‘Can and Should Judges be Feminists?’: An Analysis of Feminist Judging.

The law is inherently gendered and its application fundamentally flawed. The objective standard of the law and the myth of judicial detachment serve only to prevent judges from exercising feminist values while preserving the status quo. Accordingly women are not afforded equal protection under the law which is unacceptable; feminist judges could play a significant role in addressing this imbalance.

This article assesses whether or not judges can be feminists and if so, whether they should be. In illustrating the need for feminist judges I consider the failings of the law and its application; before refuting both theoretical and practical reasons why “feminism” and “judging” should be viewed as mutually exclusive.

To conclude I assert that feminist judges are necessary to ensure genuine equality in the legal system. Moreover there is no convincing reason to not consider feminist values in judicial decision making. Accordingly there are no barriers preventing judges from being feminists; in fact judges strive to give effect to feminist values.

Key Words: Feminism; Judging; Rape; Feminist Judgments Project; Dworkin-Hart Debate
Introduction

Rackley poses two questions, “Can judges be feminists” and “Should judges be feminists”.\(^1\) Unfortunately for many the answer to both is easy – no.\(^2\) There is an understanding, accentuated by the “post-feminist” narrative of various figures in media and academia\(^3\), that the law is as it should be. A “gender neutral” framework applied by a judiciary that remains detached and disengaged in order to apply the law fairly.\(^4\) However this serves only to divert attention from the reality of where the power lies.\(^5\) In practice the law has proven to be inherently gendered\(^6\) and judges often find themselves in a position where existing legal rules provide no answer; as such they are forced to turn to “their own sense of justice” to reach a decision.\(^7\) In these “hard cases” the “pale and male”\(^8\) judiciary of the UK inevitably base their opinion on their own life experiences and personal values; without consideration for the female perspective.

Baroness Hale, the solitary female justice in the UK Supreme Court suggests that these scenarios demand “a diversity of perspectives” in order to get the “best possible results”.\(^9\) As such what is truly controversial is not the possibility of a feminist judge but the fact that the judiciary is currently unable to guarantee equality for females as the “objective” view of the

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2 Ibid
3 Kathryn McNeily, “The Illusions of Post-feminism, Ghosts of Gender and the Discourses of Law” (2012) 1(2) Feminists@Law 1 <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/27> accessed 24th December
5 Ibid n 3 2
6 Catharine MacKinnon, Feminism, Marxism, Method and the State [1983] 8 Signs UCP 4 644
7 Ibid n 1
8 Erina Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 7
9 Jennifer MacLeod, “Resistance to Diversity Among Judges is Misguided” (3 November 2011) <http://www.theguardian.com/law/2011/nov/03/resistance-diversity-judges-misguided> accessed 22nd December
law is a proxy for the male perspective. Feminist values must be upheld by the judiciary in order to reach a fair judgment worthy of Dworkin’s Hercules.

In this article I will first illustrate the need for feminist judges; the manmade nature of positivist law means that “the law sees and treats women the way men see and treat women”. The illusion of a gender blind legal system perversely inhibits equality; facilitating a law that disadvantages women, especially in areas where they are disproportionately affected such as rape. Moreover, the law is dispensed by a predominately male judiciary who lack empathy for the female experience, effectively preventing the delivery of a fair judgment in gendered issues – as demonstrated in the decision of R v A. I will then assess whether a judge can be a feminist by exploring the Hart-Dworkin debate, the Feminist Judgments Project and the practical realities of implementing feminist values at court. The conclusion I shall arrive at is that the roles of “judge” and “feminist” are by no means mutually exclusive. Moreover judges should strive to give effect to feminist values, acknowledging the duality of human kind in order to reach the appropriate decision in the most suitable manner in any given case; offsetting the gendered nature of the law itself.

