of the hierarchy they are open to distinguishment when a sufficiently different set of facts

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arises, and are also, ultimately, open to revision. They do not have to be negotiated through parliament and hence to attract sometimes uncomfortable coalitions of support. Indeed, it is possible for two feminist judges on the same court to deliver different opinions in the same case. As noted above, both the WCC and the FJP engendered lively debates over differing feminist approaches to many of the issues raised without precipitating splits, schisms or any need to take 'sides'. The judgments also draw upon a wide range of feminist theoretical positions (see, e.g. Hunter 2010, pp. 21-27). In these projects, differences within feminism proved to be productive rather than destructive. This is also likely to be the case the more diverse the real-life judiciary becomes – including a diversity of feminists. Etherton, for example, cites US social psychology research on collegial decision-making which demonstrates that a panel of judges of the same political affiliation (Republican or Democrat) move towards a more extreme position in their decision-making in line with their politics, whereas the presence of single judge of a different political affiliation has a marked disciplining or moderating effect (Etherton 2010, p. 745). He concludes that this highlights:

> the importance on panels of appellate judges who, due to their diverse experience, can bring to bear on a case…a wider range of personal experience and judicial philosophies than would otherwise be the case. They will thereby make it more likely that the decision, and the reasoning which underpins it, will reflect the evolving values and institutions of the community, and that relevant arguments are not overlooked or brushed

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> aside, and that insupportable preconceptions are challenged. (Etherton 2010, p. 746, footnote omitted)

The second form of evidence Smart invokes to warn feminists to "avoid the siren call of law" (1989, p. 160) is a theoretical one which relates back to legal method. That is, that legal categories and frameworks limit and distort feminist agendas (p. 115). Women's claims, she argues, cannot simply be fitted into existing legal constructs. Law's language, methods and procedures are fundamentally anti-feminist because they bear no relationship to the concerns of women's lives (p. 160). Thus, law is not merely an instrument to be used pragmatically by feminist lawyers for their own ends (pp. 136-137, 160). If they attempt to do so, feminist legal reformers will not only fail to help women, but will end up merely legitimating and reinforcing the power of law itself (p. 161).

As with Smart's characterisation of the failure of law reforms, her characterisation of legal language, methods and procedures as "fundamentally anti-feminist" is arguably too absolutist. These theoretical claims must at least be open to empirical question. Do they hold true in practice? In this context, the feminist judgment-writing projects attempt to revise legal categories, frameworks and language by reference to the concerns of women's lives. Are their attempts successful? Given the relative paucity of feminist judgments – especially real-life ones – we are far from having sufficient experience to decide one way or the other. The jury is still out and is likely to be out for some time to come. But it seems better for feminist judgment-writing projects at least to try out the possibilities, to do so in a sustained way (rather than in the form of isolated judgments

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that may sink beneath the radar), and thereby to provide models and encouragement for this to occur in real life, than to concede defeat before even beginning.

As for reinforcing the power of law, there is little feminist judgment-writing projects can do to escape this charge. They clearly attempt to engage with law on its own terrain, and thus equally clearly accept that it plays an important role in shaping the contours of women's lives. This is, of course, often the case whether feminists like it or not. Many women do not have a choice – they are hauled before the law as defendants or victims in criminal cases and as respondents in family law cases. In other instances, legal action provides the only possible avenue of escape from a dire situation (e.g. deportation, eviction, withholding of medical treatment, mortgage foreclosure) or the only avenue of redress for an injury (e.g. discrimination). More broadly, law does have widespread material effects on women's lives. The challenge Smart issues, however, is to consider whether feminists should, as a matter of strategy, buy into law's power over women's lives, or should instead "resist...the creeping hegemony of the legal order" (p. 5). Rather than attempting to respond at this point, it is useful first to outline the alternative feminist strategies Smart proposes.

Smart's Strategic Prescriptions

Alongside her critique of law, Smart suggests a redirection of feminist strategy. Feminism, she argues, "needs to engage with law for purposes other than law reform" (p. 164). Feminist strategy must focus on challenging law's power to define women and to disqualify feminist knowledge (pp. 2, 164). She envisages several ways of undertaking this challenge. First, feminists should de-centre law, refusing to accept "the idea that law

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should occupy a special place in ordering everyday life" (p. 5). This involves not just questioning the idea of law as a force for good, but questioning the idea of law as a force at all (p. 12). As noted above, feminist judgment-writing projects clearly fall foul of this injunction. Worse, they arguably contribute to the "creeping hegemony of the legal order" (p. 5) by suggesting that the law holds hitherto unrealised potential for women. The WCC wants to show how Charter challenges have the potential to increase substantive equality for various groups of women. The FJP, among other things, demonstrates "the unexploited feminist potential" of the Human Rights Act 1998 (Hunter et al. 2010b, p. 18) and suggests that feminist legal activists should make more use of this legislation (contra Smart's – and others' – warnings about the traps and dangers of resorting to rights discourse: see Smart 1989, pp. 138-159; Kingdom 1991; Palmer 1996; McColgan 2000).

