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Integrating feminisms' perspectives into the legal curriculum: *Feminist Perspectives on Health Care Law*

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Abstract
This chapter discusses *Feminist Perspectives on Health Care Law*, which was edited by Sally Sheldon and Michael Thomson and published in 1998. It was the first in a series of Routledge-Cavendish collections published predominantly towards the end of the 1990s and the start of the 2000s, which brought together scholars to explore feminist perspectives on specific subjects in the UK law curriculum. The contributors to *Feminist Perspectives on Health Care Law* addressed topics which might be expected in any collection on health law - matters relating to consent, autonomy and reproduction, for example – as well as topics which might not immediately be thought of as matters of 'feminist' concern – such as the regulation of professions, the ubiquitous *Bolam* test, or resource allocation. In so doing, they raised readers' awareness of the importance of considering feminist and other perspectives and readings of law, *and* encouraged, challenged, and/or inspired them to undertake such analysis and critique for themselves. They did more than this too. In showing how feminist perspectives could draw attention to how law may operate and affect particular groups in practice (intentionally or otherwise), other disparities and matters of intersectionality were also highlighted.

The Work

Feminist Perspectives on Health Care Law (*Feminist Perspectives*) was the first in a series of collections published by Cavendish/Routledge-Cavendish, which 'gather[ed] together feminist perspectives on different areas of the law curriculum'.[1] In their collection, Sally Sheldon and Michael Thomson each contributed a chapter and brought together 14 other scholars to, amongst other things, challenge two contentions. First, that health care law[2] 'is

[1] Anne Bottomley and Sally Sheldon, 'Series Editors' Preface' in Sally Sheldon and Michael Thomson (eds), *Feminist Perspectives on Health Care Law* (Cavendish 1998) v, v. doi.org/10.4324/9781843142690. The other collections in the series are Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Routledge 1999). doi.org/10.4324/9781843142225; Anne Morris and Therese O'Donnell (eds), *Feminist Perspectives on Employment Law* (Routledge-Cavendish 1999); Jo Bridgeman and Daniel Monk (eds), *Feminist Perspectives on Child Law* (Routledge-Cavendish 2000); Lois Bibbings and Donald Nicolson (eds), *Feminist Perspectives on Criminal Law* (Routledge-Cavendish 2000); Mary Childs and Louise Ellison, *Feminist Perspectives on Evidence* (Routledge-Cavendish 2000); Janice Richardson and Ralph Sandland (eds), *Feminist Perspectives on Law and Theory* (Routledge-Cavendish 2000); Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Routledge-Cavendish 2001). doi.org/10.4324/9781843140535; Linda Mulcahy and Sally Wheeler (eds), *Feminist Perspectives on Contract Law* (Routledge-Cavendish 2005). doi.org/10.4324/9781843146094; Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006); Hilary Lim and Anne Bottomley (eds), *Feminist Perspectives on Land Law* (Routledge-Cavendish 2007); Janice Richardson and Erica Rackley (eds), *Feminists Perspectives on Tort Law* (Routledge 2014).

[2] I use 'health care law' in this chapter when referring to or discussing matters directly relating to *Feminist Perspectives*, because this is the terminology used by Sheldon and Thomson in their collection. I use 'medical law' when talking to particular matters in the 1990s, as this was the predominant terminology at that time. When discussing the field more broadly, I use the term 'health law' as it is the term starting to gain more traction now – including in the title to this collection.

nothing more than a collection of cases and statutes which might be better located within one of the core subjects of law: crime, administrative law, equity, property, contract and – in particular tort law'.[3] Second, that 'feminism has very little of interest to say about law at all'.[4] The contributions in the collection thus sought to start 'shaking the confidence of the traditionalist in both of these views' by demonstrating 'the rich diversity of feminist perspectives and the various insights which they can offer into the workings of law'.[5] These were the tasks, then, of the authors of the 14 substantive chapters, in which the *Bolam* test,[6] the doctor-patient relationship,[7] professional regulation,[8] informed consent,[9] mental health law,[10] children,[11] clinical research,[12] resource allocation,[13] confidentiality,[14] reproduction and reproductive technologies,[15] body ownership,[16] and death and dying[17] were considered.

The Context

> A father and his son are in a car accident. The father dies at the scene. The son is unconscious and is rushed to hospital. He needs immediate surgery. The surgeon enters the room, looks at the boy and says, 'I can't operate on this boy, he is my son'.
>
> Who is the doctor?

