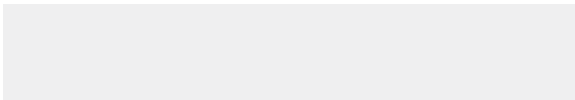
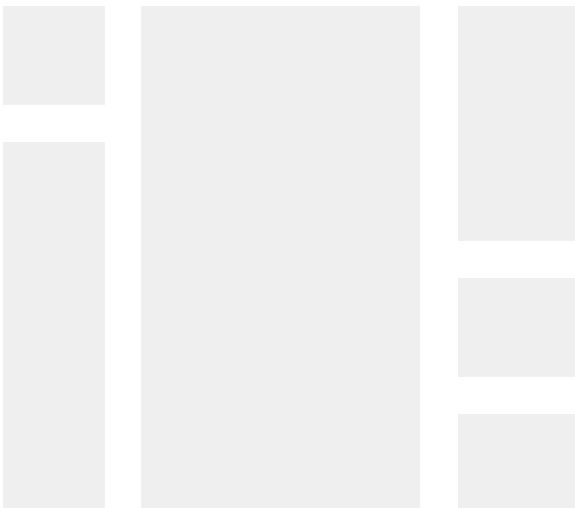


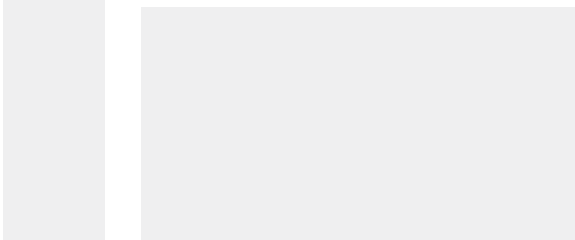
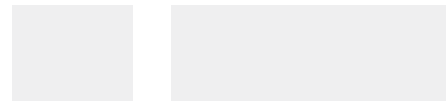
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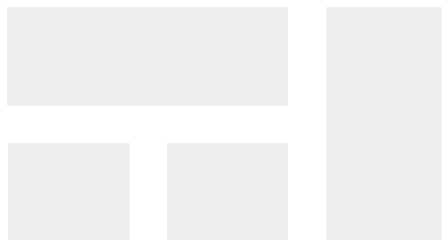
**The Content and Value of a Feminist  
Perspective on Criminal Law Legislative  
Reform**



**Ilona CM Cairns**



**December 2012**



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# THE CONTENT AND VALUE OF A FEMINIST PERSPECTIVE ON CRIMINAL LAW LEGISLATIVE REFORM

*Ilona CM Cairns\**

**Abstract:**

Over the last fifteen years, major criminal law reform has been proposed and debated in the United Kingdom and Ireland, as well as at the European level. Many of these reform initiatives have been driven by a desire to 'modernise' and 'clarify' the criminal law, either through full-scale codification or partial conversion of the common law into statutory form. Although much ink has been spilled on the merits and downfalls of codification or 'statutorification' of the common law, debate on the subject has, for the most part, ignored the plethora of feminist viewpoints on legal reform. Focusing predominantly on codification efforts in Scotland and Ireland, this paper will underline the value of feminist perspectives on criminal justice reform. While some feminists are of the view that legislative development is necessary insofar as it removes formal barriers or inequalities, others are more sceptical and believe that the capacity of legislation to effect real change is constrained by the operation of stereotypes at various stages of the criminal justice process. I will argue that the process of 'modernisation' of the criminal law must entail the taking into account of such diverse perspectives because the failure to do so is at odds with the values espoused by a modern, pluralistic and equal society. To illustrate exactly how feminism can be 'perspective transforming' in a legal context, this paper will draw on the work of the Feminist Judgements Project in the UK and the Women's Court of Canada – two high-profile projects that entailed the re-writing of key legal judgements from a feminist stance. I will conclude that a feminist perspective is essential to ensuring that the needs and rights of women are properly recognised at times of legal change.

**Keywords:** *Codification, feminism, criminal law, Scotland, Ireland, legislation, sexual offences*

## A INTRODUCTION

Over the last fifteen years major criminal law reform has been proposed and debated in the United Kingdom and Ireland. Many of these reform initiatives have been driven by a desire to 'modernise' and 'clarify' the criminal law, either through full-scale codification or partial conversion of the common law into statutory form. Although much ink has been spilled on the merits and downfalls of codification or 'statutorification' of the common law, debate on the subject has, for the most part, ignored the plethora of feminist viewpoints on legislative reform. Focusing predominantly on codification efforts in Scotland and Ireland, this paper will draw attention to the content of feminist perspectives on legislative reform and underline the value of such viewpoints.

