

SYMPOSIUM

REWRITING JUDICIAL OPINIONS AND THE FEMINIST SCHOLARLY PROJECT

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In 1995, the authors of a law review article examining “feminist judging” focused on the existing social science data concerning women judges and compared the voting records and opinions of the only female Justices on the U.S. Supreme Court: Ruth Bader Ginsburg and Sandra Day O’Connor.¹ Based on this review, the authors concluded that appointing more women as judges would make little difference to judicial outcomes or processes.² The authors accused those who advocated for more women on the bench of having a hidden feminist agenda³ and bluntly concluded that “[b]y any measure, feminist judges fit very uneasily in most conceptions of the proper role of the judicial system.”⁴

More than twenty years later, scholars have a better understanding of what constitutes “feminist judging”; moving beyond the gender of those involved in

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1 Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 919 (1995) (“The weight of the evidence demonstrates that most female judges do not decide cases in a distinctively feminist or feminine manner.”); cf. Sharon Elizabeth Rush, *Feminist Judging: An Introductory Essay*, 2 S. CAL. REV. L. & WOMEN’S STUD. 609, 610 n.2 (1993) (explaining that the concept of “feminist judging” is not confined to women judges but “focuses more on the idea that we should move away from traditional legal decisionmaking (which generally promotes white male hegemony) and begin to reconstruct our legal system to consider the views of women, people of color, gays and lesbians, and other subordinated groups”).

2 See Solimine & Wheatley, *supra* note 1, at 899.

3 *Id.* at 892 n.8 (“It is precisely the call for *feminist* judging, which we think fairly characterizes much of the literature advocating more female judges, that bears the brunt of most of our criticism. Nonetheless, our primary concern is with the call for more female judges, regardless of whether they purport to have a ‘feminist’ agenda.”).

4 *Id.* at 893.

making judgments, feminist judging is understood to derive from the asking of feminist questions and the application of feminist theories and methods. Current scholars also are taking a closer look at the role of feminist judicial perspectives throughout the judicial system. Through a series of “feminist judgments” projects around the globe,⁵ scholars are testing the proposition that feminist judging “fits” within the judicial role, no matter the gender of the judge. In the form of rewritten opinions based on the facts and precedent in effect at the time of the original decision, these projects demonstrate that judges who apply feminist perspectives would make a profound difference, not only in the outcomes and processes in individual cases, but also in the development of the law.⁶

In these projects, feminist judging is recognized as a complex and potentially transformative practice. Thus, as Kathryn Abrams suggested in 1991 about feminist lawyering, the effects of feminist judging could be extensive and far reaching.⁷ Because legal methods are not set in stone but instead consist of “a partly cohering collection of professional practices and argumentative conventions employed by those who make their livings as lawyers,” feminist advocates might over time “transform not only lawyers’ views of gender justice, but their views of how to use law to persuade and produce social change.”⁸ As Rosemary Hunter wrote more recently, such a transformation is possible because feminist judging has both substantive and procedural goals: “It aims to achieve gender justice in the outcomes of cases as well as in the process of judging, and to consider the effects of decisions on broader social relationships.”⁹

Beyond the general agreement that feminist judging is not confined to decisionmaking by women judges, feminist judging remains difficult to categorize. Unlike other jurisprudential approaches, feminism is “a wider social theory and

5 See, e.g., AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al., eds., 2014); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al., eds., 2010); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al., eds., 2017); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS]; NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright et al., eds., 2017); Diana Majury, *Introducing the Women’s Court of Canada*, 18 CANADIAN J. WOMEN & L. 1, 4 (2006); Sharon Cowan, Chloë Kennedy & Vanessa Munro, *Scottish Feminist Judgments Project*, U. EDINBURGH: EDINBURGH L. SCH., <http://www.sfjp.law.ed.ac.uk/> (last visited Sept. 6, 2018); *Feminist International Judgments Project: Women’s Voices in International Law*, U. LEICESTER, <http://www2.le.ac.uk/institution/researchimages/feminist-international-judgments-project-women2019s-voices-in-international-law> (last visited Sept. 6, 2018); Jhuma Sen et al., *The Feminist Judgments Project: India*, FEMINIST JUDGMENTS PROJECT INDIA, <https://fjpiindia.wixsite.com/fjpi/call-for-papers> (last visited Sept. 6, 2018).

