The title of this symposium – Feminist Justice? – might give rise to a number of questions. Philosophically, can there be such a thing as feminist justice? Can ‘justice’ be particularised in this way? Can it have a political agenda? If so, what would be the difference between feminist justice and any other kind of justice? Can we identify such a thing as feminist justice at a practical level? And if so, what does it look like? Although I can’t possibly hope to answer all of these questions in a mere half hour, I want at least to suggest answers to some of them. I will begin by describing the Feminist Judgments Project in which Professor McGlynn and I have been involved and which also forms the basis for her talk, and then I want to speak more generally about the concept and practice of feminist judging.

The Feminist Judgments Project [website]

Despite changes over the last 20 years in the profile of the legal profession in England and Wales, the appellate judiciary remains overwhelmingly white, male and middle/upper class. Although women now constitute 45 per cent of solicitors and 31 per cent of barristers in England and Wales, and around 11 per cent of solicitors and barristers are
from black and minority ethnic communities, only five (white, middle/upper class) women in total, and no-one from a BME background, have ever sat in the Court of Appeal, the House of Lords or now the UK Supreme Court. The Feminist Judgments Project sought to challenge this ongoing exclusion of women from legal subjectivity, both as the authors of legal decisions and doctrine, and as the subjects upon whose knowledge, experience, activities and concerns law is founded. We thus set out to write the ‘missing’ feminist judgments (or alternative feminist judgments) in significant legal cases. Rather than simply producing academic critiques of existing judgments, the participants in the project engaged in a practical, ‘real world’ exercise of judgment-writing. Among other things, the project aimed to inaugurate a new form of critical legal scholarship, one which seeks to demonstrate in a sustained and disciplined way how judgments could have been written and cases could have been decided differently. The 23 judgments resulting from the project will be published as a book titled *Feminist Judgments: From Theory to Practice* in September. [slide of book cover]

The idea for the project was sparked by a similar venture in Canada. [website – link from FJ site] There, a number of Canadian feminist scholars and litigators calling themselves the Women’s Court of Canada are engaged in writing ‘shadow’ judgments of major Canadian Supreme Court decisions on section 15 – the equality clause – of the Canadian Charter of Rights and Freedoms. Their specific aim is to show how the concept of substantive equality can be given practical, judicial expression. The first six judgments

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of the Women’s Court of Canada were published in 2006 in the *Canadian Journal of Women and the Law*. There have also been two publications in the USA in which leading scholars have been invited to write their own judgments in the landmark constitutional cases of *Brown v Board of Education* (racial segregation in schools) and *Roe v Wade* (abortion). The Feminist Judgments Project, however, has addressed a far more extensive array of topics and cases.

We initially sought expressions of interest from feminist legal scholars to propose cases that they considered to be in need of a feminist re-write. We received an outstanding response, including from colleagues in Scotland, India and South Africa, as well as those working in European law. We decided to confine the project to cases decided by courts in England and Wales, which would enable us to focus on a single body of statute and common law, but we hope that the book will inspire similar projects in other jurisdictions, or even the writing of individual judgments. On our website we have created a section for people to discuss our judgments and contribute new ones of their own [website]. Just the other day, one of our PhD students at Kent, who is working on rape law in India, told me that one of her chapters is going to be a feminist judgment in the leading Indian constitutional case on the definition of rape.

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All of our feminist judgments are appellate decisions. The majority (13) are decided by the House of Lords; nine by the Court of Appeal, and one by the Privy Council. Most (16) constitute additional judgments in the original cases. That is, they sit alongside the existing judgments or opinions in the House of Lords, Court of Appeal or Privy Council, and are written as at the time of the original judgment, on the basis of the law and any extrinsic materials in existence at that time. Nine of these are dissenting judgments, six are concurrences – reaching the same result for different reasons – and one partly concurs with and partly dissent from the original decision. These dissenting and concurring judgments illustrate powerfully how, even at the same time and within the same court, cases could have been reasoned and decided differently.

The remaining seven feminist judgments are leading judgments in fictional appeals. This course was chosen for a variety of reasons: because the original decision was made in the High Court at first instance, so an additional judgment would not have been possible; because the judgment writers wanted to overcome an intractable precedent, or to set an authoritative precedent; or because they wanted to take a broader approach than an additional judgment in the original case would have allowed. In Evans

4 Royal Bank of Scotland Plc v Etridge (No 2); Barclays Banks Plc v Harris and Another; Midland Bank Plc v Wallace and Another; National Westminster Bank Plc v Gill and Another; UCB Home Loans Corporation Ltd v Moore and Another (Conjoined Appeals); Bank of Scotland v Bennett and Another; Kenyon-Brown v Desmond Banks & Co [2001] UKHL 44, [2002] 2 AC 773.


