Oñati International Institute for the Sociology of Law
Instituto Internacional de Sociología Jurídica de Oñati
Oñati Socio-Legal Series
ISSN: 2079-5971

Oñati Socio-Legal Series, v. 2, n. 5 (2012) – Critical Thinking Inside Law Schools
ISSN: 2079-5971

Feminist judgments as teaching resources

ROSEMARY HUNTER*

Hunter, R., 2012. Feminist judgments as teaching resources. *Oñati Socio-legal Series* [online], 2 (5), 47-62. Available from: http://ssrn.com/abstract=2115435

Abstract

This paper discusses feminist judgments as a specific vehicle for teaching students to think critically about law. The analysis of appellate judgments forms a central plank of Anglo-Commonwealth and US jurisprudence and legal education. While academic scholarship generally offers various forms of commentary on decided cases, feminist judgment-writing projects have recently embarked on a new form of critical scholarship. Rather than critiquing judgments from a feminist perspective in academic essays, the participants in these projects have set out instead to write alternative judgments, as if they had been one of the judges sitting on the court at the time. After introducing the UK Feminist Judgments Project and describing what is 'different' about the judgments it has produced, the paper explains some of the ways in which these judgments have been used in UK law schools to teach critical thinking. The paper finally speculates on the potential production and application of feminist judgments or their equivalents beyond the common law context.

Key words

Critical thinking; feminist legal theory; Feminist Judgments Project; judicial decision-making; legal education; Women's Court of Canada

Resumen

Este artículo analiza las sentencias feministas como un vehículo específico para enseñar a los estudiantes a analizar el derecho desde un punto de vista crítico. El análisis de las sentencias de apelación constituye un elemento central de la jurisprudencia y la enseñanza del derecho en los países angloamericanos y de la Commonwealth. Mientras la comunidad académica ofrece generalmente diversas formas de comentario de casos resueltos, los proyectos de literatura judicial feminista se han embarcado recientemente en un nuevo sistema de crítica académica. En lugar de redactar ensayos académicos criticando las sentencias judiciales desde una perspectiva feminista, los participantes de estos proyectos se han propuesto redactar sentencias alternativas, como si hubieran sido uno de los

---

Article resulting from the paper presented at the workshop *Critical Thinking inside Law Schools*, held in the International Institute for the Sociology of Law, Oñati, Spain, 23-24 June 2011, and coordinated by Raquel Medina Plana and Ulrike Schultz.

* Rosemary Hunter is a Professor of Law at the University of Kent, where she teaches family law and law in action. Her current research is in the areas of feminist judging, family dispute resolution and domestic violence. She is an editor of the online journal *feminists@law*, and is the Chair of the UK Socio-Legal Studies Association. Kent Law School - The University of Kent, Canterbury, Kent, CT2 7NZ, UK.
R.C.Hunter@kent.ac.uk

jueces del tribunal en cuestión. Después de presentar el Proyecto de Sentencias Feministas del Reino Unido y describir las “diferencias” que presentan las sentencias que ha producido, el artículo explica algunas de las formas en que se han utilizado estas sentencias en las facultades de derecho del Reino Unido para enseñar pensamiento crítico. Finalmente, el artículo especula sobre la producción y aplicación potencial de resoluciones judiciales feministas o sus equivalentes más allá del contexto del derecho consuetudinario.

Palabras clave

Pensamiento crítico; teoría feminista del derecho; Proyecto de Sentencias Feministas; toma de decisiones judicial; enseñanza del derecho; Tribunal de Mujeres de Canadá.

Table of contents

1. Introduction 50
2. The UK Feminist Judgments Project 50
3. What's different about feminist judgments? 51
4. Feminist judgments as teaching resources 53
    4.1. Lois Bibbings, University of Bristol 54
    4.2. Anna Grear, University of West of England 55
    4.3. Joanne Conaghan, University of Kent 55
    4.4. Ben Fitzpatrick and Caroline Hunter, University of York 56
    4.5. Harriet Samuels, University of Westminster 57
5. Further applications? 58
6. Acknowledgements 59
Bibliography 59
Cases cited 61

1. Introduction

This paper discusses feminist judgments as a specific vehicle for teaching students to think critically about law.[1] The analysis of appellate judgments forms a central plank of Anglo-Commonwealth and US jurisprudence and legal education. The traditions of common law development, constitutional and statutory interpretation, individual judgments and lengthy reasons for decision provide fruitful sources for close study, argument and critique. While academic scholarship generally offers various forms of commentary on decided cases (individual or synthetic, analytical or critical, descriptive or normative), feminist judgment-writing projects have recently embarked on a new form of critical scholarship. Rather than critiquing judgments from a feminist perspective in academic essays, the participants in these projects have set out instead to write alternative judgments, as if they had been one of the judges sitting on the court at the time. This involves putting feminist theory into practice in judgment form, under conditions of constraint such as using only the law and materials available at the time of the original judgment, responding to arguments put by the opposing parties, and observing judicial norms of fairness, impartiality, and respect for precedent.[2] The aim is to show that, even at the time of the original decision, the case could have been reasoned and/or decided differently.

