

MACCABAEAN LECTURE IN JURISPRUDENCE

A Minority Opinion?

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THE PREVIOUS MACCABAEAN LECTURE in Jurisprudence, in 2005, was given by the Senior Law Lord, Lord Bingham of Cornhill.¹ It would have been given by the late Professor Peter Birks, had it not been for his untimely death. Each is a hard act to follow. Each is an outstanding exemplar of the two very different senses in which we commonly use the word ‘jurisprudence’.

To law students, ‘jurisprudence’ means the one (usually compulsory) subject that has nothing at all to do with the nuts and bolts of what the law is: it is, as the *Oxford English Dictionary* puts it, the science or philosophy of human law. It is usually taught by the brainiest scholars in the department and requires students to read some important works of moral and political philosophy. Professor Birks was a jurisperit of the science of human law rather than of legal philosophy.² Such scholars study and try to make sense of ‘jurisprudence’ in another sense: the corpus of judicial decisions on a particular subject or in a particular court or by a particular person. Lord Bingham is our longest serving senior judge. He is and has long been an exemplary provider of jurisprudence in its second sense.

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¹ ‘The Judges: active or passive?’, *Proceedings of the British Academy*, 139 (2006), 55.

² As in *An Introduction to the Law of Restitution* (Oxford, 1985), a title which is universally recognised as an understatement.

My theme was prompted by his Maccabaeian lecture of two years ago: ‘The Judges: Active or Passive?’ In this Lord Bingham addressed the traditionalist view of judging: that the judges’ role is confined to giving effect to the terms which Parliament has enacted and to declaring what the common law has always been. Anything more is to usurp the law-making role which properly belongs to Parliament. In his view, the traditionalist view ‘captures very important elements of the truth but does not express the whole truth’.³ He accepts that judges have always made the law. The difficulty is how to find the ‘elusive boundary between legitimate judicial development of the Law on the one hand and impermissible judicial legislation on the other’. He suggests that the acid test is whether the decision is ‘legally motivated’, which is permissible even if the judge has got it wrong, or whether it is ‘not in truth legally motivated. This will be so if the decision is motivated not by legal but by extraneous considerations, as by the prejudice or predilection of the judge or, worse, by any personal agenda of the judge, whether conservative, liberal, feminist, libertarian or whatever.’⁴ On this view, I take it, the decision should be predictable on the basis of precedent and legal principle, but not on the basis of the judge’s personality or philosophy.

With huge respect, I question whether this view too, although it captures important elements of the truth, expresses the whole truth. I have three main reasons for questioning it. First, the business of judging, especially in the hard cases, often involves a choice between different conclusions, any of which it may be possible to reach by respectable legal reasoning. The choice made is likely to be motivated at a far deeper level by the judge’s own approach to the law, to the problem under discussion and to ideas of what makes a just result. Secondly, an important project of feminist jurisprudence has been to explode the myth of the disinterested, disengaged, and distant judge. As Patricia Cain commented long ago,⁵

I take it that ‘bias’—in addition to being ‘a line diagonal to the grain of a fabric’⁶—can be both good and bad. To the extent that a bias is a personal preference, something a person has affection for, it is something we want to acknowledge and celebrate about human personality. Can you imagine a person

³ Bingham, ‘The Judges: active or passive?’, 60.

⁴ *Ibid.* 70.

⁵ ‘Good and bad bias: a comment on feminist theory and judging’, *Southern California Law Review*, 61 (1988), 1945, at 1946.

⁶ She is commenting on Judith Resnik, ‘On the bias: feminist reconsiderations of the aspirations for our judges’, *Southern California Law Review*, 61 (1988), 1878.

with no preferences? On the other hand, to the extent that a person's bias constitutes bigotry, prejudice or intolerance, we certainly do not want to celebrate it. . . . We want the good bias, but not the bad one. . . . The trick, of course, is to be able to say which is which.

Thirdly, the judicial choice will be guided, not only by the judge's own views of what is right and just, but also by his or her personal philosophy of judging. Cass Sunstein has developed this point by reference to the United States Supreme Court.⁷ There is a tendency to equate judicial 'activism' with a liberal or reforming agenda, such as that shown by the Warren Court of the 1950s and 1960s when racial segregation in schools was struck down⁸ and women given some control over their own reproductive capacity.⁹ Judicial passivity, if that is the right word, tends to be linked to a more conservative philosophy. But Sunstein has shown that, at least in the contemporary United States, there is no such connection. Judges with a particular view of what the law should be, whether to the left or to the right, are equally 'active'. He identifies four different approaches to judging in the Supreme Court.

First, there are the 'perfectionists' who want to make the Constitution the best it can be: they want to interpret the Constitution so as to give the people the rights that they think the people should have: the Warren Court were mainly perfectionists. Then there are the 'fundamentalists' who also want to make the Constitution the best it can be, but to do so by returning to the original understanding. They want to interpret the Constitution to mean what it meant at the time that it was ratified: Justices Scalia, Thomas and Alito on the present court are fundamentalists. In the middle he identifies two more moderate positions. 'Majoritarians' wish to defer to the will of the elected legislature unless it is quite clear that the Constitution has been violated. This leaves Congress and the States free to reflect the will of the people of the day, whether liberal or conservative, within their different spheres. This is a conservative position on judging, but one which would respect the right of the people to legislate for programmes which are very far from conservative: Justices Frankfurter and Holmes were of this view.