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This paper begins by providing an overview of recent criminal law reform, and proposals for reform, in Scotland and Ireland. I then move on to define a feminist approach to law and sketch out the two predominant attitudes to legislative reform in feminist legal thought. Next, I will bring together these two parts, arguing that an analysis of recent legislative changes and proposals through a feminist lens is both valuable and necessary. In this part, I reflect on the Feminist Judgements Project in the UK and the Women's Court of Canada to illustrate exactly how feminism can be 'perspective transforming' in a legal context. To give my argument a practical grounding, in the final part of this paper I briefly examine the Sexual Offences (Scotland) Act and demonstrate the difference that a feminist perspective could have made during the reform process.

## B RECENT CRIMINAL LAW REFORM IN SCOTLAND & IRELAND

### 1 Scotland

The nature and form of Scots criminal law has undergone significant change over the last two decades. Most significantly for the present discussion, there has been a movement away from Scotland's common law tradition in criminal law matters. Following (and likely due to) the creation of a Scottish parliament (devolution) and the incorporation of the European Convention on Human Rights (ECHR) into Scots law, significant 'statutorification', particularly in the realm of criminal procedure, has occurred. Although some legislation was passed simply to restate or clarify the law, a significant portion of the new statutes either created new offences or reformed the current law.

Calls to further modernise and clarify Scots criminal law have paralleled these developments. In 2003, a draft code criminal code for Scotland was published under the auspices of the Scottish Law Commission.<sup>1</sup> The *draft code* was reformatory in nature containing 'provisions designed to reproduce the current law, entirely new offences, and provisions intended to bring about reform, radical or otherwise.'<sup>2</sup> For a number of reasons ranging from the limits, quality and the unofficial nature of the *draft code*, the codification project in Scotland was not taken any further. Nevertheless, the publication of the *draft code* was a significant event as it sent a particular message about the merits of legislative reform that, historically, has not been popular in Scotland.

### 2 Ireland

In the past, Ireland's criminal law has been subject to similar criticism as that directed at the Scottish system, namely that it is disorganised, unclear and inconsistent.<sup>3</sup> As in Scotland, codification of the criminal law has been proposed as a solution to the perceived problems with Irish criminal law. In 2003, the Irish government set up Expert Group on Codification of the Criminal Law to investigate the feasibility of embarking on a codification project. In 2004, the Expert Group published a report that outlined the ideal structure and style of a criminal code and recommended that codification occur, albeit on a phased basis. A few years later, the Criminal Justice Act 2006 set up the Criminal Law Codification Advisory Committee 'with the function of overseeing the development of a programme for the codification of the criminal law and to advise on the

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<sup>1</sup> E Clive, PR Ferguson, CT Gane & RAA McCall Smith, *A Draft Criminal Code for Scotland with Commentary* (Published under the auspices of the Scottish Law Commission 2003) ('*draft code*').

<sup>2</sup> P Ferguson, 'Codifying Scots Criminal Law' (2005) 7, conference paper presented at International Society for the Reform of Criminal Law, 19 International Conference June 2005.

<sup>3</sup> JP McCutcheon & K Quinn, 'Codifying Criminal Law in Ireland' (1998) 19(3) 3 SLR 131.

future maintenance of the code following enactment.<sup>4</sup> In contrast to the code group in Scotland which was comprised solely of academics, the Advisory Committee includes representatives from academia, the judiciary, the legal profession and, notably, representatives from the Department of Justice, Equality and Law Reform, the Office of the Attorney General and the Office of the Director of Public Prosecutions. Last year, the Irish Minister for Justice, Equality and Defence, Alan Shatter TD, published the draft criminal code prepared by the Advisory Committee. In sum, reform of the criminal law in Ireland is well under way.

## C WHAT DOES A FEMINIST VIEWPOINT ON LEGISLATIVE REFORM LOOK LIKE?

Feminist legal thought is complex and diverse and there is therefore no such thing as a unitary, all-embracing feminist perspective on reform. My aim here is not to argue that there is one, distinctly identifiable feminist viewpoint on reform (thereby 'essentialising' the feminist perspective) but rather to present the *types* of questions that *some* feminists might ask in relation to legislative reform. For reasons of pragmatism and simplicity, below I suggest that there are two broad feminist attitudes to legal reform – one that reflects the belief that legislative reform holds promise for the status of women in society, and another that holds that the promise of legislative reform is undermined by outside factors. First, however, it is necessary to introduce the central tenets of feminist legal theory in the criminal justice context.