This may seem like an odd way to start this section, but when I was telling a colleague about this project and the leading work I had chosen, he repeated this riddle. It was posed to him at school in the 1970s and many of his classmates struggled to solve it. At that time, the answer – the surgeon is the boy's mother – was incomprehensible to many. Now, there are other possibilities that might come to mind, including that the surgeon is male and is in a same sex relationship. But the point of the riddle still stands – about the assumptions we make, about

[3] Sally Sheldon and Michael Thomson, 'Health care law and feminism: A developing relationship' in Sheldon and Thomson (n 1) 1-13, 1, reference removed.
[4] ibid 1.
[5] ibid 2.
[6] Sally Sheldon, 'A responsible body of medical men skilled in that particular art …": Rethinking the *Bolam* test' in Sheldon and Thomson (n 1) 15-32.
[7] Michael Thomson, 'Rewriting the doctor: Medical law, literature and feminist strategy' in Sheldon and Thomson (n 1) 173-88.
[8] Jonathan Montgomery, 'Professional regulation: A gendered phenomenon?' in Sheldon and Thomson (n 1) 33-51.
[9] Peggy Foster, 'Informed consent in practice' in Sheldon and Thomson (n 1) 53-71.
[10] Eileen V Fegan and Philip Fennell, 'Feminist perspectives on mental health law' in Sheldon and Thomson (n 1) 73-96.
[11] Jo Bridgeman, 'Because we care? The medical Treatment in children' in Sheldon and Thomson (n 1) 97-114.
[12] Marie Fox, 'Research bodies: Feminist perspectives on clinical research' in Sheldon and Thomson (n 1) 115-34.
[13] Noel Whitty, '"In a perfect world": Feminism and health care resource allocation' in Sheldon and Thomson (n 1) 135-53.
[14] Thérèse Murphy, 'Health confidentiality in the age of talk' in Sheldon and Thomson (n 1) 155-72.
[15] Fegan and Fennell (n 10); Derek Morgan, 'Frameworks of analysis for feminisms' accounts of reproductive technology' 189-209; Celia Wells, 'On the outside looking in: Perspectives on enforced caesareans', 237-57; Katherine de Gama, 'Posthumous pregnancies: Some thoughts on "life" and death', 259-77: all in Sheldon and Thomson (n 1).
[16] Carl Stychin, 'Body talk: Rethinking autonomy, commodification and the embodied legal self' in Sheldon and Thomson (n 1) 211-36.
[17] Hazel Biggs, 'I don't want to be a burden! A feminist reflects on women's experiences of death and dying' in Sheldon and Thomson (n 1) 279-95.

how language can lead us in certain directions, and about the importance of questioning and being alert to our bias – unconscious and otherwise.

When *Feminist Perspectives* was published in 1998, it, along with the subsequent collections in the Routledge-Cavendish series, reflected and contributed to the growing literature on feminist theory and feminist approaches to law and legal study that had started to be published during the 1980s and 1990s.[18] *Feminist Perspectives* was an important collection in terms of the *methodological* approaches the authors adopted within it. They showed *how* these approaches could be applied to complex and complicated issues in health law, practice and ethics, and how they could offer alternative ways of reading, approaching, and even resolving these matters. And in relation to health law and ethics specifically, *Feminist Perspectives* contributed to the burgeoning literature in the UK (United Kingdom) which applied feminist approaches to health matters.[19]

The collection was also a welcome addition to the literature on medical/health law, including student-focused materials.[20] While not a textbook as such, in her review of *Feminist Perspectives* Emily Jackson noted that the chapters in the collection 'offer a range of perspectives upon some of the core topics usually covered by courses on health care or medical law'.[21] And Kate Diesfeld identified 'the diversity and eclecticism of the topics, which are addressed through a broad spectrum of methodological and theoretical frameworks', as a strength in her review.[22] *Feminist Perspectives* could thus usefully be read alongside the existing textbooks of the time.

This was particularly important because despite the growing interest in perspectives other than those of the 'traditional lawyer' in wider academia,[23] the authors of UK-based textbooks on medical/health care law in the 1980s and 1990s were largely silent on feminist and other perspectives on law.[24] A notable exception was Jean McHale, Marie Fox and John Murphy's *Health Care Law: Text and Materials*,[25] which was published in 1997 - a year before *Feminist Perspectives*. In their textbook, McHale, Fox and Murphy specifically noted the

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[18] Carol Smart, *Feminism and the Power of Law* (Routledge 1989); Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); Ngaire Naffine, *Law and the Sexes: Exploration in Feminist Jurisprudence* (Allen & Unwin 1990); Katharine T Bartlett and Rosanne Kennedy, *Feminist Legal Theory: Readings in Law and Gender* (Routledge 1991); Anne Bottomley and Joanne Conaghan, *Feminist Theory and Legal Strategy* (Blackwell 1993); Anne Bottomley, *Feminist Perspectives on the Foundational Subjects of Law* (Routledge-Cavendish 1996). doi.org/10.4324/9781843142706; Hilaire Barnett, *Sourcebook on Feminist Jurisprudence* (Routledge-Cavendish 1996).

[19] Including, for example, Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth 1995); Jo Bridgeman and Susan Millns, *Feminist Perspectives on Law: Law's Engagement with the Body* (Sweet & Maxwell 1998).

[20] John K Mason and Alexander McCall-Smith, *Law and Medical Ethics* (2nd edn, Oxford University Press 1987), (3rd edn, Oxford University Press 1991), (4th edn, Oxford University Press 1994), (5th edn, Oxford University Press 1999); Margaret Brazier, *Medicine, Patients and the Law* (1st edn, Penguin 1987), (2nd edn, Penguin 1992); Ian Kennedy and Andrew Grubb, *Medical Law: Text with Materials* (1st edn, Oxford University Press 1989), (2nd edn, Oxford University Press 1994); Jonathan Montgomery, *Health Care Law* (1st edn, Oxford University Press 1997).