'Minimalists' are the ones that Sunstein likes best. They may be either conservative or liberal, willing to nudge the law in one direction or

⁷ *Radicals in Robes: Why Extreme Right Wing Courts are Wrong for America* (Cambridge, MA, 2004).

⁸ *Brown v. Board of Education*, 349 US 294 (1955).

⁹ *Griswold v. Connecticut*, 381 US 479 (1965); *Roe v. Wade*, 410 US 113 (1973).

another. But they prefer nudges to earthquakes. They refuse to promote a broad agenda. Their distinguishing feature is that they believe in narrow, incremental decisions, not broad rulings that the nation may later have cause to regret. By their very nature, minimalists are not too sure that they are right.¹⁰ Interestingly, in his view, the only two women who have been on the court are minimalists. Justice Ruth Bader Ginsburg is a (mostly) liberal minimalist, whereas Justice Sandra Day O'Connor was a conservative minimalist: 'minimalism is a method and a constraint; it is not a program and it does not dictate particular results'.¹¹ This cautious approach to judging could explain why Justice Anthony Kennedy, although a Republican and a Roman Catholic, has now replaced Justice O'Connor as the 'swing' vote on the Court.¹²

Most judges in this country never have occasion to own up to a personal philosophy, whether of life or of judging. Because of my unusual professional career, however, I have had to develop and express some sort of personal philosophy, and even, at one stage, a reform 'agenda'. I have been a legal scholar and later a law reformer, rather than a legal practitioner, before becoming a judge. It is difficult to be a legal scholar, still less a professional law reformer, without developing a point of view about what the law both is and should be.

Legal scholarship is, of course, a relatively recent development. Some people may still be reluctant to accept that it exists. Neil Duxbury, in his charming discussion of the relationship between judges and academic lawyers,¹³ reminds us of Lord Annan's view that the retention of law 'which (as taught in England) is the most flagrantly vocational of all traditional subjects' on the academic syllabus 'remains mysterious'.¹⁴ That was in 1963. But the fact that some knowledge may actually be useful in real life does not prevent its being a proper subject of academic study. The problem with law was always to explain to non-lawyers what we did apart from teaching students the rules. It is non-lawyers who tend to have the most 'traditionalist' view of what the law is and what judges do.

¹⁰ Sunstein, *Radicals in Robes*, p. 252; after Learned Hand, 'the spirit of liberty is that spirit which is not too sure that it is right', in Irving Dilliard (ed.), *The Spirit of Liberty*, see 3rd edn. (Chicago, 1960), p. 190.

¹¹ Sunstein, *Radicals in Robes*, p. 29.

¹² Although he considers that judges should avoid making policy, he has also identified the qualities of a good judge as 'compassion, warmth, sensitivity and an unyielding insistence on justice' (evidence to Senate Judiciary Committee, Dec. 1987); feminists might well consider this a good bias.

¹³ *Jurists and Judges: An Essay on Influence* (Oxford, 2004).

¹⁴ *Ibid.*, p. 69; quoting Noel Annan, 'The Universities', *Encounter*, 20(4) (1963), 3 at 10.

There are many different kinds of legal scholarship, all of which would be worthy academic endeavours, irrespective of whether there were any undergraduates sitting at the scholars' feet, anxious to gain the knowledge which will enable them to obtain riches or glory in the big wide world outside. All of them lead to, if they do not begin with, a particular point of view. The first, and in many ways the most important, is to make sense of the great undigested mass of judicial decisions: to find out what they are, to discover and lay bare the underlying principles, and to deduce what the principled answer to a new problem would be. This is what judges do on a case by case basis. But the great scholars of the law were and are able to do it over a whole subject: to see how it all fits together and to discover the concepts and principles which make it a coherent whole. As Peter Birks put it, 'there is no body of knowledgeable data which can subsist as a jumble of mismatched categories. The search for order is indistinguishable from the search for knowledge.'¹⁵ Some, like Peter Birks himself, do it synoptically. Others do it in comprehensive detail. In my own subject, family law, the prime exponent of this brand of legal scholarship was Peter Bromley: he managed to bring together the common law of husband and wife, parent and child, and the ecclesiastical-turned-statute law of divorce and matrimonial causes, into a single coherent whole.¹⁶ But pride of place should probably go to the late Sir John Smith; with Brian Hogan, he wrote the first comprehensive academic account of the criminal law.¹⁷ Such authors, having a deep understanding of the underlying principles and of the bigger picture, usually have views about what the next case should decide. Increasingly those views are influential with the judges.¹⁸

Hence these treatise writers will tend to have a consistent view of what the subject is about, what the law is trying to achieve in the particular area, and what, therefore, will amount to the just result of any particular case. The criminal lawyer will have a theory about the justifications for

¹⁵ P. Birks (ed.), *English Private Law* (Oxford, 2000), Preface.

¹⁶ P. M. Bromley, *Family Law*, 1st edn. (London, 1957).