6 See *supra* note 5 and accompanying text.

7 See Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373, 400 (1991).

8 *Id.* at 375.

9 Rosemary Hunter et al., *Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches*, 12 INT’L J.L. CONTEXT 337, 347 (2016).

political practice which seeks to explain the causes of and to remedy women's disadvantages, inequalities and subordination."¹⁰

Moreover, "feminism" itself comprises a multiplicity of theories, methods, and approaches.¹¹ Nonetheless, the organizers of feminist judgments projects agree that feminist judgments have some things in common. These include an awareness of the ways in which apparently neutral or objective legal rules and practices have varying, and nonneutral, effects on individuals.¹² They also include identifying whose perspectives are missing from current laws and "incorporating, where relevant, the experiences, perspectives and interests of women and other traditionally excluded groups into decisionmaking."¹³

Since the 2016 publication of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*,¹⁴ much has happened in the United States to make us both more and less optimistic about the future incorporation of feminist perspectives into judicial opinions. Systemic barriers to gender justice are being built while others are apparently giving way. For example, even though appointing more women judges does not guarantee more feminist judgments, the trend of appointments to the federal courts threatens to stall a slow transformation of the federal judiciary into a more diverse body.¹⁵ After decades of growth in the number of newly appointed judges who were women and members of other underrepresented groups, President Donald Trump was, as of November 2017, "nominating white men to America's federal courts at a rate not seen in nearly 30 years."¹⁶

Similarly, using words and phrases typically associated with "feminism," such as "patriarchy" or "sex-role stereotyping," does not guarantee that feminist perspectives will be incorporated into judicial decisionmaking. Yet its absence is

¹⁰ *Id.* at 346.

¹¹ Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 167–68 (2018).

¹² Hunter, Anleu & Mack, *supra* note 9, at 347; *see also* Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, in FEMINIST JUDGMENTS, *supra* note 5, at 3–5 [hereinafter *Introduction to the U.S. Feminist Judgments Project*].

¹³ Hunter et al., *supra* note 9, at 347 ("The role of a feminist judge is therefore to achieve justice by . . . acknowledging and incorporating, where relevant, the experiences, perspectives and interests of women and other traditionally excluded groups into decision-making."); *see also* *Introduction to the U.S. Feminist Judgments Project*, *supra* note 12, at 3 (describing feminism as "a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law").

¹⁴ FEMINIST JUDGMENTS, *supra* note 5.

¹⁵ *See, e.g.*, Rorie Spill Solberg & Eric N. Waltenburg, *Trump's Judicial Nominations Would Put a Lot of White Men on Federal Courts*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/28/this-is-how-trump-is-changing-the-federal-courts/?utm_term=.4fe9ec061811.

¹⁶ Catherine Lucey & Meghan Hoyer, *Trump Choosing White Men as Judges, Highest Rate in Decades*, AP NEWS (Nov. 13, 2017), <https://apnews.com/a2c7a89828c747ed9439f60e4a89193e/Trump-choosing-white-men-as-judges,-highest-rate-in-decades>. According to the Associated Press, "91 percent of Trump's nominees are white, and 81 percent are male Three of every four are white men, with few African-Americans and Hispanics in the mix. The last president to nominate a similarly homogenous group was George H.W. Bush." *Id.*

disheartening all the same. A recent study found that the words “feminist” and “feminism” have been used only once in the content of a Supreme Court majority opinion and that feminism has been discussed substantively only twice in any Supreme Court opinion.¹⁷ At a time when feminist scholarship about the law has proliferated, and feminist advocates have made feminist arguments in cases with gender implications, the use of feminist vocabulary has declined in both briefs and opinions in the federal appellate courts.¹⁸ This omission of words or phrases typically associated with feminism, let alone the actual words “feminist” or “feminism,” suggests that “[feminist] words are not properly within the language of law.”¹⁹ And this omission is significant because the language of law is a “prestigious type of language that must be used if the speaker is to function effectively and to which only the most powerful members of society have access.”²⁰