[21] Emily Jackson, 'Book review - S. Sheldon and M. Thomson (eds.), *Feminist Perspectives on Health Care Law*' (2002) 10 *Med Law Rev* 107, 109. doi.org/10.1093/medlaw/10.1.107.

[22] Kate Diesfeld, 'Book review - Sally Sheldon and Michael Thomson (eds), *Feminist Perspectives on Health Care Law*' (2000) 8 *Feminist Legal Studies* 255, 255. doi.org/10.1023/A:1009297210406.

[23] Sheldon and Thomson (n 3) 1.

[24] See (n 20).

[25] Jean McHale, Marie Fox, John Murphy, *Health Care Law: Text, Cases and Materials* (Sweet & Maxwell 1997).

absence of gender in debates about health care law and suggested that 'gender issues are not confined to questions about the patients involved' and that feminist approaches have 'highlighted the extent to which the dominant traditions of health care ethics have often stressed independence and autonomy at the expense of recognising the social world in which we live'.[26] Given this, they argued that it was necessary to 'consider how far our approaches to moral thinking have blinkered our understanding of the problems as well as illuminating them'.[27] The contributors to *Feminist Perspectives* met this challenge with aplomb, stepping into the gap with a rich and diverse narrative which has informed debate since its publication.

The Significance

In 2000, I reviewed *Feminist Perspectives* for the *Child and Family Law Quarterly*.[28] Among other things, I said that the collection was 'a valuable and significant contribution to the existing work on health care law', and I suggested that readers may be 'left with more questions than answers about feminist perspectives on health care law, but this is no bad thing'.[29] Over 20 years later, I have reviewed these statements and argue that this collection *is* a leading work in health law and ethics because the discussions in the chapters show the relevance of feminist and other perspectives on health law and highlight the 'diversity of opinions and views which are present within the subject'.[30] In their chapters, the contributors considered topics that were included in most medical/health care law undergraduate and postgraduate courses in the 1990s and continue to be included in syllabi today. The collection was, therefore, a significant - I would suggest essential - addition to the growing literature in the field of medical/health law because of *the perspectives* adopted by the authors; perspectives which introduced new ideas and possibilities to readers.

When I studied medical law (as it was definitely called at that time) in the early 1990s, not only did few law schools offer it as an option but the perspectives considered within such courses were limited. This is not to criticise my lecturers; indeed, they helped to further my growing interest in health law matters. My point is that the chapters in *Feminist Perspectives* introduced me (and many others I am sure) to different readings and interpretations of what I had, until then, naively understood to be established 'facts'. For me, *Feminist Perspectives* was a truly revealing collection. It gave voice, substance and support to some of the questions and concerns that I had had as an undergraduate but that had, as yet, largely been 'rendered invisible' to me.[31] It introduced me to a range of socio-legal literatures, it made me ask (more) questions – and to want to ask (even more) questions. Put simply, it made me think.

In making my argument that *Feminist Perspectives* is a leading work in the field of health law and ethics, I will draw on examples from the chapters in the collection, but my main focus will be on the two contentions that Sheldon and Thomson sought to challenge; first, whether health care law is a discrete subject and, second, the relevance of feminism to law. It may seem odd to focus on contentions raised in Sheldon and Thomson's 13 page introductory chapter when there are a wealth of substantive chapters in *Feminist Perspectives* that I could

[26] ibid 4.
[27] ibid.
[28] Sara Fovargue, 'Book review - *Feminist Perspectives on Health Care Law*' (2000) 12 *Child and Family Law Quarterly* 94.
[29] ibid 97.
[30] ibid 94.
[31] Anne Bottomley, 'Feminism: Paradoxes of the double bind' in Ian Grigg-Spall and Paddy Ireland (eds) *Critical Lawyers' Handbook* (Pluto Press 1992) 22-30, 25.

consider. However, when the collection was published, I was starting my academic career – a career I have spent predominantly teaching and writing within the health law and ethics space – and the contentions that Sheldon and Thomson sought to challenge were (and still are) important to me. They are significant contentions, worthy of attention *because of* the challenges that they posed (and continue to pose) to orthodoxies within law school curricula and legal research more broadly. Indeed, as Sheldon and Thomson themselves suggested, whether health care law is a discrete subject and whether feminism has 'very little of interest to say about law at all',[32] are important and interconnected matters because:

> [t]hey both raise issues of inclusion and exclusion, of what counts as "real" law, "real" knowledge and "real" legal scholarship, what is appropriate to be taught or researched in the law school and of what has no place there.[33]

While in some contexts and in some regards the subject of the exclusion may have changed, and/or the focus shifted, we know that inclusion and exclusion, 'othering', and debates about who or what 'counts' in law and in wider society, are ongoing and highly contested.[34] Thus, although the law as presented in *Feminist Perspectives* is now over 20 years old, and so may no longer be correctly stated, the broader points and insights contained within the chapters remain relevant and should be afforded appropriate attention and consideration in our discussions in the field today.