¹⁷ J. C. Smith and B. Hogan, *Criminal Law*, 1st edn. (London, 1969); Glanville Williams had earlier published *Criminal Law: The General Part*, 1st edn. (London, 1953), but his *Textbook of Criminal Law*, 1st edn. (London, 1978) came after Smith and Hogan.

¹⁸ Duxbury would give pride of place to Sir John Smith, whose case notes in the *Criminal Law Review* were undoubtedly influential; but some may think that Dr David Thomas, in expounding the principles of sentencing which had been previously locked in the judges' bosoms, was even more influential: his *Principles of Sentencing*, 1st edn. (London, 1970) was developed at the judges' insistence into *Current Sentencing Practice*, now a four volume loose-leaf encyclopedia (London, 1982).

imposing punishment which will guide his view about the justice of a particular rule of law. Subjectivists will tend to think that people should only be punished for the harm that they mean to do. But there is a respectable point of view that people can be expected to take more responsibility for their actions than that: for example, that the State is justified in requiring its citizens to take care not to purchase goods from an unconventional source without satisfying themselves that the goods have not been stolen;¹⁹ and many feminists would argue that the State is justified in requiring men to take care to ascertain that they have the other's consent before engaging in certain sexual acts. Or to take an example of a similar issue from my own subject:²⁰ should a woman who has suffered brutal cruelty at the hands of her husband be expected to return to live with him if it is unlikely that he will do it again? All sorts of moral and empirical considerations come into answering a question like that: about the nature of marriage, the purpose of matrimonial relief, the autonomy and equality of the spouses, and the reliability of predictions of future behaviour. Such academic debates will often be mirrored in disagreements between the judges: between the subjectivists and the pragmatists in the criminal law; between the privacy of the family and the protection of the vulnerable in family law. But it is rarer for a judge to put pen to paper to give a systematic account of his point of view.

Then there are the legal scholars who ask, not about the law in the law reports, but about the law as it is experienced by the people or the organisations it affects. Sometimes this will involve empirical research, or at least the systematic study of other peoples' research and policy discussions. This is the direction in which family law went, after the reforms which took effect in 1971 destroyed so much of the conceptual coherence which Peter Bromley had discovered. A new breed of family law textbook came along.²¹ The impact of the law upon real people with real problems is what made the subject interesting. The policy arguments flow from evaluating those impacts against a moral and political framework: what are the respective roles of the family and the State in looking after and supporting those who cannot look after themselves? How best can the law

¹⁹ As Justices O'Regan and Cameron in the South African Constitutional Court pointed out in their dissenting opinion in *State v. Manamela*, CCT 25/99, Judgment of 14 April 2000, citing A. Honoré, *Responsibility and Fault* (Oxford, 1999), pp. 34–7 and 122–5.

²⁰ On which Peter Bromley and I have disagreed: cf. *Family Law*, 5th edn., 1976, p. 193 (but not repeated in the 6th edn.) and S. Atkins and B. Hoggett, *Women and the Law* (Oxford, 1984), p. 128.

²¹ Exemplified by Stephen Cretney, *Principles of Family Law*, 1st edn. (London, 1974).

define and enforce the responsibility of individual family members towards one another, their children and their old folk? Once again, these academic debates are often mirrored in disagreements between the judges: there is no doubt that current views in the Court of Appeal on the economic relationship created by marriage are at odds with those of the House of Lords.²² Once again, however, judges rarely enter into extra-curial debate with one another about such questions.²³

There are many other kinds of legal scholarship. Legal philosophers ask the underlying questions about what law is. But they also ask questions about what it should be: or at least about an organising principle which would help us to decide what it should be. Their whole project is to develop a personal philosophy. A further development involves subjecting either the 'law in books' or the 'law in action', or both, to a penetrating critique from a particular theoretical perspective. The most obvious examples in recent years have been 'law and economics', critical legal studies, and feminism. Although there are many different perspectives in feminism, as Judith Resnik has said:²⁴

Feminist theories share a view that much of women's experiences of their lives has been omitted in the standard scholarly and popular descriptions of the world. A major shared premise is that knowledge of the world is constructed from one's viewpoint and that what has been assumed (by some) as a universal viewpoint is, in fact, a viewpoint of some men, who have articulated a vision of reality and claimed it to be true for us all.

The legal scholar is also expected to instruct and inspire her students. Because we know that the law is not a set of rigid rules, but is contingent and negotiable, we want to imbue our students with a sense of the excitement of discovery: discovery, not only of how to 'do' law in the technical sense, but also of how to think about the law and the purpose of law, either in general or in the particular subject under discussion. There have always been excellent teachers who can communicate a 'good set of notes' which the students can take away and learn in order to pass the examinations. But the real jurists are those who can communicate something more: and that something more is a point of view. The point of view may

²² Witness the call for reform from the Court of Appeal in *Charman v. Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246, [2007] 2 FCR 217, paras. 106 ff., after the House of Lords' decision in *Miller v. Miller; McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 3 All ER 1.

²³ A recent exception is the debate between Lord Hoffmann and Lord Steyn on the relationship between the judiciary and the other branches of government: see J. Steyn, 'Deference: a tangled tale' [2005] *Public Law* 346.