10 Ibid n 6 658
11 Ronald Dworkin, Law’s Empire (1986, Hart) 257
12 Ibid n 6 644
13 Catharine Mackinnon, Feminism Unmodified: Discourses on Life and Law (1987, HUP) 87
15 Ibid n 7 27
16 R v A (No 2) [2001] UKHL 25
17 The FJP is a research project in which a group of feminist scholars have written alternative judgments to a number of cases in English law.
18 Bertha Wilson, Will Women Judges Really Make a Difference? (1990) 28 Osgoode Hall L J 3 521
Should Judges be Feminists?

i) The Masculine Origin of Law and its Consequences

Positivist law asserts that there are no necessary connections between the legal domain and the moral domain, rejecting the opinions of natural law theorists who would suggest that the law is sourced from an “inner morality” or a divine being. Accordingly law must have been engineered by human kind or – more accurately – mankind. Indeed MacKinnon states that “the law sees and treats women the way men see and treat women” precisely because the law is largely a male construct – “No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men live.” The law on rape for instance, an offence which disproportionately affects women, was largely established before women were able to vote and written by the gender that are predominately responsible for rape and sexual assault crimes. Accordingly the law was conceived by those who share the same social experience of being “affirmed by the aggressive initiation of sexual interaction” and in ignorance of the perspective of the usual victim. Feminist judges can ensure this imbalance does not lead to an unjust decision at court.

Indeed the legacy of women’s subordination and presumptions about female sexuality has consistently haunted legal discourse. As a result women are essentially forced to compete

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21 Ibid 318
23 Ibid n 6
24 Ibid n 21
25 Ibid n 14
27 Ibid
28 Ibid
29 Ibid n 14 40
against a stacked deck. A noticeable example is the fact that marital rape was not a crime until 1994 with the introduction of the Criminal Justice and Public Order Act 1994; essentially giving legal effect to the archaic notion that “rape is sex with a woman who is not yours” and that a woman’s autonomy to choose to engage in intercourse is stolen from her after marriage. In the same vein, only with the adoption of s32 of the Criminal Justice and Public Order Act 1994 was the requirement that judges in sexual offence trials “warn the jury that a woman’s evidence alone, in the absence of independent corroboration, must be treated with caution” abolished.

Even with the removal of such “doctrinal debris”, the gendered nature of the law prevails; consider the implementation of the Sexual Offences Act 2003, the largest overhaul of sexual offences in over a century. While it is fairly uncontroversial to state that the reformed legislation was an improvement on the “archaic”, “incoherent” and “discriminatory” “patchwork quilt of provisions” that it succeeded, it still has its flaws. The reformed law states that rape consists of “penetration of the vagina, mouth or anus of another person” with a penis without consent or reasonable belief in consent. In s74 consent is held to be given by “a person…if he agrees by choice and has the freedom and capacity to make that choice.” Despite the statutory definition, empirical evidence has demonstrated that the perceived definition of “consent” can vary wildly. Archard in his study of sexual conventions states

31 Ibid n 6
32 Ibid n 6
33 Linda Jackson, Marital Rape: A Higher Standard Is in Order (1994) 1 Wm & & Mary J Women & L 1 214
34 Ibid n 14 24
35 Joanne Conaghan, Law and Gender (Oxford, OUP 2013) 113
38 Ibid 1
39 David Archard, “A Nod’s as Good as a Wink”: Consent, Convention and Reasonable Belief (1997) 3 Legal Theory 3 285
that “men consistently read behaviour in more sexual terms than do women”,\textsuperscript{40} for example an invitation for coffee is often misconstrued as consent.\textsuperscript{41} It may appear obvious that simply because sex may follow on from an invitation to coffee, acceptance of such an invitation is not the equivalent of consent.\textsuperscript{42} However this miscommunication between genders means that a male may feel he has been granted consent when in fact it has been withheld. Despite this rift of opinion, the statute allows for “reasonable belief” in consent as a defence to a charge of rape,\textsuperscript{43} without making it clear to “whom the belief is reasonable and why”.\textsuperscript{44} The Whitepaper, “Protecting the Public” suggests the standard of the “objective third party”\textsuperscript{45} but as illustrated perceptions of consent vary, making objectivity difficult. MacKinnon is of the opinion that this renders that statute “one sided: male sided”\textsuperscript{46} and consent itself as a fundamentally flawed concept engineered under conditions of inequality\textsuperscript{47} that concurrently prevents women from obtaining a fair trial.

