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Feminist Judicial Decision-Making as *Judicial Decision-Making*: A Legitimate and Valuable Approach?

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[1] R v D [2006] EWCA Crim 1139

Abstract

Feminist legal scholars argue that the rigid, formalist approach towards judicial decision-making is potentially harmful to the lives, experiences, and interests of women. In critically analysing a feminist re-judgement within *Feminist Judgments From Theory to Practice*, this dissertation argues that the Feminist Judgments Project represents a legitimate and valuable approach, which effectively re-imagines judicial decision-making in line with women's interests. This dissertation reinforces feminist judicial decision-making as a more responsive form of judgment making particularly for vulnerable and marginalised women whom regularly experience and are subjected to traditional judicial approaches. Further, the dissertation argues that feminist judicial decision-making constitutes a legitimate and valuable approach despite considerable criticism levelled at this methodology and judges who openly hold feminist beliefs. The dissertation positions the Feminist Judgments Project within the context of the legal realist approach to judicial decision-making, which serves as a critique of the formalist approach to judicial decision-making. The dissertation's analysis of the feminist re-judgment of *R v Dhaliwal* (*R v D*)[2] aims to promote the Feminist Judgments Project's methodological approach as a mode of judicial best practice. This dissertation concludes that feminist judicial decision-making is a legitimate and valuable approach which recognises social inequalities and amplifies marginalised communities, whilst also remaining faithful to legal conventions.

Keywords:

Judicial decision-making, Legal Formalism, Legal Realism, Feminist Judicial Decision-Making, Feminism, Legal Realism, Legitimacy, Justice.

[2] *R v D [2006] EWCA Crim 1139*

Chapter 1

Introduction – 'A grievous judicial backsliding on equality…the burning need for action'.[3]

'Although the rhetoric of substantive equality continues, the promise of genuine substantive equality is fading and the voices of equality advocates are being muted.'[4]

'What if a group of feminist scholars were to write the 'missing' feminist judgment in key cases?'[5]

'Dissenting opinions…have encouraged a blossoming of legal conceptions and solutions, without going so far as to cast a pall of dysfunctional dissonance over the courts'.[6]

1.1 Background and the Problem

In recent years, the disparity between the numbers of men and women appointed to the judiciary has evoked concern within and beyond the legal system; advancing judicial diversity to the top of the Judicial Appointments Committee's (JAC) and the wider judiciary's agenda.[7] The diversity of the judiciary is viewed as being 'constitutionally significant' by the House of Lords especially in terms of maintaining public confidence in the judiciary, developing the law, and discussions around justice.[8] Although the Lord Chief Justice of England and Wales reports a 3% increase in the numbers of women appointed to the bench from 2018-2019, progress to establish an equal representation of women from all backgrounds within the judiciary remains slow.[9] By promoting the appointment of judges from more diverse backgrounds, the JAC aspire to ensure that both the visible exterior of the common law and the more ambiguous

[3] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[4] Ibid
[5] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[6] Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 496
[7] Constitutional Reform Act 2005, Section 64 ;Equality Act 2010, Section 149 (1); Baroness Brenda Hale of Richmond, 'Judges, Power and Accountability Constitutional Implications of Judicial Selection' (Belfast, Constitutional Law Summer School, 2017) 4
[8] House of Lords Select Committee on the Constitution, *Judicial Appointments Report* (2012, House of Lords) 26
[9] Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2019' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2019) 1

nature of the judicial decision-making process in England and Wales is upheld as being 'legitimate, qualitative, fair' and valuable by wider society.[10] Although many initiatives aim to ameliorate the external image of the law by diversifying the judiciary, similar such efforts aimed at addressing the internal issues within the judicial decision-making process, which threaten to undermine public confidence in the common law are extremely limited.

Indeed, the restricted focus upon the inherent structural issues within the judicial decision-making process is reinforced by feminist scholars who highlight the consistent production of 'unjust', 'gendered', 'incorrect', and 'wrong' judicial decisions which negatively and disproportionately impact upon the lives and experiences of women and marginalised people.[11] MacKinnon who argues that the law's legitimacy is 'based on force at women's expense' reinforces these observations of judicial decision-making.[12] These findings by feminist scholars are particularly concerning when the legitimacy of the common law and the subsequent societal compliance with judge made law is dependent upon the 'just' treatment of all people before the court by the judiciary.[13] Fundamentally, these findings by feminist scholars exacerbate wider concerns that the existing formalist, rigid approach to judicial decision-making renders the common law an ineffective tool to respond to the social issues it is invoked to adjudicate.[14] Crucially, this research demonstrating the coercive application of the law towards selected and vulnerable groups also erodes the significant level of trust placed in the judiciary to produce fair, just, and equitable outcomes for all.

The focus on promoting a greater level of diversity, accommodating the notion of difference, and diminishing bias within the judiciary to ensure that the common law maintains

[10] House of Lords Select Committee on the Constitution, *Judicial Appointments: follow up* (House of Lords, 7th Report of Session 2017–19, November 2017) 33; Justice, 'Increasing Judicial Diversity' (Justice, April 2017) 5

[11] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

[12] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249

[13] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984

[14]Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20Feminist Legal Studies 137; Adam Gearey and John Gardner, *Law and Aesthetics* (Hart Publishing, 2001) P 2

its external image of legitimacy is commended.[15] However, while securing a more diverse judiciary may go some way to ensuring that the common law is perceived as being-outwardly legitimate, Hunter demonstrates that these efforts do not automatically prevent or remedy the production of injustices produced by traditional approaches towards judicial decision-making.[16] Ultimately, diversifying the judiciary is essential in reducing experiences of unjust legal outcomes, however this must be in undertaken in conjunction with a number of additional initiatives.[17] This is significant, as a growing global portfolio of evidence by feminist scholars and activists highlights a trend of 'unjust' and 'wrong' judicial decisions despite the slow increase in the number of women and BAME judges appointed to the judiciary in England and Wales.[18]

The continued production of unjust legal decisions despite an increase in diversity within the judiciary highlights the failure to properly address the lack of judicial diversity and to repair the inadequacies at the core of traditional judicial decision-making.[19] Not only are efforts to re-dress the injustices produced at the root of the judicial decision-making process seemingly non-existent, but scholars indicate that the judiciary actively avoid discussing the process of judging openly and honestly with their peers or larger audiences.[20] Worse still, as the traditional manner of judicial decision-making is so engrained there is increasing resistance directed towards potential fresh approaches.[21] Thus, in light of these multi-layered issues Posner highlights the study of judging as being 'challenging [yet] indispensable'.[22]

[15] Justice, 'Increasing Judicial Diversity' (Justice, April 2017) Executive Summary, 1, 20
[16] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' [2015] Current Legal Problems 22-23
[17] Ibid
[18] There are Feminist Judgments Projects within Canada, England and Wales, Scotland, Northern Ireland, Australia, USA, India, New Zealand, and Africa.; Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2018' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2018) 1;Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2019' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2019) 1
[19] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[20] Richard A Posner, *How Judges Think* (HUP, 2010) P 6
[21] Sharon Elizabeth Rush, 'Feminist Judging: An Introductory Essay' (1993) 2South California Review of Law and Women's Studies 613
[22] Richard A Posner, *How Judges Think* (HUP, 2010) P 6

However, rather than studying, re-examining, critically appraising, and remodelling their existing approaches towards judicial decision-making in response to the injustices highlighted by feminist scholars, the judiciary in England and Wales prefers to 'fetishize' the rich history of the common law.[23] In simply romanticising its history, the judiciary merely maintains its traditional approach to judicial decision-making.[24] The idealisation of traditional judicial approaches facilitates the privileging of sameness and the culture of hostility towards the notion of difference at the heart of the judicial ideology.[25] Similarly, the opposition towards difference is cemented by the treatment of judges who hold feminist beliefs and opinions by the media and the wider public.

Inevitably, in merely maintaining the judicial decision-making status quo with little to no modification, the various injustices identified by feminist scholars as existing within judicial decisions remain unchallenged and are perpetuated.[26] Fundamentally, this means that women and other marginalised groups are left exposed to additional experiences of injustice by an institution purporting to be bound by the Rule of Law and thus subjecting all in society to the law equally.[27] Therefore, the impact of the judiciary's failure to respond critically to the findings by feminist scholars and activists regarding the disproportionate level of injustice faced by women within original judicial decisions is two-fold: 1) women's lives, experiences, and best interests are relegated to the secondary division by an institution purporting to equally serve all people 2) Arguably, in subordinating lay women's life experiences within judicial

[23] Hunter, Rosemary, 'Contesting the dominant paradigm: Feminist critiques of liberal legalism' in, Professor Margaret Davies and Professor Vanessa E Munro, *The Ashgate research companion to feminist legal theory (Ashgate*, 2013)
Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[24] Hunter, Rosemary, 'Contesting the dominant paradigm: Feminist critiques of liberal legalism' in, Professor Margaret Davies and Professor Vanessa E Munro, *The Ashgate research companion to feminist legal theory (Ashgate*, 2013); Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[25] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 127
[26] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5; John Dewey, 'Logical Method and Law' [1924] The Cornell Law Quarterly 26
[27] Tom Bingham, *The Rule of Law* (Penguin, 2011) Ch 1; A V Dicey, *Introduction to the Study of the Law of The Constitution* (MacMillan and Co Ltd, 1962) P 193 'no man is above the law… that here every man, whatever be his rank or condition, is subject to the ordinary aw of the realm'.

decisions, the judiciary relinquishes the very legitimacy it seeks to uphold by appointing a more diverse judiciary.

The failure by the judiciary to critically appraise the legitimacy of its existing approach towards judicial decision-making continues despite their collective awareness of the distinct experiences of women as 'victims, witnesses, and offenders' within the legal system.[28] The reluctance to re-evaluate its existing approach towards judicial decision-making remains even when the '*Equal Treatment Bench Books'* explicitly demonstrate that the judiciary have the capacity to ensure that women's distinct experiences are recognised, addressed, and 'protected' to some degree.[29] Legal realists also reinforce the considerable flexibility available to judges to reach socially just conclusions within their judicial decisions.[30] Although the judiciary are in the position to protect and safeguard women from the unique disadvantages that they face within the judicial decision-making process, the majority of judges not only fail to capitalise on this potential, but they also deny the existence of this opportunity to protect women at the first instance.[31] This dissertation demonstrates that the judiciary's failure to recognise and act upon their capacity to respond effectively to the distinct experiences of women has resulted in what the Women's Court Canada (WCC) has termed 'a grievous judicial backsliding on equality' in England and Wales.[32]

The judiciary prioritises maintaining its existing approach towards judicial decision-making or in other words they privilege the 'niceties of its internal structure and the beauty of its logical processes' above constructing a more specific approach to safeguard and protect women's interests.[33] This is despite research reinforcing that the legitimacy of the judicial system is not a) undermined by the incorporation of feminist belief or b) conditional upon

[28] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[29] Ibid
See also: Rosemary Hunter, 'Feminist Judgments and Feminist Judging: Feminist Justice?' (Feminist Justice Symposium, University of Ulster, June 2010) 14
[30] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[31] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 9
[32] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[33] Roscoe Pound, 'Mechanical Jurisprudence' Columbia Law Review (1908) 8 605

absolute unanimity.[34] In essence, the legitimacy of the judicial decision-making process lies in a fluid and varied approach which celebrates difference, rather than an absolutely unified and identical approach. Conversely, the integrity of the judicial decision-making process is 'safeguarded' through dissenting and divergent approaches, as these differences require that judges and courts reflect upon the implications of their decisions and justify the rationale behind their decisions more rigorously.[35] These challenges to the traditional judicial approach are said to generate a higher degree of rigour, or in other words an improved quality of judicial decision.[36] This is precisely the aim sought by the JAC in their appointment of a more diverse judiciary.[37]

However, while practitioner guides, legal realists, and feminist legal scholars reinforce that women's interests may be authentically accommodated within the judiciary's approach to decision-making without sacrificing the legitimacy or the value of the common law, it appears that the compulsion to preserve the prestigious status of the traditional judicial decision-making approach trumps these realities.[38] Ultimately, in preserving its existing formalist approach, the judiciary eschew the plethora of injustices identified by feminist scholars and activists within the judicial decision-making process as being inevitable and constitutive elements of judicial decision-making rather than addressing the issues at the core of existing approaches to judicial decision-making.[39]

1.2 The "Gap"

Thus far, the predominant practical focus has been dedicated to ensuring that the outward legitimacy of the law is visibly upheld by supporting efforts to increase judicial