In the following discussion, I first introduce the UK Feminist Judgments Project and describe what is 'different' about the judgments it has produced, before going on to explain some of the ways in which these judgments have been used in law schools to teach critical thinking. I finally speculate on the potential production and application of feminist judgments outside the common law context.

Of course feminist judgments need not be imagined. There are many actual feminist appellate judgments issued by judges such as Lady Hale on the UK Supreme Court, Madame Justice Claire L'Heureux-Dubé on the Canadian Supreme Court, Justice Ruth Bader Ginsburg in the US Supreme Court and Justice Mary Gaudron on the High Court of Australia, to name only a few. Judgments identifiable as feminist may also be authored by male judges.[3] What the feminist judgment-writing projects offer, however, is a concentrated collection of feminist judgments which announce their own strategies and critical objectives and which aim to be accessible, and which may thus be drawn upon readily by legal educators and students in teaching and learning.

2. The UK Feminist Judgments Project

The idea of writing imagined feminist judgments was first conceived by a group of Canadian feminist academics, lawyers and activists who were particularly concerned with the development of the Canadian Supreme Court's jurisprudence on s.15 – the equality clause – of the Canadian Charter of Rights and Freedoms. As members of the Women's Legal Education and Action Fund (LEAF), they had been involved in a number of interventions in s.15 cases, in which LEAF had submitted briefs urging the Court to implement a more robust conception of substantive equality. Although the Court had initially been responsive to their arguments, over time those

[1] The paper assumes that students *should* be taught to think critically about law. Some of the possible reasons for doing so are discussed briefly towards the end of the paper. It does not, however, assume that legal education is currently *not* critical, nor that feminist judgments *must* form part of a critical legal education. It simply offers feminist judgments as a new and potentially helpful approach to teaching critical thinking in law.

[2] For discussion of the effect of these constraints and the limits they impose on the critical project of feminist judgment-writing, see Majury (2006, p. 6); Hunter *et al.* (2010b, pp. 5-6, 13-15); and Hunter (2010).

[3] The question of what counts as a feminist judgment and how feminist judgments may be identified is a contentious one which, while falling outside the scope of this paper, has been discussed at length elsewhere (see, e.g. Sheehy 2004; Hunter 2008; Baines 2009, 2012). See also the section on 'What's Different About Feminist Judgments?' below.

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971

arguments appeared to be having less and less impact, and they were searching for new ways to capture the Court's attention. In Majury's words:

> Women's equality is painfully far from being a reality—too many women live in poverty, unable to feed and house themselves and their children adequately; lesbians are merely tolerated, mostly regarded as a deviant lifestyle, sometimes targeted for hate and violence; women with disabilities are still denied basic access to transportation, employment, and autonomy; racialized women are stigmatized and marginalized, and, in the post 9/11 political climate, some are perceived as potential terrorists; Aboriginal women are disappearing—raped, murdered, and discarded. The issues are urgent; there is much equality work to be done. But, politicians and Supreme Court of Canada judges alike seem to think that women have largely attained equality and that other issues (balanced budgets and national security) should take priority over equality. We are losing equality ground; we are in danger of losing our equality footing. (Majury 2006, p. 1)

It was in this context that they hit upon the idea of rewriting s.15 cases in order to demonstrate to the Court how it could be done. They dubbed themselves the Women's Court of Canada (WCC), and set about 'reviewing' Supreme Court decisions on s.15. The first six decisions of the WCC were published in the *Canadian Journal of Women and the Law* in March 2008 (see http://womenscourt.ca/). One of the activities of the WCC from early on was to introduce law students to their judgments and encourage students to consider the reasoning they had employed and to compare and contrast the judgments of the WCC with the decisions of the Supreme Court. The WCC launch event included a one-day symposium incorporating student workshops at the University of Toronto, and the WCC subsequently went 'on the road' to speak to students at the Universities of Victoria and Saskatchewan in Western Canada (see http://womenscourt.ca/media). Members of the WCC have subsequently published an article on the pedagogical use of WCC judgments (Koshan *et al.* 2010).

While the WCC focused on a distinct body of jurisprudence, the UK Feminist Judgments Project, launched in late 2007, took a broader approach to its subject-matter, issuing a general invitation to feminist legal academics to write alternative feminist judgments in any area of English law. Participants were both self-selected and selected their own judgments to rewrite, inevitably choosing cases in which they perceived a particular gender issue to arise, and/or an injustice that they wished to remedy. The result was the production of 23 alternative judgments across a wide range of areas – family law, criminal law, public law, contract, property law, banking law, equality and human rights law. In a handful of cases the judgment-writer imagined an appeal to a higher court and wrote a fictional appeal judgment. However, the majority were written as additional judgments in the original case decided by the Court of Appeal, House of Lords or Privy Council. Interestingly, not all of these were dissenting judgments. Several were concurrences, in which the feminist judgment-writer agreed with the result in the case, but did so for different reasons. The judgments have been published in a book: Hunter, McGlynn and Rackley (eds), *Feminist Judgments: From Theory to Practice* (2010a). In the book, each judgment is accompanied by a commentary, which explains for the benefit of the non-specialist reader the facts and the issues in the original case, how it was originally decided, and what the feminist judgment does differently. The book also contains an introduction to the Project and two theoretical chapters on the practice of feminist judging and the judgment-writing process.