Turning, briefly, to Sheldon and Thomson's discussion of health care law *as a subject* itself,[35] as well as its *name*,[36] their comments are significant because they called specific attention to the idea that some subjects within law curricula 'mattered', 'counted', were 'real', while others were not. This point is integrally connected with feminist approaches because:

> [t]he feminist perspective establishes a systematic cross-section through existing rules of law in order to perceive otherwise unnoticed connections of significance for all individuals, especially and directly to women.[37]

As Sheldon and Thomson argued, 'traditional legal boundaries and categories' can be questioned by focusing on substance and not procedure, and bringing together cases as 'health care law', rather than discussing them in tort or criminal law or public law books, 'might be seen as beginning to challenge law's own exclusionary structures, to reformulate the organisation of principles under headings which do not immediately confound and

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[32] Sheldon and Thomson (n 3) 1, reference removed.
[33] ibid 2.
[34] We could think here of the increasing push to 'decolonise' the legal curriculum. See, for example, Foluke Adebisi, 'Should we rethink the purposes of the Law School? A case for decolonial thought in legal pedagogy' (2021) 2 *Amicus Curiae* 428. doi.org/10.14296/ac.v2i3.5309.
[35] On the history of engagement between law and medicine and of 'medical law' as an academic discipline see, for example, Margaret Brazier and Jonathan Montgomery, 'Whence and whither "modern medical law"?' (2019) 70 *NILQ* 5. doi.org/10.53386/nilq.v70i1.229.
[36] On this see, for example, Montgomery (n 31) v and ch 1; Margaret Brazier and Nicola Glover, 'Does medical law have a future?' in David Hayton (ed), *Law's Future* (Hart 2000) 371-88, 372. Note the more recent adoption of 'health law' in, for example, this collection and by others including Tamara Hervey and Jean McHale, *European Union Health Law: Themes and Implications* (Cambridge University Press 2015); Peter Skegg and Ron Paterson (eds), *Health Law in New Zealand* (Thomson Reuters 2015); Anne-Maree Farrell and others, *Health Law: Frameworks and Contexts* (Cambridge University Press 2017).
[37] Tove Stang Dahl, *Women's Law* (Norwegian University Press 1987) 27, references removed.

exclude the reader with no knowledge of law'.[38] Doing these things, thus, 'might be seen as part of a feminist legal project of breaking down exclusionary structures and beginning a process of the deprivatisation of knowledge'.[39]

Part of the role of an academic is to question and challenge established orthodoxies, to reflect on areas of law, and to bring new perspectives to existing bodies of law. As Joanne Conaghan has argued, '[i]n challenging the common sense perceptions which pervade and at the same time disturb us, feminism can be very liberating'.[40] Doing so helps to open up and start new conversations. Difficult and challenging questions were undoubtedly asked in *Feminist Perspectives* – questions that were not (routinely) asked in other medical/health care law books at that time. For example, Jonathan Montgomery considered whether the regulation of medicine, nursing and midwifery is a gendered phenomenon.[41] In so doing, he showed how 'the workings of these concepts [professionalism and professionalisation] cannot be understood without reference to issues of gender', and that 'there are in fact subtle differences in the ways in which the governing bodies have exercised their powers over the members of the [medical, nursing, midwifery and health] professions'.[42] Montgomery argued that 'the thrust of medical regulation has been to preserve the individual autonomy of doctors, while the steer given by the UKCC [the United Kingdom Central Council for Nursing, Midwifery and Health Visiting] has been more corporatist, seeking greater uniformity of values and practice'.[43]

Another example of challenging orthodoxies can be found in Fox's chapter, where she suggested that women are 'doubly disadvantaged in medical research', because of bias against them as researchers *and* as research participants.[44] She argued that 'research offers a microcosm of how women are represented in health care law', because although women are in the majority in the UK's population and are the greatest number of health care consumers:

> diseases which are exclusive to women are inadequately funded, while research into diseases affecting both sexes is overwhelmingly conducted on men, ignoring gender differences in responses to treatment, such as differential rate of absorption and excretion.[45]

Importantly, in an early footnote Fox recognised that 'bias on the grounds of gender intersects with various factors, such as class, race, sexual orientation, disability, etc',[46] and in her discussion of the relationship between investigator and subject, argued that the inherent power imbalances in that relationship are 'especially prevalent where the research object is differentiated from the investigator by factors such as gender, class, race, ethnicity, and … species'.[47] Notably, Fox cautioned against an unquestioning demand for women to be included in clinical research 'while ignoring the oppression of non-human animals in which

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[38] Sheldon and Thomson (n 3) 5. On health care/medical law being a subject in its own right see, for example, Ian Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press 1991), ch 1.
[39] Sheldon and Thomson (n 3) 5.
[40] Joanne Conaghan, 'Tort law and the feminist critique of reason' in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish 1996) 47-68, 49.
[41] Montgomery (n 8).
[42] ibid 35.
[43] ibid 36. Note that the UKCC is now known as the Nursing and Midwifery Council (the NMC).
[44] Fox (n 12) 115.
[45] ibid, reference removed.
[46] ibid n 2.
[47] ibid 122.