[34] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 30 – 31; Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 495
[35] Ibid 497
[36] William J Brennan Jr, 'In the Defense of Dissents' (1986) 37 The Hastings Law Journal 430
[37] Justice, 'Increasing Judicial Diversity' (Justice, April 2017) 5
[38] William J Brennan Jr, 'In the Defense of Dissents' [1986] 37 The Hastings Law Journal 430
[39] Ibid

diversity.[40] While the importance of ensuring judicial diversity remains undisputed, in their continued depiction of unjust and inequitable judicial decisions, the Feminist Judgments Projects highlight the need for greater receptiveness towards practical and academic efforts to improve the law's internal legitimacy.[41]

The Feminist Judgments Project is committed to ensuring the law's holistic legitimacy by promoting a more diverse and different approach to judicial decision-making by re-writing key original judicial decisions from a selected feminist standpoint.[42] Unlike traditional judicial decision-making approaches, the Feminist Judgments Project mirrors the legal realist conception of judgment writing, as the authors illuminate the considerable flexibility available to judges to reason differently because of the law's innate indeterminacy.[43] The project illustrates the potential for original judicial decisions to be decided differently in order to generate fairer, just, and equitable results for individuals within the cases and for members of. wider society .[44] Pioneers of the project undermine the supposedly fixed and inevitable nature of the common law by adopting a feminist, legal realist stance to re-centre the distinct concerns of women and other marginalised groups within judicial decision-making.[45]

Although the Feminist Judgments Project provides a realistic re-imagination of how judicial decision-making may be performed in the future in order to generate true 'equal justice for all', these collective approaches continue to be side-lined as an 'alternative' to traditional judicial approaches.[46] This dissertation argues that articulating the feminist judicial decision-making approaches as 'alternative' unduly limits their scope and applicability within the 'real

[40] House of Lords Select Committee on the Constitution, *Judicial Appointments: follow up* (House of Lords, 7th Report of Session 2017–19, November 2017) 33; Courts and Tribunals Judiciary, *Judicial Diversity Committee of the Judges' Council – Report on Progress and Action Plan 2018* (Courts and Tribunals Judiciary, 2018); Professor Kate Malleson, 'Judicial Diversity Initiative' (*Judicial Diversity Initiative*, 2018) < https://judicialdiversityinitiative.org > 1st September 2018
[41] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 140 - 141
[42] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 6
[43] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[44] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 6, 9
[45] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
46 Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge, 2013) P 15;
See: Rosemary Hunter, 'The Feminist Judgments Project' (*UKSC Blog*, 17th January 2010) < http://ukscblog.com/the-feminist-judgments-project/> accessed September 1st 2018

world' and confines them to alternative-dom forever.[47] Given their diminishment of gender and social inequalities, the dissertation submits that confining the feminist judicial decision-making approaches to mere 'alternatives' is unnecessary, illogical, and paradoxical to the aim of the judiciary to uphold the integrity and legitimacy of judicial decision-making.[48]

Therefore, in the hope of establishing feminist judicial decision-making as a mode of judicial best practice, this thesis seeks to address the following research question: **To what extent does feminist judicial decision-making constitute a valuable and legitimate approach to judgment writing?**[49] In order to address this question, the dissertation will analyse the feminist re-judgment *of R v Dhaliwal* (*R v D*)[50] contained within the England and Wales Feminist Judgments Project - *Feminist Judgments From Theory to Practice*. In undertaking an analysis of this judgment and commentary, the dissertation will highlight the issues arising from the rigid, formalist approaches of the judges in the original court and will and examine the value and legitimacy of feminist judicial decision-making in responding to these issues. Despite the fact that this text considers the legitimacy and value of feminist judicial decision-making, thus far there has been little attention dedicated to examining its legitimacy and value within the context of formalist and realist conceptions of judicial decision-making. Thus, the dissertation responds to the lacuna within the Feminist Judgments Project and makes an original contribution to the literature centring on Feminist Judgment Projects.

1.3 The Significance

The importance of critically appraising the legitimacy of the feminist judgment writing approach is heightened because of the increasing number re-judgments by feminist scholars

47 Ibid
48 Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 496
49 Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 43
50 R v D [2006] EWCA Crim 1139

and activists which highlight flaws in current judicial approaches globally.[51] Fundamentally, feminist scholars reinforce that:

> *We need more feminist judges: judges who understand women's experiences and take seriously harm to women and girls, who ask the gender question, 'How might this law, statute, or holding affect men and women differently?; who value women's lives and women's work; who do not believe women to be liars, whores, or deserving of violence by nature; who question their own stereotypes and predilections and listen to evidence; and who, simply put, believe in equal justice for all.*[52]

Ultimately then, there is a pressing need to respond to the distinct experiences of women at various levels within the justice system, and the continued failure by the judiciary to uptake this opportunity.[53] As traditional approaches towards judicial decision-making operate as the normative standard for judgment writing, a great deal of resistance towards the possibility of fresh approaches remains.[54] Therefore, a critical appraisal of the Feminist Judgment Project is pivotal in order to explore whether this approach to judgment writing constitutes a legitimate and valuable judicial decision-making avenue. In critically analysing the feminist judgments project methodology, it is hoped that the dissertation may uproot the normative conceptions of judicial decision-making, and in the process facilitate an opportunity for the imaginative and innovative approaches constructed by the Feminist Judgment Project to be utilised by scholars and practitioners as a mode of best practice.

More broadly, the importance of undertaking a critical evaluation of the Feminist Judgments methodology is cemented by the need for England and Wales to honour their

[51] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[52] Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013) P 15
See also: Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249
[53] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[54] Sharon Elizabeth Rush, 'Feminist Judging: An Introductory Essay' (1993) 2 Californian Review of Law and Women's Studies 613

commitment to ending gender inequality and further women's equality by 2030.[55] The critical evaluation of feminist judicial decision-making is also vital 'to avoid feminist alternative accounts becoming equally oppressive and constraining' as the traditional approach in which the project seeks to depart.[56] It is hoped that evaluating the legitimacy of feminist judicial decision-making will support Hunter's desire for feminist judgment writing to be used more frequently within academia and within the judicial realm.[57]

1.4 Chapter Outline

This dissertation evaluates the value and legitimacy of the Feminist Judgments Project to explore if this feminist, realist method may operate as the mode of best practice for judicial decision-making in England and Wales. This chapter briefly outlines the background to and significance of the issue addressed by the dissertation and demonstrates the limited practical focus upon re-dressing the internal injustices created by the traditional judicial decision-making approach. The chapter highlights the reluctance by the judiciary to deviate from the traditional, formalist approach to judgment writing. Simultaneously the dissertation highlights that while the Feminist Judgments Project outlays the potential impacts and value of feminist re-judgments, authors have not undertaken a specific analysis of these re-judgments in view of and with the aim of ingraining feminist judicial decision-making as the conventional approach towards judgment writing.

The following chapter provides an extended review of the literature centring upon judicial decision-making. The chapter undertakes a realist critique of formalist approaches towards judicial decision-making and identifies media pressure for the judiciary to conform to formalist judicial decision-making approaches. In considering the various flaws inherent within the formalist approach to judicial decision-making and the barriers that this approach seeks to

[55] British Council, *Gender Equality and Empowerment of Women and Girls in the UK* (British Council, 2016) Foreword, 7 British Council, 'What are the SDGs?' (*British Council*) <https://www.britishcouncil.org/sustainable-development-goals/what-are-they> last accessed 1st September 2018
[56] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 145
[57] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 43

place between the judge and the social inequalities that they are invoked to adjudicate, the dissertation criticises the continued promotion of judgment writing in the traditional, formalist sense. It is pivotal to analyse the literature from these lenses to understand the present inadequate approach to judicial decision-making and the promise held by feminist judicial decision-making.

The dissertation will then analyse the case *R v Dhaliwal* (*R v D*) from the Feminist Judgments Project with the support of these respective lenses.[58] This analysis is undertaken to support the assessment of whether feminist judicial decision-making promotes fairness and fundamentally an 'equal justice for all'.[59]

The final chapter concludes by evaluating whether feminist judicial decision-making may legitimately operate as the mode of best judicial practice in England and Wales. This is achieved through a reflection upon the case analysis and the review of formalist, realist, and feminist legal scholarship.

[58] R v D [2006] EWCA Crim 1139
[59] Ibid

Chapter 2 - Literature Review – An Analysis of Judicial Decision Writing: A Mirage of Logic, Objectivity and Impartiality and an Extension of Inequality

> *'Like other tools [rules] must be modified when they are applied to new conditions and new results have to be achieved. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practise constantly widens the gap between current social conditions and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.'* [60]

2.1 Overview

A literature review is expressed as being integral to the structure of academic writing and paramount in the formation of new knowledge.[61] There are many discussions about what constitutes an effective 'literature review' and its overarching purpose.[62] However, generally scholars describe a literature review as being an exercise undertaken by the author who provides a summary, interpretation, and synthesis of the existing body of literature within and closely tied to the authors' selected area of research.[63] Its purpose is three-fold: to assist the reader in understanding the wider body of literature around the author's chosen subject area, to enable the author to situate their personal research approach within the existing body of literature, and to enable the author to signify how their approach reflects and differs from existing research.[64] Although this description may present a literature review as a jigsaw-like exercise in which the author is simply tasked with mechanically selecting pieces of the puzzle to slot into place in relation to the other pieces, scholars highlight the need for a more engaged

[60] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
[61] **Paul Oliver,** *Succeeding With Your Literature Review: A Handbook For Students: A Handbook* **(**McGraw-Hill Education, 2012**)** P 1
[62] See: Rowena Murray, *How To Write A Thesis* (McGraw-Hill Education, 2011) P 122 onwards;
David N Boote and Penny N Beile, 'Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' (2005) 34 Educational Researcher 3
[63] Andrew S Denvey and Richard Tewksbury, 'How to Write a Literature Review' (2013) 24 Journal of Criminal Justice Education 218
[64] Christine Susan Bruce, 'Research students early experience of the dissertation literature review' (1994) 19 Studies in Higher Education 217 -218

and creative approach by the author within this exercise.[65] Fundamentally, Murray highlights the active role played by the researcher in crafting and interpreting their own version of the existing body of literature.[66]

Thus, this section seeks to provide a synthesised and interpretive review of the existing literature on judicial decision-making from the standpoints of legal formalism, legal realism, and feminist jurisprudence. Beginning an analysis of judicial decision-making from the perspective of legal formalism may appear to be counter-productive within a dissertation that seeks to persuade a shift away from more archaic and rigid approaches towards judicial decision-making in favour of a more fluid approach.[67] However, providing an interpretation of the key themes and ideas developed through formalist conceptions of judicial decision-making is paramount in order to trouble dominant formalist conceptions of judicial decision-making, to identify the flaws and inadequacies with the existing formalist approach to judicial decision-making, and to illuminate the possibility for judicial decision-making to be remoulded in order to increase its value and legitimacy without sacrificing its integrity as 'law'.[68] In other words the analysis of judicial decision-making from the perspective of legal formalism and legal realism is pivotal as a deconstructive exercise to assist the 'other' in this case, feminist judicial decision-making in becoming the judicial mode of best practice.[69]

This review will illuminate the multiple falsehoods promoted by formalist approaches towards judicial decision-making and the damaging impact of encouraging these formalist approaches in practice, particularly in terms of the perceived legitimacy and value of the common law.[70] In doing so, the analysis will highlight both the opportunity and the need to rescue judicial decision-making from being delegitimised by society in light of its production

[65] Rowena Murray, *How To Write A Thesis* (McGraw-Hill Education, 2011) P 122-123
[66] Ibid
[67] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 43
[68] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[69] A deconstructive exercise in the sense that this review hopes open up the possibility for the 'other', the 'other' being feminist judicial decision-making to move from the periphery to the centre. Jacques Derrida, *Deconstruction in a Nutshell a Conversation with Jacques Derrida* (Fordham University Press, 1997)
[70] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26

of 'unjust' legal decisions.[71] Deconstructing judicial decision-making in this way demonstrates the emancipatory promise held by feminist judicial decision-making, as a tool to further social equality and to ensure the production of just and legitimate legal decisions. Ultimately this literature review aims to convey the existing approaches to judicial decision-making as a mirage of logic, objectivity, and impartiality. Finally, the literature review highlights the potential for feminist judicial decision-making as a realist approach to redress the injustices and inequalities produced by formalist approaches towards judicial decision-making.

2.2 Judicial Decision-Making as Pure 'Logic'?

Legal formalists express the common law as being constructed by judges who perform judicial decision-making in a purely 'mechanical', 'prescriptive', and 'rigorously structured doctrinal[ly] scientific' manner.[72] Formalists argue that judges undertake judicial decision-making in a very strict manner because they perceive the legitimacy of the common law as being dependent on the pure application of legal logic and rules within an autonomous legal world.[73] Articulating the production of common law decisions as reliant solely upon the narrow and mechanical application of legal logic suggests that judges must undergo a systematic, highly restrictive, inductive, and contained application of legal rules to complex and different cases in order for the common law to retain its legitimacy.[74] In other words, all cases, without taking into account their complexity and varying facts and demands, should be decided by applying the same rigid, mechanical approach to judicial decision-making.