In the face of barriers in the courts, public movements may advance gender justice.²¹ When the #MeToo movement began, experts pointed out how difficult it is to prove sexual harassment in the courts.²² Sandra Sperino and Suja Thomas wrote that over the last fifty years, the legal system has increasingly favored “employers over employees via a host of procedural, evidentiary and substantive mechanisms. Sexual harassment lawsuits are one area where this systematic bias appears; racial discrimination lawsuits are another.”²³

The current public discussion may effectively instigate change that the law has been unable to achieve. As Catharine MacKinnon, the lawyer and legal scholar largely responsible for the creation of sexual harassment as a cognizable legal claim,²⁴ recently wrote:

17 McKaye L. Neumeister, Note, *By Any Other Name: The Vocabulary of “Feminism” at the Supreme Court*, 29 YALE J.L. & FEMINISM 241, 245–46 (2017).

18 *Id.* at 254 (“As of December 2016, 305 opinions from the federal Courts of Appeals use the word ‘feminist(s)’ or ‘feminism(s)’ Focusing on a narrower period from 1970 through 2015, the Courts of Appeals decided 1,917,930 total cases. This means that the words ‘feminist’ or ‘feminism’ appear in only 0.016% of Courts of Appeals decisions in that period.”).

19 *Id.* at 245.

20 Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 (1998).

21 An emphasis on culture as a fruitful locus for changing social values is a hallmark of what some have called “third-wave feminism.” See Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 162–63 (2007) (“Although third-wave feminists may appear to ignore the law, reject its methods or reject its accomplishments, they are very much engaged in a transformative project. Through writing, art, video, dance, and music, third-wave feminists communicate messages about the importance of women and their experiences. This type of cultural work can, in some sense, be seen as a necessary pre-condition to an evolution in the law . . . [T]hird-wave engagement with culture may be a precursor to the law’s adoption of some third-wave feminist ideas.”).

22 Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>.

23 *Id.*; see also SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017).

24 See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); see also Wendy Pollack, *Sexual Harassment: Women’s*

#MeToo, this uprising of the formerly disregarded, . . . has made untenable the assumption that the one who reports sexual abuse is a lying slut, and that is changing everything already. Sexual harassment law prepared the ground, but it is today's movement that is shifting gender hierarchy's tectonic plates.²⁵

According to MacKinnon, the “unprecedented wave of speaking out in conventional and social media . . . is eroding the two biggest barriers to ending sexual harassment in law and in life: the disbelief and trivializing dehumanization of its victims.”²⁶

Thus, as MacKinnon explains, changes in the law had to come first in order to make it possible to conceive of sexual violations in terms of inequality. Over time, however, those changes were not enough. According to MacKinnon, because “[p]owerful individuals and entities are [now] taking sexual abuse seriously . . . and acting against it as never before . . . survivors are initiating consequences none of them could have gotten through any lawsuit.”²⁷ Even more significantly, if the movement shifts society's norms over the long term, those norms may eventually be incorporated into the law.

