Published in *The Law Teacher* Vol 46, No 3, December 2012, 214-226;
http://dx.doi.org/10.1080/03069400.2012.732364

INTRODUCTION: FEMINIST JUDGMENTS AS TEACHING RESOURCES

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Abstract

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 as teaching resources in UK law schools. The paper goes on to introduce the following four articles in this issue of the *Law Teacher*, which illustrate in greater detail particular pedagogical uses of the Feminist Judgments Project.

Introduction

This issue of the *Law Teacher* features a series of articles discussing experiences, proposals and possibilities for using feminist judgments in the classroom. These articles draw upon the

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feminist judgment-writing projects which 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.[1] The aim is to show that, even at the time of the original decision, the case could have been reasoned and/or decided differently.

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.[2] What

[1] For discussion of the effect of these constraints and the limits they impose on the critical project of feminist judgment-writing, see Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1 at 6; Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 3 at 5-6, 13-15; Rosemary Hunter, 'An Account of Feminist Judging', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 30.

[2] 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. Elizabeth Sheehy (ed), *Adding Feminist to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004); Rosemary Hunter, 'Can *Feminist* Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7; Beverley Baines, 'But Was She a Feminist Judge?' in Kim Brooks

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.

The following discussion first introduces the UK Feminist Judgments Project and describes what is 'different' about the judgments the Project has produced, before going on to explain some of the ways in which these judgments have been used as teaching resources in law schools, and to introduce the next three articles, which provide more detailed illustrations of these uses. It finally introduces the last article in the section, which provides a theoretical account of the critical contribution feminist judgments may make to the current research-led-teaching agenda.

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

(ed), *Justice Bertha Wilson: One Woman's Difference* (Vancouver: UBC Press, 2009) 211; Beverley Baines, 'Feminist Judges, Feminist Adjudication and Feminist Legal Scholars', in Ulrike Shultz and Gisela Shaw (eds), *Gender and Judging* (Oxford: Hart Publishing, forthcoming 2012). See also the section on 'What's Different About Feminist Judgments?' below.

arguments, over time those 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.[3]

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.[4] 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

[3] Majury, op. cit. n 1 at 1.

[4] The judgments are available at: http://womenscourt.ca/.

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.[5] Members of the WCC have subsequently published an article on the pedagogical use of WCC judgments.[6]

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: *Feminist Judgments: From*

[5] See http://womenscourt.ca/media.

[6] Jennifer Koshan, with Diana Majury, Carissima Mathen, Megan Evans Maxwell and Denise Reaume, 'Rewriting Equality: The Pedagogical Use of Women's Court of Canada Judgments' (2010) 4 *Canadian Legal Education Annual Review* 121.

Theory to Practice.[7] 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.

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,[8] and seek to implement an 'ethic of care' rather than the more traditional, masculine 'hierarchy of rights'.[9] 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

[7] Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010).

[8] See, e.g. Jennifer Nedelsky, 'Reconceiving Autonomy' (1989) 1 *Yale Journal of Law and Feminism* 7; Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 *Representations* 162; Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (New York: New Press, 2004).

[9] See, e.g. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993); Robin West, *Caring for Justice* (New York: New York University Press, 1997); Selma Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (London: Routledge, 1998).

women's lives.[10] 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.[11] Others rethink problems of 'clashing rights'[12] 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[13] to question the privileging of 'expert' medical or welfare opinions, and the

[10] See, e.g. Ann Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373; Rosemary Hunter, 'Consent in Violent Relationships', in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Abingdon: Routledge, 2007) 158; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

[11] See, e.g. Frances Olsen, 'The Myth of State Intervention in the Family' (1984) 18 *University of Michigan Journal of Law Reform* 835; Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985); Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); Martha Albertson Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York: Routledge, 1994); Margaret Thornton, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995); Susan B. Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997).

[12] See, e.g. Elizabeth Kingdom, *What's Wrong with Rights? Problems for Feminist Politics of Law* (Edinburgh: Edinburgh University Press, 1992); Aileen McColgan, *Women Under the Law: The False Promise of Human Rights* (Harlow: Longman, 2000).

