

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.*

FEMINIST JUDGMENTS AND WOMEN'S RIGHTS AT WORK

Gillian Thomas*

The history of the law's treatment of working women is largely a history of the law's treatment of women's bodies. Overwhelmingly created by male judges, that jurisprudence considers women from a remove—their physicality, their reproductive capacity, their stature, their sexuality—eclipsing meaningful consideration of their lived experience, on or off the job. As vividly illustrated by so many of the alternative rulings contained in *Feminist Judgments*,¹ that erasure resulted in Supreme Court decisions that—even when they came out the “right” way, that is, in favor of the female litigant—squandered opportunities for advancing sex equality.

The tantalizing notion of “what might have been” is much of the pleasure in reading this collection, of course. But the book's overarching thought experiment also offers invaluable lessons to today's practitioners, myself included, who must tell clients' stories. Long before we get the opportunity to tell those stories to juries—itself an increasingly rare occurrence²—we must tell those 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.

Women's capacity for pregnancy always has been the primary driver of their inequality, especially on the job. As *Feminist Judgments* makes plain, it is that physical fact—or more accurately, that physical *difference* from male bodies—that has preoccupied legislatures, employers, and the Court and has impeded women's full status as workers. The “special treatment” approach to women's reproductive capacity has cut both ways, neither of them advantageous to women. The 1908 decision in *Muller v. Oregon*,³ in which the Court upheld a state law limiting the

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1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 See, e.g., John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

3 208 U.S. 412 (1908).

number of hours women could work in laundries or factories to ten hours a day, epitomizes this catch-22. As Andrea Doneff's introductory remarks explain, legislation limiting women's hours was intended by pro-labor forces as an "entering wedge" in the fight for humane working conditions, which had been dealt a blow three years earlier in *Lochner v. New York*,⁴ when the Court invalidated a similar, gender-neutral law governing bakery employees.⁵ But the reasoning employed by the Court to uphold Oregon's statute rested not on consideration of women's freedom to contract, or a finding that the distinct dangers of laundry work warranted special regulation, both of which principles underpinned the result in *Lochner*.⁶ Rather, the *Muller* Court relied on society's collective purported interest in protecting female laborers' wombs: "[A]s healthy mothers are essential to vigorous offspring," opined the Court, "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."⁷

The imaginary dissent written by Pamela Laufer-Ukeles takes the majority to task for ignoring the extent to which, for large swaths of female workers, the "benefit" accorded by the Oregon law actually posed a significant "burden."⁸ Specifically:

While the individual who would benefit immediately if my dissent became law is the male employer who can be said to be taking advantage of working women by employing them for an exorbitant number of hours, the majority opinion hurts all women in the long run by demeaning them in the eyes of the law and impeding the momentum of the law and history towards recognizing women's intellectual equality and significant ability to contribute to the work force.⁹

Moreover, she observes, the statute did nothing to assist the women who needed such safety regulations most—namely, women who were *actually* pregnant, rather than merely potentially so.¹⁰ (In this way, Laufer-Ukeles foreshadows the contemporary finding by the Court in *Young v. United Parcel Service, Inc.*¹¹ that, under the Pregnancy Discrimination Act employers must "accommodate" pregnant workers needing job modifications on the same basis as they do other workers "similar in their ability or inability to work."¹²) And even more fundamentally, writes Laufer-Ukeles, by embracing a women-only approach to occupational health, the majority missed an opportunity to situate women within a universalized approach to work and well-being that would have avoided the benefit-burden conundrum altogether:

4 198 U.S. 45 (1905).

5 Andrea Doneff, *Commentary on Muller v. Oregon*, in FEMINIST JUDGMENTS, *supra* note 1, at 78, 80.

6 198 U.S. at 64.

7 208 U.S. at 421. Of course, it is plain to which race the Court was referring; the law's centuries-long indifference to the toll of the brutal labor extracted from women of color speaks for itself.

8 Pamela Laufer-Ukeles, *Rewritten Opinion in Muller v. Oregon*, in FEMINIST JUDGMENTS, *supra* note 1, at 83, 91–93.

9 *Id.* at 96.

10 *Id.* at 92.

11 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

12 *Id.* at 1359 (quoting 42 U.S.C. § 2000e(k) (2012)).

[B]oth men and women are vulnerable and need protection at various times in their lives [M]en and women both become ill, suffer from overwork and stress, suffer from loss and physical and emotional challenges over their lifetimes [R]ecogniz[ing] and protect[ing] against such vulnerabilities is constitutionally justified by the state for the purpose of protecting its citizens' health and well-being and is certainly not arbitrary.¹³

Where *Muller* failed in assuming that only women needed “protection” from toxic workplaces—and that among women, *all* anticipated becoming mothers—the Court’s decision nearly seventy years later in *Geduldig v. Aiello*¹⁴ failed for the opposite reason: it assumed that the male body was the baseline for measuring equal treatment under California’s temporary disability benefits program. It further evinced willful blindness to the very real incapacity posed by childbirth, and the very real economic harm effected by excluding new mothers from the program. As the Court infamously concluded, the California scheme passed muster because “[t]here is no risk from which men are protected and women are not,” and “there is no risk from which women are protected and men are not.”¹⁵ One can only draw the conclusion that *Muller*’s singling pregnancy out for “protection” paved the way for *Geduldig*’s singling it out for detriment. Under either frame, it is *sui generis*, a “plus” factor to be added to or subtracted from any given regulatory scheme.

Indeed, as Maya Manian observes, what should have mattered was “the effect of pregnancy exclusions,” not merely “the risks covered.”¹⁶ Lucinda Finley’s alt-opinion rights this schematic wrong. “The question whether the exclusion of pregnancy-related disabilities leaves women similarly situated to men cannot be answered by facile resort to the uniqueness of pregnancy,” she writes.¹⁷ “It must be answered solely with reference to the purpose of the program, not to the nature of the underlying risk or cause of the temporary disability.”¹⁸ (That program, in the California legislature’s words, was “to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom”¹⁹—criteria plainly qualifying those recovering from childbirth.) Finley goes on to situate the exclusion of pregnancy benefits within historical context: “An equality doctrine that implicitly says that women can claim equality only insofar as they are just like men is an impoverished concept of equality, unable to protect women from the disadvantages they have long suffered because of sex role stereotypes often based on their biological, reproductive ‘uniqueness.’”²⁰

Stereotypes, Finley contends, also underpinned the state’s insistence that covering pregnancy leaves would be too expensive—namely, the stereotypes that,

13 Laufer-Ukeles, *supra* note 8, at 95–96.

14 417 U.S. 484 (1974).

15 *Id.* at 496–97.

16 Maya Manian, *Commentary on Geduldig v. Aiello*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 185, 188.

17 Lucinda M. Finley, *Rewritten Opinion in Geduldig v. Aiello*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 190, 196.

18 *Id.*

19 *Id.* at 192 (quoting CAL. UNEMP. INS. CODE § 2601 (West 2018)).

20 Finley, *supra* note 17, at 198.

on the spectrum of physical impairments, childbirth is distinctly debilitating, and on the spectrum of beneficiaries of the program, new mothers were especially prone to abuse its benefits.²¹ “The exclusion reflects the idea that women are mothers first, and workers second,” she explains.²² “This ideological belief assumes that most women will, and should, leave the workforce when they have children.”²³ Rather, the economic reality for most working women—and indeed, for the four original plaintiffs in the case, all of whom were the sole or primary breadwinners in their households—supported, rather than undermined, their rightful inclusion in the California program.

The perniciousness of sex stereotypes, and their power to shape employers’ notions of who is an ideal worker, were on full display in the Court’s 1977 decision in *Dothard v. Rawlinson*.²⁴ On the one hand, the Court’s ruling was a progressive one in that it rejected Alabama’s height and weight thresholds for prison guards, which in combination posed an insurmountable barrier to most female applicants; the state, concluded the justices, had adduced no evidence to show that those thresholds, and their disparate impact on women, were justified by “business necessity,” in that there were no data reflecting that bigger prison guards made better prison guards.²⁵ Yet, maddeningly, when the Court turned to consideration of the state Board of Corrections’ ban on women serving in maximum security prisons that put them in direct contact with inmates, it ignored the ample factual record put forward by Kim Rawlinson’s attorneys—which confirmed that women around the country were succeeding in maximum security facilities—and found Alabama’s rule was justified by Title VII’s bona fide occupational qualification (BFOQ) exception.²⁶ Despite recognizing that the statute banned “stereotyped characterizations of the sexes,” the Court nevertheless resorted to just such preconceptions about male inmates’ propensity for sexual assault in finding women per se unqualified to be correctional officers.²⁷

In her concurring and dissenting opinion, Maria Ontiveros calls out the majority for its paternalism.²⁸ The Court has, she observes, decided for women what risks they may assume. Indeed, by accepting the assumption that female guards are more susceptible to sexual assault than male guards are to physical assault generally, the Court constructs a no-win proposition: the woman’s *very body* poses a risk. (As Judson Locke, the Commissioner of the Board of Corrections, had put it in his deposition, “[The female guard] is a sex object.”²⁹) In addition to “reinforc[ing] the subordination of women, in general, and of female workers in particular,” says Ontiveros, the Court’s analysis is further infected by twin blind spots: racism—in

21 *Id.* at 205–06.