In this context, we welcome the following nine reviews of and responses to *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, a volume we edited that included twenty-five rewritten decisions and commentary on each rewritten opinion. The book project involved over fifty contributors, including legal scholars from all corners of the academy, as well as practicing attorneys.²⁸ The following reviews are from a wide array of authors from various disciplines; they include law professors, a former judge, practicing attorneys, and a political scientist. These diverse reviewers engage with the book from a number of varying perspectives, with some focusing on doctrine, others on theory, and still others on process. The end result is a rich and comprehensive look at the volume whose alternative judgments might have resulted in transformative legal and cultural shifts in the United States in terms of gender equality. Widening the scope of alternative judgments, the volume of rewritten opinions from the U.S. Supreme Court has inspired a series of subject-matter specific books that are forthcoming from Cambridge University Press.²⁹

First among the following reviews is one that illustrates the importance of incorporating feminist perspectives into judgments on women's rights in the workplace. Gillian Thomas, an attorney with the ACLU Women's Rights Project, touches on several of the volume's rewritten feminist judgments, including *Muller*

Experience vs. Legal Definitions, 13 HARV. WOMEN'S L.J. 35, 42–43 (1990) (describing Professor MacKinnon's development of the legal claim of sexual harassment).

25 Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

26 *Id.*

27 *Id.*

28 See FEMINIST JUDGMENTS, *supra* note 5.

29 The first book in the series has been published. See FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Bridget J. Crawford & Anthony C. Infanti eds., 2017). There is approval in place or concrete plans for volumes that focus on Reproductive Justice, Torts, Corporations, Trusts and Estates, Employment Discrimination, and Family Law. See *Series Projects*, THE U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/projects/> (last visited Sept. 6, 2018).

v. Oregon,³⁰ *Geduldig v. Aiello*,³¹ and *Dothard v. Rawlinson*.³² Of each of these feminist judgments, Thomas says that they offer “invaluable lessons to today’s practitioners” about the importance of telling clients’ stories “to judges who themselves may be years, even decades, away from ‘real’ jobs, and who have remained isolated from the realities of working women’s lives.”³³ Thomas explores the ways in which the gendered nature of work is a “construct of assumptions, stereotypes, and anachronistic traditions.”³⁴

Law professors Sandra Sperino and Elizabeth Kukura focus on the doctrinal transformation in two critical feminist judgments: *Price Waterhouse v. Hopkins*³⁵ and *Roe v. Wade*.³⁶ Professor Sperino makes the case that Professor Martha Chamallas’s rewrite of *Price Waterhouse* would have worked a sea change for future Title VII jurisprudence.³⁷ In particular, Sperino praises the rewritten opinion for moving the law beyond the inflammatory comments made to and about Ann Hopkins. While these comments—which included remarks that Hopkins should have gone to “charm school” and should walk and talk more “femininely”—undoubtedly helped Ann Hopkins as an individual plaintiff, they loomed so large in the original *Price Waterhouse* decision that future plaintiffs had difficulty proving discrimination in the absence of similarly outrageous comments.³⁸

Sperino points out that Chamallas’s rewrite emphasizes not the specific comments *per se*, but the structural discrimination at *Price Waterhouse*—an embedded and systematic misogyny of which the comments were merely a symptom.³⁹ This doctrinal shift would have encouraged lower courts to look underneath the surface of discriminatory workplace behavior to discover what structures put in place by the employer enabled and encouraged the behavior. Sperino also praises the feminist judgment for its rejection of the judge-made dichotomy between disparate impact and disparate treatment cases.⁴⁰ In Sperino’s view, Title VII does not distinguish these two kinds of cases and thus Chamallas’s opinion is truer to the statutory text.

30 Pamela Laufer-Ukeles, *Rewritten Opinion in Muller v. Oregon*, in FEMINIST JUDGMENTS, *supra* note 5, at 83, 83–97.

31 Lucinda M. Finley, *Rewritten Opinion in Geduldig v. Aiello*, in FEMINIST JUDGMENTS, *supra* note 5, at 190, 190–207.

32 Maria L. Ontiveros, *Rewritten Opinion in Dothard v. Rawlinson*, in FEMINIST JUDGMENTS, *supra* note 5, at 213, 213–27.

33 Gillian Thomas, *Feminist Judgments and Women’s Rights at Work*, 94 NOTRE DAME L. REV. ONLINE 12, 12 (2018).

34 *Id.* at 16.