3. What's different about feminist judgments?

The feminist judgments differ from their originals in a variety of ways, both substantive and methodological. Substantively, the judgments implicitly draw upon various aspects of feminist legal theory, particularly feminist critiques of liberal legalism. So, for example, several of the judgments view the subjects of law as

relational and interdependent rather than as atomised, self-interested and competitive individuals (see, e.g., Nedelsky 1989, 1990; Fineman 2004), and seek to implement an 'ethic of care' rather than the more traditional, masculine 'hierarchy of rights' (see, e.g., Gilligan 1982; Tronto 1993; West 1997; Sevenhuijsen 1998; Held 2005). Similarly, some reject the liberal dichotomy which sees subjects either as autonomous agents or as vulnerable victims in need of protection, and assert the possibility of occupying positions of both autonomy and vulnerability, victim and agent, at the same time – a common feature of women's lives (see, e.g. Scales 1986; Hunter 2007; Fineman 2008). Others tackle the public/private distinction, and challenge the state's refusal to limit the power of those who control the private sphere from engaging in abuse, exploitation and exclusion (see, e.g. Olsen 1984; O'Donovan 1985; Okin 1989; Fineman and Mykitiuk 1994; Thornton 1995; Boyd 1997). Others rethink problems of 'clashing rights' (see, e.g. Kingdom 1992; McColgan 2000) and bring a different perspective to bear on these dilemmas which often involves showing how differing rights and interests which were assumed to be incompatible can actually be mutually accommodated. And some, like the Women's Court of Canada, advocate a more substantive interpretation of 'equality', while others continue to appreciate the value of formal equality arguments in circumstances where even this basic standard of equal treatment is lacking.

Another group of judgments draw upon Foucauldian critiques of medical or bio-power (see, e.g. Foucault 1970, 2007; Miller and Rose 1986; Smart 1989; O'Donovan 1993; Rose 2006) to question the privileging of 'expert' medical or welfare opinions, and the associated devaluation of the knowledge and experience of parents and carers, or the need for women to produce 'expert' medical or psychiatric evidence to prove they have been harmed. The judgments also evidence the feminist theoretical concern with intersectionality – i.e. the need to acknowledge that women do not all share the same essential life experience, but that gender intersects with class, race, ethnicity, religion, sexuality and so on in different ways (see, e.g. Crenshaw 1989, 1991; Grabham *et al.* 2008; Lutz, Herrera Vivar and Supik 2011). Thus, the judgments deal with the specific positions and experiences of older women, lesbians, and Muslim women in particular cultural contexts.

Methodologically, the feminist judgments consistently use a set of techniques which are fairly distinctive, and which have also been identified in other literature on feminist judging (see, e.g. Resnik 1988; Bartlett 1990; Rush 1993; Sheehy 2004; Hunter 2008, 2010; Koshan *et al.* 2010).[4] First is the technique of telling the story differently, i.e. recounting the facts of the case in a different way from the original judgments in order to give voice to those (often women) who have been silenced or sidelined. Second is the use of contextual materials – social science, historical, and policy literature – to place the facts and the legal issues in a broader context. For example the feminist judgments variously include reference to research evidence on rape trials, domestic violence, lesbian motherhood, post-separation parenting, ageing, sado-masochistic sexual preferences, and the dynamics of commercial relationships. In addition, the judgments incorporate what I have identified as 'feminist common knowledge', i.e. information about the world that feminists consider to be so well known that it does not require proof.[5] So, for example, the feminist judgments draw on common knowledge about caring, marriage, parenthood, pregnancy, homophobia, and the intricacies of negotiating ethnic minority cultural and religious identities within contemporary British society. The

[4] Though it should be stressed that there is no fixed 'programme' for feminist judging, and that a feminist approach to judging might not differ greatly from any other critically aware judicial approach (see Hunter 2010, p. 43).

[5] For a fuller discussion of 'feminist common knowledge', and how it relates to the doctrine of judicial notice, see Hunter (2010, pp. 38-39; 2012). See also Graycar (1995) on the sources of judicial knowledge.

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971

use of social science research evidence and feminist common knowledge in turn enables the judge to engage in what Katherine Bartlett (1990) calls 'feminist practical reasoning', i.e. reasoning from context rather than in the abstract, leading to more particularised – and arguably therefore more just – results. Such reasoning can be used to highlight the shortcomings of the current law, to show why a particular rule is inappropriate or inapplicable to the given facts, and/or to incorporate previously excluded experiences and perspectives into the stock of legal knowledge, which then become available to future judges, lawyers and litigants.

4. Feminist judgments as teaching resources

It quickly became obvious to those who participated in the project, and those who read the book, that the feminist judgments made excellent teaching resources. They did so in three respects. First, they demonstrated how feminist theoretical ideas could be implemented in legal practice. For students who were curious as to how this could be done, or who were sceptical as to whether it could be done, they provided practical illustrations. Some students who expected that judgments written from a feminist perspective would be biased or incoherent were forced to rethink their preconceptions. For example in the case of *Wilkinson v Kitzinger* (2006), a lesbian couple who had been married in Canada sought to have their marriage recognised *as a marriage* in England, whereas English law recognised it only as a civil partnership. They argued that this refusal violated their rights under Articles 8, 12 and 14 of the European Convention on Human Rights (ECHR). The English judge dismissed their application and advanced a vehement defence of the value of 'traditional' heterosexual marriage, the protection of which was said to justify interference with the applicants' rights to non-discrimination under Article 14 ECHR. The feminist judgment (one of the fictional appeals) meticulously examines the legal precedents on the ECHR, exposes flaws in the judge's reasoning on Articles 12 and 14, and finds in favour of the applicants (Harding 2010). Students comparing the two judgments found that it was the *feminist* judgment that appeared neutral, dispassionate, 'legal' and 'objective', while the original judgment was more emotional, partial and overdetermined.