### 1 Feminism and Criminal Law

In essence, a feminist approach to law is one that stems from the assumptions, first, that particular laws, legal institutions and legal actors do not adequately take into account the interests of women and, secondly, that 'there is something ... about the very structure or methodology of modern law, which is hierarchically gendered.'<sup>5</sup> Lacey has identified a number of themes that feminist legal theory challenges, namely: the neutral framework of legal reasoning, law's autonomy and discreteness, law's neutrality and objectivity, law's centrality, law as a system of enacted norms or rules and law's unity and coherence. In short, feminist legal theory as a whole has 'unpacked the treatment of women in law and chartered the multiple subtle ways in which law has been modelled on men's world views, behavioural patterns, needs, and interests, to the exclusion of those of women.'<sup>6</sup>

As is commonly noted, feminist critiques of criminal law initially focused on those areas of the law that are *obviously* of concern to feminists, such as rape, domestic violence and prostitution.<sup>7</sup> Feminists exposed the deficiencies of the law in these areas and suggested ways that the law could be changed to better protect women. While feminists still campaign rigorously for changes to the law in these areas, it is no longer their sole focus. As Nicolson explains, feminist critique has evolved insofar as it now addresses the more subtle ways that the criminal law is gendered.<sup>8</sup> Seemingly gender neutral concepts have been exposed by feminists as being the opposite of such. For example, a dominant theme in criminal justice-focused feminist theory has been that the defences of provocation and self-defence are tailored and implemented in a way that reflects

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<sup>4</sup> E Clive, 'Codification of Scottish Criminal Law' [2008] SCL 747, 753.

<sup>5</sup> N Lacey, 'Feminism and the Tenets of Conventional Legal Theory' in H Barnett (ed) *Sourcebook on Feminist Jurisprudence* (Cavendish 1997) 309.

<sup>6</sup> R Jhappan, 'The Equality Pit or the Rehabilitation of Justice' (1998) 10 Can J Women & L 60, 65.

<sup>7</sup> D Nicolson, 'Criminal Law and Feminism' in D Nicolson & L Bibbings, *Feminist Perspectives on Criminal Law* (Cavendish 2000) 1-2.

<sup>8</sup> *ibid.*

male models of behaviour and discriminate against female perpetrators. Nourse is of the view that the criminal law is imbued with issues of feminist concern. She writes:

Feminist issues can be found in the criminal law every time a criminal statute touches an intimate relationship, that is, a relationship governed by society's norms about the proper relationship of men and women, whether the "doctrinal" issue falls under the heading of murder or manslaughter, self-defence or provocation.<sup>9</sup>

We have seen, then, fundamental criminal law concepts such as *actus reus* and *mens rea* and even the hearsay rule in evidence being made subject to feminist challenge. The ways in which the criminal justice system relies on and perpetuates stereotypes about male and female criminal behaviour (for example, plays a part in gender construction) has also been addressed. With the above in mind and borrowing Nicolson's typology, it can be said that there are three core feminist concerns about the criminal law: the way that it inadequately protects women, the way that it discriminates against women and the way in which it constructs gender.<sup>10</sup>

The evolution of feminist critique in the criminal justice realm paralleled another fundamental movement in feminist legal thought more broadly: the movement away from 'liberal' or 'equality' feminism that (at the risk of generalising) adopted a formal equality approach and downplayed 'natural' differences between the sexes, to 'difference' feminism, an approach that (to varying degrees) acknowledges and embraces difference and that shifted the analytical focus to law's symbolic aspects.<sup>11</sup> The rise of difference feminism was natural and welcome but has created a well-known and fundamental fissure at the very core of feminist legal thought. The questions of, firstly, whether gender equality will be achieved through emphasising or downplaying difference and secondly, whether the language of equality, or even the law itself, is a valuable tool to meet feminist aims, have locked feminist theory into a 'seemingly intractable'<sup>12</sup> dilemma. Smart is of the view that both approaches are troublesome. She refers to Mackinnon's point that 'both of these approaches presume that men are the norm against women-as-different or women-as-equal are measured'<sup>13</sup> and notes that whereas the '[t]he difference approach ultimately nourishes a crude sociobiology, the equality approach can be used as easily by men as by women and often to the detriment of women.'<sup>14</sup> Smart also notes that both approaches accept law as it is and do little to challenge its claim to neutrality.<sup>15</sup> Indeed, so much ink has been spilled articulating and debating the respective advantages and disadvantages of each approach that common goals have been obscured to the detriment of the feminist cause. It is important to note at this point that although few contemporary feminists advocate a pure, unbridled formal equality approach, traces of the approach are still apparent in much feminist work.

With respect to the criminal law, the equality versus difference dilemma 'plays out as the question of whether criminal law should treat women and men according to the same legal standards or whether sex/gender differences should be reflected in differential rules, standards and even offences.'<sup>16</sup> The feminist discourse on legal reform has thus been heavily influenced by the equality versus difference debate. The debate not

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<sup>9</sup> V Nourse, 'The Normal Successes and Failures of Feminism and the Criminal Law' (1999-2000) 75 Chi-Kent L Rev 951.

<sup>10</sup> Nicolson, 'Criminal Law and Feminism' (n 7) 5.

<sup>11</sup> N Lacey, 'Feminist Legal Theory Beyond Neutrality' (1995) 48:2 Current Legal Problems 1, 7.

<sup>12</sup> Nicolson, 'Criminal Law and Feminism' (n 7) 19-20.