22 *Id.* at 206.

23 *Id.*

24 433 U.S. 321 (1977).

25 *Id.* at 328–31.

26 *See id.* at 336–37.

27 *Id.* at 333, 335–36.

28 Maria L. Ontiveros, *Rewritten Opinion in Dothard v. Rawlinson*, in FEMINIST JUDGMENTS, *supra* note 1, at 213, 213–27.

29 Brief for the Appellees at 53, *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (No. 76-422), 1977 WL 189473, at *53 (brief filed *sub nom.* *Dothard v. Mieth*).

deeming the “jungle-like” environment of Alabama prisons singularly unfit for women—and ignorance, in framing sexual assault as a crime of passion, not violence.³⁰

As satisfying as Ontiveros’s methodical puncturing of the majority’s BFOQ decision is, however, I found myself even more compelled by her critique of its business necessity analysis with respect to the disparate impact claim. While applauding the majority for concluding that Alabama had failed to produce any evidence that height and weight correlated with the state’s stated job criterion of “strength,” Ontiveros’s imagined concurrence goes one step further: Who decided that “strength” made a better prison guard, anyway? That criterion was itself based on a stereotype, and its resulting disparate impact demanded further probing inquiry. Ontiveros further questions the extent to which the carceral state has deformed the qualifications deemed a “necessity” to the “business” of running a prison:

In this case . . . the employer has chosen to operate its prison with inadequate staffing and facilities. It has chosen not to classify or segregate its population by type of offense or level of dangerousness It has also designed prisons in a dormitory style and incorporated extensive farming operations that it argues require a large number of strip searches.³¹

Indeed, Ontiveros notes, employers make all sorts of choices that dictate what makes the “ideal worker,” among them, the standards of performance that it will reward and the structure of its workplace operations, like scheduling procedures.³² As a glimpse at the top ranks of virtually any field will tell you, that worker is a man.

It is deep dives like this one that make *Feminist Judgments* such a rewarding endeavor. The gendered nature of work is a Jenga-like construct of assumptions, stereotypes, and anachronistic traditions. It is built on notions of what jobs women’s bodies are capable of, and judgments about what they are not. Reimagining how the Court could have, and should have, untangled these puzzles reminds us that our best legal arguments arise from asking “why?”—or better yet, “why not?”—and answering those questions with our clients’ stories.

30 Ontiveros, *supra* note 28, at 223.

31 *Id.* at 217.

32 *Id.* at 216–17.

FEMINIST JUDGMENTS AND THE REWRITTEN *PRICE WATERHOUSE*

*Sandra Sperino**

In theory, Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on sex, race, color, national origin, and religion.¹ In practice, American courts have distorted this ambition by creating a host of complicated frameworks through which they determine what counts as discrimination and what does not. The Supreme Court has, at times, restricted the reach of discrimination law by interpreting Title VII narrowly. However, even many ostensibly proemployee cases have contributed to the analytical chaos of discrimination jurisprudence.

In *Feminist Judgments*,² Professor Martha Chamallas reimagines the canonical case of *Price Waterhouse v. Hopkins*.³ In that case, the Supreme Court recognized that a plaintiff can prevail on a Title VII claim by showing that a protected trait was a motivating factor in a negative employment outcome.⁴ In that case, the Court noted that plaintiffs in discrimination cases should not be required to prove but-for cause to prevail.⁵

The introduction to the Professor Chamallas concurrence correctly notes many of the rewritten opinion's strengths. Professor Chamallas provides richer detail about the facts underlying the case and the context in which *Price Waterhouse* made its decision. She embraces an enhanced role for experts to assist the courts in how discrimination occurs. Professor Chamallas also explicitly recognizes that bias may occur even when a particular decisionmaker does not express overt bias. However, there are many more contributions that are worth mentioning.

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1 42 U.S.C. § 2000e-2(a)(2) (2012).

2 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

3 490 U.S. 228 (1989).

4 *Id.* at 244–45.

5 *Id.* at 244 (plurality opinion); *id.* at 259 (White, J., concurring); *id.* at 262–63 (O'Connor, J., concurring).

Professor Chamallas improves on the original *Price Waterhouse* by focusing not only on the comments of the decisionmakers, but also on the role the employer itself played in the outcome. The *Price Waterhouse* opinion itself focused largely on the comments of the decisionmakers and did not emphasize the fairly unstructured partnership selection process and the fact that people who made biased comments about women were allowed to participate in partnership selection. As Professor Chamallas notes, the selection process could have been less prone to bias if the employer had taken steps such as “monitoring and structuring discretionary decisions to focus on job-related criteria, skills and performance.”⁶

Professor Chamallas also explicitly describes the limits of the *McDonnell Douglas* proof structure and rejected current doctrine, which tries to divide claims into so-called single-motive and mixed-motive frameworks. She points out that *Price Waterhouse* itself could be a single-motive case, if the supposedly legitimate criticism of Ann Hopkins reflected sex-based stereotypes. As Professor Chamallas correctly notes, “we should not attempt to tightly constrain the methods of proof or arguments plaintiffs offer in future cases.”⁷

Professor Chamallas also avoids the trap of declaring the case as one that falls within the label of an intentional disparate treatment claim. Title VII has two main operative provisions: 42 U.S.C. § 2000e-2(a)(1) and (2). Without much discussion, the courts have viewed the first provision as an intentional discrimination provision and the second as one that governs disparate impact.⁸ This dichotomy is court created and is not driven by the text of the statute. In *Price Waterhouse*, the plurality unnecessarily reified this dichotomy by focusing on the language in subsection (a)(1), the so-called disparate treatment provision. Almost all discrimination jurisprudence has focused on subsection (a)(1), leaving the full breadth of the statute’s reach untapped, even more than fifty years after Congress enacted Title VII. The (a)(2) provision prohibits additional discriminatory conduct, including limiting employees in any way that would “deprive or tend to deprive” them of employment opportunities or “otherwise adversely affect [their] status as an employee” because of a protected trait.⁹ Professor Chamallas avoids unnecessarily separating the two provisions. It is a subtle, but important, nuance. When Professor Chamallas cites to Title VII, she cites to the entire statute.

Professor Chamallas also soundly rejects the idea that Title VII jurisprudence should indiscriminately borrow from tort law. Justice O’Connor’s concurring opinion in *Price Waterhouse* suggested, without support, that Title VII was a “statutory employment ‘tort.’”¹⁰ This reference has created undue havoc in discrimination law, as the Supreme Court has recently started to interpret the text of both Title VII and the Age Discrimination in Employment Act (“ADEA”) through

6 Martha Chamallas, *Rewritten Opinion in Price Waterhouse v. Hopkins*, in FEMINIST JUDGMENTS, *supra* note 2, at 345, 359.

7 *Id.* at 356.

8 *See, e.g.,* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.2 (1999); *see also* *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335–36 n.15 (1977).

9 42 U.S.C. § 2000e-2(a)(2) (2012).

10 490 U.S. at 264 (O’Connor, J., concurring).

tort law.¹¹ As the Professor Chamallas concurrence properly pointed out, Congress enacted Title VII in part because tort law and the common law idea of at-will employment inadequately protected workers. She rightfully claimed Title VII as a “distinctive body of public law that aims to eliminate longstanding patterns of segregation, stratification, and lack of equal opportunity.”¹²

11 Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2524–25 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176–77 (2009).

12 Chamallas, *supra* note 6, at 349–50.

REVISITING *ROE* TO ADVANCE REPRODUCTIVE JUSTICE FOR CHILDBEARING WOMEN

*Elizabeth Kukura**

The rewritten opinions that comprise *Feminist Judgments*¹ together provide a powerful critique of judicial decisionmaking that renders certain women's experiences invisible. By reimagining key Supreme Court decisions, the opinion writers unmask various ways that gendered conceptions of social roles are deeply entrenched in the rulings and reasoning of the highest court of the United States. The authors also show, through their alternative texts, that opinions which are celebrated as women's rights victories can nevertheless impede progress toward equality and liberty.

