

Feminist Judgments

From Theory
to Practice

Edited by

Rosemary Hunter

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Erika Rackley



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FOREWORD

Is it possible to be both a judge and a feminist? Feminism involves the belief both that women are the equals of men and that the experiences of women are as much part of the common experience of mankind as are the experiences of men. The first belief is normative. It shapes our view of what the law should be. The second belief is empirical. It shapes our view of reality. It is no longer possible to assert the opposite of either belief: that the law should assign an inferior status to women or deny them the same rights as men; or that the only reality is the reality of men's experience or interpretation of the world around them. But of course it is possible to assert that the substance and practice of the law do not (yet) measure up to either of them.

So what difference would it make if there were more feminist judges? We take it as given that all judges have to work within their judicial oaths: to 'do right to all manner of people after the laws and usages of this realm without fear or favour affection or ill-will'. They cannot have an 'agenda' to shape the law to their own design. But they can certainly bring their own experience and understanding of life to the interpretation or development of the law or to its application in individual cases.

We do not have many women judges in the higher, law-shaping courts. We have even fewer judges, whether men or women, who are prepared to call themselves feminists. So it is intriguing, to say the least, to read how a group of feminist scholars would have reasoned their decisions in a selection of well-known cases both old and new. Each of the authors has made an honest attempt to write a judgment using the ordinary conventions of judgment-writing and the materials which were available at the time.

Three things stand out. First, it is remarkable how plausible they mostly are, not only as judicial writing but also as examples of how a different judgment might properly have been written in that case and at that time. Secondly, it makes such a difference how the story is told. Feminist judges will take different facts from the mass of detail to tell the story in a different way, to bring out the features which others discard, and to explain the features which others find difficult to understand. The third is context. Feminist judges will set the story in a different context, a context which they understand but others may not.

Reading this book ought to be a chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world. It is certainly a chastening experience for any judge who, like me, believes herself to be a feminist. 'Could do better' is the mark which some of the authors have given to my own best efforts.

There are always cases on which feminists can have two views. Provocation is the clearest example. Unless it is judged by objective standards, men who kill their women partners simply for making fun of them might 'get off' with a manslaughter verdict. But if it is, women who kill their partners after years of abuse might not 'get off' unless they can show some recognised mental disorder. How demeaning to have to ascribe the woman's reaction to a life which anyone would find intolerable as a mental disorder! But how unjust if a man whose life is very far from intolerable can claim an excuse without showing any mental disorder at all!

There are other cases in which the result is easier but the route to getting there is not. There are cases here in which I would have loved to be able to go the extra mile and write the judgment which the feminist 'judge' has written. Sometimes I did not because it was more important to reach the same result by a route with which the whole court could agree. Sometimes I did not because of the huge practical implications, which might actually imperil the decision if they were exposed. Sometimes I did not because I had not seen the case in that way.

If lawyers and judges like me have so much to learn from reading this book, then surely other, more sceptical, lawyers and judges have even more to learn. I suspect that it has also been quite a steep learning curve for most of the authors. But other scholars, and not only feminists, must also be fascinated by the window it opens onto the process of judicial reasoning: not the straightforward, predetermined march from A to B of popular belief, but something altogether more complicated and uncertain. And anyone will find it a very good read.

Brenda Hale

15 March 2010

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