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## **The Master's Tools? A Feminist Approach to Legal and Lay Decision-Making**

*Vanessa E Munro*<sup>1</sup>

It is neither possible, nor desirable, within the confines of this chapter to purport to offer any kind of 'instruction manual' for doing feminist legal research. Instead, my aim in the following discussion is to give a brief sketch of key theoretical contributions that feminist analyses have made to our understandings of, and expectations in relation to, law and legal process.<sup>2</sup> Having done so, I explore some of the ways in which feminist methods can be deployed in empirical socio-legal research,<sup>3</sup> and highlight in particular its utility in the context of studying the parameters, content and dilemmas of lay (and quasi-legal) decision-making. As part of this discussion, I also draw attention to some of the tensions that can arise in meeting the demands of access and impact associated with this genre of research whilst preserving the critical and deconstructive spirit of feminism.

### A Tentative Mapping of (Some) Feminist Theoretical Terrain

This chapter inevitably starts with a hefty disclaimer: there is no such thing as a unified feminist jurisprudence nor a universally shared feminist legal method. Aligned under the banner of modern feminism are a diversity of perspectives regarding the causes and consequences of unequal gender power relations, the ways in which the law and state have played a role in their creation and maintenance, and the most effective strategies for their eradication.

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<sup>1</sup> Professor of Law, University of Warwick. I am grateful to the ESRC and Nuffield Foundation for funding the research discussed in this chapter, and to Louise Ellison, Sharon Cowan and Helen Baillot without whose collaboration the projects would not have been possible.

<sup>2</sup> For more detailed discussion of the contribution of feminist accounts of knowledge and epistemology to the research process within the social sciences, see, for example, S. Hesse-Biber & M. Yaiser (eds.) *Feminist Perspectives on Social Research* (Oxford: Oxford University Press, 2004), G. Letherby *Feminist Research in Theory and Practice* (Oxford: Oxford University Press, 2003), or C. Ramazanoglu, *Feminist Methodologies: Challenges and Choices* (London: Sage, 2002).

<sup>3</sup> For a broader discussion of the application of different methods to 'feminist' social science research, see S. Reinharz, *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992), and J. Ribbens & R. Edwards, *Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives* (London: Sage, 2009).

For some feminist commentators, women's disproportionate exclusion from positions of political, economic and social power, and their concomitant relegation to private and domestic spheres, reflects an historical legacy of patriarchal privilege that is gradually being eroded by initiatives for equality and non-discrimination. That this is so, proponents argue, is evidenced – amongst other things – by the increasing numbers of women securing positions of power within the public sphere. But for other feminists, there are more entrenched systems of structural disempowerment that continue to operate notwithstanding some women's ability to successfully 'cheat' the system. Assimilation of women into an unchanged male-defined sphere, or as Iris Young puts it "coming into the game after it has already begun, after the rules have been set, and having to prove oneself according to those rules and standards," is not a tenable blueprint for genuine equality.<sup>4</sup> Instead, what is required, they argue, is a radical deconstruction of the boundaries between public and private spheres and a de facto revolution in the dynamics of gender power.<sup>5</sup> Whilst greater recognition and valuation of women's biological and existential connection to care has been posited by some feminists as the route to securing such empowerment for women,<sup>6</sup> for others any valorisation of this propensity for care serves only to entrench women's disempowerment, tying them to the domestic sphere and affording them status only on the basis of *men's* valuation of their care-giving.<sup>7</sup>

Under-cutting these debates, moreover, have been conflicting understandings of the nature of power and a diversity of perspectives regarding the ways in which gendered experiences are reinforced, challenged or overshadowed by myriad 'other' identity markers (including race, class, disability and sexual orientation),<sup>8</sup>

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<sup>4</sup> I. Young, *Justice and the Politics of Difference* (New Jersey: Princeton University Press, 1990) at 164

<sup>5</sup> See, in particular, C. MacKinnon, *Feminism Unmodified: Discourses in Life and Law* (Cambridge: Harvard University Press, 1987); C. MacKinnon, *Toward a Feminist Theory of State* (Cambridge: Harvard University Press, 1989). Also A. Scales, 'The Emergence of a Feminist Jurisprudence' (1986) 95 *Yale Law Journal* 1371; and M. Minow, 'Justice Engendered' (1987) 101 *Harvard Law Review* 10.

<sup>6</sup> C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982); V. Held, *Feminist Morality: Transforming Culture, Society and Politics* (Chicago: University of Chicago Press, 1993).

<sup>7</sup> C. MacKinnon, above note 5; R. West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1; D. Rhode, *Justice and Gender* (Cambridge: Harvard University Press, 1982).