In addition, the feminist judgments collectively demonstrate that feminism is not monolithic – that there may be a variety of feminist views on a particular issue, and that it is not possible simply to 'read off' 'the' feminist outcome from the facts. There is one acknowledged feminist judge on the UK Supreme Court (formerly the House of Lords) – Lady Hale. Some of the imagined feminist judgments rewrote her decisions, illustrating a different feminist perspective on issues such as the scope of the defence of provocation, the relative importance of biological versus social motherhood, or whether schoolgirls should be allowed their choice to wear strict Islamic dress.

Secondly, the feminist judgments can be used to provoke critical thinking about judicial decision-making by exposing the contingency of the decisions made. Results that appeared inevitable are shown not to be so (see also Koshan *et al.* 2010, pp. 137, 139). As Majury states in the Canadian context:

> The WCC decision enabled the students to see concretely that the decision really could have been written and decided very differently... While the students may already have understood this in the abstract, it seemed that reading the rewritten judgment helped them to see and understand that potential at a deeper and more meaningful level. It became a possibility rather than just an idea. (Koshan *et al.* 2010, pp. 136-137)

The judgments can also be used to highlight the techniques of persuasion judges employ, and the choices judges make in constructing the 'facts' of the case, hence demonstrating that the 'facts' represented by the court are indeed selected and constructed rather than transparently reflecting an external reality (see also Koshan *et al.* 2010, pp. 130, 138, 142). Following on from this, the judgments provoke

reflection on the important relationship between the story told about the facts and the outcome of the case.

Thirdly, the feminist judgments can be used to provoke critical thinking about the particular decision made by the court and to illustrate different possibilities for the development of legal doctrine in the relevant subject areas. The judgments suggest new directions for the development of the common law in relation to property, contracts, criminal liability and defences, child welfare and the application of international law by domestic courts, among others. They also offer alternative interpretations of legislative provisions in human rights law, criminal law, evidence law and employment protection law. In some instances, too, they illustrate the limits of the law and its inability to provide a remedy. In the case of *James v Eastleigh Borough Council*, the feminist judge reluctantly concludes that an interpretation of the concept of discrimination in the Sex Discrimination Act 1975 which she might have preferred is simply not open for a judge to make (McColgan 2010). And the incapacity of judicial review proceedings to regulate potential future conflicts, as opposed to adjudicating retrospectively on past events, is clearly identified in the feminist judgment in *R v Portsmouth Hospitals NHS Trust, ex parte Glass* (Bridgeman 2010).

The feminist judgments are now being used for teaching purposes in a number of English law schools (and internationally), in 'gender and law'-type courses (focusing on feminist approaches to judging) (see also Koshan *et al.* 2010, pp. 132-136); in introduction to law, jurisprudence and statutory interpretation courses (focusing on critical analysis of judicial decision-making); and in doctrinal courses such as family law, criminal law, civil liberties, law and commercial relationships, and healthcare ethics (focusing on how particular cases might have been decided differently, and more generally on alternative possibilities for doctrinal development) (see also Koshan *et al.* 2010, pp. 129-132, 136-137). In some of these courses, students are required to draft their own feminist judgment as part of the assessment, or have the option of doing so.

Two of the participants in the project successfully applied to the UK Centre for Legal Education for a grant to develop a set of teaching materials based on the Feminist Judgments Project. The grant enabled them to hold two workshops at which academics who were using the judgments in teaching, or were interested in doing so, could discuss with each other and share ideas about how they were using the judgments, how they had designed their classes, and their experiences of teaching with the judgments. Subsequently, some of those who attended the workshops wrote up their teaching materials, and these are now publicly available on the Feminist Judgments website at http://www.feministjudgments.org.uk. The following discussion draws upon and presents (in edited form) these teaching materials.

Two of the sets of materials use the feminist judgments as a vehicle for critical analysis of judgment-writing and judicial reasoning.

4.1. Lois Bibbings, University of Bristol

- **Module:** Legal Methods
- **Aims:** To enable critical discussion of legal methods, including the construction of legal argument, the use of precedent and, in particular, techniques of judging.
- **Reading:** Court of Appeal judgment in *R v Stone and Dobinson* (1977); feminist judgment in *R v Stone and Dobinson* (Bibbings 2010);[6] theoretical material on precedent and judging.