[71] Ibid
[72] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal; Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608, 609
Shai Dezinger et al, 'Extraneous factors in judicial decisions' (2011) 17 PNAS 6889;Antony Kronman, 'Jurisprudential Responses to Legal Realism' (1998) 73 Cornell Law Review 335
[73] C Guthrie, 'Blinking on The Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 2; Thomas C Grey, 'The New Formalism' [1999] Stanford Law School Public Law and Legal Series 5
[74] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 612; Richard H Pildes, 'Forms of Formalism' [1999] The University of Chicago Law Review 608, 609; Shai Dezinger et al, 'Extraneous factors in judicial decisions' (2011) 17 PNAS 6889

; Antony Kronman, 'Jurisprudential Responses to Legal Realism' (1998]) 73 Cornell Law Review 335; Thomas C Grey, 'The New Formalism' [1999] Stanford Law School Public Law and Legal Series 5

In recent years the seeming departure from strict formalist conceptions of judicial decision-making as a strictly rule-based exercise has provoked distrust towards judges and the common law more broadly. The level of distrust directed towards judges who are seen as deviating from the formalist conception of judicial decision-making is effectively highlighted within recent media coverage centring on the role and ambit of judicial decision-makers in the UK. Indeed, President of the UK Supreme Court, Baroness Hale of Richmond has been described as an 'Enem[y] of the People', 'A Radical feminist who is a long-running critic of marriage', 'A hardline feminist', 'The judge happy for law to be seen as an ass', and 'Out of touch' by the media.[75] These descriptions depict Hale and judges collectively who openly identify as 'feminist' as dubious, and as committed to making a mockery of the legal system in England and Wales.[76] Ultimately, these perceptions are borne out of formalist misconceptions of judicial decision-making as a solely rule-based exercise. By openly drawing upon feminist beliefs when writing judgments, these feminist judges are seen as violating formalist conceptions of judgment making as an 'impartial application of determinate existing rules of law in the settlement of disputes'.[77]

These media sources indicate that mainstream conceptions of judicial decision-making are informed by core tenets of legal formalism, as these sources dismiss and discredit judges who openly hold and reflect upon personal beliefs within their judgment writing as untrustworthy and as undermining the legitimacy of the common law.[78] Ultimately these

[75] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018
Baroness Hale is a self-identifying 'soft feminist'. See: First 100 Years, *The Life and Legal Career of Baroness Hale* (LexisNexis, 2017, https://www.youtube.com/watch?v=ZokbQ4e312M)

[76] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018
Caoilfhionn Gallagher QC, 'The Daily Mail's latest insult: a Supreme Court Justice who is "a feminist" and was instrumental in the crafting of the Children Act 1989'(https://insights.doughtystreet.co.uk/post/102dsgk/the-daily-mails-latest-insult-a-supreme-court-justice-who-is-a-feminist-and-w, Doughty Street Chambers, November 2016)

[77] HLA Hart, 'American Jurisprudence Through English Eyes The Nightmare and the Noble Dream' (1977 11 Georgia Law Review 971

[78] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018

headlines echo formalist views that judges should be completely autonomous and that they must deny their feminist beliefs so that they can simply perform their job: to apply the law.[79]

However, this is an unrealistic and reductive depiction of the role of the judge which diminishes the uniquely complex interpretation and navigation involved in judicial decision-making. Legal realists demonstrate that judicial decision-makers are not simply tasked with 'applying the law', their role requires that judges go beyond the realms of simply applying legal logic.[80] Indeed, although the formalist image of judicial decision-making as a systematic and mechanical application of legal logic may appeal to some due to the seeming ease with which legal problems may be resolved or 'pigeonholed', legal realists demonstrate that positioning judicial decision-making as a purely logical exercise is 'deceptively simple'.[81] This is because these formalist approaches deny the judge's active role within the 'complex interaction between rules and facts', a relationship that necessitates judges to go beyond simply applying legal logic and instead calls upon judges to actively reshape case facts to correspond each legal situation with the most fitting legal rule.[82] Despite attempts by formalists to present judicial decision-making as mechanical, realists expose the reality that no legal system can 'signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to'.[83] Ultimately, the judge will always be called upon to do more than simply apply legal logic because legal rules are to some degree indeterminate.[84]

Arguably, the projection of judicial decision-making as an endeavour involving the pure sole application of legal rules to cases fuels the fictitious image of judges as being passive

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Caoilfhionn Gallagher QC, 'The Daily Mail's latest insult: a Supreme Court Justice who is "a feminist" and was instrumental in the crafting of the Children Act 1989'(https://insights.doughtystreet.co.uk/post/102dsgk/the-daily-mails-latest-insult-a-supreme-court-justice-who-is-a-feminist-and-w, Doughty Street Chambers, November 2016)

[79] Erika Rackley, 'How feminism could improve judicial decision-making' The Guardian (Nov 2010) < https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making > accessed 1st September 2018

[80] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 614

[81] Richard A Posner, 'Formalism, Realism, and Interpretation' (1986) 37 Case Western Reserve Law Review 181

[82] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 991; Benjamin Cardazo, *The Nature of the Judicial Process* (Courier Corporation, 2005) P 99; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 616

[83] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 25

[84] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 614

in their creation of law.[85] Indeed, Rackley articulates that the presentation of judicial decision-making as involving a pure application of logic illustrates judges as acting somewhere between a 'demigod' and a 'legal pharmacist, dispensing the correct rule prescribed for the legal problem presented.'[86] In other words, the formalist lens through which judges are often viewed facilitates the image of a far-removed judge who simply applies legal rules in isolation. Llewellyn firmly refutes any attempt to demonstrate judicial decision writers as passive, instead evidencing lawmakers' instrumentality in the production of law.[87] Judge Posner develops this important argument, as he holds that judicial decision-makers are actually complicit in the continued pretence of judicial decision writing existing as a purely autonomous exercise supported by esoteric resources.[88]

Despite the rejection of this inaccurate portrayal of judging by many scholars, Rackley asserts that our perceptions of effective and efficient judgment writing remains bound to these prevailing conceptions of judgment writing.[89] Thus, at this stage it is important to state that an authentic account of judicial decision-making reflects a complex, indeterminate process requiring the judge to select between a multiplicity of legal rules to be applied within difficult legal issues.[90] The sheer multiplicity of legal rules available for selection by the judge within any given case creates ambiguity, which then necessitates for the judge to draw upon more than legal logic to construct their decisions.[91]

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[85] Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 Australian Journal of Law and Society 63; Leslie Green, 'Harts Message' in HLA Hart *The Concept of Law* (OUP Oxford, 2012) P 15; Sir William Blackstone, *Blackstone's Commentaries Part 1 Book 1* (1803) P 41

[86] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) P 130; William Brennan, 'Reason, Passion, and the Progress of the Law' [1998] Cardazo Law Review 4

[87] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study. (*Quid Pro Books, 2012) P 38
'the judge has sifted through these 'facts' again, and picked a few which he puts forward as essential - and whose legal bearing he then proceeds to expound'.

[88] Richard A Posner, *How Judges Think* (Harvard University Press, 2008) P 3

[89]Duncan Kennedy, *A Critique of Adjudication* (HUP, 1992) P 192; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) P 135

[90] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study. (*Quid Pro Books, 2012) P 40 – 48;
Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 990,995; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611; Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

[91] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-617

Ultimately, the formalist conception of judicial decision-making as pure 'logic' presents judicial decision writing as providing what Marx terms an 'unreal universality.'[92] In other words, formalist conceptions of law produce the false impression that the application of legal rules by judicial decision writers is undertaken in a pure and removed manner; in a way that disqualifies bias towards individual characteristics or idiosyncrasies, and instead privileges a supposedly 'neutral' and 'universal response'.[93] Stubbs cautions against this wholly unrealistic illustration of law.[94] While the aesthetic of judicial decision writing as a mechanical, syllogistic, and systematic application of rules by decision makers to legal issues may appeal to some because the appearance of absolute consistency and uniformity, ultimately this is antithetical to the authentic account of judging as detailed above.[95]

Legal Realist, Benjamin Cardozo emphasises the need to depart from the untruth of treating judicial decision-making as solely logic-based exercise in the interests of upholding the legitimacy of the common law. Indeed, he emphasises that the judicial decision-making process must be approached as 'the end which the law serves, and fitting its rules to the task at service.'[96] In other words, in the interests of fairness, rules cannot and ought not be simply 'applied' to legal cases because the complex nature of judicial decision-making necessitates a more intuitive, considered approach by judges towards each case.[97] This is paramount to recognise because the 'final cause of law is the welfare of society' and in attempting to treat legal cases as mere scientific issues with a correct and incorrect outcome, judges actively neglect the very real social inequalities and welfare issues faced by those seeking legal redress.[98] Scholars emphasise that formalist conceptions of law enforce a barrier between the

[92] Karl Marx, 'On the Jewish Question' in Robert Tucker (eds) *The Marx-Engels Reader* (Norton & Company, 1978) P 34
[93] Ibid P 34
Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608
[94] Margot Stubbs, 'Feminism and Legal Positivism' (1986) 2 Australian Journal of Law and Society 69, 70
[95] Contrary to Sir Edward Coke's conception of the law and judicial decision writing: 'reason is the life of the law; nay, the common law itself is nothing else but reason.'; Douglas Edlin, *Common Law Theory* (CUP, 2007) P 174
[96] Ibid
[97] Ibid
[98] Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (HUP, 1999) P 87; Hanoch Dagan, 'The Realist Conception of Law' [2007] The University of Toronto Law Journal 7

common law and 'social goals and human values'.[99] In essence, because formalists perceive legal rules as being 'determinate' and thus infallible, judges are isolated from, and are actively barred from engaging with, the social inequalities that they adjudicate beyond a strictly rule-based application of the law.[100] Thus, the privileging of formalist conceptions of judicial decision-making is particularly alarming considering that the perceived legitimacy of the common law is not only derived from 'just' judicial decision-making, but also from the public's perceptions as to how 'in touch' the judge appears to be with wider social issues faced by individuals before the court.[101] In short, if the judge is not perceived as being 'in touch' with these issues by the wider public, the legitimacy and value of judicial decision-making and the law more widely is threatened.[102]

Therefore, in seeking to maintain judicial decision-making in the formalist sense as a pure application of legal logic, the media and the judiciary actively neglect the complexity of judicial decision-making, overly simplify the judicial decision-making process, construct barriers around social inequalities within wider society, and present a romanticized, fabricated image of judicial decision-making. The consistent idealisation of formalist approaches is reflected in the public sphere, where media criticism of realist and feminist judges accuses these members of the judiciary of threatening the very fabric of the law and society itself. However, the formalist approach itself leads to a separation between the law and contemporary societal issues, which in itself exacerbates the popularity of the formalist approach.