<sup>8</sup> K. Crenshaw, 'Demarginalising the Intersectionality of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in A Phillips (ed.), *Feminism and Politics* (Oxford, Oxford University Press, 1998); A. Harris, 'Race and Essentialism in Feminist Legal

as well as by our differential levels of exposure to vulnerability and divergent opportunities to access institutional and inter-personal resources for resilience.<sup>9</sup>

But to focus too much on these feminist ‘fault-lines’ risks disintegrating any basis for collective action and dismissing the experientially powerful connection that many women share with others on account of their gender. Thus, much recent feminist work has focussed instead on identifying points of commonality in the midst of this diversity<sup>10</sup> and on highlighting the extent to which contemporary feminism can rarely be neatly classified exclusively within the bounds of any one conventional ‘liberal’, ‘cultural’, ‘radical’ or ‘postmodern’ typology.<sup>11</sup> In line with this, I have previously argued that it *is* possible to identify certain ‘resemblances’ that unite, albeit at times precariously, and often strategically, what are broadly (self) identified as feminist approaches to law and legal reasoning.<sup>12</sup>

Focussing on the use of feminist legal methods to examine processes and outcomes of lay decision-making, in the remainder of this chapter, I will draw attention to, and build upon, three such feminist ‘resemblances’ in particular: namely, (1) a rejection of abstraction and commitment to the importance of context; (2) a sceptical approach towards claims of law’s rationality and neutrality; and (3) a reflective attitude towards the role of power and the limits of law as a mechanism of social control. But before exploring how these basic premises impact upon, and frame the application of, feminist legal methods in particular contexts, I will first say a little more about what they each entail.

### 1. A Suspicion of Abstraction, and Commitment to Context:

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Theory’ (1990) 42 *Stanford Law Review* 581; M. Mahoney, ‘Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon’ (1993) 5 *Yale Journal of Law and Feminism* 217; M. Frug, *Postmodern Legal Feminism* (London: Routledge, 1992).

<sup>9</sup> For further discussion, see in particular, M. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 (1) *Yale Journal of Law and Feminism* 1.

<sup>10</sup> N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 2008); J. Conaghan, ‘Re-Assessing the Feminist Theoretical Project in Law’ (2000) 27(3) *Journal of Law and Society* 351.

<sup>11</sup> See, for example, M. Davies & V. Munro (eds.) *The Research Companion to Feminist Legal Theory* (Aldershot: Ashgate Publishing, 2013).

<sup>12</sup> V. Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Oxford: Hart Publishing, 2007).

Common to much feminist work is an insistence that social and legal problems cannot be understood by techniques that require abstraction - not only because such abstraction obscures important detail about the concrete particularities of people's daily lives, but because it can disguise the operation of problematic power relations. Key thinkers in mainstream liberal political theory - including John Rawls<sup>13</sup> and Ronald Dworkin<sup>14</sup> - have been criticised from a number of quarters for developing sterile frameworks for justice and rights that require the removal of social actors from their everyday environments.<sup>15</sup> In contrast, a prominent theme amongst many feminists has been the need to attend to context, to situate legal problems and to understand their purported solutions within the concrete relationships and situations that give them meaning. This requires paying attention to the law in action - how it is interpreted and applied - as much as, if not more than, the law in theory. It demands embracing the complexities and 'messiness' of social interaction, and an understanding of the human individual as a fundamentally relational entity. This is not to say that context and connection are universally perceived as empowering: relational constructions of femininity have been a source of both admiration and denigration, and the socio-economic disadvantages associated with women's caring responsibilities have been significant. But it is to insist that living is a social phenomenon: relationships shape our identities, communities frame the parameters and meanings of our conduct, and, inevitably, the spaces, functioning and potential of law as a social phenomenon are determined by this.<sup>16</sup>

## 2. A Rejection of the 'Myths' of Legal Rationality and Neutrality:

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<sup>13</sup> J. Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1971).

<sup>14</sup> R. Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1985).

<sup>15</sup> M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); A. MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988); S. Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989); C. Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988).

<sup>16</sup> R. West, above note 7; E. Frazer & N. Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (Hemel Hempstead: Harvester Wheatsheaf, 1983).

It is also a common theme in much feminist legal theory that formalist assertions of law's operation as a closed, coherent and distinctive system of reasoning, with its own language and methods, should be rejected. Alongside prominent Critical Legal Studies scholars,<sup>17</sup> many feminists have insisted that the law, rather than being a seamless web of principles awaiting discovery through legal reasoning,<sup>18</sup> is a patch-work of politically motivated choices, selected on the basis of their ability to support the status quo of (gender) power relations. Legal decision-makers do not neutrally apply legal rules or interpret broader principles to decipher inevitable outcomes; on the contrary, they make partial (and often self-interested) appraisals, which are retrospectively cloaked in the trappings of neutrality through constructed doctrines of precedent and natural justice.