Kimberly Mutcherson's rewritten concurrence in *Roe v. Wade*² illustrates the missed opportunities and unintended consequences that have made the landmark 1973 opinion a mixed bag for childbearing women.³ In the opinion, "Justice" Mutcherson grounds the abortion right in both the due process and equal protection guarantees of the Fourteenth Amendment, articulating a powerful equality argument for legal abortion. In doing so, she rejects the trimester framework laid out in Justice Blackmun's opinion,⁴ recognizing that by associating state regulation of abortion in the interest of protecting potential human life with a fixed point in time, Blackmun failed to anticipate how the use of a viability standard could be used to whittle away women's reproductive autonomy in the name of fetal protection.⁵

Despite its well-known reputation as the case that legalized abortion rights, *Roe* has legal implications for women who choose not to terminate their pregnancies, as well as for pregnant women who never contemplate abortion. Laura Pemberton had probably never thought much about the *Roe* decision or considered it relevant

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1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 410 U.S. 113 (1973).

3 Kimberly M. Mutcherson, *Rewritten Opinion in Roe v. Wade*, in FEMINIST JUDGMENTS, *supra* note 1, at 151, 151–67.

4 *See* 410 U.S. at 163.

5 Mutcherson, *supra* note 3, at 151–52.

to her personal life when she became pregnant with her second child in 1995.⁶ A medical condition called placenta previa had required that she deliver her first baby by cesarean, but as a supporter of natural childbirth and wanting a large family, she decided to pursue a vaginal birth after cesarean, commonly referred to as VBAC.⁷ Although she had weighed the risks and benefits of VBAC with those of an elective repeat cesarean and had reached an informed decision to attempt a VBAC, she was unable to find a doctor willing to support her and ultimately decided to give birth at home.⁸

When Pemberton went into labor, she began contracting as expected and labored for about a day without sign of complication before becoming concerned about dehydration.⁹ She decided to visit the hospital for IV fluids before returning home to deliver the baby.¹⁰ However, the medical staff at the hospital refused to provide fluids unless she consented to a cesarean and, in fact, decided to seek a court order compelling her to deliver by cesarean.¹¹ When Pemberton learned from a sympathetic nurse about the hospital's plans, she snuck down the back stairs of the hospital in her bare feet and went home to continue laboring.¹² Shortly thereafter, the sheriff and state's attorney removed her from her home—strapping her legs together on a stretcher—and took her back to the hospital for a hearing, in which the judge ordered her to submit to a cesarean, even though she could feel the fetus progressing into her birth canal without complication.¹³

When she later sued, the federal district court rejected Pemberton's claims that her constitutional rights had been violated.¹⁴ Generally, when confronted with a conflict over forced medical treatment during pregnancy, courts turn to the abortion rights doctrine for guidance. In cases where a woman withholds consent to cesarean surgery, courts have interpreted *Roe*'s recognition of a state interest in the fetus to justify overriding a cesarean refusal—reasoning that after viability, the state's interest in protecting fetal life trumps a woman's constitutional rights. The court that considered Pemberton's treatment refusal concluded that the “balance tips far more strongly in favor of the state” and its interests in protecting fetal life because the woman sought “only to avoid a particular procedure for giving birth, not to avoid

6 Laura Pemberton, Speech at the 2007 National Summit to Ensure the Health and Humanity of Pregnant and Birthing Women (Jan. 20, 2007), <https://vimeo.com/4895023> [hereinafter Pemberton Speech].

7 *Id.*

8 *Id.* Women across the United States have reported difficulty finding a physician or hospital that supports VBAC, despite research supporting its safety and concerns about the number of medically unnecessary cesareans performed each year. See Elizabeth Kukura, *Choice in Birth: Preserving Access to VBAC*, 114 PENN ST. L. REV. 955, 959–77 (2010) (describing the controversy around VBAC); Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 743–47 (2018) (discussing VBAC restrictions as a form of coercion in maternity care) [hereinafter *Obstetric Violence*].

9 Pemberton Speech, *supra* note 6.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1249 (N.D. Fla. 1999).

giving birth altogether.”¹⁵ It also reasoned that bearing an unwanted child is a greater intrusion on a woman’s liberty interest than having a cesarean to deliver a wanted child, so the state’s interest was even stronger relative to the woman’s interest than it had been in *Roe*.¹⁶

As various commentators have observed, the comparison between compelled treatment in pregnancy and abortion rights is a flawed one.¹⁷ Unlike in the abortion context, where a woman seeks to terminate an unwanted pregnancy, a woman who has decided to carry a pregnancy to term is presumably making decisions with her baby in mind—and arguably is the party most motivated to make the best possible decisions to protect fetal health and well-being. But since the onset of technology that has enabled visualization and treatment of fetuses in utero, the field of obstetrics has wrestled with and ultimately accepted the idea of a two-patient model—where doctors understand themselves to be treating two separate patients. The misreading of *Roe* in *Pemberton* and elsewhere both draws on and helps to perpetuate the concept of maternal-fetal conflict. This idea frames disagreement over treatment as conflict between the woman and the fetus she is carrying, rather than as conflict between a patient and provider about medical treatment during pregnancy, thus enabling the doctor to assert his or her own values in the name of protecting the fetus.¹⁸

Research and advocacy in recent years suggest that patient mistreatment is an underrecognized problem within maternity care. Advocates use the term “obstetric violence” to identify a variety of different types of conduct that occurs on a continuum from abuse to coercion to disrespect.¹⁹ Obstetric violence may include forced cesareans or episiotomies, the physical restraint of a laboring woman, unconsented medical procedures, or verbal abuse.²⁰ It may also take the form of coercion to secure a woman’s consent to labor induction, cesarean, or another form of medical intervention; healthcare providers sometimes threaten to seek a court order or make a child welfare report if a woman declines the intervention; or a woman who has previously delivered by cesarean may be coerced into an unwanted and medically unnecessary repeat cesarean due to hospital-wide restrictions on

¹⁵ *Id.* at 1251.

¹⁶ *Id.* at 1251–52.

¹⁷ See, e.g., Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951, 1953 (1986).

¹⁸ See Michelle Oberman, *Mothers and Doctors’ Orders: Unmasking the Doctor’s Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 452 (2000).

¹⁹ See *Obstetric Violence*, *supra* note 8, at 763–64 (discussing the emergence of obstetric violence as a legal concept in Latin America and its adoption by advocates concerned with the mistreatment of childbearing women in the United States).

²⁰ *Id.* at 734–38. Many instances of obstetric violence involve a disagreement between a patient and her healthcare provider about the appropriate amount of medical intervention, often reflecting a patient’s desire to forego or delay medical intervention and a provider’s desire to pursue a more interventionist approach to managing labor or delivering the baby. *Id.* at 765–78 (discussing factors that contribute to or tolerate the mistreatment of women during childbirth, including economic and legal pressures, as well as powerful social norms about self-sacrificing mothers and the superiority of medical experts).

VBAC.²¹ Still other women endure insults, withheld treatment, or emotional pressure during labor and delivery.²²

Laura Pemberton experienced coercion, threats, and ultimately a court-ordered cesarean. Her case is an example of how *Roe* has been imported into the childbirth context and misapplied to subordinate women's interests to perceived fetal interests. By rejecting the trimester framework as flawed and unworkable, Mutcherson's reimagined opinion in *Roe* rejects the articulation of the state's interest in the potentiality of human life that has subsequently migrated to the childbirth context and restricted women's decisionmaking during labor and delivery. In doing so, it precludes the kind of reasoning that supports medical and legal judgments about the fetus as a separate entity that needs protection from the pregnant woman. And indeed, it explicitly anticipates and rejects the idea that the state can make demands on a pregnant woman in order to benefit the fetus.

Reimagining the role of the fetus in abortion jurisprudence tackles an important way that the law has fallen short of protecting and vindicating women who are mistreated during childbirth, but this reframing does not reach all the ways that mistreatment occurs in maternity care. Here, Mutcherson's equal protection analysis is instructive. She explains that abortion restrictions rely on gendered stereotypes about women, particularly that women have a duty to become mothers and should be prepared to sacrifice other aspects of their lives, such as education or career, in order to fulfill that duty. Accordingly, she concludes that "to demand that [a woman] use her body to pursue the plans of another, whether a fetus, the state, a husband, a boyfriend, or a physician, is to treat her as unequal to other competent adult decision makers."²³

The opinion's equal protection analysis urges readers to consider how a sex equality approach to abortion legalization might possibly have helped alter such social norms, including those norms relating to gender and maternity that play a role in enabling and tolerating obstetric violence. For example, society's widespread expectation of maternal self-sacrifice makes it difficult for courts to recognize injuries associated with forcing medical treatment on an unwilling woman in labor. Women who are mistreated by their healthcare providers during childbirth face an uphill battle against societally entrenched maternal values, which suggest that good mothers are those who subordinate their own needs—and bodies—in service of their children and families.

The powerful idea of the self-sacrificing mother is particularly relevant in the context of so-called maternal-fetal conflict. When courts apply abortion doctrine to grant court orders compelling cesareans, courts send a message to doctors that paternalism toward childbearing women is not only acceptable, but necessary. Women with healthy babies who bring suit over their own injuries are perceived to be acting selfishly, and women themselves may internalize these social expectations, downplaying the extent of their physical and emotional injuries. Judges and juries see a healthy baby and do not recognize separate harms to the woman as such, often telling women to be grateful and stop complaining. By identifying and unmasking

21 *Id.* at 738–50.