[6] *R v Stone and Dobinson* concerns criminal liability for omissions. The court upheld manslaughter convictions for both defendants, on the basis that they had assumed a duty to care for the first defendant's seriously ill sister, and had breached that duty, resulting in her death. The feminist

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971

- **Questions/Exercise:** The focus of the class should be on the discussion and analysis of the two versions of the judgment in *R v Stone and Dobinson*. Attention should be directed first to the 'real' case: how it is argued, how it uses precedent, how convincing its reasoning and decision are and why? An analysis of the alternative judgment should follow, along similar lines and then a comparative discussion can be introduced. Amongst other things, students should be encouraged to think how precedent and the techniques of judging are used in each case, which they think is the most lawyerly/legalistic and which is the most convincing decision and why. Students could also be asked to reflect upon the nature of legal reasoning and judging, taking into account different accounts of what is, might or should be involved (e.g. objectivity, rationality, logic, craft, creativity, emotion, politics, standpoint, empathy).

4.2. Anna Grear, University of West of England

- **Module:** Critical and Legal Reasoning
- **Aims:** Understanding how judges reason (reasoning from statutory rules; reasoning from cases; the nature and legitimacy of judicial adjudication).
- **Reading**: *Donoghue v Stevenson* (1932); Court of Appeal decision in *Porter v Commissioner for Police for the Metropolis* (1999); feminist judgment in *Porter v Commissioner for Police for the Metropolis* (Grear 2010).[7]
- **Exercise:** Having engaged in an analysis of *Donoghue v Stevenson*, including an interrogation of the various strategies deployed by the judges to reach the outcome they preferred, the students were set the task of writing an alternative judgment in the case of *Porter*. Given the paucity of time, the students were set the task of constructing an analytical map of their judgment, and also providing one, in-depth, precise paragraph from the judgment in relation to any one of their own selected precedents. The students really enjoyed the exercise. I also gave them the feminist judgment as an example of how it is possible to start from any given position and still produce a judgment conforming to the canons of legal practice. This, in and of itself, emphasised, in a very practical way, the way in which law cannot, even by deploying its own limited and highly specialised version of reasoning, close out multiple perspectives.

Two other sets of materials focus on feminism and the application of feminist theory to legal decision-making, while also thinking about techniques of judging. It is notable that the second of these (by Fitzpatrick and Hunter) uses an actual rather than imagined feminist judgment – an opinion delivered by Lady Hale when she was a member of the Court of Appeal, which is contrasted with the judgment of one of her male colleagues in the same case.

4.3. Joanne Conaghan, University of Kent

- **Module:** Critical Introduction to Law

judgment revisits the facts of the case, acknowledging the difficulties experienced by the defendants who themselves suffered from significant disabilities and their unsuccessful attempts to get help for the deceased, and attributing blame not to the defendants but to the wider community and the state for their failures to care for the family as a whole.

[7] In *Porter v Commissioner for Police for the Metropolis*, a woman with two young children staged a peaceful sit-in at a ultility company's offices in protest at their alleged failure to connect the electricity supply to her new flat. She was forcibly ejected by the police, and unsuccessfully sued them for assault, battery, wrongful arrest, false imprisonment and malicious prosecution. The lawfulness of the police's actions turned on the ability of the utility company to treat her as a trespasser on its premises. The Court of Appeal held that it had power to do so. The feminist judgment disagrees, categorising the premises not as 'private' but as 'quasi-public', giving members of the public a right to enter so long as their behaviour is not unreasonable.

- **Aims:** understand feminism as a critical 'mode of analysis or *way of seeing*'; consider the application of that *way of seeing* to a particular case; analyse how the feminist judgment operates, and its similarities and differences from the original judgments; critically assess the feminist claim to produce 'fairer trials'.
- **Reading:** Privy Council decision in *Attorney-General for Jersey v Holley* (2005); feminist judgment in *Attorney-General for Jersey v Holley* (Edwards 2010).[8]
- **Questions:** ***Privy Council decision***: What was the legal issue which *Holley* seeks to resolve? What are the facts? How do you know? Consider the majority and minority judgments: (a) What arguments do they put forward? (b) What techniques of statutory interpretation do they deploy? (c) Does story telling/narrative play a role in any of the judgments? What is the relevance of justice to decision-making in *Holley*? ***Feminist judgment:*** In what sense is this a 'feminist' judgement? Does it work? Does the inclusion of gender considerations lead to more just judicial reasoning? Is the author's advocacy of a flexible standard for judging self-control consistent with her view that male jealousy and hubris should always be ruled out as a ground for provocation? Does it matter?

4.4. Ben Fitzpatrick and Caroline Hunter, University of York

- **Module:** Foundational Issues in Law
- **Aims:** Provide a general introduction to feminist legal theories and the different feminist approaches to law; Provide a brief introduction to the gendered nature of legal decision making through examination of the statistics on female judges and the reaction to the appointment of Brenda Hale to the House of Lords; Ask students to consider whether there is a distinctive female or feminist voice in judging.
- **Reading:** The judgments of Brooke LJ and Hale LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* (2001)[9] (judges' names removed). Suggested further reading includes articles on feminist legal theory, women judges, feminist judging, and commentary on the case.
- **Exercise:** The students are asked to read the judgments with the following questions in mind: Which is by a female and which by a male judge? How would you characterise their differences? This is then used to provoke a discussion on the nature of the 'voice' of the judge. We have now run this exercise twice and in general the students could tell the difference. Interestingly most preferred what they perceive as the 'neutral' voice of Brooke LJ's judgment.