much clinical research is grounded'.[48] She argued for a 'feminist science' which 'would entail less emphasis on the dispassionate approach which left women, minorities and animals vulnerable to objectification and abuse'.[49] Fox thus drew attention to matters of intersectionality and difference, and included differences that were not often recognised or spoken of in medical/health care law material at the time. Indeed, when *Feminist Perspectives* was published towards the end of the 1990s, such questions or matters were not routinely posed or considered in UK-based medical law textbooks. Rather, legal stories were automatically (unthinkingly?) written and heard from the perspective of white, able-bodied, 'autonomous' males. That law could hear from or talk to other bodies was not widely accepted.

This attention to particulars and differences was also highlighted by Katherine O'Donovan. In her Foreword to *Feminist Perspectives*, O'Donovan suggested that '[f]eminist jurisprudence has altered the way in which some traditional areas of the legal curriculum are researched, taught and understood' and that the essays in the collection indicated that feminist jurisprudence could do the same for health care law too.[50] She suggested that the move from seeing law as 'closed to the particulars of individual people' to 'the dissection of these figures', was an important shift and approach which could 'open up spaces for other possible relationships and alternative ways of structuring health care law'.[51] This is, I contend, in evidence in the 14 substantive chapters in *Feminist Perspectives*, and in the examples I have noted so far.

It can also be seen in Noel Whitty's exploration of resource allocation, where he argued that 'a prerequisite for fairer NHS rationing policies is a feminist reconstruction of the doctor-patient relationship',[52] to acknowledge 'its political nature across diverse terrain such as gender, race, class, sexuality, religion, age or disability',[53] and take account of 'the diversity of "lived experiences"'.[54] Whitty argued that, much as Sheldon did in her rethinking of the *Bolam* test discussed below,[55] seeing resource allocation as being merely about limited resources ignores the influence and power of the medical profession, and assumes that doctors' determination of a patient's best interests is insulated from, rather than replicates, 'social hierarchies on grounds such as gender, race, class and sexual orientation'.[56] Furthermore, if the doctor-patient relationship is seen as 'private and non-political' then access to healthcare rests on the available resources; yet, medical knowledge and practice have a 'politicised nature' and so other social and political factors may determine or influence access.[57] Whitty draws on Dorothy Roberts' research, which explored intersections of race, gender and class in the doctor-patient relationship in the US,[58] and he concluded that

[48] ibid 116.
[49] ibid 133.
[50] Katherine O'Donovan, 'Foreword – Is the Patient Position Inevitably Female?' in Sheldon and Thomson (n 1) vii-x, vii.
[51] ibid viii-ix.
[52] Whitty (n 13) 143.
[53] ibid 149.
[54] ibid 143.
[55] Sheldon (n 6); *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
[56] ibid.
[57] ibid 149.
[58] Dorothy Roberts, 'Reconstructing the patient: Starting with women of colour' in Susan Wolf (ed), *Feminism and Bioethics: Beyond Reproduction* (Oxford University Press 1996) 116-43, 123.

'[t]ransforming the doctor-patient relationship is not just about changing the norms of medical practice; it also requires "a reconstruction of society's view of the patient"'.[59]

As well as including these other voices and perspectives, many of the contributors to *Feminist Perspectives* adopted socio-legal approaches and drew on research from other disciplines to support and challenge their contentions, as well as to help them draw new insights into the subject of their chapter. For example, in discussing the (even then) well-trodden path of informed consent, Peggy Foster powerfully utilised medical literature on breast and cervical screening along with legal literature to support her argument that 'all healthy individuals [should] be given a clear legal right to be informed of the potential risks and limitations of any type of screening programme which is offered to them on an unsolicited basis'.[60] Similarly, in his discussions of feminisms'[61] accounts of reproductive technology, Derek Morgan drew on literature from a number of disciplines including sociology, philosophy, political philosophy, and the history of medicine.[62]

In *Feminist Perspectives*, Sheldon and Thomson brought together some 'new' voices to push and challenge 'traditional' ideas in the health care law arena. Of the 16 contributors, two were listed as professors at the time of publication (with Carl Stychin about to move from Keele University to Reading for a chair), three as senior lecturer or reader, and the remaining nine were either described as lecturers or no indication as to their professional status was supplied. Giving space to these different voices (and all collected together in one place) was important, because while the textbook authors of the time, such as Margaret Brazier, Ian Kennedy and Andrew Grubb, and Ken Mason and Alexander McCall Smith, did not all necessarily agree with each other, there was a similarity in approach if not in style. It seemed to be accepted that there was a way 'to do law', a way that had to be applied to medical law cases and matters, just as there was with, say, public law cases and matters. Yet, we will not move forward if we look at things in the same way. Rather, it is essential to use different lenses to 'see' the same body of law and thereby enrich our understandings of that law. Feminist perspectives and approaches are a *methodology* – a lens – and a way of reading and interpreting statutes and case law. The chapters in *Feminist Perspectives* showed *how* such lenses could be applied to health law matters and welcomed new voices to the conversation.