Building upon this, feminist work has often been marked by a commitment to uncover the politics of law's operation, to highlight the biases of its agents, and to deconstruct the systems and discourses that disguise this as legal rationality. Striking incarnations of this critique can be found, for example, in a range of jurisdictionally-specific 'feminist judgment projects' in which commentators have taken on the role of 'feminist judge', using the rules and precedents available at the time to re-visit leading cases and explore the extent to which, with different choices, they might have been decided more progressively. Such projects, though operating from the 'inside' of law by adopting its pretensions to precedent and inductive reasoning, provide a powerful counter-illustration of the malleability of legal forms and expose the extent to which, behind a façade of neutrality and rationality, lies a complex amalgam of power, privilege and partisan perspectives.<sup>19</sup>

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<sup>17</sup> D. Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997); R. Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561.

<sup>18</sup> c.f. R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

<sup>19</sup> See, generally, the Women's Court of Canada; Also R. Hunter, C. McGlynn & E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010); H. Douglas, F. Bartlett, T. Luker & R. Hunter (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart Publishing, 2015); K. Stanchi, L. Berger & B. Crawford (eds), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge: Cambridge University Press, 2016); M. Enright & A. O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Oxford: Hart Publishing, 2017).

### 3. A Mindfulness of the Power, and the Limits, of Law:

Though feminist legal theorists, by definition, are interested in the ways in which law shapes and legitimates patterns of gender relations, there is a shared ambivalence regarding the extent to which law as a form of social ordering has the capacity to create meaningful change. For the most trenchant critics of the liberal state, the law is deeply implicated within patriarchal structures, operating to legitimate and disguise the myriad violent consequences that they etch upon the lives, and bodies, of women.<sup>20</sup> And yet, at the same time, the impulse to resort to the law – to use ‘the masters’ tools’<sup>21</sup> – in order to campaign for and bring about reform has a measure of irresistibility. Whether selective critical amnesia or a pragmatic concessionary tactic, feminists have typically been reluctant to abandon altogether what Carol Smart referred to as ‘the siren call of law’,<sup>22</sup> and have often continued to engage with the state in pursuit of legal reforms. But, for many feminists, this process has been marked by an appreciation of the dangers of ceding too much power to law as a form of knowledge and control. It has been emphasised that feminist-driven reforms, even when *prima facie* achieved within legal frameworks, are at perpetual risk of co-option, capture or undoing by more regressive political, economic and social forces in the process of their translation and application; and that the attendant encroachment of legal authority upon women’s lives may have damaging effects.<sup>23</sup>

#### Lay Decision-Making: A Feminist Testing Ground

Feminists have engaged with the ‘legal’ in a variety of contexts and spaces, but lay decision-making provides a particularly apt terrain for feminist analyses that

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<sup>20</sup> C. MacKinnon, above note 5.

<sup>21</sup> A. Lorde, *Sister Outsider: Essays and Speeches* (Berkeley: Crossing Press, 2007).

<sup>22</sup> C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 160.

<sup>23</sup> See, for example, K. Bumiller, *In an Abusive State: How Neoliberalism Appropriates the Feminist Movement* (Durham: Duke University Press, 2008); V. Munro, ‘Violence Against Women, ‘Victimhood’ and the (Neo)Liberal State’ in M. Davies & V. Munro (eds), above note 11; V. Munro, ‘Shifting Sands: Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales’ (2017) *Social and Legal Studies*; but c.f. J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006).

emphasise the relevance of concrete context, the discretionary nature of legal outcomes, and the ways in which 'non-legal' factors influence the application and impact of legal rules. In the rest of this chapter, therefore, I focus on a series of studies that my colleagues and I have conducted, which were designed to explore and critically evaluate the mechanics, processes and outcomes of lay (or, at most, *quasi*-legal) decision-making in relation to rape, across two distinct areas of legal functioning, namely criminal justice and asylum. In a context in which many feminists have pointed to the regulation of sexuality – both the regimes that determine the parameter of acceptable and unacceptable intrusion, as well as the social tropes about (hetero)sexual desire, mating conventions and (mis)communication that inform them - as a litmus test for gender relations,<sup>24</sup> these studies raise crucial insights about women's embodied experiences under the law, as well as about the ways in which decision-makers cement, enforce, challenge and resist the law's application of patriarchal norms and structures.

In the discussion below, I will first provide a brief account of the research questions, and methods of data collection and analysis, that drove these studies, before moving on to reflect more broadly on the extent and ways in which, consciously or otherwise, they can be characterised as 'feminist'; and on the advantages and disadvantages that such an orientation has brought to bear.