[13] See, e.g. Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Tavistock, 1970); Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (Basingstoke: Palgrave Macmillan, 2007); Peter Miller and Nikolas Rose (eds), *The Power of Psychiatry* (Cambridge: Polity Press, 1986); Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Katherine O'Donovan, 'Law's Knowledge: The Judge, the Expert, the Battered Woman and Her Syndrome' (1993) 20 *Journal of Law and*

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.[14] 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.[15] 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

Society 427; Nikolas Rose, *Politics of Life Itself: Biomedicine, Power and Subjectivity in the Twenty-First Century* (Princeton, NJ: Princeton University Press, 2006).

[14] See, e.g. Kimberlé W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139; Kimberlé W. Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241; Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Abingdon: Routledge, 2008); Helma Lutz, Maria Teresa Herrera Vivar and Linda Supik (eds), *Framing Intersectionality: Debates on a Multi-faceted Concept in Gender Studies* (Farnham: Ashgate, 2011).

[15] See, e.g. Judith Resnik, 'On the Bias: Reconsideration of the Aspirations for our Judges' (1988) 61 *Southern California Law Review* 1877; Katherine T. Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829; Sharon E. Rush, 'Feminist Judging: An Introductory Essay' (1993) 2 *Southern California Review of Law and Women's Studies* 609; Sheehy, op. cit. n 2; Hunter, op. cit. n 1, op. cit. n 2; Koshan *et al.*, op. cit. n 6. Though it should also 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, op. cit. n 1 at 43).

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.[16] 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 use of social science research evidence and feminist common knowledge in turn enables the judge to engage in what Katherine Bartlett calls 'feminist practical reasoning',[17] 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.

Feminist Judgments as Teaching Resources

[16] For a fuller discussion of 'feminist common knowledge', and how it relates to the doctrine of judicial notice, see Hunter, op. cit. n 1 at 38-39; Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge', in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Oxford: Hart Publishing, 2012) forthcoming. On the sources of judicial knowledge, see also Regina Graycar, 'The Gender of Judgments: An Introduction', in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 262.

[17] Bartlett, op. cit. n 15.

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*,[18] 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 President of the Family Division, Sir Mark Potter, 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.[19] 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

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

[19] Rosie Harding, '*Wilkinson v Kitzinger* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing 2010) 430.

not possible simply to 'read off' 'the' feminist outcome from the facts. For example, some of the imagined feminist judgments rewrote decisions of Baroness Hale, 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.[20] 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.[21]

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.[22] 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.

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[20] See also Koshan *et al.*, op. cit. n 6 at 137, 139.

[21] See also Koshan *et al.*, ibid at 136-137.

[22] See also Koshan *et al.*, ibid at 130, 138, 142.

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*,[23] 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.[24] 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*.[25]

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);[26] in introduction to law, jurisprudence and statutory interpretation courses (focusing on critical analysis of judicial decision-making); and in

[23] *James v Eastleigh Borough Council* [1990] 2 AC 751.

[24] Aileen McColgan, '*James v Eastleigh Borough Council* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 420.

[25] *R v Portsmouth Hospitals NHS Trust, ex parte Glass* [1999] 2 FLR 95 (CA); Jo Bridgeman, '*R v Portsmouth Hospitals NHS Trust, ex parte Glass* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 369.

[26] See also Koshan *et al.*, op. cit. n 6 at 132-136.

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).[27] 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.[28] The following discussion draws upon and presents (in edited form) some of these teaching materials.

Specific Examples

Two of the sets of materials use the feminist judgments as a vehicle for critical analysis of judgment-writing and judicial reasoning. One of these, produced by Anna Grear for a course on critical and legal reasoning, is discussed in depth in Grear's paper in this issue. The other set, produced by Lois Bibbings, is summarised here:

Lois Bibbings, University of Bristol

[27] See also Koshan *et al.*, ibid at 129-132, 136-137.

[28] At http://www.feministjudgments.org.uk.

- *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*;[29] feminist judgment in *R v Stone and Dobinson*;[30] theoretical material on precedent and judging.
- *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

[29] *R v Stone and Dobinson* [1977] QB 354 (CA). The case 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.