In specifically applying feminist perspectives to health care law, Sheldon and Thomson noted, as I have above, McHale and colleagues' exceptional inclusion of feminist ethics and literature in their textbook. Sheldon and Thomson said that 'no other textbook currently available in the UK … engages in any depth with feminist writing on health care law', and that this absence suggested that 'feminist perspectives have had no serious impact on this part of the legal academy'.[63] The lack of engagement with, and inclusion of, such perspectives did not, of course, mean that the authors of the other medical law textbooks did not adopt critical

[59] Whitty (n 13) 151.
[60] Foster (n 9) 71.
[61] On this see, for example, Bender (n 69) 5: 'There are many feminisms, all with distinctive priorities'; Nancy Fraser and Linda J Nicholson, 'Social criticism without philosophy: An encounter between feminism and postmodernism' in Avner Cohen and Marcelo Descal (eds), *The Institution of Philosophy: A Discipline in Crisis?* (Open Court 1989) 283-302, 299, emphasis in original: 'One might best speak of it in the plural as the practice of "femninsms"'; Margaret Davies, *Asking the Law Question* (Law Book Company 1994) 172: 'as soon as we start talking about the theory which underlies feminist beliefs … it becomes not only reductive, but meaningless to talk about "feminism" as though it is a single body of thought – just as it is meaningless to speak of "women" as though we are all the same'.
[62] Morgan (n 15).
[63] Sheldon and Thomson (n 3) 7.

approaches to law, policy, medicine, and/or ethics. However, Sheldon and Thomson's comparison of the discussion of abortion in McHale and colleagues' book with that in Mason and McCall Smith's text, pertinently emphasised the significant differences in approach and the 'traditional' minimal attention paid to feminist literature on legal regulation of reproduction:

> [t]he only mention of the significance of abortion services to women is in the introduction to the chapter, where the authors [Mason and McCall Smith] note in passing that attitudes to abortion depend on one's views of the foetal right to life versus the woman's right to control her own body. Indeed, according to the authors, the major significance of abortion, given the abrogation of the central tenant of the Hippocratic oath, is its effect on the medical ethos.[64]

In not offering different lenses through which to view such important issues, the teaching, as well as readers' understandings, of health law matters were undoubtedly obscured. This can be seen in, for example, Sheldon's chapter on rethinking the *Bolam* test,[65] a now ubiquitous test which had been applied to determine matters as diverse as the standard of care in medical negligence cases, how much information should be disclosed to patients, and whether adults who lack the capacity to make decisions for themselves should be sterilised.[66]

Sheldon argued that the *Bolam* test was adopted in subsequent negligence cases because the judges *chose* to 'prioritise one set of policy considerations to the complete occlusion of others', and that that choice was 'best understood within a context of race, class and gender, where the judges naturally identify with the position of the doctor as fellow professional'.[67] Thus, in her readings of doctor and patient in the House of Lords decisions in *Whitehouse v Jordan* and *Sidaway v Board of Governors of the Bethlem Royal Hospital*,[68] Sheldon suggested that in determining where loss should fall in medical negligence cases, judges were influenced by their identification with the doctors involved – with shared backgrounds, gender, class and race. By contrast, Mrs Whitehouse was categorised as a 'difficult, nervous and at times aggressive patient',[69] and while there was no evidence on Mrs Sidaway's mental state, Lord Templeman stated that the doctor 'might reasonably have taken the view that Mrs Sidaway might be confused, frightened or misled by more detailed information which she was unable to evaluate at a time when she was suffering from stress, pain and anxiety'.[70] These interpretations and readings were not common in either tort law or health law scholarship or teaching in the 1990s, but Sheldon importantly showed how (re)viewing legal cases through different critical lenses could shed new light on established 'facts'.

Feminist Perspectives is thus a significant collection because it shows *how* feminist methodologies can be applied to a range of issues within health law. In their chapters, contributors offered alternatives to 'black letter' approaches to teaching and writing about health law. In black letter approaches, '[p]eople are decontextualized for the analysis, yet no one really lives an acontextual life'[71] they tend to exclude 'consideration of anything but the

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[64] ibid 8.
[65] Sheldon (n 6); *Bolam* (n 55), respectively.
[66] *Maynard v West Midlands AHA* [1985] 1 All ER 635, HL; *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] 1 All ER 643, HL; *F v West Berkshire Health Authority* [1990] 2 AC 1, HL.
[67] Sheldon (n 6) 21.
[68] [1981] 1 All ER 267, HL; *Sidaway* (n 64), respectively.
[69] *Whitehouse* (n 68) 271 *per* Lord Wilberforce.
[70] *Sidaway* (n 66) 664.
[71] Leslie Bender, 'A lawyer's primer on feminist theory and tort' (1988) 38 *Journal of Legal Education* 3, 35.