(i) *Jury Decision-Making in Criminal Rape Trials:*

Across a series of three consecutive ESRC funded projects, the first of which was conducted in 2003, my co-investigators and I have explored the ways in which (mock) jurors approach the task of deliberating towards a unanimous verdict in contested rape trials, exposing the factors that influence the content, direction and

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<sup>24</sup> S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975); S. Lees, *Carnal Knowledge: Rape on Trial* (London: Penguin, 1993); C. MacKinnon, above note 5; L. Gotell, 'Rethinking Affirmative Consent in Canadian Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865; L. Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle against Sexual Violence' in A. Powell, N. Henry & A. Flynn (eds.) *Rape Justice: Beyond the Criminal Law* (London: Palgrave MacMillan, 2015); S. Cowan, 'Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape' in V. Munro & C. Stychin (eds.) *Sexuality and the Law: Feminist Engagements* (London: Routledge-Cavendish, 2007).

dynamics of those deliberations. Each of these projects had its own distinctive focus – the first explored the approach taken by jurors to a complainant who was intoxicated at the time of the alleged assault, and examined the extent to which evaluations of credibility and responsibility might be affected by the means by which she became intoxicated, the nature of the intoxicating substance, and the level of the defendant’s intoxication.<sup>25</sup> The second study explored the extent to which providing jurors with ‘myth-busting’ education (through expert evidence or extended judicial direction) might impact the tone and direction of deliberations involving complainants who displayed what might otherwise be regarded as counter-intuitive behaviours, namely, failing to physically resist the attacker, failing to report the attack immediately to the police, and failing to appear emotionally distraught whilst giving testimony in the courtroom.<sup>26</sup> And, most recently, the third study explored whether, and in what ways, the fact of a complainant giving testimony with the benefit of ‘special measures’ (either a screen in the courtroom, a live video-link, or pre-recorded evidence-in-chief) influenced jurors’ perceptions of her credibility and attendant verdict outcomes.<sup>27</sup>

But individually and collectively, these projects were also engaged in the broader enterprise of charting and interrogating the ways in which popular understandings of what rape looks like, expectations in relation to ‘normal’ heterosexual mating and dating behaviour, and attributions of responsibility for sexual (mis)communication influenced the substance and outcome of jury deliberations.<sup>28</sup> Moreover, in a context in which observation of, and research

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<sup>25</sup> E. Finch & V. Munro, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26(3) *Legal Studies* 303; E. Finch & V. Munro ‘The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants’ (2007) 16(4) *Social & Legal Studies* 591.

<sup>26</sup> L. Ellison & V. Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49(2) *British Journal of Criminology* 202; L. Ellison & V. Munro, ‘Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009) 49(3) *British Journal of Criminology* 363.

<sup>27</sup> L. Ellison & V. Munro, ‘A Special Delivery? Exploring the Impact of Screens, Live Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials’ (2014) 23(1) *Social & Legal Studies* 3.

<sup>28</sup> L. Ellison & V. Munro, ‘Better the Devil You Know? ‘Real Rape’ Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberation’ (2013) 14 *International Journal of Evidence & Proof* 299; L. Ellison & V. Munro, ‘A Stranger in the Bushes or an Elephant in the Room? Critical Reflections on Received Rape Myth Wisdom in the Context of a Mock Jury Study’ (2010) 13(4) *New Criminal Law Review* 781; L. Ellison & V. Munro, ‘Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18(3) *Social & Legal Studies* 1.

about the content of, 'real' jury deliberations is prohibited by the Contempt of Court Act 1981, they provided a glimpse into the discursive dynamics of that process, the ways in which jurors communicate and defend their conclusions to peers, the significance of verdict polls, the impact of the presence of a 'strong' foreperson, and the relevance of gender and other socio-demographics.<sup>29</sup>

In each study, a similar method was adopted to simulate and collect deliberation data. Jury service eligible participants were recruited from the general public and asked to observe a real-time re-enactment of one of a series of scripted mini-rape trials that were modified in line with isolated study-relevant variables. Scripts for the trials were created in consultation with a number of criminal justice practitioners, and actors and barristers were recruited to play key roles within the re-enactments. After observing the 'trial', participants were provided with a judicial direction, crafted in accordance with prevailing Bench Book guidance, and then streamed off into juries of 8 to deliberate towards a unanimous, or failing that (and only after 75 minutes) majority, verdict. Deliberations were audio- and video-recorded, and then transcribed for analysis. Elsewhere in this collection, Mandy Burton gives further details regarding the mechanics by which we gathered our deliberation data in these studies, and reflects upon their merits and demerits, as well as their potential to mitigate the chasm of verisimilitude that has often plagued vignette-based simulation studies.<sup>30</sup>

(ii) *Home Office Decision-Making in Asylum Rape Claims:*

Credibility is frequently acknowledged as the first (and most significant) hurdle to be overcome in the process of successfully securing asylum status,<sup>31</sup> and it is

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<sup>29</sup> L. Ellison & V. Munro, 'Telling Tales: Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35(2) *Legal Studies* 201; L. Ellison & V. Munro, 'Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial' (2010) 30(1) *Legal Studies* 74.