Archard refrains from going as far as MacKinnon who seems to suggest that women can only “acquiesce” to sex”.\textsuperscript{48} While I agree with him that women are able to give consent both verbally and through non-verbal conventions,\textsuperscript{49} MacKinnon’s point does carry some weight. From a Foucauldian perspective it could be said that the term “objective third party” diverts attention from what is in reality a gendered practice.\textsuperscript{50} Accordingly the concept of gender neutrality serves only to perpetuate the myth that equality rhetoric need not be reiterated but

\textsuperscript{40}Ibid
\textsuperscript{41}Ibid n 14 28
\textsuperscript{42}Ibid n 41 285
\textsuperscript{43}S1 Sexual Offences Act 2003
\textsuperscript{44}Sharon Cowan, “Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape” in Vanessa Munro and Carl Stychin (eds), Sexuality and The Law (Routledge, 2007) 61
\textsuperscript{45}Ibid 62
\textsuperscript{46}Ibid 61
\textsuperscript{47}Ibid
\textsuperscript{48}Ibid n 41 283
\textsuperscript{49}Ibid 290
\textsuperscript{50}Ibid n 3 2
“simply breathed”\textsuperscript{51}. Feminist judges are needed to highlight that this is not the case by refusing to endorse male interests disguised as human interests\textsuperscript{52} and ensuring the female perspective is given equal consideration.

Section 1(2) of the statute is somewhat reassuring, indicating that the steps taken by A to ascertain whether B consents are relevant to whether or not a belief in consent was reasonable. However the statute also states that “all circumstances” can be relevant. The white paper expands upon this declaration, indicating that the jury should “have to take into account the actions of both parties, the circumstances in which they have placed themselves and the level of responsibility exercised by both”.\textsuperscript{53} This suggests that the jury is to view rape as a “zero sum game”\textsuperscript{54}; any responsibility borne by the complainant is to be detracted from the culpability of the defendant. Again it is a “male-centred” paradigm that is utilised as the objective standard\textsuperscript{55}; emphasising women as “sexual gatekeepers”\textsuperscript{56} who are responsible for whatever may occur. As Box states, such an application of the law is as ridiculous as assessing the liability of bank robbers by focusing on the precautions taken by the bank.\textsuperscript{57}

From the examples above it is clear that although there has been some progress, the law remains skewed in favour of the male defendant. The objective standard is in fact, “an extremely smart trick”\textsuperscript{58} and serves as a proxy for the masculine perspective. However it is possible for a judge to interpret these provisions in a manner that allows room for the duality of human kind\textsuperscript{59} by incorporating the female perspective. The fact that the law is gendered does not prevent a feminist from being a judge; rather it reinforces the need for a judge to be

\textsuperscript{51} Rosalind Coward, Sacred Cows: Is Feminism Relevant to the New Millennium? (London: Harper Collins, 1999) 7
\textsuperscript{52} Ibid n 19 11
\textsuperscript{53} Ibid n 44 63
\textsuperscript{54} Ibid
\textsuperscript{55} Ibid n 14 39
\textsuperscript{56} Ibid
\textsuperscript{57} Ibid n 47 63
\textsuperscript{58} Ibid n 26
\textsuperscript{59} Ibid n 18 521
a feminist. In order to avoid the attitudes and presumptions about females that continue to haunt legal discourse and deliver a fair judgment it is vital that the law is viewed through a feminist lens and interpreted accordingly.