2.3 Judicial Decision-Making as Determinate?

As noted above, the rejection of the reductionist conception of judicial decision-making as a purely logic-based exercise is at the heart of the legal realist critique of judicial decision-making.[103] This is because legal realists perceive that the 'indeterminacy' of legal doctrine

[99] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[100] Morton J Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 2009) P 15
[101] Kate Warner, Julia Davis, Maggie Walter, and Caroline Spiranovic, 'Are Judges out of Touch?' (2014) 25 Current Issues in Criminal Justice
[102] Ibid
[103] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611

'renders pure doctrinalism a conceptual impossibility'.[104] They perceive that the sheer multiplicity and manipulability of legal rules in any given legal case creates ambiguity and this necessitates that judges draw upon more than legal logic in order to: a) make a decision between two or more competing legal rules, or to b) fit legal facts to these legal rules in any judicial decision.[105] Ultimately, they recognise the multiple factors at play in judicial decision-making because of the law's inherent indeterminacy unlike the legal formalists who maintain the superlative role played by legal logic.[106]

However, Hart asserts that the realist argument regarding the indeterminacy of law is overstated because there are 'plain cases constantly recurring in similar contexts to which general expressions are clearly applicable'.[107] While realists concede that some cases will involve a less complex decision-making process, and that the nature of legal doctrine 'impose[s] certain limitations in the [court's] application' they maintain that 'a gap will always exist between doctrinal materials and judicial outcomes.'[108] Thus, realists hold that the ambiguity generated by the law's indeterminacy not only facilitates, but requires judges to make personal choices which are informed beyond the realms of legal logic in order 'to reformulate the victorious trend, more narrowly or broadly than espoused by the attorney.'[109] Fundamentally, the indeterminacy generated by the multiplicity of legal rules available to the judge combined with the considerable discretion extended to judicial decision-makers when constructing their final decisions necessitates that they draw upon multiple factors to assist in their choice between legal rules.[110] These factors may include but are not limited to: 'life experience, educational and professional background, personal beliefs, and the social

[104] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[105] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-14
[106] Ibid
[107]HLA Hart, *The Concept of Law* (3rd Edn, OUP, 2012) P 130, P 145, 147
[108] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law 620; Max Radin, 'Statutory Interpretation' [1930] Harvard Law Review 878
[109] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320; Karl N. Llewellyn, Paul Gewirtz and Michael Ansaldi, 'The Case Law System in America' (1988) 88 Columbia Law Review 1017; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-614
[110] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 997; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal

context'.[111] That is not to say that we venture into a 'Frankified' version of judicial decision-making whereby the judge has unfettered discretion to reach the conclusion that most aptly reflects their personal beliefs, instead we merely recognise the reciprocity between the indeterminacy of legal doctrine and the discretion possessed by judges to fill the gap created by this doctrinal indeterminacy.[112]

The active involvement of a judge's personal beliefs, background, and values when authoring their judicial decisions runs counter to formalist and more generalised accounts of judicial decision writing as absolutely 'impersonal [and] objective'.[113] Indeed, Llewellyn illustrates the perceived dichotomy between the reality of judicial decision-making as being informed by human life experiences and its clash with the illusion of judges providing 'absolute certainty'.[114] Although Llewellyn demonstrates the need to balance various human and legal factors when constructing legal judgments, some continue to be motivated by reductive, formalist perspectives which attempt to strictly separate and polarise these factors.[115]

For example, some scholars criticise the inclusion of feminist beliefs within judgment writing, as they assert that 'feminism in a judge is… evidence of partiality [and] a threat to judicial independence.'[116] However, Hunter refutes the suggestion that the inclusion of judges' feminist principles damages or conflicts with the production of approved judicial decision writing.[117] Instead she demonstrates that they represent a springboard by which to inform rather than to prejudice legal judgments.[118] Thus, in demonstrating the important role played by judges' discretion and personal values within the judicial decision-making process, the

[111] Bridget J. Crawford, 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' University of Baltimore Law Review [2018] 186; Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5, 31
[112] Brian Leiter, 'Toward a Naturalized Jurisprudence' (1997) 76 Texas Law Review 269
[113] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 24
[114] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 995
[115] Joseph Bingham, 'What is Law? Part II' [1912] Michigan Law Review 113; Brian Tamanaha, 'Understanding Legal Realism' (2009) 87 Texas Law Review 732
[116] Wendy Baker, 'Women's Diversity: Legal Practice and Legal Education – A View from the Bench' (1996) 45 University of New Brunswick Law Journal 199
[117] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 31, 43
[118] Ibid

respective realist and feminist approaches expose the false dichotomy between the application legal logic and the incorporation of these values. In so doing, they also undermine dominant formalist conceptions of judicial decision-making which aim to problematise the inclusion of any other factors outside legal logic.

2.4 Judicial Decision-Making: Legal Realism as 'fundamentalist'

Despite the provision of a more authentic and nuanced account of judgment writing by legal realists, prominent scholars such as HLA Hart and Lind characterise the respective realist and formalist schools of thought as extremist.[119] Thus, they prefer to adopt what they term a midway approach between embracing logical legal reasoning and recognising the limits of logic. [120] However, this is precisely the balance struck by legal realism indicating misconceptions of legal realism. [121] In articulating legal realism as fundamentalist, these scholars do a disservice to realism by illuminating realist conceptions as potentially dangerous and harmful.[122] Not only do they provide an inaccurate account of realism, but arguably in doing so they also limit the opportunities for realist conceptions of law to be considered as legitimate legal approaches. Thus, in illustrating realist conceptions of law as being extremist the shrouding of law and judicial decision writing behind the indestructible shields of 'objectivity' is permitted to continue. Subsequently, this supports a double-denial: firstly, a denial of the reality of law and a denial of judicial decision writing as being partisan and as facilitating inequality in practice. [123] This then denies the potential for legal realist re-conceptions of these tools, which demonstrate what lawmakers *'ought'* to do to be considered as legitimate.[124]

The denial resulting from the inaccurate portrayals of legal realism is particularly

[119] HLA Hart *The Concept of Law* (OUP Oxford, 2012) P ; D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999]) 52 SMU Law Review 137
[120] Ibid
[121] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal
[122] D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999) 52 SMU Law Review 137
[123] Bertha Wilson, 'Will Women Judges Really Make A Difference' (1990) 28 Osgoode Hall Law Journal 509
[124] Roscoe Pound, 'Calls for A Realist Jurisprudence' (1931) 44 Harvard Law Review 700

important to recognise, as Fuller depicts the implications arising from the continued distortion of the reality of law. [125] Ultimately, scholars warn that these misrepresentations become ingrained as reality. [126] However, despite concerns regarding the protraction of formalist conceptions of judicial decision-making, some scholars identify resentment to a challenge to the prevailing formalist image of judicial method. [127]

2.5 Judicial Decision-Making as Male: The Myth of 'Objectivity'

While legal formalists are concerned with maintaining the image of judicial decision-making as an autonomous and objective logical exercise, in comparison, realist and feminist legal scholars uncover that this very quest results in the subjectivity and subsequent unfairness inherent within traditional judicial decision-making. Although legal formalists characterise traditional judicial decision writing by its supposedly pure, objective and autonomous nature, feminist scholars mirror legal realists in that they uncover the falsity of this image. [128] Mackinnon illuminates the manipulation of the value of 'objectivity' in its pure form by the judiciary as a means of privileging the voices of men and marginalising women's experiences. [129] She demonstrates that 'objectivity' in its distorted sense is then established as the universal standard under which the law, the judiciary, and society operate. [130] Inevitably, this means that in maintaining the existing approach to judicial decision-making, judges will subconsciously or otherwise inclined to prioritise the interests of men above women in legal cases. [131]

Ultimately, MacKinnon demonstrates that the marginalisation of women's experiences by the law is permitted because the values of neutrality and objectivity are synonymous with

[125] Lon Fuller, 'Positivism and Fidelity to Law-A Reply to Professor Hart' (1958) 71 Harvard Law Review 631
[126] Ibid
[127] Ibid 631, 632
[128] Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608, 609; Emily Jackson, 'Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal' (1992) 19 Journal of Law and Society 195
[129] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 114
[130] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 237
[131] Ibid

maleness.[132]The law's role in the distortion of these values in their pure form is invisible because male perspectives dominate within wider society and are reinforced by the judiciary within the common law. [133] Thus, the manipulation of these values goes largely unquestioned. Instead, judicial decision-makers and the common law more broadly is commended for its retention of this distorted value of objectivity.[134] In essence, law is routinely commended for its gendered and sexist approaches towards women under the guise of 'objectivity'.

In upholding the sham of absolute 'judicial objectivity', MacKinnon expresses the proclivity of the law to exclude marginalised social groups. Simultaneously, she uncovers the lip service paid to the value of objectivity by the judiciary in practice. [135] Therefore, although the notion that 'subjective decision-making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results' is true, the current traditional judicial approach reflects these sentiments because these traditional approaches are weighted heavily in favour of men's interests.[136]

In light of the common law's consistent privileging of male interests under the guise of objectivity, Mackinnon cements the need for a distinctly feminist legal approach. In doing so she indirectly highlights the promise held by the Feminist Judgments Project as an imaginative and promising feminist legal method that engages with real world judgment writing.[137] She argues that:

> *Women have never consented to [law's] rule – suggesting that the system's legitimacy needs repair that women are in a position to provide. It will be said that feminist law cannot win and will not work. But this is premature. Its*

[132] Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) P 55
[133] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 237
[134] Ibid
[135] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 166, P 221; Anne Bottomley, *Feminist Perspectives on The Foundational Subjects of Law* (Cavendish Publishing, 1996) P 61
[136] D IPP, 'Maintaining the Tradition of Judicial Impartiality' (2008) 12 Southern Cross University Law Review 95
[137] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) 3-4

> *possibilities cannot be assessed in the abstract but must engage with the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.*[138]

This dissertation argues that the Feminist Judgments Project responds to the production of gendered judicial decisions and offers a viable opportunity for change.[139] The Feminist Judgments Project is a hybrid feminist-legal methodological approach requiring activists and scholars to undertake feminist re-judgments of unjust, inequitable, troubling cases that are pertinent to feminist legal scholarship.[140] The method requires that scholars select important cases that they feel would benefit from feminist analysis.[141] The feminist re-analysis must be undertaken in line with existing judgment writing conventions and constraints such as the judicial oath.[142] In constructing the judgments, scholars are not confined to a set feminist approach to reflect the fluid and expansive nature of feminism. However, Hunter also highlights the key techniques shared by all of the judgments contained within the collection; including 'asking the woman question', 'seeking to remedy injustices and to improve the conditions of women's lives', 'promoting substantive equality' 'story-telling' and a reliance on contextual materials.[143]

Despite their collective adherence to the judicial oath and conventions, suspicion towards the open and active inclusion of feminist perspectives within judicial decision-making continues. Lord Bingham of Cornhill emphasises that judicial decisions must be 'legally motivated' meaning that decisions are to be generated from a consultation with established legal doctrine or common law principles rather than from the assistance of untruthful legal

[138] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249
[139] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3-4
[140] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3-4
[141] Ibid
[142] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[143] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 35, 36

means.[144] Within his keynote address, Bingham characterises judicial decisions which are written in view of factors other than common law principles or doctrinal sources as being inauthentic legal decisions.[145] Arguably, in illustrating judicial decision writing in this narrow way, Bingham underlines the need for judicial decisions to be written in isolation of all other influences in order to retain their status as legitimate legal decision.[146]

Despite efforts to present judges who openly draw upon external influences as part of their decisions as being somehow unfaithful to the true judicial role, other commentators work to normalise this as part of the process.[147] Lord Justice Etherton exposes the reality of judicial decision writing in practice and simultaneously expresses the impossibility for a complete divorce between judicial decisions and the personal bias and life experiences of judges.[148] As such, Etherton undermines the image of the judge exercising a totally unfettered and unharnessed discretion, and instead demonstrates a careful and holistic consideration by judicial decision makers to author just and fair decisions for parties.[149] Arguably, Baroness Hale of Richmond advances Etherton's argument by asserting that the creation of judicial decisions and deeply held personal beliefs are not incompatible with one another.[150] Rather, the beliefs and life experiences of judges actively inform the judicial decision writing process and these personal beliefs support the invention of what will eventually come to be known as "the law".[151]

Indeed, Rackley reflects upon the opposition towards the inclusion of feminist values within legal judgment writing.[152] She asks the fundamental question: 'given that judges will, sometimes, have no choice but to fall back on their own values and perspectives, why shouldn't

[144] T Bingham, 'The Judges: Active or Passive?' (British Academy Lecture, 2005) 70
[145] Ibid
[146] Ibid
[147] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[148] Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging' [2010] Public Law 8, 9
[149] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[150] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[151] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[152] Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

feminist values and perspectives be included?'[153] Indeed, the media headlines and formalists treat the presence of feminism within judgment writing with contempt in comparison to the plethora of other beliefs that may also be invoked by judges when authoring their judgment.[154] 'The Secret Barrister' strengthens Rackley's challenge to the issue with the invocation of feminist values as they ask 'all lawyers are members of legal societies. I'm a member of Criminal Bar Association - should that stop me being a crim[inal] judge?'[155] Ultimately, both questions directly challenge the mainstream resistance towards the incorporation of personal beliefs and biases within judicial decision-making. Moreover, the strong opposition towards the reflection upon feminist beliefs within judicial decision-making raises the question: what makes feminist beliefs distinct from all other beliefs so as to justify the treatment of these values with such arbitrary suspicion?