35 Martha Chamallas, *Rewritten Opinion in Price Waterhouse v. Hopkins*, in FEMINIST JUDGMENTS, *supra* note 5, at 345, 345–60.

36 Kimberly M. Mutcherson, *Rewritten Opinion in Roe v. Wade*, in FEMINIST JUDGMENTS, *supra* note 5, at 151, 151–67.

37 Sandra Sperino, *Feminist Judgments and the Rewritten Price Waterhouse*, 94 NOTRE DAME L. REV. ONLINE 17, 17–19 (2018).

38 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

39 Sperino, *supra* note 37, at 17–18.

40 *Id.* at 18.

Law professor Elizabeth Kukura takes a similarly future-looking approach to her evaluation of Kimberly Mutcherson's *Roe v. Wade*.⁴¹ Kukura emphasizes the critical importance of Mutcherson's rejection of "viability" as the point at which the state's interest in the life of the fetus becomes compelling. She also commends Mutcherson for grounding women's reproductive rights in the Equal Protection Clause as well as privacy.⁴² For Kukura, what many see as a mere academic debate has serious, real-world consequences, not just for women who wish to obtain an abortion, but also acutely for women who wish to give birth on their own terms. Kukura focuses on cases referred to as "obstetric violence," in which pregnant women who wish to control the means of giving birth are coerced, and sometimes physically forced, to undergo procedures against their will. She tells the story of a woman who wished to have a vaginal birth for her second child after delivering her first child by cesarean section. The woman was literally forced down by medical personnel and made to endure a cesarean section.⁴³ For this woman, and all women who wish to make free choices about reproduction, the doctrinal basis for *Roe* is not solely an academic question.

In her review essay, law professor Noa Ben-Asher notes a doctrinal move that Angela Onwuachi-Willig makes in her feminist rewrite of *Meritor Savings Bank v. Vinson*,⁴⁴ but Ben-Asher's primary focus is on the theoretical. Specifically, she observes that Onwuachi-Willig's *Meritor* would have moved discrimination jurisprudence away from the liberal feminism that has dominated the discourse since the 1970s toward an antisubordination theory.⁴⁵ Again, this shift in Onwuachi-Willig's rewrite is theoretical, but the practical consequences are undeniable. In Onwuachi-Willig's reimagined majority opinion, the theoretical shift causes Title VII sexual harassment law to focus on the behavior of the accuser, not the behavior of the victim.⁴⁶ The impact of such a shift would have been immense, requiring lower courts to scrutinize employer and worker behavior without resort to "victim blaming." As Ben-Asher points out, the transformation that Onwuachi-Willig made to the law in her feminist judgment resonates with calls from the current #MeToo movement and others to require affirmative consent for sexual relations.⁴⁷ But the law still lags behind, embracing a liberal model of feminism that, because it assumes unconstrained choice and a balance of power between fully informed legal actors, requires asking questions about why a woman did not report, leave her job, or resist.

In their response to the rewritten *Loving v. Virginia* opinion of Professor Teri McMurtry-Chubb,⁴⁸ former Chief Justice of the Georgia Supreme Court Leah Ward

41 Mutcherson, *supra* note 36, at 151–67.

42 Elizabeth Kukura, *Revisiting Roe to Advance Reproductive Justice for Childbearing Women*, 94 NOTRE DAME L. REV. ONLINE 20, 20, 23 (2018).

43 *Id.* at 20–22.

44 Angela Onwuachi-Willig, *Rewritten Opinion in Meritor Savings Bank v. Vinson*, in FEMINIST JUDGMENTS, *supra* note 5, at 303, 303–21.

45 Noa Ben-Asher, *How Is Sex Harassment Discriminatory?*, 94 NOTRE DAME L. REV. ONLINE 25, 25–27 (2018).

46 Onwuachi-Willig, *supra* note 44, at 315.

47 Ben-Asher, *supra* note 45, at 27.

48 Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in FEMINIST JUDGMENTS, *supra* note 5, at 119, 119–36.