Yet while feminist judgment-writing projects obviously fail to decentre law, they do, at least to some extent, decentre that iconic legal figure, the judge. By engaging in the practice of judgment-writing, the projects question judicial hegemony over this practice and in the process attempt to demystify it. In particular, they separate judgment-writing (legal method) from judicial authority, and demonstrate that the latter is not a necessary element of the former. Rather, judgment-writing is a particular technology which can be picked up and redirected. Indeed Hunter et al. argue that:

> By appropriating judgment-writing for feminist purposes, the judgment-writers engage in a form of parodic – and hence subversive – performance. In much the same way as Judith Butler describes 'drag' as a performance

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> that subverts gender norms, these feminist academics dressed up as judges powerfully denaturalise existing judicial and doctrinal norms, exposing them as contingent, and as themselves (the product of) performances. (2010b, p. 8, citing Butler 1990, pp. 136-138)

Of course, at the same time, the judgment-writing projects are predicated for their effect on the writers borrowing the authority of the judge, so the decentring is limited, but they are perhaps not completely strategically compromised.

In order to challenge and resist legal discourse, and as a corollary to decentring law, Smart stresses the importance of feminism producing its own counter-discourse about women's lives. Feminism's role should be to "construct an alternative reality to the version which is manifested in legal discourse" (p. 160). This necessarily involves refusing to comply with law's image of feminism as powerless (p. 25). Contrary to law's truth claims, we must insist on the legitimacy of feminist knowledge "and feminism's ability to redefine the wrongs of women, which law too often confines to insignificance" (p. 165).

The ideal location for the articulation of alternative feminist knowledge about women is not entirely clear within Smart's analysis. On the one hand, she says that law "provides a forum for articulating alternative visions and accounts. Each case of rape, sexual abuse, domestic violence, equal pay, and so on provides the opportunity for an alternative account to emerge" (p. 88); and that "[t]he legal forum provides an excellent place to engage this process of redefinition. At the point at which law asserts its definition, feminism can assert its alternative" (p. 165). This suggests that counter-

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narratives should be expressed within legal fora – in the courtroom, in legal argument, perhaps in legal scholarship. For instance Smart praises Tove Stang Dahl's Women's Law (p. 25) as an illustration of how feminists might develop their own legal categories, frameworks and principles based on the material reality of women's lives rather than on disembodied jurisprudential concepts (p 158). She also suggests the adoption of different legal principles in abortion law and family law, which would avoid the abstract clash of competing rights claims which bedevil these areas, and acknowledge women's lived experience (pp. 156-158). Another example noted by Rosemary Pringle might be the way in which the Greenham Common women "made brilliant use of the courts as a forum" for resistance and the expression of an alternative reality (1990, p. 232). Elsewhere, however, it appears that alternative feminist visions, definitions and accounts are to be constructed outside law – for example Smart suggests that they are more likely to emerge in "women's writing and feminist groups" than in court or in reformed legislation (p. 88).

Clearly, the feminist judgment-writing projects attempt to redefine the wrongs of women and construct an alternative reality within legal discourse. They do this in particular through recounting the 'facts' (telling the story) of the case in ways that are different from previous accounts, through the extensive introduction of contextual material, including social science evidence and feminist 'common knowledge', and through challenging gender (and other) bias in legal doctrine and judicial reasoning (see Hunter 2010, pp. 35-41). Arguably, then, they do as Smart suggests and provide alternative accounts and engage in the process of redefinition in the legal forum. At the same time, feminist judgment-writing projects somewhat blur the distinction between the legal forum and "women's writing and feminist groups". Although judgments are

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obviously not forms of 'creative writing' through which it might be possible to explore the notion of a 'feminine voice', they are, nonetheless, imaginative works that are the product of collective feminist discussion and debate, and thus the alternative accounts they provide participate to some extent in the shared constitution of feminist knowledge.