**ii) The Masculine Interpretation of the Law**

Equally as troublesome as the gendered nature of the law is its application in court. The individuals who make up the judiciary, especially in the higher courts, are predominately “male and pale”. For example only 29.4% of County Court judges in Northern Ireland are female with no female judges reaching the High Court. Similarly there is one solitary female justice in the UK Supreme Court, the aforementioned Baroness Hale. Hale has previously expressed disappointment that England and Wales are the fourth least gender diverse legal system in Europe, followed only by Azerbaijan, Scotland and Armenia; even going as far as to state that the “present situation is terrible.”

In the same way as the law itself is portrayed as a “gender neutral” endeavour that guarantees female equality; judges are often afforded the status of “somewhat mystical others”, “independent”, “disengaged” and “dispassionate”. It is comforting to think of them as such, especially considering the power they have to compel obedience and inflict punishment.

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60 Ibid n 14 40
64 Ibid n 65
65 Ibid n 4 32
66 Ibid
However the reality is that judges often “fall back on their own values and perspectives” especially in hard cases where the law itself is unclear.67

The sheer lack of women in the judiciary means that it is unlikely a judge will have a strong awareness of feminist values and accordingly will overlook the female perspective in making a decision. This plays a large part in why a woman’s “real experience of sexual violation” can be deemed, “just sex” in the court room.68 Judges effectively normalise male power by presuming that they are operating with equality. Incorporating feminist values however reveals “masculinity…as a specific position, not just the way things are” and encourages greater thought in both process and procedure.69

The effect of this normalisation is evident in the case of *R v A* (No. 2). The facts of the case were as such: The complainant and respondent were walking together along the towpath of the River Thames. The respondent fell down; the complainant stated that as she went to help him he pulled her to the ground and raped her. In his defence the respondent argued that the sex had been consensual.70 Furthermore he argued that the fact that he had previously had a sexual relationship with the complainant was relevant to the trial at hand.71 As such the question put to the House of Lords on appeal was, “May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 a contravention of the defendant's right to a fair trial?”72

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67 Ibid n 1
68 Ibid n 14 39
69 Ibid n 6 1306
70 Ibid n 16 [18] (Lord Steyn)
71 Ibid [19] (Lord Steyn)
72 Ibid [24] (Lord Steyn)
Section 41 of YJCEA was introduced to prevent sexual history evidence from being adduced at trial for a number of reasons illustrated in McGlynn’s “feminist judgment”.\(^73\) Firstly there is concern regarding what Lees terms “judicial rape”;\(^74\) referring to the objectification of a woman as her “body’s secretions and underclothing are scrutinised [and] her…level of sexual arousal debated without regard to her testimony”.\(^75\) Permitting sexual history evidence to be adduced encourages attacks on the morality of the woman in question. This “condescending, demeaning and indifferent”\(^76\) investigation discourages victims of sexual offences from bringing their attackers to trial as they fear that their own history will be “trawled through and criticised.”\(^77\) Such a result is simply impermissible with the already poor statistics for rape convictions.\(^78\) A feminist judge could reduce the impact of this traumatic experience by allowing the use of video link statements or by generally enforcing a less accusatory tone towards the complainant.

Secondly sexual history evidence is empirically proven to have an adverse impact on the trial at hand.\(^79\) Rapes that conform to the stereotype of being carried out by a, “knife-wielding maniac” unknown to the attacker are likely to be taken seriously.\(^80\) Prior romantic involvement with the attacker however “mitigates the perceived seriousness of the rape;” it is often accepted by the jury that past consent evidences, “a propensity to consent in the present”\(^81\) and that a “scorned lover” may even have a motive for fabricating a rape charge.\(^82\)