<sup>30</sup> For further discussion, see also E. Finch & V. Munro, 'Lifting the Veil: The Use of Focus Groups & Trial Simulations in Legal Research' (2008) 35 *Journal of Law & Society* 30.

<sup>31</sup> International Association of Refugee Law Judges (2013) 'A Guide on the Assessment of Credibility in International Protection Procedures' available at: <http://www.asylumlawdatabase.eu/en/content/international-association-refugee-law-judges-guide-assessment-credibility-international>. For further discussion on the challenges of establishing credibility, see also M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee

well-established that a large proportion of women seeking asylum in the UK will have, or at least will claim to have, experienced sexual violence in the context of, or as part of their reason for, fleeing from their lives in their home countries.<sup>32</sup> Against this background, this project – funded by Nuffield - examined the ways in which asylum decision-makers handle and evaluate claims of sexual violence made as part of women’s claims for refugee status. It explored parallels with the criminal justice system, where presumptions regarding what constitutes a credible victim account are similarly marked by expectations of coherent narratives and complete recall, notwithstanding the disassociative effects of trauma experienced by complainants;<sup>33</sup> but it also highlighted the distinctive ways in which cultural and linguistic factors, and the existence of a ‘politics of disbelief’, may entrench barriers to being heard and believed in asylum decision-making.<sup>34</sup>

The study involved over 100 semi-structured interviews with key stakeholders, including immigration judges, Home Office case officers and presenting officers, solicitors specialising in asylum and immigration, interpreters involved in asylum proceedings, and NGO / support organisations. In addition, we undertook a series of observations of First Tier Tribunal appeal hearings across a number of UK sites, focussing particularly on cases involving female appellants who had previously disclosed an allegation of rape. During these observations, the researcher took detailed notes (often verbatim) of the statements made by Home Office presenting officers and Immigration Judges, as well as counsel for the applicant (where present) and – far more infrequently – the applicant herself. The researcher also recorded her observations regarding the overall environment of the tribunal

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Status Determinations' (2003) 17(3) *Georgetown Immigration Law Journal* 367; D. Bögner, C. Brewin & J. Herlihy, 'The Impact of Sexual Violence on Disclosure during Home Office Interviews' (2007) 191(7) *British Journal of Psychiatry* 75; J. Herlihy, P. Scragg & S. Turner, 'Discrepancies in autobiographical memories-implications for the assessment of asylum seekers: repeated interview study' (2002) 7333 *British Medical Journal* 324.

<sup>32</sup> Asylum Aid, *Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Cases* (London, Asylum Aid, 2011); London School of Hygiene and Tropical Medicine & Scottish Refugee Council (2009) *Asylum Seeking Women, Violence and Health* (London: LSHTM & SRC, 2009); Refugee Council Briefing, *The Experiences of Asylum-seeking Women and Girls in the UK* (London: Refugee Council, 2012).

<sup>33</sup> H. Baillot, S. Cowan & V. Munro, 'Reason to (Dis)Believe? Evaluating the Rape Claims of Women Seeking Asylum in the UK' (2014) 10 (1) *International Journal of Law in Context* 105.

<sup>34</sup> H. Baillot, S. Cowan & V. Munro, 'Hearing the Right Gaps: Enabling & Responding to Disclosures of Sexual Violence within the UK Asylum' (2012) 21(3) *Social & Legal Studies* 269.

centre and hearing room, and the apparent demeanour of, and interaction between, participants. In a number of the cases where tribunal appeals were thus observed, the research team were also able to secure access to surrounding case file documents, including Home Office refusal letters and final tribunal decisions. This provided a valuable context within which to understand the appeal proceedings in the given case, as well as the overall asylum application journey.

The substantive findings of all these studies have been discussed in detail elsewhere, and the aim in this chapter is not to replicate that discussion. Instead, in what follows, I aim to reflect specifically on the ways in which these studies might be seen to be 'feminist' in their orientation, and on the additional insights that this theoretical and methodological approach brought to bear upon their findings. In addition, though, I highlight some of the ways in which their feminist ambitions were frustrated somewhat by the politics and pragmatics of research design, and more broadly by the inevitable tensions of using 'the masters' tools'.

### Mastery, Tools and Methods: Some Feminist Reflections

At the heart of each of these projects was a fundamental commitment to 'asking the woman question'<sup>35</sup> – that is, to uncovering and subjecting to critical scrutiny the ways in which legal frameworks impact upon the lives and experiences of women. Though they often also cast light on the handling and evaluation of men's allegations of sexual violence (which can in themselves be an appropriate subject matter for feminist analysis and insight), women were the primary focus – partly as a consequence of the statistically disproportionate levels of sexual violence perpetrated upon women, and partly because the interconnections between victimisation, (hetero)sexualisation, and femininity ensure that this continues to represent the paradigm of gender power. But – of course – not all research that is interested in women's experiences can, or should, be assumed to be feminist.