22 *Id.* at 750–54.

23 Mutcherson, *supra* note 3, at 163.

the “romantic view of pregnancy and motherhood,” Mutcherson’s opinion acknowledges the burdens of pregnancy and motherhood, which opens up the possibility of recognizing the physical and emotional harms women suffer due to mistreatment during childbirth as true harms.²⁴

The rewritten *Roe* adds important layers to the constitutional analysis, explicitly identifying what women lose when abortion is banned and discussing the disproportionate harm abortion restrictive laws cause women of color, poor women, and other women who are marginalized. This important context reflects judicial decisionmaking that acknowledges the actual lived experiences of the people whose lives are shaped by constitutional rulings. As Rachel Rebouché notes in her commentary on the rewritten opinion, Mutcherson’s concurrence “might have provided future courts stronger language for grounding abortion protections in the rights of women.”²⁵ By rejecting the trimester framework’s focus on the fetus and articulating a powerful sex equality basis for abortion legalization, this opinion would likely have foreclosed reliance on *Roe* to justify the kind of pregnancy exceptionalism that permits healthcare providers to force unwanted medical treatment on women just because they are pregnant. Not only does the rewritten *Roe* help us imagine the world that might have been, but it also reminds us that when jurists fail to consider the realities of women’s lives, we risk settling for an impoverished conception of reproductive autonomy.

24 *Id.* at 164.

25 Rachel Rebouché, *Commentary on Roe v. Wade*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 146, 150.

HOW IS SEX HARASSMENT DISCRIMINATORY?

*Noa Ben-Asher**

What is sexual harassment, and what is its actual harm? Since the 1980s, these two questions have perplexed lawmakers, policymakers, feminists, and the public.¹ Today, with the rise of #MeToo, and with increased national attention to Title IX claims regarding sexual violence on college campuses, these questions are once again in the spotlight. As some commentators have observed, in the last several years lawmakers and policymakers have been increasingly influenced by a feminist antisubordination approach to sexual harassment and assault.² This growing influence is currently reflected in more strict standards of consent (“affirmative consent”) to sex, in higher procedural and substantive burdens on those accused of sexual harassment or assault, and in closer governmental monitoring of institutional settings, such as public universities.

*Feminist Judgments*³ takes us to a key moment in the history of sexual harassment law. In *Meritor Savings Bank v. Vinson*,⁴ the Supreme Court recognized for the first time that both quid pro quo and hostile environment sexual harassment violate Title VII of the Civil Rights Act of 1964.⁵ It also held that to be actionable under Title VII, sexual advances must be (1) “unwelcome”⁶ and (2) “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁷ The latter part of the test (“sufficiently severe

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1 See Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

2 See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 887–91 (2016); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 418–19 (2016); Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS (SPECIAL ISSUE) 257 (2016).

3 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

4 477 U.S. 57 (1986).

5 See *id.* at 65.

6 *Id.* at 68 (citing 29 C.F.R. § 1604.11 (1985)).

7 *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). “Unwelcome” conduct has typically been understood as one which an employee did not solicit or incite and which is regarded as undesirable or offensive. See Kristen Konrad Tiscione, *Commentary on Meritor Savings Bank v. Vinson*, in FEMINIST JUDGMENTS, *supra* note 3, at 297,

or pervasive”) fits well into the liberal-feminist judicial attitudes in the 1970s and 1980s that emphasized gender equality and the integration of women in the workplace.⁸ The problem with sexual harassment under this Ginsburgian liberal framework is that it impairs the equal participation of women in the workplace. The first part of the *Meritor* test (unwelcomeness), however, has been subject to intense debates among feminists. What does it mean for a sexual advance to be *unwelcome*? Is the test objective or subjective? Does welcomeness have to be conveyed affirmatively? Can passive silence indicate welcomeness? Does provocative dress matter? The answers to these questions often depend on the branch of feminist thought that appeals to you. For instance, according to antisubordination feminism, the primary harm of sexual harassment is sexual subordination: men use sexuality as a primary means to subordinate women to male power.⁹ By contrast, for liberal feminism, the focus is not so much on *sexual* subordination as it is on unequal opportunity in the workplace.¹⁰

Interestingly, the fascinating feminist rewriting of *Meritor* by Angela Onwuachi-Willig reflects the large-scale shift toward antisubordination feminism in sexual harassment law. Most importantly, Onwuachi-Willig rejects *Meritor*’s unwelcomeness standard. As Kristen Konrad Tiscione explains, the unwelcomeness test “distracts the decisionmaker from what should be the central inquiry: *the behavior of the harasser* and the effect of that behavior on both the workplace and the victim.”¹¹ Namely, the problem with the unwelcomeness test is that due to power differentials between supervisor and subordinate, it is common for a subordinate to say “yes” if they wish to “be accepted, get promoted, or save [their] job.”¹² Onwuachi-Willig’s normative position is that Title VII is violated by acts that “unreasonably interfere with the complainant’s work performance, create a hostile or intimidating environment, and/or help to preserve patterns of sex segregation in employment.”¹³ If harassment enforces “the notion of the dominant and powerful man over the subordinate woman,” a hostile environment exists.¹⁴ In addition, the work environment ought to be evaluated from the perspective of a “reasonable

298 (quoting *Henson*, 682 F.2d at 903). The Court also concluded that Vinson’s clothes and speech were relevant to the merits of her claim (under EEOC guidelines “the totality of circumstances” are to be evaluated in sexual harassment claim), *Meritor Savings Bank*, 477 U.S. at 69, and that employers are not automatically liable for hostile environment sexual harassment by supervisors. *Id.* at 72.

8 See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that the Fourteenth Amendment precludes Virginia from maintaining a males-only public institution of higher learning in the VMI); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (mandating the provision of equal benefits to both servicemen and servicewomen serving in the military); *Reed v. Reed*, 404 U.S. 71 (1971) (recognizing under the Fourteenth Amendment the unconstitutionality of a statutory preference for males when selecting an estate administrator); see also Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187 (2016).

9 See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

10 *Id.*

11 FEMINIST JUDGMENTS, *supra* note 3, at 301 (emphasis added).

12 *Id.*

13 *Id.* at 315.

14 *Id.* at 316.

victim in the complainant's shoes,"¹⁵ and "dress is not relevant to the inquiry of welcomeness."¹⁶ In contrast with the original Supreme Court decision, Onwuachi-Willig also finds employers "strictly liable" for the actions of their employees because they are "best positioned to communicate to all employees how they must treat others in the workplace."¹⁷ Under this strict liability standard, employers could be perfectly vigilant, yet be held liable for an employee's sexual harassment of another by mere relationship of employment.

In this feminist rewriting of *Meritor*, the legal investigation into sexual harassment in the workplace does not explicitly include an inquiry into what the complainant wanted or even communicated to the accused. The question of unwelcomeness is left out. What matters is *how the accused behaved*. This feminist judgment, which echoes antisubordination feminism, has important overlaps with the current shifts toward greater regulation of sex on college campuses and "affirmative consent" standards.¹⁸ While it is beyond the scope of this Essay to assess whether the growing dominance of antisubordination feminism in this area of law is desirable, it will be interesting to see whether the influence of #MeToo will lead courts, lawmakers, and employers, toward the more plaintiff-friendly standards suggested by Onwuachi-Willig.

15 *Id.* at 315.

16 *Id.* at 321.

17 *Id.* at 320.

18 *See* Gruber, *supra* note 2, at 429–40; Halley, *supra* note 2.

THE LOVE IN *LOVING*: OVERCOMING ARTIFICIAL RACIAL BARRIERS

*Justice Leah Ward Sears (Ret.) & Sasha N. Greenberg**

INTRODUCTION

In *Loving v. Virginia*,¹ the U.S. Supreme Court struck down the Virginia statute that criminalized marriages between Whites and non-Whites. Rather than relying on history or precedent, Chief Justice Earl Warren simply declared, in a unanimous opinion, that the law violated the central meaning of the Equal Protection Clause and that it ran afoul of the Due Process Clause because it deprived the Lovings of liberty in the form of the right to marry.

The rewritten opinion in *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*² is in stark contrast to the original. Professor Teri McMurtry-Chubb's judgment for the court "unmasks—and renders unavoidable—the link between America's history of White supremacy and patriarchy and America's legal structures for regulating marriage and families."³ The feminist opinion relies almost entirely on legal, social, and cultural history, in particular the history of marriage and family relationships among and between Blacks and Whites during the colonial, antebellum, and postbellum eras in the American South.

While the original opinion mentions that the maintenance of White supremacy is the only possible rationale for the Virginia statute,⁴ the feminist judgment digs deeper into the extensive ties between White supremacy and patriarchy, and in particular the ways in which the patriarchal ties of matrimony were designed to confer racial benefits.⁵ The rewritten feminist judgment tells the story of the

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1 388 U.S. 1 (1967).