²⁴ 'On the Bias', p. 1906.

be very hazy and undeveloped when the jurist starts the intellectual journey. It may go down some blind alleys or take some wrong turnings along the way.²⁵ It may even experience a Damascene conversion when the light dawns. But on the whole it will develop along consistent and foreseeable lines. It will be transparent and articulated. Legal scholar A should be able to write a learned piece on the legal philosophy of legal scholar B. In such a world, consistency and predictability are a virtue, not a criticism.

The same goes for the other legal world which I have inhabited. The Law Commission is a statutory body whose mission is the reform of the law.²⁶ It looks to over-turn ancient anomalies and injustices, to promote a coherent and principled body of law. It requires a vision of what the law should be. It was meant to deal in so-called 'lawyers' law', those parts of the common (and some statute) law which were important to lawyers and their clients but not to government departments. From the start, however, it dealt in family law and long before my time had developed a collective point of view: a point of view which tried to redress centuries of inequality between the rights of husband and wives, between the children of married and unmarried parents, and latterly between the able minded and people with mental disorders and disabilities. This translated into something I would describe as recognisably feminist, with its concern to see the world through other eyes than those of the traditionally empowered.

It was a point of view entirely in tune with my own earlier academic work, on mental health,²⁷ on children,²⁸ on the family,²⁹ and on women and the law.³⁰ In the academic world, and even in the Law Commission, I never had any qualms about describing myself as a feminist.³¹ Feminism is quite a new word, let alone a new idea. The 1928 edition of the *Oxford English Dictionary* called it 'rare' and defined it as 'the qualities of females'. Obviously, it was not then thought of as a philosophy or a point

²⁵ As Jack Beatson observed in his obituary of Peter Birks, 'Birks coupled the clarity and certainty with which he advanced his ideas with a willingness to reconsider, even radically alter, his position, and to state his new position with equal firmness . . .', *The Guardian*, 16 July 2004.

²⁶ Law Commissions Act 1965, s 1(1); fleshed out in s 3(1).

²⁷ B. M. Hoggett, *Mental Health Law*, 1st edn. (London, 1975, 4th edn., 1996).

²⁸ B. M. Hoggett, *Parents and Children*, 1st edn. (London, 1976, 4th edn., 1994).

²⁹ B. M. Hoggett and D. S. Pearl, *The Family, Law and Society: Cases and Materials*, 1st edn. (London, 1982); 6th edn., by B. M. Hale, D. S. Pearl, E. J. Cooke and D. Monk (forthcoming 2008).

³⁰ Atkins and Hoggett, *Women and the Law*.

³¹ Others might describe me as a pretty lukewarm and under-educated feminist but that is beside the point.

of view but as a state of affairs. Feminism was not something which people, whether women or men, might believe in but something which women, and presumably only women, had. By 1933, however, things had moved on. The 'rare' was deleted and a new definition added: 'The opinions and principles of the advocates of the extended recognition of the achievements and claims of women; advocacy of women's rights.'³² By 1972, however, this second definition has been refined to: 'advocacy of the rights of women (based on the theory of the equality of the sexes)'. That is the definition repeated in the current 1989 edition. It also defines a 'feminist' as 'an advocate of feminism'.

These definitions have several layers. The first is a theory that men and women are equal (whatever that complex concept might mean). The next is a belief in that theory. The next is the recognition that the equality of men and women is not adequately provided for in human institutions. And the final layer is translating that belief and that recognition into advocacy of the rights of women. Feminist scholars would have no difficulty in acknowledging all of that—though they might differ in their definitions of equality, in their analyses of the inequalities of human institutions, and in their prescriptions, if any, for a more equal world.

But in the light of Lord Bingham's lecture, I am bound to ask myself, how far is it possible to hold such a point of view and do a proper job as a judge? It will be understood that I am using feminism here simply as an example of all the other points of view of the kind listed by Lord Bingham—conservative, liberal, libertarian or whatever. I choose it because it is the one which I know best and the one which I try to espouse. There is another reason, most eloquently voiced by Sandra Berns: 'Why . . . is it still suggested that, in some matters at least, a black judge or a woman judge would be somehow biased while a white male judge would be impartial and neutral?' In a footnote she observes: 'To have one's identity transformed into a source of bias, of partiality is to be excluded, not only from the judiciary but from all forms of normal human intercourse. The silencing inherent in such claims is, it seems to me, a casting out, a sense of thrownness, an absolute exclusion from even the possibility of being authoritative.'³³ The very notion of objectivity is suspect but liable to drown out what is seen as a minority opinion.

³² How intriguing that the first source quoted, from *Athenaeum*, 27 April 1895, reads: 'Her intellectual evolution and her coquettings with the doctrines of "feminism" are traced with real humour.' Apparently women flirt with theories as well as with men.