6 Eg Porter v Commissioner of Police for the Metropolis.

7 Eg Mundon v Del Monte Foods.
v Amicus Healthcare, for example – a case concerning the use of frozen embryos – the matter had been decided by the Court of Appeal, leave to appeal to the House of Lords was refused, and the applicant went on to take her case to the European Court of Human Rights. There was thus a natural ‘gap’ or missing judgment in the sequence of events and the author of the feminist judgment, Sonia Harris-Short, was interested to explore what the House of Lords could have done with the human rights arguments in the case.

Within the book we have grouped our 23 judgments under five main headings: parenting, property and markets, criminal law and evidence, public law, and equality. The specific areas of law covered include administrative law, contract law, criminal law, constitutional law, discrimination law, employment law, equity, evidence law, family law, housing law, human rights law, international law (both public and private), medical law, migration law, property law, and practice and procedure. The cases chosen include some which deal with subject-matter of immediate concern to many women’s lives, such as reproduction, residence and contact with children, workplace discrimination and domestic violence; some are causes célèbres for feminist activism.

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11 Re G (Children) (Residence: Same Sex Partner) [2006] UKHL 43, [2006] 1 WLR 2305; Re L (A Child) (Contact: Domestic Violence); Re V (A Child); Re M (A Child); Re H (Children) [2000] EWCA Civ 194, [2001] Fam 260; Re N, ibid.

12 Del Monte Foods Ltd v Mundon, above n 19; Roberts v Hopwood, above n 19.

13 See the discussion below of cases involving domestic violence.
in law, such as *R v A (No 2)*,\(^{14}\) involving sexual history evidence in rape trials, which Professor McGlynn will speak about. But lest you form the impression that feminist judging just means that the woman always wins, some of the cases do not involve women (e.g. the famous criminal case concerning homosexual sado-masochism, *R v Brown*, or *James v Eastleigh Borough Council*, where a man was claiming sex discrimination), and some do not involve any human persons (e.g. *Baird Textile Holdings v Marks & Spencer plc*, a contract case between two corporations). Moreover, some cases involve two women (e.g. *Re G*, a residence and contact dispute between a separated lesbian couple).

Several of the cases raise issues on which there is no clear, single feminist position. The judgments were developed through a series of workshops funded by the ESRC, and discussions at the workshops often included disagreements as to what the feminist judicial response or outcome in a particular case could or should be. Each judgment in the book is accompanied by a commentary designed to render the case accessible to a non-specialist audience, and some of the commentaries also highlight these differences of feminist opinion. In the case just mentioned, *Evans v Amicus Healthcare*,\(^ {15}\) to give just one example, should one empathise with a woman whose only chance to have her own genetically-related child is about to be taken from her, due to the withdrawal of consent by her ex-partner; or should one rather be concerned to resist the relentless social pressures which valorise motherhood as the highest object of a woman’s life and which privilege genetic families over other forms of family relationships?


\(^{15}\) Above n 28.
Indeed, in four of the feminist judgments, the judgment-writers offer different reasons for decisions from those of Baroness Hale of Richmond, the one acknowledged feminist judge on the House of Lords. This illustrates not only the diversity within feminism, but also the fact that a single, token woman judge cannot possibly be expected to represent the range of women’s – or even feminist – perspectives on a particular issue.

**Feminist Judging**

This brings me to the question of feminist judging. Of course, the Feminist Judgments Project and the Women’s Court of Canada are far from being the only instances of feminist judging in existence. Many real examples can be found in magistrates, trial and appeal courts around the world. Drawing on these examples, our own experience and theoretical literature, we might identify a feminist vision of justice as follows:

- rules and practices, including those that appear ‘neutral’, do not have adverse gender implications, or impact adversely on other traditionally excluded groups;
- women’s experiences, both as individual litigants and collectively, are fairly represented in legal discourse and in the construction of legal rules;
- legal doctrine and judicial reasoning are free of gender bias
- reasoning is contextualised and decisions are individualised rather than categorical or abstract
- taken-for-granted, essentialist factual and legal categories and classifications are questioned and deconstructed.

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16 EM (Lebanon) v Secretary of State for the Home Department; Re G; R (Begum) v Governors of Denbigh High School; YL v Birmingham City Council.
• judges do not privilege their own values and views of the world over those of the parties before them
• ‘equality’ is interpreted in substantive rather than merely formal terms and the law strives to achieve substantive equality
• injustices are remedied
• where possible, results are preferred that improve the conditions of women’s lives.

On the one hand, it is difficult to object to this vision. As Baroness Hale puts it in the Foreword to our book, “Feminism involves the belief both that women are the equals of men and that the experiences of women are as much part of the common experience of mankind as are the experiences of men…. It is no longer possible to assert the opposite of either belief.” On the other hand, it is clear that this is not how the law often operates. The question, then, is how and to what extent it is possible for a judge to get from ‘how the law operates’ to this vision of justice.