2 Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 119* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter *FEMINIST JUDGMENTS*].

3 Inga N. Laurent, *Commentary on Loving v. Virginia*, in *FEMINIST JUDGMENTS*, *supra* note 2, at 114, 117.

4 *Loving*, 388 U.S. at 11.

5 McMurtry-Chubb, *supra* note 2, at 130–33.

Lovings' marriage, but their story is recounted as a part of a bigger cultural and legal history that provides both the essential context and the necessary reasoning. In the rewritten opinion, *Loving* is significant not only to family relationships, but also to the relationship between history and law and between government and individuals.⁶

For the authors of this response Essay, both the original and rewritten *Loving* opinions get it right by focusing on White supremacy, but they fall short in treating Mildred and Richard as proxies for racial justice. In their view, it is important for the law to remember that Mildred and Richard were real people, whose lives depended on the outcome of this case. The authors also reflect on the future of what they identify as artificial racial barriers. In emphasizing that Mildred Jeter identified as mixed race, the authors highlight the difficulty of racial categorization in the modern era when so many are discovering, sometimes surprisingly, their mixed and diverse ancestry. Thus, the Essay suggests, while the rewritten feminist judgment might have worked some societal change through the development of the law, time and culture are equally powerful agents of change.⁷

DISCUSSION

To American history, the marriage of Mildred Delores Jeter and Richard Perry Loving will always be important. It was the focal point of the landmark 1967 U.S. Supreme Court decision that put an end to Virginia's 300-year-old antimiscegenation laws, which made marriages between Whites and non-Whites a crime. Fifty years later, movies, television shows, and books celebrate their story as a touchstone in the fight for racial equality which ultimately brought an end to "the most odious of the segregation laws and the slavery laws."⁸ But, to Mildred and Richard, their marriage was not about race, or politics, or laws. As Mildred explained on the fortieth anniversary of the Supreme Court decision, to them, their marriage was about love: "We were in love, and we wanted to be married."⁹

To the Lovings, their love story was not simply the Black and White tale that historians recount. In fact, the marriage license displayed on the Lovings' dresser when the police barged into the couple's bedroom revealed that Mildred identified as both African American and Indian,¹⁰ suggesting as diverse and complicated a background as so many other Americans. Whereas the Lovings ultimately saw race as insignificant in the face of their commitment to one another, society saw a need to categorize and separate them based solely on their skin color. As the local trial judge, Leon M. Bazile of the Caroline County Circuit Court, wrote, echoing Johann

6 *Id.* at 119–36.

7 *See id.* at 117–19.

8 *Excerpts from a Transcript of Oral Arguments in Loving v. Virginia*, ENCYCLOPEDIA VA. (Apr. 9, 2014), https://www.encyclopediavirginia.org/Excerpts_from_a_Transcript_of_Oral_Arguments_in_Loving_v_Virginia_April_10_1967.

9 *Mildred Loving, 40 Years Later*, ATLANTIC (June 18, 2007), <https://www.theatlantic.com/daily-dish/archive/2007/06/mildred-loving-40-years-later/227582/>.

10 Arica L. Coleman, *What You Didn't Know About Loving v. Virginia*, TIME (June 10, 2016), <http://time.com/4362508/loving-v-virginia-personas/>.

Friedrich Blumenbach's eighteenth-century interpretation of race,¹¹ the Lovings were faced with the view that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents The fact that he separated the races shows that he did not intend for the races to mix."¹² They were also faced with the application of eugenics (the set of beliefs and practices which aims at improving the human population by exploiting genetic engineering)¹³—a theory that was intended to be applied to "animals, to pigs, and hogs, and cattle," not to human beings.¹⁴ Race may have seemed inconsequential to them, but Judge Bazile, Sheriff Brooks, and the law saw it differently.

Unfortunately, Judge Bazile and Sheriff Brooks were not wrong—race would ultimately prove to be far from irrelevant for the Lovings. Because of their different skin colors, they were jailed, banished from their homes, and ultimately forced to face years of legal battles. But the reality is that the cause of this turmoil was not their skin color at all: it was society's reaction to their skin color. It was Sheriff Brooks's view that their marriage was "no good here"¹⁵ and Judge Bazile's view that God intended them to be separate. It was the Virginia legislature's view that their marriage was a "sociological, psychological evil[]." ¹⁶ Absent the application of those views to the Lovings' marriage, race would have been, and ultimately should have been, entirely irrelevant.

The Lovings' marriage appears to have been a real love story, so much so that when Richard died in a car wreck in 1975, Mildred never remarried: "[S]he said she missed him."¹⁷ Their lives serve as an important reminder that once the imaginations of people who seek to assign import to skin color are rightfully ignored, race has the same insignificance as hair or eye color. People should not look to skin color to discriminate against others.

Certainly, in the years since the *Loving* decision, our society has made much progress in removing the imaginary meaning that U.S. history has assigned to race. Fifty years ago, three percent of marriages crossed ethnic and racial lines.¹⁸ Today,

11 See generally JOHANN FRIEDRICH BLUMENBACH, THE ANTHROPOLOGICAL TREATISES OF BLUMENBACH (1865).

12 *Opinion of Judge Leon M. Bazile (January 22, 1965)*, ENCYCLOPEDIA VA. (Mar. 25, 2014), https://www.encyclopediavirginia.org/Opinion_of_Judge_Leon_M_Bazile_January_22_1965.

13 See generally DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY (1985).

14 Marisa Peñaloza, *'Illicit Cohabitation': Listen to 6 Stunning Moments from Loving v. Virginia*, NPR (June 12, 2017), <https://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia>.

15 David Margolick, *A Mixed Marriage's 25th Anniversary of Legality*, N.Y. TIMES (June 12, 1992), <http://www.nytimes.com/1992/06/12/news/a-mixed-marriage-s-25th-anniversary-of-legality.html?pagewanted=all>.

16 Peñaloza, *supra* note 14.

17 Mary C. Curtis, *Is "The Loving Story" Over, Even Now?*, WASH. POST (Feb. 13, 2012), https://www.washingtonpost.com/blogs/she-the-people/post/is-the-loving-story-over-even-now/2012/02/13/gIQAkqrqECR_blog.html?utm_term=.93b4f52832a3.

18 Sheryl Gay Stolberg, *50 Years After Loving v. Virginia*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/50-years-after-loving-v-virginia.html>.

that number has risen by a factor of five, to one in six marriages.¹⁹ These numbers reflect the fact that, in large part, marriage no longer appears to be focused on “blood” or “supremacy” or “breed.”²⁰ Instead, today, as America becomes less White and the multiracial community formed by interracial unions and immigration continues to expand, “[m]arriage [merely] responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”²¹ The removal of racial barriers to marriage is now readily apparent. Whereas Judge Bazile had no problem characterizing individuals as “white, black, yellow, malay [or] red,”²² today, people recognize that ancestry is so “mixed” that more than two million people have turned to DNA analyses to identify their ancestry, making 23andMe a billion dollar online personal genomics and biotechnology company.²³

At the same time, education, poverty, employment, crime, and incarceration rates all demonstrate that race is, unfortunately, still far from unimportant in our society. The Judge Baziles and Sheriff Brookses of the world still exist and, regrettably, still enforce and interpret the laws that govern us. Plus, many Americans still look to their skin color to define not only who they are but who others are as well. As Mildred Loving wrote, “[m]y generation was bitterly divided over something that should have been so clear and right.”²⁴ Unfortunately, the same can often be said today, as the issue of race continues to play a much too significant role in our lives. Nevertheless, Mildred’s words are still applicable. That is to say, it is still true that once the imaginary value assigned to racial composition is removed from the equation, the solution to racial turmoil will become “so clear and right.”²⁵

19 *Id.*

20 *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

21 Osagie K. Obasogie, *Was Loving v. Virginia Really About Love?*, ATLANTIC (June 12, 2017), <https://www.theatlantic.com/politics/archive/2017/06/loving-v-virginia-marks-its-fiftieth-anniversary/529929/> (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015)).

22 *Opinion of Judge Leon M. Bazile (January 22, 1965)*, *supra* note 12.

23 Erika Check Hayden, *The Rise and Fall and Rise Again of 23andMe*, NATURE (Oct. 11, 2017), <https://www.nature.com/news/the-rise-and-fall-and-rise-again-of-23andme-1.22801>.

24 *Mildred Loving, 40 Years Later*, *supra* note 9.