Similarly, the treatment of feminist views within the traditional judicial decision writing process as being suspicious or devious is reflected across the globe in Australia, as the Sydney Morning Herald reported on a 'female judge [who was] asked to disqualify herself due to suspected "feminist" and "leftist" views.'[156] The justice was asked to step down by her male colleague on the basis that he 'suspected that as a female judge, I was a feminist with leftist leanings, who would not give him a fair hearing'. [157] Regardless of the judges' personal views, the sub-text of this accusation is that (1) judges holding feminist views cannot be trusted to

[153] Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

[154] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 32 as Hunter demonstrates these may include but are not limited to: faith, religion, and political beliefs. For example, within the short Daily Mail media piece, the author does not at any point make reference to any of the Supreme Court Justices political or philosophical beliefs, but makes explicit reference to Hale's subscription to feminist beliefs. The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016)< http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2017

[155] The Secret Barrister is an anonymous practitioner at the Bar and the author of the Sunday Times Bestseller, *Reasonable Doubts: Stories of the Law and How It's Broken* (Pan MacMillan, 2018) https://twitter.com/BarristerSecret/status/794319131105513482

[156] Michaela Witborn, 'Female judge asked to disqualify herself due to suspected 'feminist' and 'leftist' views' *Sydney Morning Herald* (October 2014) < https://www.smh.com.au/national/nsw/female-judge-asked-to-disqualify-herself-due-to-suspected-feminist-and-leftist-views-20141012-114vrj.html > accessed 1st September 2018

[157] Michaela Witborn, 'Female judge asked to disqualify herself due to suspected 'feminist' and 'leftist' views' *Sydney Morning Herald* (October 2014) < https://www.smh.com.au/national/nsw/female-judge-asked-to-disqualify-herself-due-to-suspected-feminist-and-leftist-views-20141012-114vrj.html > accessed 1st September 2018

perform their job without bias and (2) by default judges who identify as women decide cases in line with feminist principles.[158]

Firstly, these various instances reflect a double standard in relation to the specific incorporation of feminist beliefs as opposed to other beliefs. Secondly, while a judges' gender may influence the way that they judge, Somiline et al underline the problematic and inaccurate assumption that women judges will instinctively undertake a feminist approach to judgment writing.[159] Ultimately, while in England and Wales 'nemo iudex in causa sua' and 'justice must not only be done but be seen to be done', Hunter demonstrates that invoking feminist beliefs within judgment making does not conflict with these principles and the need to uphold judicial impartiality.[160] Rather, Hunter underlines the Feminist Judgments Project as representing an ideal fusion between feminism and legal principles, both of which are fluid and unfixed to some degree and also assist in the construction of variable and indeterminate outcomes.[161]

The irony inherent within the notion that judges who hold or reflect upon feminist beliefs are in some way prejudiced is effectively encapsulated by MacKinnon in her text in *Towards a Feminist Theory of the State*. She hypothesizes about the critical reception of feminist law operating in practice:

> *To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. But existing law is not neutral. It will be said that it undermines the legitimacy of the legal system. But the legitimacy of existing law is based on force at women's expense*.[162]

[158] Ibid
[159] Michael E Somiline and Susan E Wheatley, 'Rethinking Feminist Judging' (1995) 70 Indiana Law Journal 898, 900
[160] Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003 [3]
Law v Chartered Institute of Patent Agents [1919] 2 Ch 276; Rosemary Hunter, Clare McGlynn, Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Bloomsbury Publishing, 2010) P 31
[161] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) 43
[162] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249

This passage reaffirms the double standard applied to feminist approaches in comparison to the current 'objective' or more aptly, male approach, as she demonstrates that maleness continues to be accepted as the objective and correct mode of operation.[163]

Conversely, the law's insistence upon maintaining its pretence of absolute objectivity and impartiality within judicial decision writing results in the perpetuation of the very inequalities that decision writers seek to distance themselves from.[164] Indeed, Dewey demonstrates that in portraying and attempting to engrain judicial decision writing as syllogistic and mechanical scholars further entrench inequality, as 'adherence to it in practise constantly widens the gap between current social conditions and the principles used by the courts.'[165]Dewey argues that adhering to formalist conceptions of judicial decision-making to inspires 'irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.'[166] Ironically then, continuing the pretence of judicial decision-making as an autonomous, purely impartial, and objective process appears to damage the reputation, legitimacy and aesthetic of the common law.[167] Not only does the continued portrayal of judicial decision-making in formalist terms damage the reputation of the common law, but as Dewey demonstrates it also extends greater distance between the judiciary and those experiencing the law within wider society.

2.6 Feminist Judicial Decision-Making as Judicial Decision-Making: 'An Equal Justice for All'?

Hunter suggests that the methodological approach contained within the Feminist Judgments Project may assist in more effectively addressing the multiple and intersecting

[163] Ibid P 249
[164] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
Margot Stubbs, 'Feminism and Legal Positivism' (1986) 2 Australian Journal of Law and Society 70
D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999) 52 SMU Law Review 137
[165] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
[166] Ibid
[167] William Shakespeare, *Hamlet* (Prestwick House, 2005) P 73

social inequalities and injustices produced by traditional approaches towards judicial decision-making.[168] She demonstrates that 'feminist judges are likely to be concerned to make decisions that correct perceived injustices, improve women's lives and promote substantive equality.'[169] Moreover, she reinforces that feminist judges are likely to exhibit a higher degree of consciousness about their beliefs when writing their judicial decisions than the 'traditional judge.'[170]

Indeed, while Hunter concedes that the approach adopted by authors within the Feminist Judgments Project is similar to that undertaken by traditional judicial decision-makers because of its adherence to judicial conventions and constraints, she emphasises that judges undertaking a distinctly feminist approach will be more likely to be 'well-schooled in gender issues, feminist theoretical concerns, and to have a particular commitment to gender justice'.[171] Arguably then, feminist judges are more likely to be aware of the historic privileging of male interests under the normative male standard of objectivity which operates within existing judicial decision-making.[172]

Thus, the potential for a greater awareness of the inequalities produced at the root of the common law may also assist in dismantling the male-centred approach towards judicial decision writing.[173] This is pivotal given the consistent production of the 'unjust' and 'gendered' judicial decisions by the existing judicial approach and the threat that these decisions pose towards the perceived value and legitimacy of the law.[174] The following analysis demonstrates that the greater awareness and consideration by those undertaking feminist judicial decision-making cements the Feminist Judgments Project methodology as an

[168] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)) P 32
[169] Ibid
[170] Ibid P 31
[171] Ibid P 43
[172] Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) P 55
[173] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)) P 31
[174] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

ideal approach towards judicial decision-making.

Despite the potential held by the Feminist Judgments Project to redress various social inequalities created by existing approaches towards judicial decision-making, it is precisely this attempt to construct a reciprocal relationship between law with feminism which angers some feminist scholars.[175] In her thesis *Feminism and the Power of Law*, Smart expresses the impossibility for a mutual relationship between feminism and law to exist because of the law's status as an exclusionary masculine and hegemonic discourse, which invalidates all other forms of knowledge.[176] Indeed, Smart remarks that court and judicial decision-making will always preclude alternative visionary approaches to the law from emerging.[177] Thus, Smart specifically cautions feminists against resorting to law for the resolution of women's issues because of the law's 'malevolence' to women.[178] Although Smart recognises the value inherent within feminist critiques of the law, she believes the product of this research should be used to challenge masculine power at the root of law, rather than attempting to reform the law with a hybrid feminist-legal method.[179]

Similarly, Mossman mirrors Smart's thesis illustrating that the structure of the law means that it is 'impervious' towards other discourses such as feminism because of the innate power of existing approaches towards judicial decision-making and its resistance towards alternatives deviating from tradition.[180] Mossman's thesis also alludes to the pedestrian nature of existing feminist legal approaches and thus further reducing the potential scope of future feminist legal scholarship.[181] Mossman remains dubious as to the potential for feminism and law to co-exist and cautions that a relationship may only be possible if future feminists provide

[175] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 2-5; Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' [1987] Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society)
[176] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 4
[177] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5, P 88
[178] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 2
[179] Ibid
[180] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 167, 168
[181] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 168

imaginative and powerful alternatives to traditional legal method.[182]

Ultimately, Smart and Mossman's positions in the late 1980s highlight the law's coerciveness; simultaneously confining feminism to a subservient position because of its perpetual yielding to the law's demands.[183] Smart and Mossman's respective theses demonstrate the illegitimate coupling of law as a brute power and feminism as a weaker and subservient alternative.[184] In their eyes, feminism is 'immobilized' by traditional judicial method, which silences all alternative approaches to law.[185] Majury also reflects upon the initial feelings of hopelessness expressed by the Women's Court of Canada because of the difficulty in understanding where their combined voices and alternative legal approaches would be taken seriously.[186]

Smart and Mossman's unwillingness to accept the potential of a collaboration between feminism and traditional judicial method is understandable when considering the law's consistent homogenisation and marginalisation of minority groups.[187] However, scholars demonstrate that a credible relationship between law and feminism is achievable without sacrificing the law's structural integrity and feminism's reputation as an instrument of equality, justice, and fairness.[188] Indeed, while Hunter concedes that feminism must perform a secondary role to judicial conventions and constraints in order to uphold the feminist judicial decision-making as a 'real-life' legal exercise, in engaging with judicial decision-making in an authentic way with the support of feminism, she also reinforces realist arguments that the law is indeterminate to some degree.[189] By enabling feminist beliefs to be incorporated within judicial decision-making, Hunter highlights the considerable space available for judicial

[182] Ibid
[183] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002)) P 5
[184] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5
[185] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5, P 88
[186] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[187] See: Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge, 2013) P 7; Katharine Bartlett, 'MacKinnon's Feminism: Power on Whose Terms?' [1987] 1559
[188] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143
[189] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5

decision writers to draw upon non-legal factors to assist them in selecting between competing legal rules and interests.[190] Thus, Hunter argues that the indeterminacy at the core of judicial decision writing extends considerable discretion to judges, which in turn heightens the potential for feminism to play a significant role in judicial decisions in practice.[191]

The degree of freedom available to judicial decision makers when writing their decisions is accurately encapsulated by the Feminist Judgment Project, as some of the re-judgments provide the same decision as the original judgments but adopt different styles of feminist legal reasoning, while others reach entirely different legal conclusions.[192] Therefore, although Smart would undoubtedly disapprove of the subservient role played by Feminist Judgments Project, Hunter and fellow pioneers of the project strongly advocate that feminist judging represents a legitimate and effective method of judicial decision-making. Working with traditional judicial conventions, the feminist judgment methodology capitalises on the gap created by the indeterminacy inherent within practical judicial decision-making to produce more just, equitable, and feminist decisions.[193]

Ultimately, in combining traditional judicial conventions and constraints with feminist scholarship and praxis, the methodology contained within the Feminist Judgments Project facilitates an opportunity to actively confront and respond effectively to multi-layered issues such as: inequality within the law, substantive equality, and women's live experiences from within the law's borders.[194] Thus, although Smart and Mossman's dissolution with law and their aversion to an engagement between traditional legal method and feminism is understandable, ultimately their approaches unduly limit the potential for feminist alternatives to make a difference.[195]

[190] Ibid P 5
[191] Ibid P 31-32
[192] Ibid
[193] Ibid P 6
[194] Ibid P 35
[195] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 62

Indeed, Hunter argues that Smart's belief that the law and judicial decision-making is 'fundamentally anti-feminist' is 'too absolutist'.[196] MacKinnon reinforces this belief, as arguably within the following excerpt she emphasises the potential inherent within an approach such as that contained within the Feminist Judgments Project as a method created by women scholars who recognise and attempt to support the need to reform the current common law system:

> *Women have never consented to [law's] rule – suggesting that the system's legitimacy needs repair that women are in a position to provide. It will be said that feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage with the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.*[197]

MacKinnon's faith in the potential for feminist law to work in practice and even 'win' reinforces the central argument made by this dissertation that feminist judicial decision-making features as a transformative and therefore, valuable and legitimate judicial approach.[198] Indeed, the potential for this method to operate as an emancipatory tool for the traditional judicial system is of increased importance, as Gordon explains that because the law is 'profoundly paralysis-inducing because they make it so hard for people (including the ruling classes themselves) even to imagine that life could be different and better… people come to 'externalize' [it], to attribute to [it] existence and control over and above human choice; and, moreover, to believe that these structures must be the way they are.'[199]

[196] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 160; Hunter, 'The Power of Feminist Judgments' [2012] Feminist Legal Studies 142
[197] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249
[198] Ibid
[199] Robert W. Gordon, 'New Developments in Legal Theory' in David Kairys, *The Politics of Law A Progressive Critique* (2010)

Thus, because the Feminist Judgments Project re-imagines the seemingly unimaginable in an accessible and practical manner, arguably the method represents hope in that it demonstrates that a different and viable legal approach is possible. President of the Supreme Court, Baroness Hale of Richmond echoes these sentiments, as she expresses that the Feminist Judgments Project demonstrates that 'a different perspective can indeed make a difference'.[200]

[200] First 100 Years, *The Life and Legal Career of Baroness Hale* (LexisNexis, 2017, https://www.youtube.com/watch?v=ZokbQ4e312M)

Chapter 3 Feminist Judicial Decision-Making - A legitimate hybrid critique-reform tool to generate legal change: *R v Dhaliwal* (*R v D*)[201]A Case Analysis

While scholars such as Smart and Mossman seek to dissuade others from the seemingly futile exercise of reforming the law with feminism, the Feminist Judgments Project requires that contributors undertake a 'kind of hybrid form of [academic] critique and law reform project'.[202] This hybrid critique-reform project is achieved by scholars who actively engage in a feminist critique of original judicial decisions and then practically reform these decisions with the assistance of the findings from their feminist critiques and traditional judicial decision-making conventions.[203]