Sears and her colleague Sasha Greenberg focus on the story of Mildred Jeter and Richard Loving rather than the legal history that is the backbone of the rewritten opinion.⁴⁹ Though Sears and Greenberg agree that both the original U.S. Supreme Court opinion and McMurtry-Chubb's feminist judgment were correct in centering their legal conclusions on the legacy of White supremacy, Sears and Greenberg place their emphasis elsewhere. Their response highlights the family and individual lives that were at risk because of the Virginia statute.⁵⁰ Sears and Greenberg also emphasize developments that show society's growing recognition of the artificiality of racial barriers, which they find suggestive of the legal evolution that might be brought about by cultural changes over time.⁵¹

Political scientist Claire Wofford and Australian law professors Gabrielle Appleby and Rosalind Dixon approach their reviews largely from a procedural perspective. Both reviews tackle the concept of the book as a whole, as contrasted with the reviews that focus on a single case. Wofford acknowledges the groundbreaking nature of the book, but wonders whether the sole focus on judicial decisionmaking is flawed.⁵² She points out that gender subordination comes into play well before a decision is written, at least as early as the decision to file the case.⁵³ She cites a study that shows women are less likely to litigate than men and so are underrepresented in judicial decisions.⁵⁴ This result also suggests that the cases we do see about gender discrimination are statistical outliers.

Similarly, Professors Appleby and Dixon praise the breadth of the cases covered by the book, but see the book as primarily of interest to scholars and academics. As a teaching tool, the book is, in their view, too diverse and unwieldy to be easily digested by students.⁵⁵ They contrast the twenty-five cases in the *Feminist Judgments* book with their own volume, *The Critical Judgments Project: Re-reading Monis v The Queen*,⁵⁶ in which several authors rewrite the same case.⁵⁷ Appleby and Dixon make a compelling argument that students can more readily digest rewritten opinions if they are all of the same case.⁵⁸ Appleby and Dixon also suggest that diverse perspectives on one case have greater pedagogical value than a volume of disparate rewritten opinions insofar as multiple rewritings of the same case are more likely to demonstrate to students the wide variety in critical legal thinking.⁵⁹ They emphasize that their approach, which takes a critical legal stance

49 Leah Ward Sears & Sasha N. Greenberg, *The Love in Loving: Overcoming Artificial Racial Barriers*, 94 NOTRE DAME L. REV. ONLINE 28, 29–30 (2018).

50 *Id.* at 30.

51 *Id.* at 30–31.

52 Claire B. Wofford, *Looking to the Litigant: Reaction Essay to Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, 94 NOTRE DAME L. REV. ONLINE 32, 33 (2018).

53 *Id.* at 34.

54 *Id.* at 34–35.

55 Gabrielle Appleby & Rosalind Dixon, *Extending the Critical Re-reading Project*, 94 NOTRE DAME L. REV. ONLINE 37, 39 (2018).

56 THE CRITICAL JUDGMENTS PROJECT: RE-READING *MONIS V THE QUEEN* (Gabrielle Appleby & Rosalind Dixon eds., 2016).

57 Appleby & Dixon, *supra* note 55, at 39.

58 *Id.* at 39–43.