\(^73\) Louise Ellison, Commentary on R v A (No 2) in Rosemary Hunter et al, Feminist Judgments: From Theory to Practice (Hart, 2010) 211
\(^75\) Ibid
\(^76\) Ibid n 22 1306
\(^77\) Ibid n 74 212
\(^78\) Ibid
\(^79\) Zsuzsanna Adler, Rape on Trial (Routledge, 1987)
\(^80\) Aviva Orenstein, “No Bad Men!”: A Feminist Analysis of Character Evidence in Rape Trials (1998) 49 Hastings LJ 663 679
\(^81\) Ibid n 14 42
\(^82\) Ibid n 84
These myths do not reflect the reality of rape. As a “large proportion of rape is perpetrated by partners or former partners” it is illogical to allow previous sexual history evidence to be used as a defence.\textsuperscript{83} Such an approach suggests that a woman’s sexual autonomy is reduced with consensual intercourse and accordingly evidence of such is relevant.\textsuperscript{84} Simply put, it is not relevant; as Ellison summarises “consent is a decision, not an emotion or a ‘mind-set’. It is a choice made afresh within the specific circumstances existing at the time.”\textsuperscript{85}

Yet despite the importance of these arguments being acknowledged by the court,\textsuperscript{86} the conclusion reached was that the best course of action was to read down s41 YJCEA utilising the interpretative obligation in s3 of the Human Rights Act 1998.\textsuperscript{87} The reasoning behind the decisions remains “unsatisfactorily obscure.”\textsuperscript{88} Lord Steyn criticises “The old fashioned beliefs” previously held by the court surrounding marital rape and recognises that “generalised, stereotyped and unfounded prejudices ought to have no place in our legal system.”\textsuperscript{89} However he then proceeds to enable these stereotypes so as not to “endanger the fairness of the trial”.\textsuperscript{90} His arguments are self-contradictory and confused; he postulates that “It is true that each decision to engage in sexual activity is made afresh”\textsuperscript{91} but then advocates that it is just “common sense” that a prior sexual relationship may be relevant because, “the mind does not blot out all memories”.\textsuperscript{92} Evidently Lord Slynn and Lord Clyde somehow found this argument compelling as they followed the same line in their own opinions. Only

\textsuperscript{83} Ibid n 74 221
\textsuperscript{84} Ibid 220
\textsuperscript{85} Ibid
\textsuperscript{86} Ibid n 16 [3-4] (Lord Slynn)
\textsuperscript{87} “So far as it is possible to do so, primary legislation…must be read and given effect to in a way which is compatible with the Convention rights”\textsuperscript{88} Ibid n 74 210
\textsuperscript{89} Ibid n 16 [27]
\textsuperscript{90} Ibid [4]
\textsuperscript{91} Ibid [31]
\textsuperscript{92} Ibid
Lord Hope maintained that the “mere fact that the complainant had consensual intercourse with the accused on previous occasions” was irrelevant in considering the alleged rape.  

Madame Justice L’Heureux-Dube commented in the Canadian Case of *R v Seaboyer* that questions of judicial relevance are “particularly vulnerable to the application of private beliefs.” Indeed this seems to be the case; the majority opting to undermine specifically enacted legislation on the basis of “common sense”. The fact that this decision could be reached with such weak justification is a clear indicator that the viewpoint of the complainant and the future impact on women was given little consideration. A report by the Home Office indicates that applications for exemption from s41 YJCEA are brought in roughly 25% of all rape cases. 67% of these applications were successful with *R v A* being referred to in over a third of applications.

### iii) The Role of the Feminist Judge

Evidently there is a need for feminist values to be upheld in court; feminist judges can play a significant role in ensuring that they are. Hale states that she has often brought, “a different perspective to the task of fact-finding” and that the mere presence of a woman can “make it difficult” for male judges to voice views they may otherwise have expressed. Additionally by convincingly articulating their contrasting opinions a feminist judge can lead their learned friends to acknowledge the masculine nature of the “objective standard” and foster a greater consideration for equality.