25 *Id.*

LOOKING TO THE LITIGANT: REACTION ESSAY TO
*FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE
UNITED STATES SUPREME COURT*

*Claire B. Wofford**

*Feminist Judgments: Rewritten Opinions of the United States Supreme Court*¹ does a lot of things—and does them extremely well. At the most general level, it offers us a collection of new opinions in twenty-five key U.S. Supreme Court cases related to gender. Beginning with one of the earliest instances of the Court’s approach to women’s rights (*Bradwell v. Illinois*² in 1872) and reaching across subsequent decades to the landmark 2015 case on gay marriage (*Obergefell v. Hodges*³), each essay in the volume uses feminist theory and method to reformulate Supreme Court opinions and legal doctrine to better reflect feminist conceptions of equality and justice.

In so doing, the collection first reminds us of the extent to which the high court’s promulgations have affected central, tangible areas of our lives (reproduction, sexuality, employment, family) and affected them in ways often unfriendly to certain feminist principles. The book also underscores the importance of the Court’s membership and shows us that who a justice is (or is not) can have an enormous impact on the shape and substance of the law. Traditional judicial opinions are often written as if their interpretations and conclusions are the inevitable consequence of neutral reasoning and rigorous logic; every essay here challenges that presumption and demonstrates just how much opinions are influenced by the situated perspectives of the jurist. Most fundamentally, the collection demonstrates that law can be different than it is or was and that feminist inquiry can show us how.

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¹ *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter *FEMINIST JUDGMENTS*].

² 83 U.S. (16 Wall.) 130 (1872).

³ 135 S. Ct. 2584 (2015).

So, what is there to add? One could quibble mildly with the book's exclusion of important lower court opinions, certain topics, or its confinement of authors to the extant legal record. But every collection of essays requires choices and every set of editors wrestles with how best to render their vision. Indeed, these editors are more upfront than many about how and why they made the decisions they did. Rather than critique the book's coverage or content, I think it is more helpful to model its approach to feminist method and theory in examining another potential locus of inequality in the law.

As the editors detail, feminist method comes in a variety of forms—use of narrative or asking the “woman question,”⁴ for instance. Similarly, feminist theory contains a variety of perspectives—from the “same as” claims of formal equality to the less relativistic approaches of agency and antisubordination. What all the perspectives have in common, however, is that they shine light where there was none before, revealing biased assumptions and adding substantive knowledge that has remained covert. I suggest that even a cursory use of those same tools indicates that, aside from the jurist, there is another important player in the legal system whose potentially gendered choices are shaping the law: the litigant.

Feminist Judgments's focus on jurists alone is not unusual. My own discipline has devoted a great deal of study to understanding why and how the justices of the U.S. Supreme Court make the decisions they do.⁵ Some of the scholarship has even examined whether women judges might operate differently than their male counterparts, though the findings have been mixed at best.⁶ The emphasis, moreover, is understandable and laudable, as it is jurists who have the final say on the content of law.⁷

Emphasizing judicial behavior, however, unfortunately overlooks the fundamental passivity of the courts. As much as they might wish to do so, jurists cannot reach out into the world of potential legal disputes and select certain topics for resolution; they must wait for a litigant to bring the dispute to them. Indeed, were it not for the litigants bringing cases into the legal system in the first place, there would be no vehicle through which jurists make the law. The jurist may be the law's sculptor, but the “raw material” with which he or she works is provided by a litigant. Moreover, if that litigant's behavior has been shaped by gender, then the judicial opinion, *whoever* has written it, has been as well. To put it simply, if gender is influencing the cases on which jurists work, then gender has influenced the content of law—even if the jurist operates with a feminist perspective.

4 Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990).

5 See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

6 See Christina L. Boyd, *She'll Settle It?*, 1 J.L. & CTS. 193, 201–11 (2013); Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390–92 (2010).

7 This is most clearly seen in the case of appellate judges, who write opinions based on questions of law and thereby generate legal policy.

So, what can feminist theory and method tell us about litigants and their behavior? As I have argued elsewhere,⁸ female litigants might make choices over whether and how to use the legal system differently than men. There is evidence from social science and legal scholarship that women are more risk averse than men,⁹ avoid competition more, and withdraw earlier from competitive environments.⁹ When it comes to conflict resolution, women also seem to be more collaborative than men, rejecting fighting over “zero sum” winners and losers in favor of cooperation, compromise, and solutions that “make everyone happier.”¹⁰

Litigation in the United States, however, is an inherently risky, competitive, and adversarial environment. Female litigants therefore may be more reluctant to pursue legal action when they are harmed. Having filed lawsuits, they may also be less combative in the legal process than their male counterparts. In terms of the practicalities of litigation, this translates into women being less likely than men to bring cases into court and more likely to resolve the cases they do file through mediation or settlement rather than seek a “winner-take-all” final victory from a jury or judge.

I have tested these predictions using survey experiments.¹¹ Imagining themselves harmed by a classic “slip and fall” injury and an instance of gender-based pay discrimination, survey respondents answered questions about whether and how they would pursue legal action.¹² The results indicated that women were generally less litigation prone than men, though only when the injury was the physical harm;

8 Claire B. Wofford, *Avoiding Adversariness? The Effects of Gender on Litigant Decision-Making*, 13 POL. & GENDER 656, 675–76 (2017) [hereinafter *Avoiding Adversariness?*]; Claire B. Wofford, *The Effect of Gender and Relational Distance on Plaintiff Decision Making in the Litigation Process*, 51 LAW & SOC’Y REV. 966, 969–73 (2017) [hereinafter *The Effect of Gender and Relational Distance*].

9 James P. Byrnes et al., *Gender Differences in Risk Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367, 369 (1999); Gary Charness & Uri Gneezy, *Strong Evidence for Gender Differences in Risk Taking*, 83 J. ECON. BEHAV. & ORG. 50, 57 (2012); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 328–39 (1999); Seda Ertac & Mehmet Y. Gurdal, *Deciding to Decide: Gender, Leadership and Risk-Taking in Groups*, 83 J. ECON. BEHAV. & ORG. 24, 26–29 (2012); Christine R. Harris et al., *Gender Differences in Risk Assessment: Why Do Women Take Fewer Risks than Men?*, 1 JUDGMENT & DECISION MAKING 48, 51 (2006); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC’Y REV. 67, 88 (1999).

10 *Avoiding Adversariness?*, *supra* note 8, at 659; *see, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); Deborah M. Kolb & Gloria G. Coolidge, *Her Place at the Table: A Consideration of Gender Issues in Negotiation*, in NEGOTIATION THEORY AND PRACTICE 261 (J. William Breslin & Jeffrey Z. Rubin eds., 1991); Mark A. Boyer et al., *Gender and Negotiation: Some Experimental Findings from an International Negotiation Simulation*, 53 INT’L STUD. Q. 23, 40 n.19 (2009); Charles B. Craver, *Gender and Negotiation Performance*, 4 SOC. PRAC. 183, 187 (2002); Elizabeth Miklya Legerski & Marie Cornwall, *Working-Class Job Loss, Gender, and the Negotiation of Household Labor*, 24 GENDER & SOC’Y 447, 465–67 (2010); Morgan, *supra* note 9, at 70; Laura Sanchez, *Gender, Labor Allocations, and the Psychology of Entitlement Within the Home*, 73 SOC. FORCES 533, 546–48 (1994).

11 *Avoiding Adversariness?*, *supra* note 8, at 656–82; *The Effect of Gender and Relational Distance*, *supra* note 8, at 966–1000.

12 *Avoiding Adversariness?*, *supra* note 8, at 663.

when women suffered from pay discrimination, they were more likely than men to file lawsuits, at least in one set of results.¹³ Across two experiments, women were more likely than men to favor mediation instead of filing lawsuits and favored it more than men for resolving the dispute once litigation had begun.¹⁴ Lastly, both men and women were much less willing to bring the pay discrimination case into court than they were with the “slip and fall” injury.¹⁵

The implications of these findings for law and the legal system are multifaceted. First, women may not be taking advantage of the potential benefits of litigation as much as men. Whatever gains they could achieve from litigation—financial compensation, publicity for the wrongdoer, feelings of personal empowerment—cannot be realized if they do not file cases or pursue them fully. In addition, as men are more combative during litigation, the legal process itself may be slower, costlier, and more adversarial than it need be.

Perhaps most importantly, the cases that eventually end up in the hands of jurists may themselves be gendered. If lawsuits are filed disproportionately by men, and men litigate over different issues, then certain types of cases are more likely to become the vehicle for lawmaking. This does not undercut the bravery and commitment of the female litigants highlighted in *Feminist Judgments*, but it does suggest that those plaintiffs and those cases are unusual outliers.¹⁶ Both men and women, moreover, are less likely to file lawsuits involving one type of sex discrimination. What this means is that even if jurists want to remedy such inequalities through the law, they may frequently be denied the opportunity to do so. The cases excerpted in *Feminist Judgments* therefore are quite remarkable, not (just) because of their importance for legal doctrine, but simply because they ended up in the legal system in the first place.