Feminist critiques play a fundamental role in the feminist judgment critique-reform hybrid. However, as Hunter demonstrates, the feminist re-judgments are not performed 'simply as an academic exercise or for an academic audience'.[204] Rather, part of the justification for engaging in a hybrid academic critique-law reform approach to judicial decision-making is driven by the desire for feminist judicial decision-making to be perceived as a serious and legitimate way to instil practical legal change within the 'real world'.[205] Fundamentally, Hunter et al demonstrate that the feminist re-judgments are employed with an extended vision in mind: to generate further feminist judgment writing within academia, to induce sustained change within the courtroom by judges and advocates, and to change the lives of those disadvantaged by law.[206] Thus, Hunter demonstrates that the desire for feminist judicial decision-making to be appreciated as a serious and legitimate way of generating sustained legal change across a number of spheres necessitates that the project must strike an intricate balance

[201] R v D [2006] EWCA Crim 1139
[202] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[203] Ibid
[204] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[205] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 6; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 27-28
[206] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 43

between providing an academic feminist critique of existing decisions and practical legal reform.[207]

Hunter is reflexive about the reality that an academic feminist approach alone is unlikely to make a substantial impact within the lives of those most in need within society.[208] However, she and fellow contributors to the Feminist Judgment Project reject Smart's more reductionist belief that the power of law completely precludes a relationship between law and feminism.[209] In this sense those engaging in feminist judicial decision-making reflect a more realist approach because they believe that the indeterminacy of judicial decision-making facilitates an opportunity for feminist approaches to be legitimately incorporated with the law to create social change.[210] Thus, to ensure that the Feminist Judgments Project is understood as an authentic tool for legal reform in practice, contributors illustrate the relationship between a more academic feminist critique and practical legal reform as being reciprocal.[211] I.e. law reform is dependent on a feminist critique of law in its existing state and vice versa: a feminist critique of law is redundant without an attempt to reform the existing law.[212]

However, one may challenge the value of a feminist judicial decision operating as a 'hybrid form of critique-reform' because Lord Rodger asserts that the proximity between academic writing and judgment writing is now non-existent.[213] In fact Lord Rodger articulates that the judiciary are producing glorified academic articles rather than legal judgments.[214] Thus, Lord Rodger's perception of judicial decision-making as a form of academic writing undermines claims by the Feminist Judgments Project of 'feminist judgments' operating as a critique-reform hybrid.[215] His criticism creates the possibility that feminist judicial decision-

[207] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 138
[208] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 17
[209] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 49
[210] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 49; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 5
[211] Introducing the Women's Court of Canada' (2006) 143
[212] Ibid
[213] Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 Law Quarterly Review 237
[214] Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 Law Quarterly Review 237
[215] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143

making is actually an abstract, academic exercise under the guise of being a practical method of legal reform. While this sceptical view of feminist judicial decision-making may appear to be legitimated by Lord Rodger who illuminates the perceived proximity between academic writing and judgment writing, conversely, Rackley restates the distinctiveness of the practice of judgment writing and the drive by the Feminist Judgments Project to exploit and harness this distinctiveness.[216] Ultimately, it is precisely this reciprocal relationship between academic critique and legal reform that underpins the value and legitimacy of feminist judicial decision-making as a socio-legal tool for change and as a method of best judicial practice.[217]

The value generated by the Feminist Judgments Project as a hybrid academic critique-legal reform tool is exemplified by its move beyond rigid, formalist judicial decision-making approaches towards embracing the realist, indeterminate nature of judicial decision-making. The power of feminist judicial decision-making to protect the legitimacy and the value of judicial decision-making through radical doctrinal, policy, and conceptual reform is demonstrated within the re-judgment of the landmark case *R v Dhaliwal (R v D)*[218].

The feminist re-judgment in *R v D* highlights the opportunity missed by the court in the original case to widen the scope of the law under the Offences Against the Person Act 1861 (OAPA) to ensure that perpetrators of domestic violence are subjected criminal sanctions for their abusive conduct.[219] The case *R v D* concerned the victim who took her own life after being subjected to sustained psychological and physical abuse by the perpetrator, her husband.[220] Upon the victim's death, the perpetrator was charged with committing Manslaughter and Grievous Bodily Harm contrary to the OAPA 1861.[221] Despite evidence by experts that the

[216] Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 56
[217] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[218] R v D [2006] EWCA Crim 1139
[219] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255
[220] R v D [2006] EWCA Crim 1139 [1][3]
[221] Offences Against The Person Act 1861
R v D [2006] EWCA Crim 1139 [1]

‘“overwhelming primary cause” for the [victim’s] suicide “was the experience of being physically abused by her husband in the context of experiencing many such episodes over a very prolonged period of time”’, the CoA decided that the perpetrator could not be held accountable for either offence.[222]

The court’s decision to acquit the defendant within the case was underpinned by evidence from medical experts invoked by the Crown, Dr Chesterman and Dr Agnew-Davies who held that there was insufficient evidence to demonstrate that the victim suffered from a diagnosable psychological issue.[223] However, the expert evidence by Chesterman and Agnew-Davies was undermined by Dr Mezey who claimed that there was “sufficient evidence” to demonstrate that the victim within the case suffered from a psychological condition.[224] Although Mezey’s evidence suggests that the victim could have been suffering from a psychological condition and the court made explicit reference to the evidence found after the victim’s death detailing her attempts to self-harm and consume large quantities of alcohol, the court relied upon the conclusions made by Chesterman and Agnew-Davies.[225] Thus, the court acquitted the defendant on the basis that the jury could not properly conclude that the defendant was guilty due to the scope of the concept ‘bodily harm’ under OAPA 1861. This statute ‘does not allow for un-diagnosed psychological symptoms caused in domestic violence to be classified as ‘bodily harm’.[226]

The approach by the court in the original decision in *R v D* is highlighted by Shah, Munro, and Burton as being unjust; ineffective, and thus in need of an intervention by feminist judicial decision-makers.[227] They articulate that in emphasising the need for medical evidence to affirm the psychological state of mind of the victim, the court privileges medical knowledge

[222] Ibid [14]
[223] R v D [2006] EWCA Crim 1139 [16]
[224] R v D [2006] EWCA Crim 1139 [14]
[225] R v D [2006] EWCA Crim 1139 [3] [4] [5]
[226] R v D [2006] EWCA Crim 1139 [1] [6] [12 -17] [32][33]
[227] Mandy Burton, ‘Commentary on *R v Dhaliwal’* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258

above drawing upon a wide body of social science research.[228] Indeed, the original decision was made with no reference made to the established body of research on domestic violence which demonstrates a clear correlation between the subjection of women to sustained periods of domestic violence and their increased experiences of psychological conditions such as depression.[229]

In the original decision, the court emphasised a need for medical evidence in the interests of ensuring 'certainty' for future cases.[230] However, as Burton effectively highlights even the medical experts within the original case decision could not unanimously agree on whether the victim was experiencing a psychological condition, thus generating the very uncertainty that the court sought to avoid by relying upon expert medical knowledge.[231] In their feminist re-judgment, Shah and Munro argue that by prioritising medical knowledge above social science research the court in the original decision excludes victims of domestic violence who do not have a medically recognised psychological condition from the possibility of legal redress.[232] The exclusion of victims/survivors of domestic violence from the opportunity of accessing justice is reinforced by research by social scientists who demonstrate that victims of domestic violence are highly unlikely to seek medical assistance.[233] Thus logically in light of this research, the majority of domestic violence victims will never be able to access justice and accountability, as existing psychological conditions will remain undiagnosed.

In light of the injustice produced by the approach of the court in the original decision of *R v D*, Burton highlights the need to reform key concepts such as 'bodily harm' contained

[228] Ibid
[229] Cathy Humphreys and Ravi Thiara, 'Mental Health and Domestic Violence: 'I Call it Symptoms of Abuse' (2003) 33 The British Journal of Social Work 209
[230] R v D [2006] EWCA Crim 1139 [31]
Mandy Burton, 'Commentary on *R v Dhaliwa*l' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[231] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[232] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* ((Hart Publishing, 2010) P 258
[233] Anna Taket et al, 'Routinely asking women about domestic violence in health settings' [2003] BMJ 673

within the OAPA 1861. [234] Burton demonstrates that the reform of this concept is imperative to ensure that undiagnosed psychological symptoms can fall under this category without the need for a formal medical examination of the victim's state of mind. [235] Reforming this approach to 'bodily harm' in practice could ensure that the law provides greater accountability for those affected by domestic violence. [236]

Similarly, Burton also emphasises the need for a shift in policy around the approach towards causation in manslaughter cases where individuals have been subjected to domestic violence. [237] This is because when causation is followed rigidly, traditional judicial decision-makers have a tendency to focus on the victim's 'voluntary' act of suicide as the intervening act breaking the chain of causation, rather than emphasising this act within the context of the catalogue of abuse experienced by the victim. [238] Burton highlights that this rigid formalist approach towards causation is also flawed in domestic violence proceedings because the 'voluntary' act of suicide by the victim, who has usually been systematically controlled and manipulated for a sustained period is judged by the law on the basis that they are an 'autonomous person', rather than acting in light of this period of abuse. [239] Arguably, the court's consideration of causation within the original decision is formalist because the court did not contextualise causation within the context of the domestic violence which evidently impacted on the victim's conduct and state of mind. [240] Rather, it seeks to apply causation in a rigid and mechanical fashion when there are clear issues necessitating a more flexible approach to causation.

[234] Mandy Burton, 'Commentary on *R v Dhaliwal'* in [234] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 258
[235] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[236] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[237] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258- 259
[238] Ibid
[239] Ibid
[240] Ibid

The value of the feminist judgment methodology is reinforced by Shah and Munro who attempt to move beyond the parameters of the unjust doctrinal and policy approaches of the court within the original decision within the feminist re-judgment of *R v D*.[241] Indeed, Shah and Munro respond to the need to broaden the concept of 'bodily harm' and revise the traditional approach to causation within domestic violence proceedings as highlighted by the original approach of the court in *R v D*.[242] Within their re-judgment, they illustrate that the definition of 'bodily harm' contained within OAPA 1861 could be legitimately reformed to better support victims and survivors of domestic violence where the abuse committed by the perpetrator does not fall strictly under the existing category of 'bodily harm'.[243] To this end, Shah and Munro attempt to provide a more open, flexible interpretation of 'bodily harm' in order to ensure that the perpetrator is held accountable for their actions.[244] In doing so, the feminist re-judgment transcends the parameters of the existing concept of 'bodily harm' and re-centres its focus upon supporting victims and survivors of domestic violence; rather than upon continuing their punitive treatment of victims in seeking for evidence of their psychological conditions.[245]

The re-approach proposed by Munro and Shah could result in a higher degree of flexibility afforded to courts around the concept of 'bodily harm' in practice to ensure that victims/survivors of domestic violence who are subjected to 'non-fatal' offences, but who cannot be protected under the OAPA 1861 due to the present narrow definition of 'bodily harm' are still supported.[246] Burton articulates this specific approach to 'bodily harm' and causation

[241] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255; *R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[242] Mandy Burton, 'Commentary on *R v Dhaliwal*' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255*; R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[243] Mandy Burton, 'Commentary on *R v Dhaliwal*' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255; *R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[244] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260
[245] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 259
[246] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260

as assisting in the wider goal set by feminist scholars to ensure that the criminal justice system adequately responds to both the perpetrators and victims/survivors of domestic violence.[247]

Therefore, in considering the positive impact generated by the interaction between a feminist critique of existing judgments and the subsequent feminist re-judgment of the original decision in *R v D*, arguably the distinct value of the feminist judgment methodology lies in the reciprocal relationship between legal critique and legal reform. Indeed, in operating between critique and reform, the Feminist Judgments Project may be said to adopt a 'sceptical pragmatist' approach to judgment writing in that they 'embrace legalism as a tool of necessity' but they also 'stand outside the courtroom door'.[248] In other words, contributors strike the balance between critiquing the law from a more theoretical, feminist critical standpoint 'outside the courtroom door' and then recognising the need to engage with this law from the 'inside' by reforming judicial decisions from a feminist standpoint.[249] Thus, rather than mirroring the 'absolutist' recommendations to cease from engaging with law to reform by Smart, feminist judicial decision-making works to bridge the gap between more engaging with abstract feminist principles and practical forms of legal reasoning in the hope of generating more fair and just results for society.[250] As re-affirmed by Hunter, this approach is taken not because feminist judicial decision-makers neglect the limitations of law reform, nor do they accept the operation law in its entirety.[251] Rather, contributors to the Feminist Judgments Project recognise the reality that the law plays a pivotal role in the lives of women and sometimes an engagement with law is necessary to achieve wider social justice objectives.[252]

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[247] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260