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93 Ibid [105]  
94 [1991] 2 SCR 577  
95 Ibid [14]  
96 Ibid n 77 209  
97 Liz Kelly et al, Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials (Home Office, 2006) 24  
98 Ibid  
100 Ibid n 26
Hunter warns that having “identified the relevance of gender” the feminist judge must make a conscious effort to avoid decisions that “protect male interests masquerading as human interests.”101 Moreover they must be willing to draw upon personal experience that they may share with female litigants. Male and female judges should “talk with...women to learn how they experience the world”, interacting with women’s organisations and government bodies102 through courses and workshops103. A greater understanding of the female perspective will dispel myths and stereotypes which litter legal discourse. Rejecting these “stock stories”104 which may for example establish rape as a zero sum game105 ensures justice is as accessible to females as it is to men. Accordingly feminist judges can and should make an impact on the legal system; countering the gendered nature of the law itself and ensuring its application in a manner which allows for balanced justice while avoiding illogical outcomes arising from the “myth of rationalism”.106

Can Judges be Feminists?

i) Hart-Dworkin Debate and its Relevance to Feminist Judging

Two scholars in particular have shaped our understanding of modern jurisprudence; namely Hart and Dworkin.107 Their models fundamentally disagree upon what the role of the judge ought to be in “hard cases”, when the issue at hand is not explicitly dealt with by the established law. Hart’s model suggests that judges must utilise “hard discretion” when standards “socially designated as authoritative”, such as the law, run out.108 Dworkin is of the

101 Ibid n 19 11
102 Ibid
103 Ibid n 18 513
104 Ibid n 19 11
105 Ibid n 44 63
opinion that beyond social standards are “morally authoritative” standards and so in a hard case the judge cannot apply his own discretion; he is bound by moral facts.¹⁰⁹

Neither of these models is incompatible with the feminist approach. Under Hart’s model a judge is specifically required to use their own discretion in deciding a hard case – thus enabling the judge to rule according to their feminist values. Dworkin’s model is bound by “moral facts” – judges should seek to emulate “Hercules”, a fantastical judge who can always reach the perfect decision.¹¹⁰ There is clearly a moral obligation for a decision to be made fairly; accordingly I suggest that Hercules must be a feminist. “Gender neutrality” merely enables the dominant masculine perspective. Acknowledging the duality of human kind¹¹¹ and actively incorporating feminist values brings fairness to the court room. Therefore on a strictly theoretical basis there is nothing prohibiting the existence of a feminist judge.

ii) Restrictions in practice and The Feminists Judgment Project

As discussed earlier Judges are expected to be, “independent and impartial”.¹¹² Former Canadian Justice Bertha Wilson states that she was instructed that a judge should not approach a decision, “with preconceived notions about law or policy”.¹¹³ Frankly however the concept of judges as somehow “superhuman...and unbiased” is “totally unreal”.¹¹⁴ As Professor Griffith satirically commented, to be truly neutral a judge must become a, “political, economic and social eunuch and have no interests in the world outside the court”.¹¹⁵

¹⁰⁹ Ibid 5
¹¹⁰ Ibid n 11
¹¹¹ Ibid n 18
¹¹² Ibid 507
¹¹³ Ibid 508
¹¹⁴ Ibid 509
By understanding the reality of judicial decision making, we dispel the majority of criticism pointed at the concept of the “feminist judge”. For example Lord Bingham of Cornhill argues that all decisions should be “legally motivated”,\textsuperscript{116} precluding a feminist judge from implementing their values into the decision making process. This approach portrays feminist judging as an oxymoron\textsuperscript{117} – one cannot have political and social motivations yet judge with dispassion. However the persuasiveness of this argument is crippled by the reality that judicial decision making cannot escape a degree of bias; in fact it is arguably improved by it.\textsuperscript{118} Bingham is defending an understanding of the law that simply does not exist.

As Grear states there is little doubt whether it is possible to be both a judge and a conservative, rather there is a clear trend between the two.\textsuperscript{119} Griffith’s suggests that as a result of their education, training and background the English judiciary in particular has acquired a “strikingly homogenous collection of attitudes, beliefs and principles.” This enables individual judges to apply the law according to their viewpoint and as the results are inevitably similar to their colleagues, label it, “the public interest”.\textsuperscript{120} The idea of a feminist judge is deemed controversial as they may uphold values that lead to a decision that deviates from the accepted norm. However the thought process that leads them to their decision is no different. The feminist judge like any other judge simply applies the law as they understand it according to how they understand the issue at hand. Ergo there is no valid justification for arguing that judges cannot be feminists and vice versa.