As with all empirical work, my studies have major limitations. At the theoretical level, they rest upon ideas about gender that are largely essentialist and ignore (for now) how race, class, or sexual identity may also shape litigant behavior. Because so few survey respondents, both men and women, ever said they would pursue a case all the way to an appeal, the experiments also cannot speak directly to the production of appellate court opinions, where most legal policymaking occurs. And, of course, there are the myriad ways in which the gender (and race and class, etc.) of other legal actors might be impacting the legal system.

At the same time, however, I would suggest that examining whether gender affects litigant decisionmaking is a worthy question and there is some evidence for an affirmative, and important, answer. Again, because it is the litigant’s choices that generate the cases on which jurists work, any gendering of those choices necessarily means a gendering of the law. Even if the jurist were to model the opinions in *Feminist Judgments*, that opinion would still be influenced by gender, albeit in a very subtle way. Given that most judges in the United States (and all of those on the

13 *Id.* at 675.

14 *Id.*

15 *Id.*

16 See the powerful story of Christy Brzonkala, for example. Anibal Rosario Lebrón, *Rewritten Opinion in United States v. Morrison*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 453–56.

current U.S. Supreme Court) are generally *not* writing in a feminist way, the law has potentially suffered from a “double whammy” of bias in opinion writing and bias in the cases themselves. Such a conclusion is certainly not comforting, but, as with *Feminist Judgments* itself, illustrates the central importance of feminist methods of scholarship. Only through continuing such a pursuit, by pushing our analyses onward and outward, will we be able to fully assess the inequities of the legal system and the law.

EXTENDING THE CRITICAL REREADING PROJECT

*Gabrielle Appleby & Rosalind Dixon**

We want to start by congratulating Kathryn Stanchi, Linda Berger, and Bridget Crawford for a wonderful collection of feminist judgments that provide a rich and provocative rereading of U.S. Supreme Court gender-justice cases.¹ It is an extremely important contribution to the growing international feminist judgments project—in which leading feminist academics, lawyers, and activists imagine alternative feminist judgments to existing legal cases—which commenced with the seminal UK Feminist Judgments Project.² The original 2010 UK Project was based on the initially online Canadian community known as the Canadian Women’s Court.³

These works bring feminist critiques of legal doctrine from an external, commentary-based perspective to a position where such critiques might breathe reality into the possibility of feminist judgment writing. A feminist rewriting can change the way the story is told, the voices that are heard in the story, and the context in which it unfolds. Today, the feminist judgments project, having expanded across

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1 FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

2 FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al., eds., 2010); see also AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al., eds., 2014); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO: A TWO-STRANDED ROPE (Elisabeth McDonald et al., eds., 2017); NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright et al., eds., 2017). There is also an international feminist judgments project to be published soon by Hart. See Loveday Hodson & Troy Lavers, *Feminist Judgments in International Law*, VÖLKERRECHTSBLOG (Apr. 24, 2017), <https://voelkerrechtsblog.org/feminist-judgments-in-international-law/>.

3 A number of the Canadian Women’s Court judgments were published in special editions of the *Canadian Journal of Women and Law*. See, e.g., Melina Buckley, *Symes v. Canada*, 18 CAN. J. WOMEN & L. 27 (SPECIAL ISSUE) (2006); Mary Eberts et al., *Native Women’s Association of Canada v. Canada*, 18 CAN. J. WOMEN & L. 67 (SPECIAL ISSUE) (2006); Dianne Pothier, *Eaton v. Brant County Board of Education*, 18 CAN. J. WOMEN & L. 121 (SPECIAL ISSUE) (2006).

the world, is now being joined by other critical rereading projects, such as the Wild Law Judgment Project and the Children’s Rights Judgments Project.⁴

In this reflection, we want to explain a project in Australia that extends the feminist judgments project and adapts it specifically for the purpose of *teaching* critical theory, critical legal thinking, and the assumptions inherent in the legal method.

This is not to say, as Stanchi, Berger, and Crawford acknowledge in their introduction to the U.S. collection, that the feminist judgments project does not also have an educative objective. But its core objectives are elsewhere. As Stanchi, Berger, and Crawford explain, the feminist judgments project’s goals are:

- (a) To unmask the claims of neutrality and objectivity that continue and protect traditional power hierarchies;
- (b) By unmasking these claims, exposing the possibility that the perspectives of decisionmakers may be broadened and result in change; and
- (c) To provide an exploratory account of what feminist judicial decisionmaking might look like, how it might have practical application in judging and decisionmaking, and how that might change substantive outcomes, reasoning, and style.⁵

The editors of the U.S. Project also acknowledge this rereading project will have an important “educational function,” for students to learn about the law and feminism, for the legal community and the wider public to “learn about the way law works, what cases mean, and how the identity and philosophy of judges matter,” and to contemplate the arc of justice and the role of judges in achieving justice.⁶

Certainly, the feminist judgments project collections are helpful vehicles for teaching critical legal thinking to students and, since the publication of the first UK feminist judgments collection, have been employed as such across a number of courses and institutions.⁷

In our own project, *The Critical Judgments Project: Re-reading Monis v The Queen*,⁸ we recognize the feminist judgments project as seminal, but we also recognize that feminist perspectives represent only a limited critical viewpoint from

4 See generally LAW AS IF EARTH REALLY MATTERED: THE WILD LAW JUDGMENT PROJECT (Nicole Rogers & Michelle Maloney eds., 2017); REWRITING CHILDREN’S RIGHTS JUDGMENTS: FROM ACADEMIC VISION TO NEW PRACTICE (Helen Stalford et al., eds., 2017).

5 See FEMINIST JUDGMENTS, *supra* note 1, at 4–6.

6 *Id.* at 22.

7 See, e.g., *supra* note 4 and accompanying text; see also Rosemary Auchmuty, *Using Feminist Judgments in the Property Law Classroom*, 46 LAW TCHR. (SPECIAL ISSUE) 227 (2012); Jennifer Koshan et al., *Rewriting Equality: The Pedagogical Use of Women’s Court of Canada Judgments*, 4 CANADIAN LEGAL EDUC. ANN. REV. 121 (2010); Tamara Tulich, *Using Feminist Legal Judgments in Public Law Teaching*, U. WESTERN AUSTL. (Feb. 12, 2015), http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/poster_presentation_t_tulich.pdf; *Teaching with the Feminist Judgments Project*, U. KENT, <http://www.kent.ac.uk/law/fjp/resources/teaching.html> (last visited Sept. 13, 2018).

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

which to approach judicial decisionmaking.⁹ We have taken the view that there is a need to pluralize not just the feminist critique, but also the critical perspectives within such projects.

We also believe that the structure of the feminist judgments project books may not be ideal to encouraging *students*, rather than scholars, to grasp the full diversity of critical perspectives within the law. Most law teachers using the feminist judgments project will select only one or two cases for students to discuss. This selection may itself also privilege certain feminist perspectives, leaving others largely unexplored in certain students' educational experience.

In brief, our project has compiled a series of rereadings from leading critical scholars across Australia of a famous Australian High Court decision, *Monis v The Queen*. The project's focus on a single case was intended to encourage students to engage more directly and immediately with the theory presented. By focusing on a single case, this new project extends the teaching possibilities of the project, allowing teachers to expose students to a larger variety of critical legal perspectives without also needing to grasp changing factual and legal scenarios. Further, students will more easily identify those aspects of commonality and difference across the perspectives, allowing them to develop a nuanced understanding of the critiques.

The critical perspectives we have included in our project include feminism and the public-private divide, antisubordination feminism, critical race theory, intersectional theory, queer theory/poststructural feminism, the capabilities approach, international human rights theory, law and literature, political liberalism, law and economics, restorative justice, preventative justice, and deliberative democratic theory.

The case of *Monis* involved a constitutional challenge to a criminal prohibition on the use of the postal services in a manner that a reasonable person would find offensive. The challenge was based on Australia's constitutional implied freedom of political communication.¹⁰ The challenge had been brought by Mr. Man Haron Monis and Ms. Amirah Droudis, who had been charged under the provision after sending a number of highly offensive letters to the families of soldiers killed in the war in Afghanistan.¹¹

In *Monis*, all of the justices agreed that the provision amounted to an effective burden on the implied freedom of communication, which left the point of contention

9 We are not alone in this observation. It is recognized in the feminist judgments project itself and is now recognized by the expansion of the project into wild law and child rights.

10 *Monis* was charged under section 471.12 of the Criminal Code with thirteen counts of using the post in a way that reasonable persons would, in all the circumstances, regard as offensive. *Monis v The Queen* [2013] HCA 4, ¶ 4 (Austl.). Ms. Amirah Droudis was charged with aiding and abetting *Monis* with eight of these counts. *Id.* Section 471.12 provides:

A person commits an offence if:

(a) the person uses a postal or similar service; and
(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

Criminal Code Act 1995 s 471.12 (Austl.).