³³ *To Speak as a Judge: Difference, Voice and Power* (Aldershot, 1999), p. 8 and n. 20. For a review of cases of allegations of bias against Australian, Canadian and American female judges, see

Let me begin with the easy answers. There can be nothing wrong with a judge believing in the equality of the sexes. Indeed, I suspect that all my colleagues would say that they do so and so they should. Democracy itself is founded in the belief in equal freedom: ‘democracy values everyone equally even if the majority does not’.³⁴ But whereas freedom is an idea which has been around for a long time and which the judges think they know well,³⁵ equality is a much more recent arrival on the legal scene. It found its way into the United States Constitution through the Fourteenth Amendment but it cannot be said that the Supreme Court revealed any real understanding of what it might mean until after the Second World War.³⁶ The equal rights of men and women were proclaimed in the preambles to the Charter of the United Nations in 1945 and to the Universal Declaration of Human Rights in 1948. They were given legal force in international law in Article 3 of the International Covenant on Civil and Political Rights and of its sister Covenant on Economic, Social and Cultural Rights in 1966. They were fleshed out in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. This acknowledges that some differences of treatment may be necessary to redress historic disadvantage. The United Kingdom is a party to all of these, although they are not directly incorporated into domestic law.

However, equality of the sexes was a founding principle of what has now become the European Union, and this was a large part of the motivation for our domestic Equal Pay Act 1970 and Sex Discrimination Act 1975. It is also explicit in the European Convention on Human Rights, Article 14 of which guarantees to everyone the enjoyment of the rights and freedoms it defines without discrimination on grounds, among other things, of sex. The European Treaties do, in their different ways and different spheres, form part of the domestic law of the United Kingdom. I do not say that it would be impossible for a person who did not believe in the equality of the sexes to be a judge under our modern legal system. But it is not only acceptable but also easier to be a judge if one’s fundamen-

R. Graycar, ‘The gender of judgments: some reflections on “bias”’, *University of British Columbia Law Review*, 32 (1998), 1. For the story of a woman judge treated in a way in which it is said that no man would have been treated, see Rosemary Hunter, ‘Fear and loathing in the Sunshine State’, *Australian Feminist Studies*, 19 (2004), 145.

³⁴ *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 357, [2004] 3 All ER 411, para. 132.

³⁵ See e.g., *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [2005] 3 All ER 169, *per* Lord Hope of Craighead, para. 108.

³⁶ R. Singh, ‘Equality—the neglected virtue?’ [2004] *European Human Rights Law Review* 141.

tal beliefs accord with the fundamental principles of the Constitution and legal system one is there to serve.

Are there some beliefs which it would be impossible for a judge to hold and still do a proper job as a judge? Today, for a judge publicly to profess a belief in witches and witchcraft might well raise eyebrows as well as doubts about his fitness for office. But in 1665, my far more learned and distinguished namesake, Sir Matthew Hale, told a jury ‘that there were such creatures as witches he made no doubt at all; For first, the scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime. And such hath been the judgement of this kingdom, as appears by that act of Parliament which hath provided punishments proportionable to the quality of the offence.’³⁷ The last ground is sufficient in itself, then and now. The task of judging frequently requires the judge to uphold a law in the wisdom or justice of which he does not believe. In these days, the persistence of the death penalty in countries which also preserve a right of appeal to the Judicial Committee of the Privy Council presents a problem for at least some of the judges in that court. We were all appointed after the death penalty had in practice been abolished in the United Kingdom and most of us were appointed after the United Kingdom had ratified the Sixth Protocol to the European Convention on Human Rights of 1983, concerning the abolition of the death penalty. When Christmas Humphreys became an Old Bailey judge more than fifty years ago, it was agreed that he should be excused from trying cases in which he might have to impose the death penalty because he was a devout Buddhist. But generally speaking there is no conscience clause for judges. We have no right to opt in and out of particular cases in accordance with our conscientious objections to particular laws. The Employment Appeal Tribunal has recently held that a magistrate was not entitled to be excused from hearing cases in which he might be obliged to place a child with a homosexual couple even if this was contrary to his religious or philosophical beliefs.³⁸ We have all sworn impartially to administer justice according to law. As Lord Bingham put it in the first Pilgrim Fathers’ lecture (before we had the Human Rights Act to give us

³⁷ Trial of Rose Cullender and Amy Duny, *State Trials*, Vol. VI, cols. 687–702, at 699–701. Alan Cromartie, suggests that he may have had ‘a certain subsequent uneasiness’: *Sir Matthew Hale, Law, religion and natural philosophy* (Cambridge, 1995), p. 239.

³⁸ *McClintock v. Department for Constitutional Affairs*, Appeal No. UKEAT/0223/07/CEA, handed down 31 Oct. 2007.

a more nuanced answer): ‘If Parliament were clearly and unambiguously to enact, however improbably, that a defendant convicted of a prescribed crime should suffer mutilation, or branding, or exposure in the public pillory, there would be very little a judge could do about it—except resign.’³⁹ It is the connection between the judge’s beliefs and how she goes about her judging which is what matters, not the beliefs themselves.

Nor can there be anything wrong in a judge believing that there should be more women judges, especially in the higher, law-making, ranks of the judiciary. Not long ago, it was thought regrettable that there were so few, but inevitable because there were so few in the senior ranks of the legal profession from whom the judges were recruited. A former Lord Chief Justice, Lord Taylor, said in his Dimbleby lecture of 1992, ‘I have no doubt that the balance will be redressed in the next few years.’⁴⁰ Fifteen years later, however, women are still less than 10 per cent of the senior judiciary. To provoke more effort for change, it is necessary to make the positive case for judicial diversity: specifically, that a more diverse judiciary becomes a *better* judiciary.