59 *Id.* at 43.

as opposed to a feminist one, is better suited to teaching students that legal reasoning is an exercise in standpoint and perspective.⁶⁰

By contrast, Sarah Weddington, the attorney who argued *Roe v. Wade* before the Supreme Court of the United States and an ongoing leader in the fight for reproductive rights, sees the *Feminist Judgments* book as a clarion call to young women, particularly law students, to fight for justice.⁶¹ Weddington, who argued *Roe* at just twenty-six years old, is thought to be the youngest person to successfully argue a Supreme Court case.⁶² In her review essay, she notes that activism takes confidence and passion.⁶³ Successful activists also need role models and mentors—someone to tell a young person she can do it, and that she should do it. In Weddington's case, her clients encouraged her to fight to argue the case, even though an older, more experienced man wanted to take the case from her when it got to the Supreme Court.⁶⁴ She encourages young people to use *Feminist Judgments* as a way to gain confidence, to seek out causes that inspire them, and to find the mentors and role models on whose shoulders they can stand.⁶⁵

Law professor Margaret Johnson's review essay concludes the collection, again by addressing the process of writing alternative judgments. She focuses on the expanded role of narrative as integral to a more just judicial process.⁶⁶ Johnson observes that most of the rewritten opinions in the book alter or expand the narratives of the original opinions.⁶⁷ In this way, the opinions disrupt the perception that the published opinion is the only story, and the only acceptable account of what happened in the case. She, like Ben-Asher, refers to the #MeToo movement, but Johnson's emphasis is on #MeToo as a narrative movement that, like the rewritten opinions, uses storytelling to undercut the power of the status quo. Johnson's review first embraces the concept of the book as a whole, and she then uses Ann McGinley's rewritten opinion of *Oncale v. Sundowner Offshore Services, Inc.*⁶⁸ as an example of how expanded narrative can dispute the law's priorities and biases.⁶⁹

These review essays are thoughtful, thought provoking, and challenge all who are engaged in Feminist Judgments projects around the globe⁷⁰ to consider the effectiveness of rewriting judicial opinions as a form of scholarship, a pedagogical tool, or even an exercise in activism. A variety of questions common to all of the

60 *Id.* at 38–39.

61 Sarah Weddington, *Feminist Judgments and the Future of Reproductive Justice*, 94 NOTRE DAME L. REV. ONLINE 44, 45 (2018).

62 *See, e.g.*, Sarah Weddington, *Reflections on the Twenty-Fifth Anniversary of Roe v. Wade*, 62 ALB. L. REV. 811, 811 n.* (1999) (author's note describing Ms. Weddington as the attorney who "successfully argued the winning side of the landmark 1973 case of *Roe v. Wade* and is thought to be the youngest person to win a case before the United States Supreme Court").

63 Weddington, *supra* note 61, at 46.

64 *Id.* at 48.

65 *Id.* at 50.

66 Margaret E. Johnson, *Feminist Judgments & #MeToo*, 94 NOTRE DAME L. REV. ONLINE 51, 51–54 (2018).

67 *Id.* at 52–54.

68 Ann C. McGinley, *Rewritten Opinion in Oncale v. Sundowner Offshore Services, Inc.*, in FEMINIST JUDGMENTS, *supra* note 5, at 414, 414–25.

69 Johnson, *supra* note 66, at 51–54.

70 *See supra* note 5 and accompanying text.

global feminist judgments are ripe for further inquiry. First, we come back to the question that started this Essay: Can feminist judging “fit” the “proper role of the judicial system”?⁷¹ We believe that the opinions in *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* answer that question with a resounding “yes,” but we recognize that the question is still a matter of some controversy.⁷²

This broader question raises numerous corollary questions. If a judge incorporates feminist perspectives into her judicial opinion, whether explicitly or implicitly, is she more likely to be considered “biased” than a judge who incorporates, say, a particular religious perspective into his judicial opinion? Why does the feminist perspective indicate (to some) a built-in bias,⁷³ but a Law and Economics perspective does not?⁷⁴ Given the possibility of being accused of bias, how likely is it that a judge will reveal himself to be a feminist?⁷⁵ Why does (or should) such a revelation matter (or not), given that no judge can check his or her personal life experience at the door to the courthouse? Finally, is feminism as an analytic tool capacious enough to highlight bias in the law that is based on race, gender, sex, sexuality, ethnicity, class, nationality, language, culture, ability,