<sup>13</sup> C Smart, *Feminism and the Power of Law* (Routledge 1989) 82.

<sup>14</sup> *idid* 84.

<sup>15</sup> *ibid* 82.

<sup>16</sup> Nicolson, 'Criminal Law and Feminism' (n 7) 20.

only rears its ugly head when questions are asked about whether reform is necessary at all, but also when it comes to determining the content of reformatory measures. With the necessary groundwork in place, this paper now turns to sketch out the two main feminist attitudes to legal reform. The latter parts of this paper will then explain why feminism is valuable when it comes to determining the content and structure of criminal legislation.

## 2 The Appeal of Statutory Reform and Legal Change

Lacey describes liberal feminism as feminist legal theory's 'age of innocence.'<sup>17</sup> During this 'age of innocence' feminists pushed for legislative reform to remove formal barriers and eradicate explicit discrimination. Formal equality was the ultimate aim and changing the letter of the law was understood as the way to get there. Unsurprisingly, liberal feminists employed the language of liberalism to push for legislative change, framing their cause in terms of equality, citizenship, autonomy, individualism and choice. The following description of liberal feminism makes this point clear:

Liberal feminism assumes that people are autonomous individuals making decisions in their own self-interest in light of their individual preferences. Human well-being therefore should increase as individuals have more choices. Sexism operates by pressuring or requiring, sometimes by law, individuals to fulfil male and female roles regardless of their individual preferences. The solution to inequality between women and men is to offer individuals the same choices regardless of sex. The legal standard of formal equality is an expression of this solution.<sup>18</sup>

In the UK, the Sex Discrimination Act, which prohibits discrimination 'on grounds of sex' is the obvious 'trophy' of the liberal feminist movement. The difficulties with the formal equality approach adopted in this legislation will be addressed below.

The formal equality approach was also reflected in the efforts of US and Canadian feminists who fought to bring eradicate obstacles that differentiated rape from other crimes. Such feminists forcefully argued that requirements relating to corroboration, recent-complaint and resistance discriminated against rape victims and perpetuated gender stereotypes. As a result of this pressure, these barriers were formally removed. These reformatory measures had a number of profound effects that speak to the appeal of statutory and other reform more broadly. Firstly, and most obviously, these reforms 'helped produce significant legal and social changes regarding rape'<sup>19</sup>: they put rape victims on 'equal footing' with other victims of crime and played a part in changing public opinion about sexual assault.<sup>20</sup> In short, they illustrated that reform can have symbolic force and can send a particular and powerful message to society as a whole about equality and, more specifically, the legal status of women. It has also been argued that, if properly implemented, rape law reforms play a significant role in encouraging victims to come forward and ameliorating their experience in court.<sup>21</sup> Indeed, in the Canadian context, Roberts and Grossman highlighted a marked increase in reporting following enactment of new sexual offence laws.<sup>22</sup> 'Rape shield' legislation, of course, has been passed in

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<sup>17</sup> Lacey, 'Feminist Legal Theory Beyond Neutrality' (n 11) 3.

<sup>18</sup> M Becker, 'Patriarchy and Inequality: Towards a Substantive Feminism' (1999) *Chi Legal F* 21, 32-33, cited in A Gruber, 'The Feminist War on Crime' (2007) 92 *Iowa Law Review* 741, 752.

<sup>19</sup> A Gruber, 'Rape, Feminism, and the War on Crime' (2009) 84 *Washington Law Review* 581, 593.

<sup>20</sup> *ibid* 594.

<sup>21</sup> *ibid* 644.

<sup>22</sup> JV Roberts & MG Grossman, 'Changing Definitions of Sexual Assault: An Analysis of Police Statistics' in JV Roberts & RM Mohr (eds) *Confronting Sexual Assault: A Decade of Legal and Social Change* (University of Toronto Press 1994),

numerous countries with the specific purpose of encouraging victims to come forward through mitigating the trauma that they face when their sexual history is dragged up in court. On a more general note, the fact that feminist groups have been successful in campaigning for legal reform has demonstrated 'the possibility of voicing women's concerns in the legal process.'<sup>23</sup> This positive insight supports the view that law can be responsive to women's needs and intimates that there is something to be hopeful about!

Before turning to deal with the limits of legal reform it is worth underlining a basic point that is often overlooked: legislative change and reform is, in all areas of law, popularly regarded as the 'natural' solution to a legal problem. The majority of time (but not always) the enactment of legislation reflects a desire to change the status quo and move forward. With this in mind, it is starkly unsurprising that feminists have felt and responded to the strong pull towards legislative reform that could be said to provide 'quantifiable "success" or "progress."<sup>24</sup> Nonetheless, many argue that, as difficult as it is, the seemingly magnetic force of legislative reform should be resisted.