The Feminist Judgments Project illustrates that not only is the idea of a “feminist judge” not an oxymoron, but the “alternative rationalities” they propose are “no less compelling in their

\textsuperscript{116} Ibid n 19 15
\textsuperscript{117} Ibid n 107 3
\textsuperscript{118} Ibid n 18 508
\textsuperscript{119} Ibid n 107 2
\textsuperscript{120} Ibid n 117 193
persuasive force and value”,¹²¹ arguably even more compelling in matters such as sexual offences that predominately affect females.¹²² This is illustrated clearly in McGlynn’s judgment on *R v A*. She is quick to acknowledge that “myths”, “assumptions” and “stereotypes” contaminate the law and that the judiciary have played a role in perpetuating these myths.¹²³ Moreover she is concerned about the wider impact the case could have on the success of rape complaints in the future.¹²⁴ It is this wider understanding that is lacking in the original judgment. Accordingly McGlynn reaches the logical conclusion that sexual history evidence is not relevant in the trial.¹²⁵ Furthermore if she is wrong, she argues that a declaration of incompatibility should be issued;¹²⁶ giving the executive the opportunity to decide the importance of the YJCEA, as opposed to the unelected judiciary. The Feminist Judgments Project then is undoubtedly a useful tool to demonstrate how in practice as well as theory, there is no reason why a judge cannot be a feminist and still reach decisions within the remits of the law.

**Conclusion**

I have sought to prove two points in this article. That judges should be feminists and that there is no theoretical or practical reason that a judge could not be a feminist. There is a clear need for judges with an understanding of the female perspective. The law is fundamentally flawed as for the most part it, “sees and treats women the way men see and treat women”.¹²⁷ The concept of an “objective” law is a “smart trick”¹²⁸ that facilitates and distracts from the institutional discrimination of women, failing to provide them with the tools they need to

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¹²¹ Ibid n 107 7
¹²² Ibid n 73
¹²³ Ibid 212
¹²⁴ Ibid 227
¹²⁵ Ibid
¹²⁶ Ibid n 73 227
¹²⁷ Ibid n 73 227
¹²⁸ Ibid n 6 640
¹²⁹ Ibid n 26
achieve justice in areas that disproportionately affect them such as rape. Moreover in the court room the “male and pale” judiciary have consistently failed to give effect to the law in a manner consistent with equality; as evidenced in the decision of \( R \) v \( A \).

Feminist judges can counter these failings. The gendered nature of the law can be tempered by interpreting it with regard for the female perspective; ensuring women are not disadvantaged by statutes implemented to protect them. Moreover by delivering compelling judgments the deceptive, masculine nature of the law can be revealed; encouraging widespread awareness ensuring that the judiciary understands that humanity is dual and factors the female viewpoint into the decision making process. An increased number of feminist judges should lead to a generally fairer application of the law that is a step closer to the calibre of Dworkin’s Hercules.

Finally, there are no convincing reasons why a judge could not implement their feminist values. Modern jurisprudence necessarily allows for a judge to rely upon their own understanding of the world. A feminist judge would be following a similar approach to any other judge with an opinion outside of the court room; the concept of the “superhuman” judge is an unattainable myth. Indeed the Feminist Judgments Project has evidenced the practical reality of how a judge could implement feminist values whilst remaining entirely within the remit of the law. Thus I must conclude in answer to Rackley’s questions that the roles of “judge” and “feminist” are certainly not mutually exclusive and to achieve equality under the law judges should strive to give effect to feminist values.

\(^{129}\) Ibid n 14 37  \(^{130}\) Ibid n 18 521  \(^{131}\) Ibid n 11  \(^{132}\) Ibid n 107 2  \(^{133}\) Ibid n 18 509  \(^{134}\) Ibid n 1
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