[30] Lois Bibbings, '*R v Stone and Dobinson* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 234. The feminist 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.

accounts of what is, might or should be involved (e.g. objectivity, rationality, logic, craft, creativity, emotion, politics, standpoint, empathy).

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. Again, one of these, produced by Caroline Hunter and Ben Fitzpatrick, is discussed in depth in their paper in this issue. It is notable that in their 'Foundational Issues in Law' module, Hunter and Fitzpatrick use 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. The other set of materials, produced by Joanne Conaghan, uses Susan Edwards' feminist judgment in the case of *Attorney-General for Jersey v Holley*.[31]

Joanne Conaghan, University of Kent

- *Module:* Critical Introduction to Law
- *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

[31] *Attorney-General for Jersey v Holley* [2005] UKPC 23; [2005] 2 AC 580; Susan Edwards, '*Attorney-General for Jersey v Holley* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 297. The case 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.

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*; feminist judgment in *Attorney-General for Jersey v Holley*.
- *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?

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

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*;[32] feminist judgment in *Roberts v Hopwood* and accompanying commentary;[33] *Short v Poole Corporation*,[34] 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.

[32] In *Roberts v Hopwood* [1925] AC 578, 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.

[33] Harriet Samuels, '*Roberts v Hopwood* – Judgment', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 387; Stephanie Palmer, 'Commentary on *Roberts v Hopwood*', in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010) 381. The feminist judgment draws on contemporary material to demonstrate that equal pay for women should not have been considered unreasonable.

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

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.

Rosemary Auchmuty's paper in this issue describes a new, upper level core module, 'Property Law Project', which similarly combines consideration of the nature of judgment-writing, the application of feminist legal theory and different ways in which legal doctrine could have developed. Auchmuty identifies three obstacles to using feminist judgments in the classroom: that they are judgments (which students have grown out of the habit of reading), that they are feminist (which students tend to dismiss or resist), and that they are subject-specific (requiring some depth of knowledge to understand them). She goes on to describe how the 'Property Law Project' seeks to overcome these obstacles, by requiring students to write their own judgment as part of the assessment in the module, and to use *Feminist Judgments* as a primer in doing so.

Conclusion: Critical Projects in Teaching and Learning

It can be seen that the teaching approaches developed from the Feminist Judgments Project 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* to precede the seminar exercise set out above. The approaches 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 stance in relation to the feminist project itself. As Réaume notes of 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.[35]

Although judgments embodying other critical theories are less readily available, the feminist judgments and related teaching materials could also clearly be used to illustrate ways in which other critical approaches (such as critical legal studies, critical race theory or

[35] Koshan *et al.*, op. cit. n 6 at 139.

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.* 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'".[36] 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".[37] I would suggest, however, that while some teachers will want to use the feminist judgments as part of a political project of feminist, critical or 'outsider' pedagogy – as Rosemary Auchmuty's paper illustrates – 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.

Nevertheless, in their concluding article on 'Research Led Teaching, Vehicular Ideas and the Feminist Judgments Project', Carr and Dearden argue that a commitment to promoting critical thinking on the part of students is an essential element of the use of

[36] Koshan *et al.*, ibid at 124, quoting Natasha Bakht, Kim Brooks, Gillian Calder and Jennifer Koshan, '"Counting Outsiders": A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education' (2007) 45 *Osgoode Hall Law Journal* 667 at 674.

[37] Koshan *et al.*, ibid at 125; see also pp. 138, 143-144.

feminist judgments in the classroom. Stepping back from detailed teaching strategies to a broader consideration of the concept of research led teaching (RLT) and the role it has played within higher education policy agendas, Carr and Dearden observe that using feminist judgments as teaching resources provides a useful example of RLT. But they also warn of the risk of RLT being deployed in a depoliticised form which merely plays into dominant neo-liberal norms. By contrast, by consciously offering both a critical approach and a collaborative dialogue between researchers and teachers, the Feminist Judgments Project and the teaching materials developed from it can assist in avoiding this result.