[248] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics' (2004) 20 Australian Feminist Law Journal 44; Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 1 Women's Rights Law Reporter

[249] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44; Rosemary Hunter, 'The Feminist Judgments Project: Legal Fiction as Critique and Praxis' (2015) 5 International Critical Thought 501

[250] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 142 - 143

[251] Ibid 143; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44

[252] Rosemary Hunter 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44; Ralph Sandland, 'Between '"Truth" and "Difference": Poststructuralism, Law and The Power of Feminism' (1995) 3 Feminist Legal Studies 47

In inhabiting the role of the 'sceptical pragmatist' and approaching legal reform through some traditional judicial means, Shah and Munro transform the courtroom as a forum previously identified by Smart as a sphere in which to 'silence' women into a tool in which to centralise women's specific issues and concerns, particularly within the realm of domestic violence.[253] Indeed, in facilitating the re-interpretation of 'bodily harm', Shah and Munro can be said to effectively 'challenge the majority's story and weaken its hold on our collective imagination' in the context of domestic violence.[254] In other words, they utilise feminist knowledge and the traditional legal system to critique and challenge the traditional approach to judgment writing within proceedings concerning domestic violence and in doing so they open our collective minds to the prospect of a new approach.[255] Ultimately, in balancing legal reform with a critique of law from a feminist perspective within their re-judgment of *R v D*, Shah and Munro reinforce Hunter's belief that a genuine engagement with the law from the inside holds great potential for transformative practical legal change.[256]

Arguably, the potential for the Feminist Judgments Project to modify established legal doctrine and policy in order to create more 'just' judicial outcomes cements feminist judicial decision-making as the mode of best judicial practice. This is because the feminist re-judgments provide an opportunity to rectify the various injustices identified by feminist scholars within original judicial decisions; and as such these reduce the threat that these injustices pose to the perceived legitimacy and value of the law.[257]

[253] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 88
[254] Erika Rackley, 'Difference in the House of Lords' (2006) 15 Social and Legal Studies 163,181
[255] Ibid
[256] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 6; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 4; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44
[257] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984; Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

Chapter 4 Conclusion - Feminist Judicial Decision-Making as *Judicial Decision-Making*: A Legitimate and Valuable Approach?

This dissertation commended the commitment of the judiciary and the JAC to improving the external legitimacy of the common law by appointing a more diverse judiciary.[258] However, while this was praised, this dissertation identified the active failure and neglect by judges to engage with and to analyse their existing and formalist approaches towards judicial decision-making. The dissertation emphasised that the reluctance by the judiciary to engage critically with their decision-making approaches continued, even as feminist scholars unearthed the judiciary's production of 'unjust' and 'wrong' judicial decisions.[259]

The dissertation demonstrated two of the main implications arising from the judiciary's failure to critically engage with their approaches to judicial decision-making. Firstly, in failing to engage with their approaches towards judicial decision-making and by avoiding discussions about judicial decision-making more widely, the judiciary was identified as endangering women and minority groups to further levels of injustice.[260] Secondly, the judiciary's continued treatment of women in an 'unjust' manner was depicted as undermining the legitimacy and the value of the common law because as recognised, the legitimacy of the law is inextricably linked with perceptions of the law as an arbiter of justice and fairness.[261] In compromising the legitimacy of the common law, the judiciary was identified as diminishing the status of the law more widely, and even creating the potential for disobedience and unrest within wider society.[262] As demonstrated in treating women in a disproportionately 'unjust'

[258] Constitutional Reform Act 2005, Section 64; Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 22-23
[259] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3
Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45
[260] Richard A Posner, *How Judges Think* (HUP, 2010) P 6
[261] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984
[262]William A. Bogart, *Consequences: The Impact of Law and Its Complexity* (University of Toronto, 2002) P 45

and 'wrong' manner, the judiciary was depicted as disadvantaging the needs, experiences, and interests of women.[263]

In addition, the dissertation highlighted the judiciary's complicity in damaging the legitimacy of the common law and its wider value because of the judiciary's awareness of the distinct experiences and needs of women within the judicial decision-making system.[264] Not only did the dissertation highlight the judiciary's awareness of the distinct experiences of women in the judicial decision-making process, but it also highlighted the discretion available for judges to respond to these needs.[265] Ultimately, the treatment of women in this way was highlighted as reinforcing the inadequacy of the present formalist approach to judicial decision-making.[266]

The dissertation provided a realist critique of present formalist approaches towards judicial decision-making and identified the promotion of formalist approaches towards judicial decision-making by the wider public and media. The project identified the inherent contradictions, mistruths, and reductionist conceptions of judicial decision-making from the perspective of formalism.[267] The deconstruction of formalist approaches towards judicial decision-making facilitated the illustration of the methodology contained within the Feminist Judgments Project as a realist approach to judicial decision-making. This was achieved by dismantling formalist conceptions of judicial decision-making as a completely autonomous and rule-based exercise and the problems arising from promoting the pretence of a formalist approach to judicial decision-making. [268] In evaluating the formalist approach to judicial decision-making combined with the inequalities arising from an attempt to maintain a formalist

[263] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3
Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45
[264] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[265] Ibid and Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 656
[266] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Adam Gearey and John Gardner, *Law and Aesthetics* (Hart Publishing, 2001) P 2
[267] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[268] Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging' [2010] Public Law 8, 9

approach to decision-making in practice, the literature review highlighted the potential for the Feminist Judgments Project to rectify these issues in a more considered and 'just' way.[269] The dissertation identified feminist judicial decision-making as a realist project because it discerns and embraces the gap generated by the indeterminacy of the law and seeks to plug this gap with feminist reasoning techniques in order to create more just outcomes.[270] The literature review considered the views of Smart and Mossman and the counter-arguments provided by Hunter et al regarding the possibility for the Feminist Judgments Project to feature as a legitimate and distinctive approach towards judicial decision-making.[271]

In response to the judiciary's production of 'unjust' judicial decisions as a result of the formalist tendencies of judicial decision-makers, the dissertation placed its focus on calls by feminist legal scholars for a distinctly feminist approach to judicial decision-making.[272] This dissertation analysed a feminist re-judgment contained within the Feminist Judgments Project in the interests of promoting fairness, and fundamentally an 'equal justice for all' within the judicial decision-making process. [273] This analysis was undertaken because of the disproportionate levels of criticism aimed at judges who appear to be, or who are openly incorporating feminist beliefs into their judicial decision-making approach and the continued 'fetishization' of the legal status quo by the judiciary.[274] The analysis identified the invaluable nature of feminist judicial decision-making because of its response to the distinct needs and interests of vulnerable women as in *R v Dhaliwal*.[275] In responding to the distinct issues faced

[269] Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 31
[270] Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[271] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 2
[271] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 167, 168
Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143
[272] Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013) P 15
Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249
[273] Ibid
[274] Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[275] R v D [2006] EWCA Crim 1139
Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)

by *Dhaliwal* through the means of a hybrid feminist-judicial decision-making, the analysis demonstrated that feminist judicial decision-making might be recognised as a legitimate form of judicial decision-making.[276] This is because in responding to these issues in *Dhaliwal*, feminist judicial decision-making moves beyond an academic feminist critique to provide a more 'just' outcome for a variety of people who are neglected by existing judicial approaches. Thus, in light of the greater sense of justice produced by feminist judicial decision-making, the feminist judicial decision-making approach was identified as an appropriate way of saving the legitimacy and value of the common law.[277]

Overall, this dissertation argues that feminist judicial decision-making represents a legitimate and valuable approach to judicial decision-making because of its considered approach towards the distinct needs of women within the boundaries of existing judicial conventions and constraints. Although the analysis of the approach within the Feminist Judgments Project is limited due to the length of this piece, the findings demonstrate the potential for this judicial decision-making approach to be ingrained as a mode of judicial best-practice. This is because the project remains faithful to existing judicial conventions, however in discerning the gap available within the judicial decision-making process, contributors identify a way to incorporate a more academic feminist critique and knowledge.

In future research, it is suggested that a larger scale review of feminist re-judgments ought to be conducted across all of the published global Feminist Judgments Projects with the aim of cataloguing the key impact(s) of feminist judicial decision-making upon the law and society more broadly. The findings from this research could then be compiled into a policy document to highlight the seriousness of unjust judicial decision-making with regards to undermining the legitimacy and value of the law, and the ability of feminist judicial decision-

[276] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[277] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984

making to support the common law's legitimacy. This could then assist in shifting feminist judicial decision-making from the realms of 'alternative-dom' towards a normative approach to judicial decision-making in turn reflecting Hunter's wider objective for feminist judicial decision-making to feature more in academic and practical spheres.[278]

To conclude, feminist judicial decision-making is reinforced as a legitimate and valuable socio-legal and realist approach to judicial decision-making because of its potential to generate genuine legal change and to reduce unfair, 'unjust' and gendered judicial decisions. Ultimately, where existing judicial decision-making approaches fail, the Feminist Judgments Project responds. Although the accommodation of feminism and law may be initially difficult, the Feminist Judgments Project demonstrates that judicial decision-making may legitimately incorporate a more academic feminist critique of law into judicial decision-making in order to generate a viable path for change and justice.

[278]Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 43

Bibliography

Statutes

Courts Act 2003

Criminal Justice Act 2003

Coroners and Justice Act 2009

Constitutional Reform Act 2005

Equality Act 2010

Offences Against the Person Act 1861

Sentencing Guidelines

Constitutional Reform Act 2005

Judicial Appointments Commission Regulations 2013/2191

Supreme Court (Judicial Appointments) Regulations 2013/2193

Judicial Discipline (Prescribed Procedures) Regulations 2014/1919

Judicial Conduct (Judicial and other office holders) Rules 2014

Judicial Conduct (Tribunals) Rules 2014

Judicial Conduct (Magistrates) Rules 2014

Senior Courts Act 1981

Cases

R v Dhaliwal [2006] EWCA Crim 1139

Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003 [3]

Law v Chartered Institute of Patent Agents [1919] 2 Ch 276

Books

Adam Gearey and John Gardner, *Law and Aesthetics* (Hart Publishing, 2001)

Anne Bottomley, *Feminist Perspectives on The Foundational Subjects of Law* (Cavendish Publishing, 1996)

A V Dicey, *Introduction to the Study of the Law of The Constitution* (MacMillan and Co Ltd, 1962)

Benjamin Cardazo, *The Nature of the Judicial Process* (Courier Corporation, 2005)

Bridget J Crawford, *Feminist Judgments: rewritten tax opinions* (CUP, 2017)

Carol Smart, *Feminism and the Power of Law* (Routledge, 1990)

Catherine A MacKinnon, *Toward a Feminist Theory of the State* (HUP, 1989)

Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987)

David Kairys, *The Politics of Law A Progressive Critique* (2010)

Douglas Edlin, *Common Law Theory* (CUP, 2007)

Duncan Kennedy, *A Critique of Adjudication* (HUP, 1992)

Erika Rackley, *Women, judging and the judiciary; from difference to diversity* (Routledge, 2012)

Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart, 2014)

Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge, 2013)

HLA Hart *The Concept of Law* (OUP Oxford, 2012)

Jacques Derrida, *Deconstruction in a Nutshell a Conversation with Jacques Derrida* (Fordham University Press, 1997)

Judith Butler, Feminism and the Subversion of Identity (Routledge, 1990)

Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study. (*Quid Pro Books, 2012)

Karl Marx, ‘On the Jewish Question’ in Robert Tucker (eds) *The Marx-Engels Reader* New (Norton & Company, 1978)

Máiréad Enright, Julie McCandless, Aoife O'Donoghue (eds) *Northern / Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Bloomsbury, 2017)

Margaret Davies and Professor Vanessa E Munro, *The Ashgate research companion to feminist legal theory. (Ashgate*, 2013)

Morton J Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 2009)

Paul Oliver, *Succeeding With Your Literature Review: A Handbook For Students: A Handbook* **(**McGraw-Hill Education, 2012**)**

Richard A Posner, *How Judges Think* (HUP, 2010)
Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (HUP, 1999)

Rosemary Hunter, Clare McGlynn, Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Bloomsbury Publishing, 2010)

Rowena Murray, *How To Write A Thesis* (McGraw-Hill Education, 2011)

Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013)

Sara Salih, Judith Butler (Psychology Press, 2002)

Sir Mark Hedley, *The Modern Judge: Power, Responsibility, and Society’s Expectations* (LexisNexis, 2016)

Sir William Blackstone, *Blackstone's Commentaries Part 1 Book 1* (1803)

The Secret Barrister *Reasonable Doubts: Stories of the Law and How It's Broken* (Pan MacMillan, 2018)

Tom Bingham, *The Rule of Law* (Penguin, 2011)

William Shakespeare, *Hamlet* (Prestwick House, 2005)

Journals

Alan Patterson, 'Decision-making in the UK's top court' (2014) 3 Cambridge Journal of International and Comparative Law

Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud' (2017) 81 Journal of Criminal Law

Anna Taket et al, 'Routinely asking women about domestic violence in health settings' (2003) 327 BMJ

Andrew S Denvey and Richard Tewksbury, 'How to Write a Literature Review' (2013) 24 Journal of Criminal Justice Education

Anthony Kronman, 'Jurisprudential Responses to Legal Realism' (1998) 73 Cornell Law Review

Bridget J. Crawford; Kathryn M. Stanchi; Linda L. Berger, 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' (2018) 47 University of Baltimore Law Review

Bertha Wilson, 'Will Women Judges Really Make A Difference?' (1990) 28 Osgoode Hall Law Journal

Bradley W. Joodeph, 'The Many Meanings of "Politics" in Judicial Decision Making' (2008) 77 UMKC Law Review

Brian Leiter, ‘Toward a Naturalized Jurisprudence’ (1997) 76 Texas Law Review

Brian Tamanaha, ‘Understanding Legal Realism’ (2009) 87 Texas Law Review

Caroline Hunter and Ben Fitzpatrick, ‘Feminist Judging and Legal Theory’ (2012) 46 The Law Teacher

Carol Smart, 'The Woman of Legal Discourse' (1992) 1 Social & Legal Studies

Cathy Humphreys and Ravi Thiara, ‘Mental Health and Domestic Violence: ‘I Call it Symptoms of Abuse’ (2003) 33 The British Journal of Social Work

Christine A. Littleton, ‘Equality and Feminist Legal Theory’ (1947) 48 University of Pittsburgh Law Review

Christine Susan Bruce, ‘Research students early experience of the dissertation literature review’ (1994) 19 Studies in Higher Education

Claire L'Heureux-Dube, ‘The Dissenting Opinion: Voice of the Future’ (2000) 38 Osgoode Hall Law Journal

C Guthrie, ‘Blinking on The Bench: How Judges Decide Cases’ (2007) 93 Cornell Law Review

David N Boote and Penny N Beile, ‘Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation’ (2005) 34 Educational Researcher

D IPP, ‘Maintaining the Tradition of Judicial Impartiality’ (2008) 12 Southern Cross University Law Review

D Lind, ‘Logic, Intuition, and the Positivist Legacy of H.L.A. Hart’ (1999) 52 SMU Law Review

Diana Majury, ‘Introducing the Women’s Court of Canada’ (2006) 18 Canadian Journal of Women and the Law

Elizabeth M Schneider, ‘Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future’ (1994) 2 Virginia Journal of Social Policy and the Law

Emily Jackson, ‘Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal’ (1992) 19 Journal of Law and Society 195

Erika Rackley, ‘Difference in the House of Lords’ (2006) 15 Social and Legal Studies

Erika Rackley, ‘Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales’ (2012) 24 Canadian Journal of Women and the Law

Erika Rackley, ‘Difference in the House of Lords’ (2006) 15 Social and Legal Studies

Hanoch Dagan, ‘The Realist Conception of Law’ (2007) 57 University of Toronto Law Journal

HLA Hart, ‘American Jurisprudence Through English Eyes The Nightmare and the Noble Dream’ (1977) 11 Georgia Law Review

Johnson, Maguire and Kuhns, ‘Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean’ (2014) 48 Law and Society Review

John Dewey, ‘Logical Method and Law’ (1924) 10 Cornell Law Review

Johnson, Maguire and Kuhns, ‘Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean’ (2014) 48 Law and Society Review

Joseph Bingham, ‘What is Law? Part II’ [1912] Michigan Law Review

Kate Fitz-Gibbon and JaneMaree Maher, ‘Feminist Challenges to the Constraints of Law: Donning Uncomfortable Robes?’ (2015) 23 Feminist Legal Studies

Katharine T. Bartlett, ‘Feminist Legal Methods’ (1990) 103 Harvard Law Review 831

Margaret Davies, ‘Feminist Judgments’ [2012] Things We Like

Katharine T. Bartlett, ‘Feminist Legal Scholarship: A History Through the Lens of the California Law Review’ (2012) 100 California Law Review

Katharine T Bartlett, ‘MacKinnon’s Feminism: Power on Whose Terms’ (1987) 75 California Law Review

Karl Llewellyn, ’Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard Law Review

Karl N. Llewellyn, Paul Gewirtz and Michael Ansaldi, ‘The Case Law System in America’ (1988) 88 Columbia Law Review

Katherine Bartlett, ‘Objectivity: A Feminist Revisit’ (2012) 66 Alabama Law Review

Kate Warner, Julia Davis, Maggie Walter, and Caroline Spiranovic, 'Are Judges out of Touch?' (2014) 25 Current Issues in Criminal Justice

Kathryn McNeill and Paul Stapleton, ‘Judging the Singular: Towards a Contingent Practice of Improvisation in Law’ (2018) 12 Critical Studies in Improvisation

Kimberlé 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

Leslie J Moran, ‘Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley’ (2012]) 75 The Modern Law Review

Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 Harvard Law Review.

Lord Rodger, ‘The Form and Language of Judicial Opinions’ (2002) 118 Law Quarterly Review

Mari J Matsuda, ‘When the First Quail Calls: Multiple Consciousness as Jurisprudential Method’ [1989] 8 Women’s Rights Law Reporter

Margaret Davies, ‘Feminist Judgments’ [2012] Things We Like

Margot Stubbs, ‘Feminism and Legal Positivism’ (1986) 2 Australian Journal of Law and Society

Mary Jane Mossman, ‘Feminism and Legal Method: The Difference It Makes’ (1987) 3 Wisconsin Women's Law Journal

Margaret Davies, ‘The Law Becomes Us: Rediscovering Judgment’ (2012) 20 Feminist Legal Studies

Max Radin, ‘Statutory Interpretation’ [1930] Harvard Law Review 878

Michael E Somlimine and Susan E Wheatley, ‘Rethinking Feminist Judging’ (1995) 70Indiana Law Journal

Ralph Sandland, ‘Between ‘”Truth” and “Difference”: Poststructuralism, Law and The Power of Feminism’ (1995) 3 Feminist Legal Studies

Richard H Pildes, ‘Forms of Formalism’ (1999) 66 The University of Chicago Law Review

Richard A Posner, ‘Formalism, Realism, and Interpretation’ (1986) 37 Case Western Reserve Law Review

Robin West, ‘Jurisprudence and Gender’ (1988) 55 The University of Chicago Law Review

Rosemary Auchmuty and Karin Van Marle, ‘Special Issue: Carol Smart’s *Feminism and the Power of Law’* (2012) 20 Feminist Legal Studies

Rosemary Hunter, ‘Analysing Judgments from a Feminist Perspective’ (2015) 15 Legal Information Management

Rosemary Hunter, ‘Can *feminist* judges make a difference?’ (2008) 15 International Journal of the Legal Profession

Rosemary Hunter, ‘Introduction: Feminist Judgments as Teaching Resources’ (2012) 46 Oñati Socio-Legal Series

Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’ (2015) 68 Current Legal Problems

Rosemary Hunter, ‘The Feminist Judgments Project: Legal Fiction as Critique and Praxis’ (2015) 5 International Critical Thought

Rosemary Hunter, ‘The Power of Feminist Judgments’ (2012) 20 Feminist Legal Studies
Sharon Elizabeth Rush, ‘Feminist Judging: an introductory essay’ (1993) 2 Southern California Review of Law and Women's Studies

Shai Dezinger et al, ‘Extraneous factors in judicial decisions’ (2011) 17 PNAS

Susan H. Williams, ‘Feminist Legal Epistemology’ (1993) 63 Berkley Women’s Law Journal

Susan M Armstrong, ‘Is Feminist Law Reform Flawed? Abstentionists & Sceptics [2004] Australian Feminist Law Journal

Suzanna Sherry, ‘Civic Virtue and the Feminine Voice in Constitutional Adjudication’ (1986) 72 Virginia Law Review

Suzanna Sherry, ‘The Gender of Judges’ (1986) 4 Law and Inequality

Terence Etherton, ‘Liberty, the archetype and diversity: a philosophy of judging’ [2010] Public Law

Thomas C Grey, 'The New Formalism' [1999] Stanford Law School Public Law and Legal Series

Timothy J Capurso, ‘How Judges Judge: Theories on Judicial Decision Making’ (1998) 29 University of Baltimore Law Forum

Wendy Baker, ‘Women’s Diversity: Legal Practice and Legal Education – A View from the Bench’ (1996) 45 University of New Brunswick Law Journal

William J Brennan, ’In Defense of Dissents’ (1986) 37 Hastings Law Journal

William J Brennan, ‘Reason, Passion, and the Progress of the Law’ [1998] Cardazo Law Review

Parliamentary Reports

House of Lords Select Committee on the Constitution, *Judicial Appointments: follow up* (House of Lords, 7th Report of Session 2017–19, November 2017)

External Reports

Courts and Tribunals Judiciary, ‘Judicial Diversity Committee of the Judges’ Council – Report on Progress and Action Plan 2018’ (Courts and Tribunals Judiciary, 2018)

British Council, ‘Gender Equalty and Empowerment of Women and Girls in the UK’ (British Council, 2016)

Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1

Justice, ‘Increasing Judicial Diversity’ (Justice, April 2017)

Lord Chief Justice of England and Wales and Senior President of Tribunals, ‘Judicial Diversity Statistics 2018’ (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2018)

Conference Papers

Baroness Brenda Hale of Richmond, ‘Judges, Power and Accountability Constitutional Implications of Judicial Selection’ (Belfast, Constitutional Law Summer School, 2017)

Baroness Hale of Richmond, ‘A Minority Opinion? Maccabean Lecture in Jurisprudence’ (British Academy Lecture, 2007)

Lord Neuberger, President of the Supreme Court, ’Some thoughts on Judicial reasoning across jurisdictions’ (Mitchell Lecture, Edinburgh, 11th November 2016)

Rosemary Hunter, ‘Feminist Judgments and Feminist Judging: Feminist Justice?’ (Feminist Justice Symposium, University of Ulster, June 2010)

T Bingham, ‘The Judges: Active or Passive?’ (British Academy Lecture, 2005)

Conference session

Professor Rosemary Hunter: The Feminist Judgments Project, SOAS University of London https://www.youtube.com/watch?v=kE4OHu3J3EU&t=215s

Blogs

Caoilfhionn Gallagher QC, ‘The Daily Mail's latest insult: a Supreme Court Justice who is "a feminist" and was instrumental in the crafting of the Children Act 1989’(https://insights.doughtystreet.co.uk/post/102dsgk/the-daily-mails-latest-insult-a-supreme-court-justice-who-is-a-feminist-and-w, Doughty Street Chambers, November 2016)
Professor Kate Malleson, ‘Judicial Diversity Initiative’ (*Judicial Diversity Initiative*, 2018) < https://judicialdiversityinitiative.org > 1st September 2018

Rosemary Hunter, ‘The Feminist Judgments Project’ (*UKSC Blog*, 17th January 2010) < http://ukscblog.com/the-feminist-judgments-project/> accessed September 1st 2018
UKSC, ‘The Politics of the Judiciary’ (*UKSC*, 2011) ‘http://ukscblog.com/the-politics-of-the-judiciary/ accessed September 1st 2018

Newspaper Articles

Erika Rackley, ‘How feminism could improve judicial decision-making’ *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

James Slack, ‘Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis’ *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed 17 Oct 2018

Michaela Witborn, ‘Female judge asked to disqualify herself due to suspected 'feminist' and 'leftist' views’ *Sydney Morning Herald* (October 2014) < https://www.smh.com.au/national/nsw/female-judge-asked-to-disqualify-herself-due-to-suspected-feminist-and-leftist-views-20141012-114vrj.html > accessed 1st September 2018

Sarah Crowther, ‘Criticising judges: a risky business’ The Law Society Gazette (3rd June 2014) https://www.lawgazette.co.uk/practice-points/criticising-judges-a-risky-business/5041481.article >

Insight Articles

Kate Mulvaney-Johnson, Thomson Reuters, ‘Judges’ (Thomson Reuters, 2018, Insight Article Westlaw UK)

Websites

British Council, ‘What are the SDGs?’ (*British Council*) <https://www.britishcouncil.org/sustainable-development-goals/what-are-they> last accessed 1st September 2018

Videos

First 100 Years, *The Life and Legal Career of Baroness Hale* (LexisNexis, 2017, https://www.youtube.com/watch?v=ZokbQ4e312M)

Tweets

The Secret Barrister, “All lawyers are members of legal societies. I'm a member of Criminal Bar Association - should that stop me being a crim judge?” *Twitter* 3 Nov 2016, URL: https://twitter.com/BarristerSecret/status/794319131105513482, Last Accessed 17 Oct 2018.