There are both symbolic and substantive aspects to this. In a democracy, the people should be able to look to the judiciary as ‘their’ judges, not some alien aristocracy set to rule over them. Such a view comes naturally to the peoples of republics such as the United States of America, with a Constitution which opens with the words ‘We the people . . .’. It may come less naturally to the people of a monarchy with an unwritten Constitution such as ours. Hierarchy still plays a much greater part in our lives than we would like to think. I have argued elsewhere that, however much some people may rail against the old fashioned, out of touch judges with their wigs and gowns and their glasses on the ends of their noses, others instinctively feel more comfortable with the judicial stereotype—anonymous, dehumanised, impartial, authoritative and intrinsically male.⁴¹ But we too are a constitutional democracy. If equality is an important democratic principle, then one section of society should not be set in judgement over everyone else.

The substantive argument is more difficult: I have also argued that we should not expect individual women or minority judges to ‘make a

³⁹ Sir Thomas Bingham, ‘Anglo-American Reflections’, Inaugural Pilgrim Fathers Lecture, 29 Oct. 1994; published in Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford, 2000), part 6, chap. 2.

⁴⁰ Taylor of Gosforth, ‘The Judiciary in the Nineties’, Dimbleby lecture, BBC, 1992.

⁴¹ ‘Equality and the Judiciary: Why should we want more women judges?’ [2001] *Public Law* 489.

difference'.⁴² Along with many other senior women judges from around the world, however, I do believe that a more diverse judiciary will be a better judiciary.⁴³ Diversity of background and experience enriches the law. Women lead different lives from men, largely because we have visibly different bodies from men. This is not to say that all women are the same, any more than that all men are the same. Some women may lead lives which are very close to men's and (less plausibly) vice versa. But by and large, the interaction between our own internal sense of being a woman and the outside world's perception of us as women leads to a different set of everyday and lifetime experiences.⁴⁴ The same is true for other visible minorities. It is just as important that these different experiences should play their part in shaping and administering the law as the experiences of a certain class of men have played for centuries. They will not always make a difference but sometimes they will and should. This is all the more important at present, when equality principles are by no means fully embedded or achieved. People who have experienced their own personal humiliations can bring that experience to the humiliations of others.

This is only an aspect of the argument for diversity of judicial 'mentality', for background and experience are part of what goes to shape that mentality.⁴⁵ As Justice Felix Frankfurter of the United States Supreme Court accepted, a person 'brings his whole experience, his training, his outlook, his social, intellectual and moral environment with him when he takes a seat on the supreme bench'.⁴⁶ And as Justice Cardozo argued, 'out of the attrition of diverse minds there is beaten something which has a

⁴² Ibid.; also Kate Malleson, 'Justifying gender equality on the bench: why difference won't do' (2003) 11 *Feminist Legal Studies* 1.

⁴³ e.g. Justice Claire L'Heureux-Dube. 'Making a difference: the pursuit of a compassionate justice', Address to the International Bar Association, Amsterdam, 20 Sept. 2000; Chief Justice Beverley McLachlin, 'Promoting gender equality in the judiciary', Seminar to the Association of Women Barristers, 2 July 2003; Brenda Hale, 'Making a difference? why we need a more diverse judiciary' (2005) 56 *Northern Ireland Law Quarterly* 281.

⁴⁴ Justice Albie Sachs, of the Constitutional Court of South Africa, tells how his colleague, Justice Yvonne Mokgoro, remarked in the course of argument in a case about whether the police owed a duty of care to later victims of a dangerous man given bail, 'if I get into a lift, I'm on my own and a man gets in, and we are alone together, I feel apprehensive': speech to the Sixth National Conference of the Discrimination Law Association, London, Dec. 2005.

⁴⁵ Basil Markesinis, 'Judicial mentality: mental disposition or outlook as a factor impeding recourse to foreign law', *Tulane Law Review*, 80 (2006), 1325.

⁴⁶ Ibid. 1333, quoting Philip Elman (ed.), *Of Law and Men: Papers and Addresses of Felix Frankfurter* (Hamden, CT, 1956), pp. 40-1.

constancy and uniformity and average value greater than its component elements'.⁴⁷

This is, of course, a particular feature of appellate courts, where groups of judges come together to decide the hard cases. They may try to reach consensus or at least a plurality view. But in the common law world there is also a thriving tradition of judicial dissent: we do not pretend that the answers are always easy and clear cut. We explain why we have difficulty agreeing with the answers given by our colleagues.⁴⁸ Introducing different perspectives may help to develop new understandings. My view of the law of duress, speaking as a 'reasonable but comparatively weak and fearful grandmother',⁴⁹ was slightly different from my colleagues'—I would have allowed the battered wife who stays with her husband although she expects to be forced to cook the dinner, wash the dishes, iron the shirts and submit to sexual intercourse to plead duress when she is unexpectedly forced to handle stolen goods, store illegal drugs, or commit some other crime. I may have been a minority opinion on the court but I wonder whether I was a minority opinion in the country? A minority opinion may be tempered by the views of the majority,⁵⁰ but sometimes it must be voiced. Out of today's minority opinion can sometimes come the orthodoxy of tomorrow.⁵¹