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<sup>35</sup> K. Bartlett, 'Feminist Legal Methods' (1989) 103 *Harvard Law Review* 829; L. Finley, 'The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified' (1988) 82 *Northwestern University Law Review* 352.

'Asking the woman question' may be the fundamental starting point for much feminist research, but it is by no means a solely determinative feature: resultant data regarding women's experiences must also be situated within broader contexts of (gender) power relations, and so too the precariousness of the constructions of 'reason' and 'normality' upon which these relations are often legitimised by powerful stakeholders must be subjected to critical scrutiny.<sup>36</sup>

Jurors in criminal rape trials are specifically directed by the judge to apply their 'combined good sense, experience and knowledge of human nature and modern behaviour' (*R v Olugboja* (1981) 73 Cr App R 344) in evaluating the credibility and probative weight of the testimony with which they are presented, and in applying their individual and collective renderings of 'what took place' to determine a defendant's liability. This 'lay' perspective is often juxtaposed against 'legalistic' rationality as part of a broader narrative by which the centrality of the jury to the pursuit of a socially accountable justice is defended. At the same time, however, the unbridled nature of 'popular wisdom' has provoked much anxiety in the sexual offences context where research highlights the existence of problematic public perceptions regarding women's 'appropriate' (that is, non-provocative) sexual and social behaviour, and demanding expectations regarding the 'normal' responses of 'genuine' victims in terms of physical resistance, immediate reporting, and so on.<sup>37</sup> The ESRC projects outlined above track the scale and impact of this 'common sense' understanding of sexual assault on the dynamics and outcomes of jury deliberation. They evidence the limited power of legal doctrine – specifically through the imposition of a test of objectively reasonable rather than subjective belief in consent (s.2 Sexual Offences Act 2003) - to shift the balance of responsibility for negotiating and communicating sexual desire from the complainant to the defendant in the minds of lay decision-makers. Moreover,

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<sup>36</sup> See, further, C. Littleton, 'Feminist Jurisprudence: The Difference Method Makes' (1989) 41 *Stanford Law Review* 751; M. Mossman, 'Feminism and Legal Method: The Difference It Makes' (1986) *Australian Journal of Law and Society* 103; K. Bartlett, above note 35.

<sup>37</sup> M. Burt, 'Cultural Myths and Support for Rape' (1980) 38 *Journal of Personality and Social Psychology* 217; K. Lonsway & L. Fitzgerald, 'Rape Myths' (1994) 18 *Psychology of Women Quarterly* 220; H. Gerger, H. Kley, G. Bohner & F. Siebler, 'The Acceptance of Modern Myths About Sexual Aggression (AMMSA) Scale: Development and Validation in German and English' (2007) 33 *Aggressive Behaviour* 422; J. Temkin & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008).

they highlight the tenacity of jurors' impulse to 'fill in the gaps' in the narratives provided by witnesses, often by relying on personal experiences and unfounded presumptions, and to cushion the excesses of hetero-normative sexuality with tropes regarding the ease with which signals can be misinterpreted as consent.

In the criminal justice context, it has long been debated whether evidence of similar preoccupations on the part of police and prosecutors are best attributed to personal or institutional biases in progression decision-making, or to pragmatic predictions of the likelihood of conviction based upon projections of jurors' likely perspectives in these regards. But what is clear is that such 'common sense justice' infiltrates and informs the bureaucratic machinery of the criminal justice process, and often in ways that reduce the prospects of redress for a number of rape complainants. Though the asylum study referred to above emerges in a quite different political, procedural and probative context, its findings also clearly illustrated the extent to which presumptions regarding gender and cultural norms, as well as the bounded parameters of political activity vis-à-vis 'mundane' sexual aggression, influenced – and often determined - the outcomes of asylum decision-making, irrespective of formal rules and protocols. A lower burden of proof is required in asylum contexts, designed to give applicants the benefit of the doubt, in recognition of the difficulties that are often encountered in providing objective evidence to corroborate narratives of persecution and predictions of future threat. Despite this, and notwithstanding the at least formally non-adversarial structure of first instance and appeal asylum decision-making, this study highlighted parallels with the criminal justice system's handling of rape in relation to the suspicion encountered by complainants who failed to conform to expectations in terms of demeanour, behaviour before or after the alleged attack, ability to provide detailed and consistent retrospective accounts, and so on. A suspicion that was compounded by a political climate – both in the Home Office, and in the UK more generally - in which asylum-seekers are seen as presumptively untrustworthy, and a 'problem' to be managed and contained by state officials.