### 3 The Limits of Legislative Reform

All of the above claims about the value of legislative reform from a feminist perspective have been convincingly disputed. The basic and central counter claim is that 'legal reforms are frequently undercut by the sexism of those involved in enforcing the new laws.'<sup>25</sup>

A number of more sophisticated points stem from this foundational proposition. For example, it has been argued that 'law reform leaves untouched the institutions and practices that are at the root of women's subordination.'<sup>26</sup> Thus, although reform helps individual victims and may offer individual remedies, this comes at the cost of obscuring systemic disadvantage that needs to be addressed for real change to occur. A related point is that although reform entails legal change, its ability to effect meaningful social change is less clear. In short, legal reform is simply not a panacea: it has to 'be accompanied by more fundamental changes – changes in women's social and economic positions and in the power relations between men and women.'<sup>27</sup> To expand on this, it might be also suggested that the criminal justice system is ill-equipped to eliminate institutional sexism. It appears, for example, that the nature of the criminal justice system, with its narrow, individualistic focus on punishment is conceptually at odds with the ideal of substantive equality which is tied to notions of autonomy, belonging and dignity. On this view, to expect legal reform in the criminal justice sphere to deal effectively with women's oppression is fundamentally flawed.

With respect to the symbolic power of reform, feminists have pointed out this can be negative as well as positive. Reform can be seen as symbolically 'closing' issues, making it difficult for women to continue to campaign effectively for change.<sup>28</sup> In the US context, Nourse has used concrete examples to show that criminal law reform does not 'close' issues.<sup>29</sup> Enormous discrepancies remain between theory and practice following the enactment of legislation in certain areas. For instance, Nourse shows that the US courts' decisions are still informed by the resistance requirement despite the formal elimination of the requirement

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cited in K Tang, 'Rape Law Reform in Canada: The Success and Limits of Legislation' (1998) 42 Int J Offender Ther Comp Criminol 258.

<sup>23</sup> Tang, 'Rape Law Reform in Canada' (n 22) 262.

<sup>24</sup> Smart, *Feminism and the Power of Law* (n 13) 84.

<sup>25</sup> Nicolson, 'Criminal Law and Feminism' (n 7) 3.

<sup>26</sup> Tang, 'Rape Law Reform in Canada' (n 22) 266.

<sup>27</sup> *ibid* 267.

<sup>28</sup> *ibid*.

<sup>29</sup> Nourse, 'The Normal Successes and Failures of Feminism and the Criminal Law' (n 9).



from US law.<sup>30</sup> The Scottish experience with the 'rape shield' provisions of the Criminal Procedure (Scotland) Act 1995, which came into effect in 2002, is also illustrative.<sup>31</sup> A 2007 government study found that sexual history and bad character evidence was being introduced in court as much as before, despite being introduced with the clear and specific aim of reducing such evidence. The explanation provided for such failures is, of course, that outdated sexist norms continue to infect our legal system and influence the actions of those working within it.<sup>32</sup> The interesting question, according to Nourse, is exactly *how* these norms perpetuate themselves in a world that would, all other things being equal, reject them.<sup>33</sup> She posits that ambiguous or complex legislation provides hiding places for these norms at the same time as nurturing them. Discussing complex marital rape exemptions in the US, she writes:

Metanorms of flexibility and leniency become a friendly shield that allows legislators to avoid openly avowing what they really believe – that marital rape is a lesser crime. The discarded norms in which the relationship is more important than the violence still holds true; they simple remain hidden within complexity's claims for legitimacy.<sup>34</sup>

One final yet important feminist concern about legal reform is that it can have the indirect effect of lending support to conservative or neoliberal political ideologies that are at odds with the feminist cause more generally. The contention is that feminist demands that gender violence be taken more seriously and punished more stringently are essentially calls for criminalization and increased state control – calls that, if responded to, will have the effect of strengthening the penal state. This point is covered in detail by Gruber who views neoliberal values as individualist, anti-progressive and 'distinctly anti-feminist':<sup>35</sup>

... the anti-distributive characteristics of neoliberalism and the current criminal system are clearly ideologically dissonant with feminism's "commitment to a more egalitarian distributive structure and a greater sense of collective responsibility." Moreover, the belief that criminals are inherently worse than ordinary people is strikingly similar to the idea that women are inherently weaker than man and consequently incapable of occupying high status positions.<sup>36</sup>

Significantly, while some feminists simply draw attention to the limits of legislative reform and advocate a cautious approach, Gruber and others are of the view that reform has reached its limits and that feminists should therefore abandon it as a strategy. The criminal justice system, it is argued, can 'no longer provide a meaningful avenue for transformation'<sup>37</sup> because:

The lonely voice of women's empowerment cannot and will not be heard above the sound and fury of the criminal system's other messages – messages that reinforce stereotypes, construct racial and socio-economic binaries, and unmoor crime from issues of social justice.<sup>38</sup>

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<sup>30</sup> *ibid* 953-961.