Accounts of the practice of judging stress the values of fairness, independence, impartiality, consistency and certainty. There is a tendency to believe, by contrast, that ‘Feminism in a judge is…evidence of judicial partiality [and] a threat to judicial independence’.17 More generally, concerns are expressed that ‘subjective decision-making based on political or social or philosophical beliefs leads to unpredictable and

This proposition is self-evidently true, but has little purchase as a critique of feminist judging. First, a feminist judge would not base her decision-making on her vision of justice. Like all other judges, she would base her decision-making on the facts of the case and applicable legal principles. On the other hand, her decision-making may be informed by her vision of justice. To the extent that this distinguishes her from any other judge, it is in the particular content of that vision, and in perhaps being rather more conscious of her beliefs and values than some other more ‘traditional’ or formalist judges might be. This does not make her decision-making ‘subjective’.

In an essay on the judicial role, Lord Bingham of Cornhill has suggested that judicial decisions must be ‘legally motivated’, rather than being motivated ‘by extraneous considerations, [such] as…the prejudice or predilection of the judge, or worse, by any personal agenda of the judge, whether conservative, liberal, feminist, libertarian or whatever’. As Lord Justice Etherton has noted, the word ‘agenda’ here suggests an approach based on a pre-conceived view of the correct outcome, ‘irrespective of the ordinary constraints of proper judicial analysis’.

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19 I use ‘she’ and ‘her’ in the following discussion to reflect the fact that the majority of feminist judges – and all of the judgment authors in this volume – are women. I do not, however, mean to suggest or imply that only women can be feminist judges.


constraints of proper judicial analysis does not preclude a feminist approach. As Etherton says, it is ‘impossible to exclude…a general outlook, or personal philosophy, based on an individual judge’s life experience’. Or as Baroness Hale has pointed out, decisions can indeed be legally motivated while also – inevitably – reflecting personal views:

[T]he business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge’s own approach to the law, to the problem under discussion and to ideas of what makes a just result.

Hale goes on to point out that ‘an important project of feminist jurisprudence has been to explode the myth of the disinterested, disengaged, and distant judge’. Fairness, independence and impartiality do not – indeed cannot – require the judge to become a blank slate upon which the evidence and arguments in each case are written afresh. Realistically, a judge’s vision of justice is likely to inflect his or her decision-making, but should not intrude to the extent that the judge allows him- or herself to prejudge the issue or to be biased against particular parties or particular arguments. A feminist approach must always be subordinated to judicial norms. But this allows considerable scope to pursue one’s vision.

For example, if a case directly raises issues of equality and discrimination – as many cases do in countries that have adopted constitutional or legislative human rights

22 Ibid.
24 Ibid.
instruments – then a decision that promotes substantive equality is likely to be ‘consistent with the fundamental principles of the law’;25 and as such, is entirely legitimate.26 If a judge is exercising discretion, there is also likely to be some scope for feminist decision-making. Discretion is not, of course, entirely unconstrained. It must be exercised within the bounds of any statutory or common law criteria to be taken into account, and more generally within the bounds of fairness, impartiality and consistency. It must also be exercised by reference to the arguments and evidence presented by the parties. Nevertheless, discretionary decision-making is an area in which a feminist vision of justice may come into play. In this respect, the feminist judge is in no different position from the judge who exercises discretion in accordance with his or her predisposition towards liberalism, conservatism, the Christian faith, defendants, the state, institutions, or individuals. The same may be said for the interpretation of ambiguous statutory language and divergent precedents, and other instances of legal indeterminacy.

A lower or intermediate level judge faced with clear legislative provisions and/or clear precedent may have very little opportunity for feminist decision-making, although the way in which a trial judge manages the case and ensures that the dignity and integrity of all of the parties are respected can make an important contribution to the realisation of a feminist vision of justice. Judges who are members of the highest court in the relevant court hierarchy clearly have more room for doctrinal manoeuvre, but it should also be

25 Hale, above n 9 at 335.

26 B Hale, ‘Making a Difference? Why We Need a More Diverse Judiciary’ (2005) 56 Northern Ireland Legal Quarterly 281, 286. See also Judicial Studies Board, Equal Treatment Bench Book (September 2008) [1.1]: ‘Ensuring fairness and equality of opportunity may mean providing special or different treatment’.
remembered that decision-making on appellate courts is collegial.\textsuperscript{27} This gives rise to several possible roles for the feminist judge. She may agree with the other members of the court if satisfied with the result and the reasoning of the leading judgment, which may include (probably many) cases in which she perceives no feminist issue to arise. Alternatively, she may write the leading judgment or a judgment with which another or other members of the court agree.\textsuperscript{28} She may agree or write a joint judgment\textsuperscript{29} with one or more other members of the bench, who may or may not constitute the majority. She may agree with the outcome but write a concurring opinion setting out different reasons for decision. Or she may dissent from the result, and write a separate dissenting opinion.