The final set of materials addresses all three issues: the nature of judgment-writing, the application of feminist legal theory and different ways in which legal doctrine could have developed. The author presents a generic teaching plan for introducing feminist judgments in the classroom, which she suggests could be

[8] *Attorney-General for Jersey v Holley* concerned the legal test for the availability of the defence of provocation. While a majority of the Privy Council held that the provocation must be such that it could cause an ordinary person to lose self control, the feminist judgment prefers the alternative formulation, that the provocation could make a person with the defendant's characteristics (including any physical or mental conditions) lose self-control, on the basis that this formulation is necessary in order to do justice to battered women who kill their abusers.

[9] The issue in *Parkinson v St James and Seacroft University Hospital NHS Trust* was whether a mother could recover damages for the birth of a disabled child following a negligently-performed sterilisation operation. The Court of Appeal unanimously held that damages were recoverable for the extra costs of bringing up a child with a significant disability, where that was foreseeably a result of the surgeon's negligence. However, Brooke LJ and Hale LJ gave different reasons for arriving at this conclusion, with Hale LJ emphasising in particular the invasion of bodily integrity involved and the effects of pregnancy, child birth and caring responsibilities on women.

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971

applied to a range of possible modules including Public Law, Legal Method, Law and Gender, Human Rights, Legal Theory or a Project-based course.

4.5. Harriet Samuels, University of Westminster

- **Aims:** Understand and experience the process of judgment-writing; Develop an understanding of the historical, social, and economic context of judgments; Understand and apply feminist method.
- **Reading:** First instance, Court of Appeal and House of Lords decisions in *Roberts v Hopwood* (1925); feminist judgment in *Roberts v Hopwood* (Samuels 2010) and accompanying commentary (Palmer 2010);[10] *Short v Poole Corporation* (1926), or any two contemporaneous cases that raise relevant issues. (Samuels also includes a reading list for the teacher, covering women and the law, feminist methods, judicial decision-making, judicial politics, women judges, and feminist judging.)
- **Exercise:** Introduce the first case; Consider the case in its historical, social, economic and political context as appropriate; Study feminist method and feminist judgment-writing; Re-write another case using feminist method.
    - Class 1. Discuss thinking critically, feminist method, historical context; assign case reading and questions to prepare.
    - Class 2. Discuss the case: facts, arguments, legal issues, majority and dissenting judgments, judicial preferences/partiality/values; discuss the feminist judgment: how does it apply feminist method? Compare and contrast the majority and feminist judgments.
    - Class 3. Prepare students to write a feminist/alternative judgment in the second case: summarise facts, summarise arguments, conclusions, reasons, reasons for rejecting the other side's arguments; reflection on values, gender issues, wider context.
    - Judgments may be written in next class or in students' own time.

It can be seen that these teaching materials mostly seek to engage students in discussion, debate and practical exercises, although the feminist judgments can clearly also be incorporated into lectures – for example on the Feminist Judgments website Conaghan provides powerpoint slides for a lecture on feminist judging and the case of *Attorney-General for Jersey v Holley* (2005) to precede the seminar exercise set out above. The materials are also evidently focused on *critical* thinking about law, emphasising various ways in which law may be questioned rather than taken for granted, evaluated rather than simply learnt, and considering how a critical, feminist approach may be brought to bear, while also being concerned to take a critical, questioning approach to the feminist project itself. As Réaume notes in relation to her experience of teaching a seminar dedicated to a sustained analysis of the WCC judgments and their originals:

> While the students appreciated the different approach that the WCC brought to the cases, they did not passively go along with the new approach. Having opened up what made a WCC decision different, the students often noticed gaps or flaws in the reasoning of both courts. This sometimes led to reflection on how the gaps could be filled, on how the argument *really* should go. (Koshan *et al.* 2010, p. 139)

Although judgments embodying other critical approaches are less readily available, the feminist judgments and related teaching materials could also clearly be used to

[10] In *Roberts v Hopwood*, the district auditor disallowed Poplar Borough Council's decision to pay a higher minimum wage to its employees than had been agreed through official trade union negotiations, and to pay the same wage to women and men, on the grounds that the proposed pay was excessive, unreasonable, amounted to gratuities rather than wages, and failed to take into account the interests of the ratepayers. The Council sought judicial review of the auditor's decision, but the decision was upheld by the House of Lords. The feminist judgment draws on contemporary material to demonstrate that equal pay for women should not have been considered unreasonable.

illustrate ways in which other critical approaches (such as critical legal studies, critical race theory or decolonising jurisprudence) could be incorporated into judgments, and/or to encourage students to write alternative judgments employing these approaches.