<sup>31</sup> P Duff, 'The Scottish "Rape Shield": As Good as it Gets?' (2011) 15(2) ELR 218.

<sup>32</sup> *ibid*.

<sup>33</sup> Nourse, 'The Normal Successes and Failures of Feminism and the Criminal Law' (n 9) 958.

<sup>34</sup> *ibid* 968.

<sup>35</sup> A Gruber, 'Rape, Feminism, and the War on Crime' (n 19) 623. See also DL Martin, 'Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies' (1998) 38(1) OHLJ 151.

<sup>36</sup> *ibid* 634.

<sup>37</sup> *ibid* 658.

<sup>38</sup> *ibid*.

While such arguments certainly hold weight, it is significant to note that those who advance them do not go into detail about alternative strategies that might be more useful. Moreover, if feminists accept the futility of law reform and turn away from the criminal justice system, then what does this leave? The task of overhauling sexist societal attitudes? This would be a challenge of mammoth and potentially unmanageable proportions.

On another note, the argument that legal reform has reached its limits is not so persuasive in the Scotland where there is still room and opportunity for reform. I am also of the view that the debate over whether feminists should pursue or abandon a reform agenda diverts the focus away from another important issue: the value and necessity of a feminist perspective on reforms that are already in the pipeline. In essence, my argument is that there is significant value in a feminist perspective on reform that is occurring or proposed, regardless of whether it has been initiated by feminists.

## D THE DIFFERENCE IT MAKES: THE VALUE OF A FEMINIST PERSPECTIVE

First and foremost, the feminist voice is valuable because diversity of opinion is necessary in a pluralistic society and is widely understood to lead to more inclusive, democratic decision making. This argument is all the more forceful when the focus is on criminal justice reforms that are being justified on the basis that the criminal law requires 'modernisation.' It is argued here that a law or system cannot purport to be 'modern' unless it is grounded in modern principles, including (substantive!) equality. A feminist perspective is one step towards ensuring that this goal is realised.

Further, if one accepts the argument that women's voices have been ignored in legal discourse then a feminist critique of the law provides a platform for this marginalised voice to be heard and has the potential 'to produce a very different picture of the world from that which informs the male perspective currently embedded in the law.'<sup>39</sup> The work of the Feminist Judgments Project in the UK<sup>40</sup> and the Women's Court of Canada<sup>41</sup> neatly illustrates the way in which feminism can be 'perspective transforming'<sup>42</sup> in a legal context. These two high-profile projects entailed the re-writing of key legal judgments from a feminist stance with the purpose of revealing what the law and legal decisions might look like if feminist viewpoints were taken into account. One infamous criminal law judgment that was re-written as part of the Feminist Judgments Project was the UK House of Lords judgement in *R v A* (2001).<sup>43</sup> This case concerned a challenge by a defendant that provisions contained in the English Criminal Evidence Act 1999 restricting the use of sexual history evidence in sexual offence trials violated his right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). Whereas the House of Lords employed section 3 of the Human Rights Act 1993 to render the provisions compatible with Article 6 – and thereby 'reintroduced judicial discretion into the system'<sup>44</sup> – the feminist judgment by Clare McGlynn upholds the restrictions on sexual history evidence in the new judgment:

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<sup>39</sup> DG Réaume, 'What's Distinctive About Feminist Analysis of Law: A Conceptual Analysis of Women's Exclusion from Law' (1996) 2 LT 265, 267.

<sup>40</sup> Feminist Judgments Project <<http://www.kent.ac.uk/law/fjp/>> (26 November 2012). There is also a book containing the rewritten judgments: R Hunter, C McGlynn & E Rackley, *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

<sup>41</sup> Women's Court of Canada <<http://womenscourt.ca/>> (26 November 2012).

<sup>42</sup> C Menkel-Meadow, 'Portia in a Different Voice: Speculating on a Women's Lawyering Process' (1985) 1 Berkeley Women's Law Journal 39.

<sup>43</sup> *R v A* (No 2) [2001] UKHL 25.

<sup>44</sup> *R v A* [2001], Feminist Judgments Project <<http://www.kent.ac.uk/law/fjp/cases/crime.html>> (26 November 2012).