In each case other than the separate concurrence or dissent, the feminist judge has either been able to persuade her judicial colleagues to her point of view, or has been persuaded by them. When she persuades other judges to adopt her view, they are presumably persuaded by the cogency of her construction of the case and the legal plausibility of her argument, rather than by any form of judicial impropriety. Indeed, Lord Justice Etherton argues that this is precisely the point at which a diverse judiciary is of the utmost importance. He refers to research on the behaviour of three-judge federal appeals court panels in the United States, which found that panels of judges with the same political outlook tended to move towards a more extreme position in decision-making in line with that outlook, whereas the presence of a single judge with a different

\textsuperscript{27} See, eg, A Paterson, \textit{The Law Lords} (London, Macmillan, 1982) for an interesting discussion of the ‘social process’ of decision-making in the House of Lords.

\textsuperscript{28} For example, this was the case in 28\% of Neave JA’s judgments.

\textsuperscript{29} As noted in the Introduction, joint judgments were not possible in the UK House of Lords, but they are possible in the Court of Appeal of England and Wales, and are now possible in the UK Supreme Court.
outlook ‘has a marked disciplining or moderating effect’.  From this, Etherton concludes that bringing to bear a range of personal experiences and judicial philosophies on a hard case make[s] it more likely that … relevant arguments are not overlooked or brushed aside, and that insupportable preconceptions are challenged.

At the same time, neither a feminist concurrence nor a feminist dissent introduces any form of ‘bias’ into the result of a case. Both rely on different reasoning from that of other members of the court, but this does not affect the outcome or change the law. Feminist concurrences and dissents do, however, demonstrate a different way of thinking about the issues in the case, provide an opportunity for judges to debate and analyse the merits of alternative approaches to those issues, and potentially lay the groundwork for future legal development. In turn, the authority and persuasive success of a concurring or dissenting opinion relies on the quality of its reasoning.

It is difficult to see, therefore, how this form of feminist judging might violate judicial norms of fairness, impartiality, independence, consistency or certainty. The

30 Etherton, above n 7 at [68].

31 Ibid [70].


33 L’Heureux-Dubé, ibid 514.
observation of fairness and impartiality requires that the arguments of both sides in the adversarial contest are given equally careful attention. If, in the course of a feminist judgment, the arguments with which the judge disagreed were ignored or summarily dismissed, this could create an appearance of partiality. But so long as a feminist judgment acknowledges and gives plausible reasons for rejecting opposing arguments, then no problem of unfairness or partiality arises. Indeed, to the extent that such a judgment pays careful attention to gender-sensitive arguments that are dealt with cursorily in other judgments, it may represent a fairer approach.

Finally, it is worth noting that many jurisdictions have adopted Equal Treatment Bench Books and similar guides for judicial officers. The advice given by the Equal Treatment Bench Book promulgated by the Judicial Studies Board of England and Wales includes: being ‘well informed about the differing realities of life for all peoples of diverse backgrounds’; recognising the existence of ‘diversity within…minority groupings’, recognising that ‘factors such as ethnicity, social class, sexual orientation, disability status and age affect women’s experience and the types of disadvantage to which they might be subject’ and that ‘women’s experiences as victims, witnesses and offenders are in many respects different to those of men’, conveying the message to the public that domestic violence will not be tolerated and that abuse and violence in intimate relationships is unacceptable and a serious matter, and being ‘careful not to judge same-

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34 Judicial Studies Board, above n 14 at [1.2.1].

35 Ibid.

36 Ibid. [6.1]

37 Ibid.

38 Ibid [6.1.8].
sex relationships according to the principles of heterosexual married life’. 39 Importantly, the Bench Book observes that, ‘[a]s judges, we can go some way to ensuring that women have confidence in the justice process and that their interests are properly and appropriately protected’. 40 Feminist judging, as I have described it, and as found in the judgments produced by the Feminist Judgments Project, is not only entirely consistent with the advice given by the Equal Treatment Bench Book; it illustrates for appellate judges how the Bench Book may be put into practice.

**Conclusion**

In conclusion, then, I hope I’ve been able to show that feminist justice is both theoretically legitimate and practically possible. As yet, though, it is a form of justice that is very much, as Derrida would put it, ‘to come’. Hence the Feminist Judgments Project, and our small but we hope inspiring contribution to the realisation of a vision of feminist justice. In this brief presentation, however, my discussion has necessarily been fairly abstract. Professor McGlynn will now put more flesh on the bones in her discussion of her work on one particular feminist judgment.

39 Ibid [7.1].

40 Ibid [6.1].