71 Solimine & Wheatley, *supra* note 1, at 893.

72 See *id.* at 892. In 1990, Massachusetts gubernatorial candidate John Silber stated that he would not appoint Gloria Steinem to be a judge because men would not get a fair hearing before her. Fox Butterfield, *Silber Taps Public's Anger to Run a Strong Race in Massachusetts*, N.Y. TIMES (July 27, 1990), <http://www.nytimes.com/1990/07/27/us/silber-taps-public-s-anger-to-run-a-strong-race-in-massachusetts.html>. And, more recently, in 2013, Republicans blocked the judicial appointment of Nina Pillard to the District of Columbia Court of Appeals, based in part on her “militant feminism.” Dana Liebelson, *The Republican Freakout Over This Feminist, Pro-Choice Federal Judicial Nominee*, MOTHER JONES (Nov. 12, 2013), <https://www.motherjones.com/politics/2013/11/republicans-nina-pillard-dc-circuit-confirmation/>.

73 See Solimine & Wheatley, *supra* note 1, at 896.

74 See, e.g., *Mason Judicial Education Program*, MASON L. & ECON. CTR., <http://masonlec.org/divisions/mason-judicial-education-program/> (last visited Sept. 6, 2018) (“For over four decades, the LEC’s Judicial Education Program has helped train the nation’s judges and justices in basic economics, accounting, statistics, regulatory analysis, and other related disciplines. The Program offers intellectually rigorous, balanced, and timely education programs to the nation’s judges and justices in the belief that the fundamental principles of a free and just society depend on a knowledgeable [sic] and well educated judiciary.”). If this reasoning applies to any perspective-based analysis, then presumably judicial education in feminist theories and methods should be equally welcome.

75 For two examples of judges who openly have embraced the feminist label, see Brenda Hale, *Foreword*, in *FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE*, *supra* note 5, at v. Lady Hale became the first female president of the UK Supreme Court in 2017. See Haroon Siddique, *Brenda Hale Appointed as U.K. Supreme Court's First Female President*, GUARDIAN (July 21, 2017), <https://www.theguardian.com/law/2017/jul/21/brenda-hale-appointed-as-uk-supreme-court-first-female-president>; see also Erika Rackley, *What a Difference Difference Makes: Gendered Harms and Judicial Diversity*, in *WOMEN IN THE JUDICIARY* 36 (Ulrike Shultz & Gisela Shaw eds., 2012) (describing criticism of Australian judge who self-identified as a feminist at her swearing-in ceremony); cf. Heather Roberts, *Ceremony Matters: The Lasting Significance of the Swearing-In Ceremony of Chief Justice Susan Kiefel*, AUSTL. PUB. L. (Feb. 9, 2017), <https://auspublaw.org/2017/02/ceremony-matters/> (noting that Kiefel is the first woman to hold the position of the Chief Justice of the (Australia) High Court, and that four speakers at the ceremony referred to her Honour’s identity as a woman, but that Chief Justice Kiefel herself preferred to “minimise allusions to her gender in her speech”).

immigration status, and religion? As editors of the Feminist Judgments Series, we believe that feminist perspectives are multiple and far from monolithic.⁷⁶ In their best iterations, feminisms should advocate for all historically disadvantaged people. Our greatest hope is that *Feminist Judgments* will encourage students, lawyers, judges, law professors, and members of the public to understand that the law's future trajectory is not etched in stone. We turn toward the future with a hope for a more inclusive and just legal system.

⁷⁶ See *Introduction to the U.S. Feminist Judgments Project*, *supra* note 12, at 3–4 (“[W]hen we refer to feminist methods or feminist reasoning processes, we mean ‘methods’ and ‘reasoning processes’ *plural*, all the while acknowledging that there is a rich and diverse body of scholarship that has flourished under the over-arching label ‘feminist legal theory.’”). Although, as editors, we left it to all contributors to define feminism for themselves, our own view is stated explicitly in the introduction to *Feminist Judgments*. See *id.*