Nor should one underestimate the importance of diversity in the body of trial judges. Trial judging, whether in criminal trials where the jury and not the judge is the finder of fact or in civil cases where the judge is also the finder of fact, is a much under-researched area.⁵² A judge who understands relative powerlessness can bring that understanding to her task. This is not the knee jerk assumption that the alleged victim must be telling the truth. But it could be a deeper understanding of her behaviour, both in and out of the witness box. It could be a refusal to rely upon stereotypical assumptions about the relations between the sexes: is it really the case (as a senior circuit judge told me when I was starting out

⁴⁷ Benjamin Cardozo, *The Nature of the Judicial Process*, first pub. 1921 (New Haven, CT, 1961), p. 177.

⁴⁸ The virtues of the common law tradition are eloquently explained by Justice Michael Kirby in 'Judicial dissent—common law and civil law traditions' (2007) 123 *Law Quarterly Review* 379.

⁴⁹ *R v. Hasan* [2005] UKHL 22, [2005] 2 AC 467, [2005] 4 All ER 685, para. 73.

⁵⁰ A perception I owe, among many other things, to my legal assistant, Corinna Ferguson.

⁵¹ See that great feminist judge Claire L'Heureux-Dube, 'The dissenting opinion: voice of the future?' (2000) 38 *Osgoode Hall Law Journal* 495.

⁵² But see T. Bingham, 'The Judge as juror: the judicial determination of factual issues', in *The Business of Judging*.

on my judicial career) that a wife who has had an accident in her husband's car will always be covering up the truth? Such a judge could also bring a more determined effort to ensuring that the trial itself is fair: that a fair opportunity is given to the witnesses on both sides to give their best evidence. Judge Learned Hand wrote this of the process of judging:⁵³

Of course, you must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can—it's impossible for human beings to do so absolutely, but just so far as you can—not to interject your own personal interests, even your own preconceived assumptions and beliefs.

Patricia Cain rewrote this advice from a feminist perspective:⁵⁴

When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. Find some small part of your own self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then, should you judge.

Of course, that means that women judges, who have not had the experience of being male, to whom the male is the Other, should listen just as carefully to the male stories as they do to the female. The message is a universal one: do not reject a story out of hand because it does not conform to your own experience or assumptions. If there are judges whose experiences are those of the Other, that can in time reduce the power of the dominant stories.

In criminal trials, properly protecting the prosecution witnesses while allowing the defence properly to deploy its case is a hugely demanding task. It is so much easier to sit back and let defence counsel rip. It is also much safer: appellate courts do not usually have the opportunity to criticise trial judges for failing to protect vulnerable witnesses properly; but they have plenty of opportunities to criticise trial judges for 'descending into the arena' and intervening too much. Enabling all the witnesses, on either side, to give their best evidence is a much more radical idea than one might think. I am not at all surprised that Professor Rosemary Hunter's feminist trial judge friend, spending her working life presiding over rape, sexual assault and child abuse cases, suggested that a feminist judge is 'bloody tired'.⁵⁵ But the process of enabling witnesses to give

⁵³ *The Spirit of Liberty*, pp. 309–10.

⁵⁴ Cain, 'Good and bad bias', 1955.

⁵⁵ Rosemary Hunter, 'What (or who) is a feminist judge?', Paper presented at the Joint Annual Meeting of the LSA and RCSL, Humboldt University, Berlin, 25–8 July 2007.

their best evidence, of listening carefully to the stories being told even if alien to one's own experience, can only enhance the fairness of the trial. A feminist trial should be a fairer trial.

Diverse judges can also make a difference in their interaction with their fellow judges. It becomes harder to give voice to sexist or racist views if there is a woman or a minority ethnic judge around the lunch table, no longer a servant but an equal. Better still, perhaps, if they are voiced and can then be challenged. A real virtue of diversity, as Justice Kate O'Regan of the South African Constitutional Court has put it,⁵⁶ is that one can begin to interrogate one another's prejudices and assumptions.

So, ideally, here we are with a collection of judges, diverse in their gender, ethnicity, background, experiences both in and out of the law, their mentality and approaches to judging; but alike in their knowledge of and training in the law and legal reasoning, and true to 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'. Learning from one another, they can become a more complete judicial body than they were before.

But all those advantages do not tell us whether it is permissible to bring a feminist, or any other kind of '-ist', approach to the result of the case. As with the trial process, this cannot be a problem if all it entails is a deeper understanding of what the case is about. If a family judge understands how difficult it will be for a particular woman to re-establish herself in the labour market (and conversely, how easy it will be for another woman to do so), then she can quite properly exercise her discretion to award ancillary relief accordingly.⁵⁷ If an employment tribunal chair understands what it feels like for a school dinner lady to receive a letter warning her that to pursue her entirely justified equal pay claim may threaten not only her colleagues' jobs but also the school meals service offered to disadvantaged children, she may quite properly decide that it has crossed the border between permissible attempts to settle the case and impermissible victimisation.⁵⁸ This does not mean relying only upon one's own experiences, but taking steps to try and learn more about the experience of the Other generally. That is why the Judicial Studies Board publishes an *Equal Treatment Bench Book*. As Rosemary Hunter says, 'such

⁵⁶ Miriam Rothschild and John Foster Human Rights Trust Lecture, 'The challenge of change: judging under South Africa's new Constitution', London, University College, 23 Oct. 2007.