To this extent, both of these projects transcend the immediate parameters of a focus on women's experiences, and the dynamics of sexual domination

specifically, to contribute broader feminist insights regarding the limited impact of legal doctrine, the scale and impact of discretion and bias in the application of 'legal' decision-making, and the ways in which the operation of legal structures cannot be meaningfully detached from social contexts and political agendas. The asylum research in particular also highlighted – within the confines of an empirical study – the necessity of consciously engaging with the intersectionality of women's gendered experiences of 'violence', 'protection' and 'voice'. But there are other key ways in which a feminist sensitivity to the role and relevance of power, relationality and context also played out in these studies to produce additional insights. More specifically, these studies – in different ways – highlighted the impossibility of detachment and impartiality in the face of others' narratives of abuse, particularly when one is tasked with the responsibility for attributing blame and bringing about life-changing consequences in their light.

The bureaucratic structures of the asylum process, as much as the investigative and adversarial protocols of the criminal justice system, promote the myth of 'professional' distance and deliberative neutrality. For feminists, such pretensions send alarm bells ringing, and these studies should strengthen their volume. In the jury studies, notwithstanding the fact that participants knew that their involvement in deliberations was 'mock', there was considerable evidence that jurors experienced stress as a consequence of observing the trial, negotiating with peers towards a collective verdict, and returning that judgment upon the parties before them. Disbelief was suspended to the extent that several jurors commented on how emotionally difficult they had found the deliberation process, noting that they felt a burden of responsibility for determining the fate of the defendant and complainant, and suggesting – for example – that they "won't sleep tonight" as a consequence. There is every reason to suspect that in a 'real' trial, where jurors are exposed to greater amounts of evidence, much of it potentially graphic and brutal, over an extended period marked by numerous disruptions and delays, and are required to reach a verdict upon which there is no doubt that very real consequences will befall the trial parties, the emotional labour referred to by our

mock participants will be particularly acute;<sup>38</sup> and yet, jurors continues to be selected at random, provided with very little information regarding what is expected of them and directed at the end of their service that to talk about their experiences in the jury room again would be a contempt of court for which they may face punishment. This has ramifications both for the ethical treatment of lay participants within the criminal justice system, and for our appreciation of the ways in which – under such emotional pressure – jurors may become increasingly susceptible to coping strategies that demonise or depersonalise trial participants, or invoke cognitive shortcuts in order to expedite their emotional exposure.<sup>39</sup>

Similarly, in the asylum study, a prominent theme that emerged from the interview data was the extent to which quasi-legal decision-makers, employed by the Home Office to interpret and apply the provisions of the Refugee Convention and associated doctrine but often without formal legal qualifications, struggled to manage the emotional labour involved in being exposed to, and deliberating upon, narratives of abuse on a recurring basis. The institutional and political context in which asylum decision-making takes place, moreover, increased the sense of ‘burn-out’ and ‘compassion fatigue’ exhibited by a number of participants, and threatened to significantly reduce the prospects for justice for individual asylum-seekers. Home Office personnel were seen, in some – but not all – cases to disengage from the specifics of each narrative, viewing them – collectively – as ‘stories’ that should be met with presumptive suspicion. What was also apparent in this study, and amplified when cast through a feminist lens that is mindful of the politicised nature of personal experience and the significance of relationship and community to personal identity, was the ways in which the background of the interpreter in asylum proceedings can have a considerable impact not only upon the applicant’s experience of the process and her prospects for being able to ‘tell her story’ effectively and convincingly, but also upon the interpreter, and his/her emotional well-being in this interaction. Interpreters – many of whom will have come from the same community as the applicant, and may have experienced, or

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<sup>38</sup> N. Robertson, G. Davies & A. Nettleingham, ‘Vicarious Traumatization as a Consequence of Jury Service’ (2009) *48 Howard Journal of Criminal Justice* 1.

<sup>39</sup> L. Ellison & V. Munro, ‘Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process’ (2016) *International Journal of Evidence and Proof*, forthcoming.

known family and friends who experienced, the dynamics of persecution that the applicant recounts – often reported high levels of emotional upset as a consequence of their professional involvement, with several commenting that they had been reduced to tears after hearings. Meanwhile, it was apparent that – for applicants – the cultural and political orientation of the interpreter (whether actual or surmised) made a crucial difference to their ability to recount experiences openly. This served, in many cases, to increase the emotional challenges already experienced by applicants who are being asked (often on a repeated basis) to narrate traumatic events to satisfy others' evaluation, in unfamiliar and frequently intimidating bureaucratic or tribunal environments.<sup>40</sup>

In both contexts, then, when the veil of law's pretence at neutrality and rationality is – at least partially - lifted, the inherently emotional nature of criminal justice and asylum decision-making, for quasi-legal professional and lay participants alike, begins to emerge; and with it arises a raft of questions regarding how best to acknowledge and attend to that emotionality, and support decision-makers in managing it effectively and productively, in ways that ultimately increase rather than reduce the prospects for a just outcome. In these respects, both studies are indebted to, and influenced by, feminist theories and methods, and can be seen to go beyond merely 'asking the woman question' in specific legal contexts, in order to uncover surrounding power dynamics and their relational ramifications.