The accounts of women's lives put forward by feminist judgment-writing projects, however, are not the product of consciousness-raising. They are accounts of other women's lives, and thus they are open to the same kind of critique that Maria Drakopoulou (1997) levels at Smart. That is, while Smart contests law's claim to speak the truth about women, she does not take the same critical approach to feminism's claim to speak the truth about women. Indeed, she argues that while legal discourse misrepresents and marginalises women's experience, feminist knowledge about women is authentic and feminism has the ability legitimately to define women's wrongs. But what are the grounds for feminism's claim to know the 'truth' about women? If law's truth-claims are merely the effects of power, the same must also apply to feminist truth-claims. Moreover, if, as Smart contends, legal discourse (and other disciplinary discourses) have such a powerful constitutive effect, what un-constructed version of women's reality outside law is available to feminists to be set against legal constructions (Drakopoulou 1997, pp. 116-117)?

These questions caution us that the claims about the 'reality' of women's lives put forward within feminist judgment-writing projects must be open to critical scrutiny. Feminists – including self-proclaimed feminist judges – do not necessarily have access to the 'truth' about all women. Indeed there are good grounds for believing that such a 'truth' does not exist, as the history of exclusionary positions and internal contestations

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within feminism amply demonstrates. Further, it is necessary to recognise that just like legal constructions of women, feminist counter-discourses about women are also constitutive. In order to avoid feminist alternative accounts becoming equally oppressive and constraining, therefore, they must be contextualised, contingent, subject to discussion and debate, remain open to revision, and arise from a diversity of feminist voices. As noted above, feminist judgment-writing projects seem to have greater capacity to incorporate these requirements than do feminist projects aiming at legislative reform.

Finally, both Drakopoulou (1997, p. 115) and Sandland (1995, p. 20) have taken issue with the exclusive nature of Smart's prescriptions for feminist strategy – with her argument that resistance to law is the only ethical goal for feminism, and that challenging law's power to define women is the only appropriate and effective way for feminists to critique law. These prescriptions suggest that there is a 'truth' about feminist strategy in the same way that there is a 'truth' about women to which feminists have access, and they are thus open to the same objections. Sandland in particular contests Smart's insistence that feminists should engage in deconstruction rather than reform. Surely, he argues, it is not possible to decide between these options a priori; the relative merits of one goal over another must be assessed on a case by case basis (1995, pp. 28, 35). Moreover, are deconstruction and reform necessarily mutually exclusive, or can deconstruction sometimes be accomplished via reform (1995, p. 28)?

Feminist judgment-writing projects appear ultimately to fall within the category of deconstruction via reform – or reform via deconstruction. They undoubtedly challenge law's power to define women and to disqualify feminist knowledge, but they do so from inside law and with the objective of changing law, of revising law's knowledge about and

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representations of women, and of extending legal subjectivity to women – as both the authors of decisions and the subjects upon whose experiences, activities and concerns law is founded. In doing so they fulfil Smart's injunction not to accept feminism as powerless in the face of law, but exercise collective agency to promote and encourage legal change.

Conclusion

In summary, feminist judgment-writing projects are predicated upon a rejection of some of Smart's more essentialist or categorical arguments in Feminism and the Power of Law. They do not accept that legal method is closed and antithetical to feminism, that legal forms are essentially anti-feminist, that law reform projects are universally ineffective and harmful to women and to feminism, that feminism has access to the truth about women's lives, nor that there is any singular truth about feminist strategy. Feminist judgment-writing projects are not alone in disputing these claims; from the perspective of 2010, they appear unsustainable.

At the same time, feminist-judgment writing projects are predicated upon other elements of Smart's theoretical enterprise: her concern to highlight the power of legal discourse, to urge the importance of providing alternative accounts of women's experience, to build those accounts through working imaginatively and collectively, and to refuse to accept feminism as powerless in the face of law. And several of Smart's arguments retain continuing salience in the context of feminist judgment-writing projects. She is right to highlight the potential problems of attempting to achieve feminist legislative reforms, of reinforcing the power of law and of contributing to legal hegemony. Her warnings that legal method may force invidious choices, may not be

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capable of appropriately responding to the variety and complexity of women's lives, and may benefit some women at the expense of others are also important cautions to be heeded.

Thus, largely contrary to Smart's injunctions, feminist judgment-writing projects attempt to appropriate the power of law to qualify feminist knowledges, to provide alternative accounts within legal discourse, and to change legal doctrine. But largely in accordance with them, they need to remain mindful of both law's and feminism's capacity to construct totalising and constraining definitions of women and gender. The legal knowledge generated by feminist judges must remain contingent, contextualised, diverse, debated, open to critical scrutiny, and above all a collective enterprise. Differences within feminism must remain productive rather than destructive. And judicial authority and legal decision-making must continue to be deconstructed. The concept of deconstruction via reform, and reform via deconstruction, provides a useful image for the hybrid nature of feminist-judgment writing projects, and for their ambivalent relationship with Smart's critical and strategic contentions.

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