⁵⁷ *Barrett v. Barrett* [1988] 2 FLR 16, [1988] FCR 707; *SRJ v. DWJ (financial provision)* [1999] 2 FLR 176, [1999] 3 FCR 153.

⁵⁸ *Derbyshire v. St Helen's Metropolitan Borough Council* [2007] UKHL 16, [2007] ICR 90, [2007] 3 All ER 81.

an approach to fact finding arguably would perfect rather than violate judicial norms of fairness and impartiality'.⁵⁹

This brings us to that part of judging which requires the judge to decide what the law is before deciding how it applies to the particular case. In the hard cases this is mostly the task of appellate courts, although first instance judges, especially in the High Court, are not exempt. What part can personal philosophy play here? By this I mean something more than the 'mentality' which is the product of the judge's background and experiences. I mean a consistent and coherent point of view. It seems to me that this too should present no problem, provided that two conditions are fulfilled: first that the point of view is consistent with the fundamental principles of the law one is sworn to apply; and secondly that it is carefully and cautiously applied to the issues in the case.

That brand of feminism which simply believes in the equality of the sexes is entirely consistent with fundamental principles. But most feminists would go beyond formal equality and look to the context in which the question arises, would understand that substantive equality involves accommodating difference,⁶⁰ and would also take account of historic and systemic disadvantage. That too is simply a deeper understanding of the complexities of equality. Sometimes it is possible to apply that understanding to the case in hand. An example is a case (in which I was not involved) concerned with discrimination against widowed fathers in the social security scheme.⁶¹ Widowed mothers received several benefits which were not available to widowed fathers. The Government had promoted legislation to remove the discrimination: in some cases levelling up to give both the same benefits and in some cases levelling down to deny them to either. Did this mean that the earlier discrimination could not be justified? The Court of Appeal decided that it did. The House of Lords, however, accepted that the discrimination had been justified on the basis of the historical disadvantage of mothers in the market place and that it was a matter of judgement when that disadvantage had sufficiently disappeared. But that was a case under Article 14 of the European Convention on Human Rights; domestic anti-discrimination law may not always permit such sensitive accommodation to inherited difference.

⁵⁹ 'What (or Who) is a Feminist Judge?', 14.

⁶⁰ Perhaps more readily understood in the disability discrimination context, see *Archibald v. Fife Council* [2004] UKHL 32, [2004] ICR 954, [2004] 4 All ER 303.

⁶¹ *R (Hooper) v. Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, [2006] 1 All ER 487.

Outside the realms of formal equality and discrimination law, there are issues on which it is entirely permissible to look for substantively equal treatment: allowing women the same autonomy as men in sexual and reproductive choices, recognising that to cause a woman to have a child she never meant to have is not only a gross invasion of her autonomy and bodily integrity but also imposes upon her long term caring obligations towards the child;⁶² realising the harmful effect which violence towards the mother can have, not only on the mother, but also on the child;⁶³ and calculating the real life time costs of time away from the labour market for child and other family care.⁶⁴ In cases such as these, it is possible to give voice to a distinctively female point of view without in any way transgressing the norms of judicial behaviour. These are all examples of using permissible and accepted forms of judicial reasoning to arrive at a conclusion which accords with permissible and acceptable underlying principles. All judges select from the available and permissible sources what factors they will rely upon in reaching their judgments. In the truly hard cases legal reasoning can take us in more than one direction. The direction we choose is bound to be guided by some deeper level of principle. If a female judge also chooses to tell the same story in a different way from the male,⁶⁵ this can also enrich the collective mix.

But alongside consistency with legal principle, I would suggest that the reasoning used in support of a result which reflects one's own point of view should be of the minimalist rather than the perfectionist or fundamentalist variety. I am with Sunstein here. Most of the time, it is dangerous to do more than is required to decide the case in hand. It is even more dangerous if that is done in pursuit of some grand design. A point of view is not the same as an agenda. If that makes me a feminist minimalist, I am in some very good company. Like Learned Hand, I try not to be too sure that I am right.

⁶² *Parkinson v. St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266, [2001] 3 All ER 97.

⁶³ *Re D (contact: reasons for refusal)* [1997] 2 FLR 48, [1998] 1 FCR 147; *Re L (a child) (contact: domestic violence)* [2001] Fam 268, [2000] 4 All ER 609.

⁶⁴ *Miller v. Miller, McFarlane v. McFarlane* [2006] UKHL 24, [2006] 2 AC 618, [2006] 3 All ER 1.

⁶⁵ As Erica Rackley has suggested that I did in the harrowing case of *N v. Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296, [2005] 4 All ER 1017.