text of the law itself'.[72] By contrast, feminism/feminisms have a 'woman-centred methodology of critically questioning our ideological premises and reimagining the world',[73] and seek to be 'inclusive, not exclusive; its teachings illustrate the harm that flows from exclusion'.[74] Feminism values 'openness, inclusivity, and equal respect, not exclusivity and hierarchy; diversity and difference, not uniformity and sameness'.[75] And in openly acknowledging and discussing lived experiences, partialities and positions, '[f]eminism describes shades of differences and varieties of relationships rather than distinct oppositions'.[76]

An example of this can be found in Hazel Biggs's chapter, where she questioned whether women's experiences as carers impacted their attitudes to death and dying.[77] Drawing on sociological and anthropological research, as well as feminist legal research, Biggs suggested that 'women have unique encounters with death and dying', including via infanticide, abortion, miscarriage, stillbirth, and neonatal death, and are thus 'more directly involved with death and dying simply because of their gender, and their experiences are distinct from those of men, even though men may share in the involvement'.[78] Given these experiences and the fact that 'it is usually women who assume the role of primary carer' for the dying,[79] Biggs pertinently called attention to the fact that while individual autonomy might be used to support voluntary euthanasia, the impact of such legalisation on women (who tend to live longer than men and are likely to have experiences as carers) should not be ignored. She suggested that having seen the effects of illness and the increasing dependence of others, women's experiences may mean that they are more likely to want to avoid being a burden and cared-for by others. Alternatively, they could believe that they are no longer of value in society if they can no longer *be* the carer but need to be cared-for. Thus, '[l]egal change to permit euthanasia could be perilous for women in these circumstances'.[80]

Biggs' chapter is an important challenge to accepted ideas about autonomy and end-of-life matters, highlighting, as it does, the fact that changes to law may affect different groups differently, even disproportionally, and that assumptions of a 'standard' patient are erroneous, even dangerous. Biggs' chapter was an example of the fact that feminist legal thought draws attention to 'mistrust in the impartiality of knowledge and a profound sense of the standpoint from which one is speaking'.[81] Furthermore, feminism's focus on gender offers 'just one possibility' by which to challenge law's supposed objectivity and partiality, and it can blend 'with consideration of other factors and other aspects of inclusion and exclusion'.[82] This can be seen in, for example, Whitty's chapter on resource allocation, which I have discussed above.[83] Indeed, one important method in feminist legal theory is asking the 'woman question': 'have women been left out of consideration? If so, in what way; how might that

[72] ibid 8.
[73] Bender (n 71) 4, references removed.
[74] ibid 4-5.
[75] ibid 11.
[76] ibid 27. This can be seen in, for example, research on relational autonomy, as included in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000).
[77] Biggs (n 17).
[78] ibid 282.
[79] ibid 285.
[80] ibid 294.
[81] Sheldon and Thomson (n 3) 12.
[82] ibid 9.
[83] Whitty (n 13).

omission be corrected? What difference would it make to do so?'[84] The aim in so doing is to 'identify the gender implications of rules and practices which might otherwise appear to be neutral or objective'.[85] Thus, as Katherine Bartlett, a prominent US-based feminist academic, has argued:

> "[d]oing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognizing that the woman question always has potential relevance and that 'tight' legal analysis never assumes gender neutrality.[86]

That this was so can be seen from Sheldon and Thomson's discussion, in their introductory chapter, of an area which might not be thought 'to be about women'[87] – medical malpractice. Sheldon and Thomson posed a series of questions about malpractice to highlight the relevance of feminist attention to (m)any health care/medical law matters:

> Few health care lawyers … will ever have asked themselves why so many of the cases dealing with medical malpractice seem to involve female patients (particularly those involving flawed consent). Is this just a coincidence? Is the need to provide adequate information to patients more routinely disregarded where those patients are female? Are cases where the patient is female more likely to reach the courts?[88]

These were important questions at the time and remain possible avenues for research today.

The Legacy

Trying to assess the legacy of an edited collection such as *Feminist Perspectives* is almost impossible. It can be seen in terms of the subsequent research of the individual contributors, work which has undoubtedly influenced, even shaped, health care law research and, in some instances, policy. Sheldon, for example, has consistently called attention to the need for law reform in the UK in relation to the regulation of reproductive health, particularly abortion,[89] Jo Bridgeman has continued to apply feminist methodologies to matters relating to children, families and health care,[90] with Biggs doing the same in relation to death and dying, end of life decision-making, and clinical research.[91] Legacy can also be seen in terms of the