In their article on the use of WCC judgments in teaching, Koshan *et al.* (2010) connect their project firmly with 'outsider pedagogy', i.e. the conscious inclusion of the experiences and perspectives of 'outsider' groups within (legal) education in order both to remedy past exclusions and to challenge the claims to neutrality and objectivity of traditionally accepted and authoritative ways of seeing and understanding the world. For example, they argue that "Including feminist perspectives in legal education...seeks to ensure that women's voices have 'space...credibility, and perhaps even power'" (Koshan *et al.* 2010, p. 124, quoting Bakht *et al.* 2007, p. 674). They further argue that it is necessary for law students to be exposed to multiple social realities and to become aware of "multidimensional sources and forms of, as well as solutions to, inequality", in order to "properly serve their clients and be strong social citizens" (Koshan *et al.* 2010, p. 125; see also pp. 138, 143-144). While it has not been the purpose of this paper to advocate specific motivations for encouraging law students to engage in critical thinking – or any particular kind of critical thinking – I would suggest that there is no *necessary* connection between motivations and methods. While some teachers will use the feminist judgments as part of a political project of feminist, critical or 'outsider' pedagogy, the judgments may also be used by those who are concerned to teach students to interrogate the nature of legal reasoning and the development of legal doctrine, but may not share these broader political goals.

5. Further applications?

Although the feminist judgments have proved to be very useful critical teaching resources in a common law context, one question that obviously arises is whether this model is applicable in other legal systems. The idea of encouraging students to scrutinise court decisions and to write alternative judgments as a way of operationalising critical perspectives on law and of thinking critically about legal doctrine and judicial decision-making presupposes some degree of indeterminacy and judicial choice in the reasoning and outcomes of cases, and some elaboration of the reasons for decision. It is not difficult to see such possibilities, for example, in relation to the European Court of Human Rights or the International Criminal Court, as well as ad hoc post-conflict tribunals (see, e.g. the feminist judgment of the International Criminal Tribunal for Rwanda on the definition of rape in *Prosecutor v Jean-Paul Akayesu* (1998)). In Constitutional Courts, too, there would always seem to be room for interpretation. It should be noted that the possibility of delivering individual judgments is not a necessary prerequisite. Even where the court speaks with one voice, and there is no scope for concurring or dissenting judgments, the singular decision of the court may still be open to rewriting.

It is acknowledged that in some contexts, court decisions may not be the object of study because they make no material contribution to the development of the law. Here, the emphasis is solely on legislation, possibly incorporating preparatory materials as well. Although the idea of alternative judgments would have little critical purchase in this situation, it may be possible, by analogy, to think about alternative legislative provisions, or alternative processes for producing new legislation. The task may indeed be challenging, but critical thinking about law is by definition a challenging exercise. Fundamentally, the feminist judgment-writing projects have been animated by a perceived gap between law and justice (a gap which, according to Derrida (1990), always exists). Wherever such a gap is perceived, an alternative has already begun to be imagined.

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971

6. Acknowledgements

I am grateful to the authors of the teaching materials discussed herein for making these materials publicly available; to the participants in the Onati Workshop on 'Critical Thinking inside Law Schools' for stimulating discussions; to the editors of this special issue for their forbearance; to the anonymous referees for helpful comments and suggestions for strengthening the paper; and to Jennifer Koshan for providing me with a copy of her jointly-authored article on teaching with the WCC judgments.

Bibliography

Baines, B., 2009. But was she a feminist judge? *In*: K. Brooks, ed. *Justice Bertha Wilson: one woman's difference*. Vancouver: UBC Press, 211-228.

Baines, B., 2012. Feminist judges, feminist adjudication and feminist legal scholars. *In*: U. Schultz and G. Shaw, eds. *Gender and judging*. Oxford: Hart Publishing, forthcoming.

Bakht, N., *et al.*, 2007. 'Counting outsiders': a critical exploration of outsider course enrollment in Canadian legal education. *Osgoode Hall law journal,* 45, 667-732.

Bartlett, K.T., 1990. Feminist legal methods. *Harvard law review,* 103, 829-888.

Bibbings, L., 2010. *R v Stone and Dobinson* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 234-240.

Boyd, S.B., 1997. *Challenging the public/private divide: feminism, law and public policy*. Toronto: University of Toronto Press.

Bridgeman, J., 2010. *R v Portsmouth Hospitals NHS Trust, ex parte Glass* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 369-378.

Crenshaw, K., 1989. Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago legal forum,* 1989, 139-167.

Crenshaw, K., 1991. Mapping the margins: intersectionality, identity politics, and violence against women of color. *Stanford law review,* 43, 1241-1299.

Derrida, J., 1990. Force of law: 'the mystical foundation of authority'. *Cardozo law review,* 11, 920-1045.

Edwards, S., 2010. *Attorney-General for Jersey v Holley* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 297-307.

Fineman, M.A., 2004. *The autonomy myth: a theory of dependency*. New York: New Press.

Fineman, M.A., 2008. The vulnerable subject: anchoring equality in the human condition. *Yale journal of law and feminism,* 20, 1-23.

Fineman, M.A. and Mykitiuk, R., eds., 1994. *The public nature of private violence: the discovery of domestic abuse*. New York: Routledge.

Foucault, M., 1970. *The order of things: an archaeology of the human sciences*. London: Tavistock.

Foucault, M., 2007. *Security, territory, population: lectures at the Collège de France*. Basingstoke: Palgrave Macmillan.

Gilligan, C., 1982. *In a different voice: psychological theory and women's development*. Cambridge, MA: Harvard University Press.

Grabham, E., *et al.*, eds., 2008. *Intersectionality and beyond: law, power and the politics of location*. Abingdon: Routledge.

Graycar, R., 1995. The gender of judgments: an introduction. *In*: M. Thornton, ed., *Public and private: feminist legal debates*. Melbourne: Oxford University Press, 262-282.