But there are also some important ways in which these projects perhaps fell short of their feminist methodological ambitions. The primary focus of the Nuffield study was an exploration of the bases upon which adjudicators assessed credibility and made decisions in relation to women's asylum claims. But to the extent that the processes through which this reasoning was channelled also had profound experiential impacts upon both decision-makers and claimants, the absence of women's voices is lamentable. Women's experiences were represented in this study, but they were mediated in interviews through the lens of NGO

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<sup>40</sup> H. Baillot, S. Cowan & V. Munro, 'Second-Hand Emotion? Exploring the Contagion of Trauma and Distress in the Asylum Law Context' (2013) 40 (4) *Journal of Law & Society* 509.

support workers' and others' interpretations, and the paper-based format and intimidating environment of the appeal tribunal entailed that women's voices were rarely directly heard in this forum. The research team took a conscious decision – grounded on ethical and pragmatic considerations – not to conduct interviews with women claimants, but this does diminish the texture with which their experiences can be discerned in the study, and raises important questions about representation, authenticity and voice for feminist purposes. But this is a restriction that also speaks to some of the broader methodological dilemmas – discussed below - that can be faced in conducting feminist empirical legal research, in particular as a consequence of the need to make strategic concessions to gatekeepers, and / or to make the substance of the research 'useful' (which also perhaps entails being palatable) to those with the power to bring about reform.

#### Feminist Dilemmas: Access, Impact and What Lies Between

The power dynamics underpinning empirical research are often complicated. In many cases it involves negotiating with gatekeepers to identify minimally intrusive mechanisms for securing access to required data, and satisfying stakeholder participants of the impartiality of the researchers, the rigour of the analysis process, and the uses to which the resultant outcomes will be put. From the outset, these considerations can jar against feminist critical conventions, requiring an abstraction of research questions from the political context in which they originate, and an assertion of 'neutrality' – or at least a postponement of partiality – within the data collection and analysis process. Feminist researchers are often faced, therefore, with the choice of either being at least partially complicit in reaffirming artificial understandings of the social world, including the processes of engaged social research, or failing altogether to secure the empirical data with which to uncover, challenge – and seek to reform – problematic social behaviours. Navigating through this dilemma may involve a strategic 'softening' of feminist edges. So too, at the end of the research process, whilst the achievement of 'impact' is often a precarious matter embedded within institutional and political vagaries beyond the control of the researcher, maximising 'pathways to impact' may entail – to some extent at least - a re-

packaging of findings into concepts and remedial mechanisms that the 'legal community' already acknowledges, and can more readily digest and action, even where the harms and solutions suggested by the data sit somewhat askew.

In many senses, of course, this is just a replication in the research context of the broader dynamics and challenges encountered in rendering women's perspectives intelligible to powerful (typically male) elites. In the legal environment, these difficulties are amplified, moreover, by the tenacious insistence upon myths of legal rationality, abstraction, and neutrality, which feminist work often deconstructs and yet cannot be allowed to entirely move beyond. And in the legal academy, there is reason to suspect that the tensions which this can generate will become even more acute, as increased emphasis is placed upon the need to ensure that the products of research are 'useful' to and liable to generate 'impact'. Whilst such impact can be felt amongst a variety of constituencies within the community, where research outcomes are directed at bringing about reforms to existing legal institutions, processes and practices, it entails a delicate negotiation of power relationships with those individuals or organisations with the imputed capability to agitate for, or secure, such reforms. What is more, it often involves a strategic forgetting of work that deconstructs this simplistic and linear model and its implicit assumption that any such legal reforms will in turn ensure predicable and effective changes in underlying social practices.

In much the same way as with feminist legal theory more broadly, then, feminist (empirical) legal researchers may ultimately have little choice but to consciously 'play the game'. In the process of ensuring access to data and maximising the impact of our findings, this may, at times, require participating in the perpetuation of half-truths about what the law is, how it operates, and what capacity it has to bring about social change; but staunchly refusing to do so, for all the critical integrity it might bring, may frustrate and potentially paralyse our impulse for pragmatic improvements in the pursuit of social justice. The challenge, then, is to be mindful of the trade-offs that researchers make in this context, of why we make them, the ways in which they skew our analysis, and of what is otherwise at stake.