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[84] Katherine Bartlett, 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829, 837.
[85] ibid 837.
[86] ibid.
[87] Bottomley (n 31) 24.
[88] Sheldon and Thomson (n 3) 8.
[89] See, for example, 'How can a state control swallowing? The home use of abortion pills in Ireland' (2018) 24 *Reproductive Health Matters* 90. doi.org/10.1016/j.rhm.2016.10.002; 'British abortion law: Speaking from the past to govern the future' (2016) 79 *MLR* 283. doi.org/10.1111/1468-2230.12180; 'The decriminalisation of abortion: An argument for modernisation' (2015) 36 *OJL* 334. doi.org/10.1093/ojls/gqv026; 'Gender equality and reproductive decision making' (2004) 12 *Feminist Legal Studies* 303. doi.org/10.1007/s10691-004-4988-z.
[90] See, for example, *Medical Treatment of Children and the Law: Beyond Parental Responsibilities* (Routledge 2020); 'A relational responsibilities framework for children's healthcare law' in Chris Dietz and others (eds), *A Jurisprudence of the Body* (Palgrave Macmillan 2020) 255-80; 'The provision of healthcare to young and dependent children: the principles, concepts and utility of the Children Act 1989' (2017) 25 *Med Law Rev* 363. doi.org/10.1093/medlaw/fwx008; 'Relational vulnerability, care and dependency' in Julie Wallbank and Jonathan Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2013) 199-215.
[91] See, for example, 'From dispassionate law to compassionate outcomes in healthcare law, or not' (2017) 13 *International Journal of Law in Context* 172. doi:10.1017/S1744552317000106; 'Legitimate compassion or

subsequent scholarship of the new and emerging scholars who were included in the collection, and the contributions they have made to health law debates and wider academia. *Feminist Perspectives* can thus be seen as a significant platform in this regard.

A further impact of the scholarship presented in *Feminist Perspectives* can, perhaps, be seen in the context of current UK-based health law textbooks. A quick look at the content pages or indexes of the most recent editions of such texts shows how the subject's landscape has changed, not only because all now include at least one chapter which discusses (bio)ethics or moral theories, but also because feminist ethical theories are included in all of them.[92] More broadly, the inclusion of such material in textbooks has undoubtedly influenced generations of health law academics, practitioners and members of the judiciary. While it would be too much to claim that this was all the result of *Feminist Perspectives*, Leslie Bender has suggested that in order for students to see 'it' (whatever that 'it' is) as worthwhile, a book on 'it' is required so that they do not need to 'question whether they are learning the "right stuff"', because 'the presumption is that if a law book or academic publisher binds the material between hard (or even soft) covers, the likelihood that the materials are appropriate for the study of the subject increases'.[93] The very publication of *Feminist Perspectives*, and the rest of the series, thus gave credibility (if it was needed) to feminist legal thinking and methodologies, credibility which has since been enhanced (with the same query again) by the near universal inclusion of such theories and materials in UK-based health care law and ethics textbooks.

Finally, as I noted at the start of this chapter, this collection was a real eye-opener for me and so has had a personal legacy in terms of my research. The chapters in *Feminist Perspectives* showed me that it was possible to approach and view issues in health law in different ways, and that doing so was worthwhile and important. Reading the collection helped me to see how asking 'the woman question' could reveal hitherto unseen inequalities in areas where such might not necessarily be expected to exist. They also suggested how that question could be reframed, so that, as Martha Minnow has proposed, 'similar feminist critiques' could be developed 'in contexts beyond gender, such as religion, ethnicity, race, handicap, sexual preference, socioeconomic class, and age'.[94] *Feminist Perspectives* thus made me consider excluded and/or oppressed 'others', as well as matters of intersectionality,[95] and I have sought to explore such matters in my subsequent research. Others have done the same, and it is now common for scholars to employ a range of perspectives, including feminist

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compassionate legitimation? Reflections on the policy for prosecutors in respect of cases of encouraging or assisting suicide' (2011) 19 *Feminist Legal Studies* 83. dx.doi.org/10.1007/s10691-011-9165-6; *Healthcare Research Ethics and Law: Regulation, Review and Responsibility* (Routledge-Cavendish 2009); 'Criminalising carers: death desires and assisted dying outlaws' in Belinda Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart 2007) 58-74.

[92] Contents page - 'ethics of care' - Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016); 'feminist medical ethics' - Jonathan Herring, *Medical Law and Ethics* (8th edn, Oxford University Press, 2020). Index - 'feminist ethics'- Emily Jackson, *Medical Law: Text, Cases and Materials* (6th edn, Oxford University Press 2022); 'feminism' - Shaun Pattinson, *Medical Law and Ethics* (6th edn, Sweet & Maxwell 2020).

[93] Leslie Bender, 'Teaching feminist perspectives on health care ethics and law: A review essay' (1993) 61 *University of Cincinnati Law Review* 1251, 1252.

[94] Martha Minnow, 'Feminist reason: Getting it and losing it' (1988) 38 *Journal of Legal Education* 47, 47.

[95] Kimberlé Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Legal Forum* 139.

approaches, when analysing law.[96] Clearly, such applications cannot be attributed solely (if at all) to Sheldon and Thomson's collection, but what the contributors to *Feminist Perspectives* undoubtedly did do is show how feminist (and other) perspectives could usefully and successfully be employed to challenge existing orthodoxies and hegemony. *Feminist Perspectives* may have been the start of a journey, but it has not been (and should not be) its end.

[96] These can be seen in collections such as Máiréad Enright and others (eds), *Northern/Irish Feminist Judgements: Judges' Troubles and the Gendered Politics of Identity* (Hart 2017); SW Smith and others (eds), *Ethical Judgments: Rewriting Medical Law* (Hart 2017); Helen Stalford and others (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017).