A defendant's rights do not extend to permitting the admission of any, or even all relevant, evidence. A balance must always be struck between the various interests at play. In the context of sexual history evidence, there is a strong risk of prejudice to the truth-seeking function of the trial in admitting sexual history evidence, as well as a risk of interfering with the complainant's right to private life ...<sup>45</sup>

It is interesting to note that not every re-written decision in the UK project resulted in a different legal conclusion – it was only that the reasoning employed to reach the decision had a feminist edge. There was also evidence of feminist disagreement over certain issues. Overall, however, such projects demonstrate the way in which feminism challenges 'vested interests, [and] uproots perspectives which are familiar, and because familiar, comfortable.'<sup>46</sup> The logic underlying such projects – that feminism challenges the status quo and is necessary to focus attention on issues that affect women's lives, interests and needs – applies equally when we come to think about the content and structure of legislation. Accordingly, we might consider what legislation that was rewritten from a feminist perspective would look like. This will be the focus of the final part of this paper. Before doing so, however, I would like to acknowledge the assumption at the root of any argument that the feminist perspective has inherent value: that there is something 'different' or 'distinct' about the feminist voice in the legal context. The idea that there is such a thing as a unique female-specific conception of justice owes a huge amount to Carol Gilligan, whose work has been hugely influential (and controversial) as far as feminist legal theory is concerned.<sup>47</sup> The crux of Gilligan's argument is that men and women have different way of approaching moral problems – whereas women espouse a contextual ethics of care that prioritises human connection, relationships and responsibilities, men are more likely to espouse a more abstract ethics of justice that prioritises rules and rights. While acknowledging that there are difficulties (a consideration of which is beyond the scope of this paper) with Gilligan's approach, it is important to recognise that there are strong continuities between her ideas and any project that takes a unique or distinct feminist sense of justice as its starting point.

## **E HOW FEMINISM COULD INFLUENCE THE CONTENT OF LEGISLATIVE REFORM: AN EXAMPLE FROM SCOTLAND**

Above I explained that the value of a feminist perspective on legislative reform rests with its power to disrupt the status quo in order to ensure that the law takes into account the experiences of women. I will now use the Sexual Offences (Scotland) Act 2009 to illustrate the difference that a feminist perspective could have made to the content of the legislation.

This Sexual Offences (Scotland) Act 2009 was introduced following extensive consultation and a comprehensive review of the law of rape and other sexual offences by the Scottish Law Commission.<sup>48</sup> In the main, the SLC report and the resulting Act were a reaction to legal criticism of the shortfalls of the common

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<sup>45</sup> C McGlynn, 'Feminist judgment: R v A (No 2) [2001] UKHL 25' (*The Guardian*, 11 November 2010) <<http://www.guardian.co.uk/law/2010/nov/10/rape-juries-feminist-judgment>> (26 November 2012).

<sup>46</sup> E Langland & W Gove (eds), *A Feminist Perspective in the Academy: The Difference It Makes* (University of Chicago Press 1983) 3 cited in MJ Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 *Wis Women's LJ* 147.

<sup>47</sup> C Gilligan, *In A Different Voice: Psychological Theory & Women's Development* (Harvard University Press 1982).

<sup>48</sup> Scottish Law Commission, *Report on Rape and Other Sexual Offences* (The Stationery Office 2007), Scot Law Com No. 209 ('SLC' and 'SLC Report').

law of rape triggered by the High Court's decision in *Lord Advocate's Reference*,<sup>49</sup> a decision that was heavily criticised in legal and academic circles. The Act introduced a comprehensive new law of sexual offences in Scotland. For simplicity's sake, below I focus on two issues with the *actus reus* of the law of rape<sup>50</sup> in the Act that are interesting from a feminist perspective, and draw attention to the sorts of questions that might have been asked by feminists in relation to each of these issues.

One controversial aspect of the new legislation relates to the fact that, according to section 1 of the Act, only men can be guilty of rape. In short, the legislation is *not* gender neutral. There are two obvious yet different feminist responses to this absence of gender neutrality. The first response which might be categorised as being a product of the 'difference approach' – is that it is right to exclude female perpetrators from the definition of rape as this reflects a statistical reality. To change the law so that women could be prosecuted for rape would be to fail to recognise the intrinsically gendered nature and effects of rape. Notably, this is the approach that was preferred by the drafters of the *draft code* in Scotland. In any event, the argument goes that gender neutral legislation 'crumbles'<sup>51</sup> the moment that it is subject to interpretation by judges. Canadian feminist Lahey is of the view that it is better to have gender specific legislation 'rather than leave to the vagueries of the judicial mind the extent to which gendered experience will be considered to be relevant in the definition of sexual offences like rape.'<sup>52</sup>

The second response – which is more of a 'formal' equality response – is that the legislation should be gender neutral as the inclusion of men and not women as perpetrators of rape risks reinforcing stereotypes. As Cowan puts it:

The inclusion of women as potential perpetrators is arguably progressive in that it challenges the traditional understanding of rape as premised on active male sexuality preying on the passive bodies of women. Rape, confined to non-consensual penile penetration, can be read as grounded in gendered stereotypes of active/passive male/female sexuality.<sup>53</sup>

As Cowan also notes, the fact that only men can be prosecuted for rape may give rise to a human rights claim on grounds of gender discrimination.<sup>54</sup> This, of course, would be somewhat ironic from a feminist standpoint! In sum, the decision to include or exclude women from the definition of rape is far from simple. It was a decision, however, that received little consideration in the SLC review or during the Bill's passage through Parliament.<sup>55</sup> It is submitted here that feminism could have been used as a tool to explore the issues further. Even if the same decision was reached (to enact gender specific legislation), at least this would have occurred in a more democratic way and against the backdrop of a more thorough review process that explicitly took into account the needs and experiences of those that the legislation is going to directly affect.