Grear, A., 2010. *Porter v Commissioner of Police for the Metropolis* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 174-183.

Harding, R., 2010. *Wilkinson v Kitzinger* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 430-442.

Held, V., 2005. *The ethics of care: personal, political and global*. New York: Oxford University Press.

Hunter, R., 2007. Consent in violent relationships. *In*: R. Hunter and S. Cowan, eds. *Choice and consent: feminist engagements with law and subjectivity.* Abingdon: Routledge, 158-173.

Hunter, R., 2008. Can *feminist* judges make a difference? *International journal of the legal profession,* 15 (1-2), 7-36.

Hunter, R., 2010. An account of feminist judging. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 30-43.

Hunter, R., 2012. Justice Marcia Neave: case study of a feminist judge. *In*: U. Schultz and G. Shaw, eds. *Gender and judging*. Oxford: Hart Publishing, forthcoming.

Hunter, R., McGlynn, C. and Rackley, E., eds., 2010a. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing.

Hunter, R., McGlynn, C. and Rackley, E., 2010b. Feminist judgments: an introduction. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 3-29.

Kingdom, E., 1992. *What's wrong with rights? Problems for feminist politics of law*. Edinburgh: Edinburgh University Press.

Koshan, J., *et al*., 2010. Rewriting equality: the pedagogical use of Women's Court of Canada judgments. *Canadian legal education annual review,* 4, 121-148.

Lutz, H., Herrera Vivar, M.T. and Supik, L., eds., 2011. *Framing intersectionality: debates on a multi-faceted concept in gender studies*. Farnham: Ashgate.

Majury, D., 2006. Introducing the Women's Court of Canada. *Canadian journal of women and the law,* 18 (1), 1-12.

Miller, P. and Rose, N., eds., 1986. *The power of psychiatry*. Cambridge: Polity Press.

McColgan, A., 2000. *Women under the law: the false promise of human rights*. Harlow: Longman.

McColgan, A., 2010. *James v Eastleigh Borough Council* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 420-424.

Nedelsky, J., 1989. Reconceiving autonomy. *Yale journal of law and feminism,* 1, 7-36.

Nedelsky, J., 1990. Law, boundaries and the bounded self. *Representations* 30, 162-189.

O'Donovan, K., 1985. *Sexual divisions in law*. London: Weidenfeld and Nicolson.

O'Donovan, K., 1993. Law's knowledge: the judge, the expert, the battered woman and her syndrome. *Journal of law and society,* 20 (4), 427-437.

Okin, S.M., 1989. *Justice, gender and the family*. New York: Basic Books.

Olsen, F., 1984. The myth of state intervention in the family. *University of Michigan journal of law reform,* 18, 835-864.

Palmer, S., 2010. Commentary on *Roberts v Hopwood*. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 381-386.

Resnik, J., 1988. On the bias: reconsideration of the aspirations for our judges. *Southern California law review,* 61, 1877-1944.

Rose, N., 2006. *Politics of life itself: biomedicine, power, and subjectivity in the twenty-first century*. Princeton, NJ: Princeton University Press.

Rush, S.E., 1993. Feminist judging: an introductory essay. *Southern California review of law and women's studies,* 2, 609-632.

Samuels, H., 2010. *Roberts v Hopwood* – judgment. *In*: R. Hunter, C. McGlynn and E. Rackley, eds. *Feminist judgments: from theory to practice*. Oxford: Hart Publishing, 387-400.

Scales, A.C., 1986. The emergence of feminist jurisprudence: an essay. *Yale law journal* 95, 1373-1403.

Sevenhuijsen, S., 1998. *Citizenship and the ethics of care: feminist considerations on justice, morality and politics*. London: Routledge.

Sheehy, E., ed., 2004. *Adding feminism to law: the contributions of Justice Claire L'Heureux-Dubé*. Toronto: Irwin Law.

Smart, C., 1989. *Feminism and the power of law*. London: Routledge.

Thornton, M., ed., 1995. *Public and private: feminist legal debates*. Melbourne: Oxford University Press.

Tronto, J.C., 1993. *Moral boundaries: a political argument for an ethic of care*. New York: Routledge.

West, R., 1997. *Caring for justice*. New York: New York University Press.

Cases cited

Attorney-General for Jersey v Holley [2005] UKPC 23; [2005] 2 AC 580.

Donoghue v Stevenson [1932] UKHL 100; [1932] AC 562.

James v Eastleigh Borough Council [1990] 2 AC 751

Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530; [2002] QB 266.

Porter v Commissioner of Police for the Metropolis [1999] All ER (D) 1129 (CA).

Prosecutor v Jean-Paul Akayesu, Case No ICTR-96-4-T (1998).

R v Portsmouth Hospitals NHS Trust, ex parte Glass [1999] 2 FLR 95 (CA).

R v Stone and Dobinson [1977] QB 354 (CA).

Roberts v Hopwood [1925] AC 578.

Short v Poole Corporation [1926] Ch 66 (CA).

Wilkinson v Kitzinger [2006] EWHC 2022 (Fam); [2007] 1 FLR 295.

Oñati Socio-Legal Series, v. 2, n. 5 (2012), 47-62
ISSN: 2079-5971