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<sup>49</sup> As the SLC put it: '[t]he immediate background to the reference was the existence of public, professional and academic concern as a consequence of certain high-profile decisions of the High Court of Justiciary.' *ibid* 1.

<sup>50</sup> There are many other aspects of the Act that are interesting from a feminist perspective. These include the way in which consent is dealt with, more specifically the content of the non-exhaustive list of circumstances in which free agreement is presumed to be absent, and the extent to which the *mens rea* test contained in section 16 is really 'objective.'

<sup>51</sup> K Lahey, 'Implications of Feminist Theory for the Direction of Reform of the Criminal Code' [unpublished paper for the Law Reform Commission of Canada 1984] 34.

<sup>52</sup> *ibid*.

<sup>53</sup> S Cowan, 'All Change or Business as Usual? Reforming the Law of Rape in Scotland' in C McGlynn & V Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010) 159.

<sup>54</sup> *ibid*.

<sup>55</sup> *ibid*.

Another controversial aspect of the new definition of rape is that it does not include rape by objects. Despite the fact that the SLC 'considered penetrative assaults to be markedly different from non-penetrative assaults',<sup>56</sup> under the new legislation penetration by an object is treated legally as a specific form of sexual assault, not rape.<sup>57</sup> Although the maximum sentence for this offence is the same as rape, Cowan points out that there is evidence of a more lenient approach being applied in England and Wales where there are similar provisions.<sup>58</sup>

What, then, is the feminist perspective on whether penetration by objects should be included in the definition of rape? Although this is not a clear cut issue there is likely feminist consensus that the way in which victims experience and react to such offences should be taken into consideration as a matter of priority. As a starting point, the question as to what exactly makes rape 'rape' might be asked. Is it the fact of penetration or *penile* penetration? During the Bill's passage through Parliament, Scottish Women's Aid (SWA) and Victim Support Scotland (VSS) argued that the wrongness or rape, and the trauma and violation that stems from rape – is caused by the act of penetration rather than the object doing the penetrating.<sup>59</sup> They also pointed out that the risk of physical and mental harm was just as acute. It is also important to point out here that the exclusion of rape by objects from the definition of rape, together with the exclusion of women as potential perpetrators of rape, fails to protect 'women who have sex with women'<sup>60</sup>. As Cowan explains, 'rape as an offence of penile penetration leaves women who have sex with women without the same level of criminal law protection from intimate partner assault as heterosexuals and gay men.'<sup>61</sup> With this in mind, the fact that penetration by an object does not constitute rape appears to disregard the experiences and feelings of victims, at the same time as protecting some victims more than others. Although the offence of penetration by an object may still result in an equally severe sentence according to the law, in practice a more lenient approach may be taken and, even if a severe sentence is granted, it might still be argued that the expressive harm of the offence is not captured through the failure to classify it as rape. Although victims' groups did give evidence to the Justice Committee, it is submitted here that more weight should have been given to the feminist perspective on this issue and that, had this happened, this particular shortfall in the new Act could have been avoided. Such shortfalls have had the unfortunate effect of overshadowing the more progressive elements of the legislation which, so far, has done little to ease the dissatisfaction with how the Scottish legal deals with sexual offences.

## F CONCLUSION

Although it is perhaps too early to tell, the Sexual Offences (Scotland) Act may also tell us something about the limits of legislative reform more generally. Although the Act was clearly introduced with good intentions and with the aim of responding to Scotland's atrociously low conviction rate for rape, many are doubtful that the legislation will solve the problems that triggered its birth. Nevertheless, it is difficult to argue that the new Act does not mark a step forward. At the very least, it is an improvement on the situation under the common law and signals that the Scottish government is making valiant efforts to deal with sexual offences. However, as should be clear from above, some feminist thinkers will simply not accept this argument. They might contend, for example, that the Act represents a step backwards insofar as it strengthens the penal

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<sup>56</sup> *ibid* 160.

<sup>57</sup> Section 2 Sexual Offences (Scotland) Act 2009.

<sup>58</sup> Cowan, 'All Change or Business as Usual?' (n 53) 159.

<sup>59</sup> *ibid* 160.

<sup>60</sup> *ibid* 161.

<sup>61</sup> *ibid*.

state, undermining feminist values in the long run. Despite the complexities in the relationship between feminism and reform, this paper has suggested that the feminist voice should be paid attention to both in deciding whether to proceed with reform and when it comes to determining the content of such reform. The incorporation of diverse viewpoints, of which feminism is one, should be part and parcel of the 'modernisation' of the criminal law that is currently occurring in Scotland and Ireland.