11 *Monis v The Queen* [2013] HCA 4, ¶ 1 (Austl.).

whether the provision was a proportionate legislative response to a legitimate state objective, consistent with Australia's constitutional democratic system. This question required the judges to grapple with deep issues about the appropriate role of the state in employing the criminal law to regulate civility of discourse and to protect vulnerable groups, and the ongoing influence of gender and race in approaching these issues.

Monis also presented an ideal vehicle for *The Critical Judgments Project* for another reason. The judges in *Monis* split evenly three to three on the question of whether the provision was in breach of the implied freedom. The three male judges—Chief Justice Robert French, Justice, Kenneth Hayne, and Justice Dyson Heydon—found that the purpose of the provision was simply to prevent the postal service from being used in a menacing, harassing, or offensive manner.¹² In determining whether such an objective was compatible with the maintenance of the system of government prescribed by the Constitution, both Chief Justice French and Justice Hayne held that the Australian system of government rested on a commitment to “robust” debate,¹³ often offensive and insulting.¹⁴

The joint judgment of Justices Susan Crennan, Susan Kiefel, and Virginia Bell construed the purpose of the statute very differently. They held that a key aim of the provision was to “recognise a citizen’s desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive.”¹⁵ They found that this objective was consistent with the constitutionally prescribed system of representative and responsible government.

Divided three to three, *Monis* was ultimately decided by a procedural rule. For the purposes of this project, it therefore suggests a natural opening for critical constitutional analysis: if members of the High Court of Australia were themselves unable to agree on a majority position in the case, this suggests a particular value in turning to other ways of thinking about constitutional law, or constitutional values, in trying to understand and address the problem the Court confronted.

The case was also an ideal vehicle because it was the first in which the High Court split along gender lines. Helen Irving notes not only the gender split in the judgment as significant, but also comments on the different approaches taken by the female judges.¹⁶ Gabrielle Appleby and Ngaire Naffine have observed that the male judges in the case, and particularly Justice Hayne, present offensive speech as a legitimate, if not essential, part of political discourse in Australia: “[A] constitutional imperative to be defended.”¹⁷ They observe, for instance, that “[Justice] Hayne []

12 *Id.* ¶ 73 (French, C.J.); *id.* ¶ 97 (Hayne, J.).

13 *Id.* ¶ 67 (French, C.J.).

14 See generally Adrienne Stone, ‘Insult and Emotion, Calumny and Invective’: *Twenty Years of Freedom of Political Communication*, 30 U. QUEENSL. L.J. 79 (2011).

15 *Monis v The Queen* [2013] HCA 4 ¶ 320 (Austl.) (Crennan, J., Kiefel, J. & Bell, J.); see also *id.* ¶ 348.

16 See Helen Irving, *Constitutional Interpretation: A Woman’s Voice?*, U. SYDNEY (Mar. 20, 2013), http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html.

17 Gabrielle Appleby & Ngaire Naffine, *Civility, Gender and the Law: Critical Reflections on the Judgments in Monis v The Queen*, 24 GRIFFITH L. REV. 616, 625 (2015).

conflates the experiences of all members of society, the experiences of men and women in public discourse, and majority responses and minority responses.”¹⁸

A case in which the identity of the various justices was clearly so salient is also a particularly natural one for introducing students to the idea that *who* judges are, and how they understand notions of constitutional justice, may matter to the resolution of concrete constitutional questions.

Finally, the case of *Monis* became one of enduring public interest in Australia because of the subsequent hostage terrorist actions of Mr. Monis in the Lindt Café in Sydney’s Martin Place in December 2014, in which two of those hostages and Monis were killed.¹⁹ One of those killed was a Sydney lawyer and University of New South Wales graduate, Katrina Dawson.²⁰ This occurred just days after Monis’s request for special leave to the High Court to rehear the matter was refused.

As a focused and directed teaching tool, *The Critical Judgments Project* is different in structure from the feminist judgments project in another way. Rather than providing a commentary to each judgment, which explains the case, its political, historical, social and economic context, and engaging in an explanation and critique of the approach adopted in the judgment, each judgment author in *The Critical Judgments Project* was asked to select a small number of extracts from canonical texts on which the relevant approach is based, supplemented, if necessary, by a short commentary explaining the approach. This gave students, often coming to the theories for the first time, the necessary grounding in the seminal thinkers and concepts on which the judgment is based.

In the judgments themselves, some of the authors focused directly on the facts and legal issues as they were presented in case. Others used the broad factual background or legal framework to explore broader issues relating to hate speech, intimidation, racial and gender justice, and the public sphere, or constitutional issues concerning the relationship between the implied freedom of political communication and prohibitions on offensive speech more generally. Like many of the judgments in the feminist judgments project, some judgments focus directly on relevant legal issues. Others focus on questions of style and method in legal reasoning, and the need to engage with more expansive legal and nonlegal contexts in which offensiveness is regulated and has an impact, or the consequences of the law through, perhaps, social research or different assumptions of knowledge. The chapters pluralize readers’ understanding of substantive values that are protected and promoted by the law, or those that should in fact underpin it.

The nature of the exercise of rewriting the *Monis* judgment undertaken by authors in this book has necessarily constrained them. Some liberties with judicial method have been taken that might stretch the boundaries of the judicial role, but the chapters each produce alternative imaginings *of the judgments*, an alternative imagining *of the law*. For many of the contributors writing from a highly critical perspective, this has meant working within the confines of quite artificial, and indeed

18 *Id.*

19 *The Many Faces of Lindt Siege Gunman Monis*, ABC NEWS (May 22, 2017), <http://www.abc.net.au/news/2017-05-22/lindt-cafe-sydney-siege-gunman-man-haron-monis/8375858>.

20 *Id.*

sometimes quite personally difficult, constraints. The judgment of Anne Macduff and Wayne Morgan, for example, is prefaced by explaining the inherent contradiction in the concept of a queer or poststructural feminist judgment on the basis that queer theory and poststructuralism are deployed as tools of deconstruction and critique of law and the legal system and thus are in necessary and inherent opposition to them.²¹ A queer/poststructural judgment “would either not be ‘queer,’ or it would not be a ‘judgment.’”²² Their judgment is framed as one *informed by* the critique of the theories, and in this more limited way brings the critical perspective within the legal paradigm. For the project as a whole, it has also meant that it is impossible to include within the main section of the book certain critiques of the law, which question law itself as a helpful structure or discourse for achieving social and political change. We have sought to address this, however, by ending the collection with a chapter from Margaret Davies providing a form of truly external critical reflection on the contributions found earlier in the final chapter.²³

As a focused teaching tool, students are given a series of questions at the commencement of the book to assist them in navigating the critical perspectives and reading the judgments, and to also understand the purpose of the rereading project, which captures the objectives to which all of the critical judgments projects are directed. These questions are:

Did the judgment noticeably depart from traditional formal legal methods of reasoning, and if so, how? Did, for example, the judgment employ empirical research, or other information/knowledge? Do you think any identified departure is an important addition to legal decisionmaking?

How is the “story” of the case told in the judgment? Do you think this has an influence on the reasoning and outcome?

What are the different groups within the community who are represented in the judgments: Who is included, who is excluded? Why these groups and not others? What does this mean for the development of the reasoning, if any? What might it mean for the selection and appointment of judges who can deliver such judgments in like cases in the future?

Does the reasoning reveal that apparently neutral, objective norms have discriminatory implications for historically excluded groups, including women, Indigenous Australians, and racial or religious minority groups?

Do you think the judgment results in a more “just” decision than those reached by the High Court judges in *Monis*, either in terms of its reasoning or outcome?

What are the flaws that you can identify in the judgment as rewritten, either from a traditional legal approach, the critical perspective adopted, or from another perspective? How might these be remedied?

Is the judgment transparent about the reasoning employed to reach its outcome?

21 Anne Macduff & Wayne Morgan, *Queer Theory and Poststructuralist Feminism*, in THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 73.

22 *Id.*

23 See Margaret Davies, *Critical Judging*, in THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 218.

How, if at all, did the rewritten judgment show the contingency of existing legal approaches and theoretical approaches to questions of constitutional law of this kind?

What critical perspective/s are not included in the book? How would you rewrite the judgment from other perspectives?²⁴

²⁴ See Gabrielle Appleby & Rosalind Dixon, *Critical Thinking in Constitutional Law and Monis v The Queen*, in THE CRITICAL JUDGMENTS PROJECT, *supra* note 8, at 1.

FEMINIST JUDGMENTS AND THE FUTURE OF REPRODUCTIVE JUSTICE

*Sarah Weddington**

I am thrilled to take part in the discussion of this important project, a large-scale feminist rewriting of major U.S. Supreme Court cases.¹ *Roe v. Wade*² is one of the twenty-five Supreme Court cases that has been rewritten from a feminist perspective by an imaginative group of law professors and lawyers.

I found Professor Kimberly M. Mutcherson's rewrite of the *Roe* opinion to be interesting and informative.³ She indicated in the panel discussion that she was not sure if I was the one who had suggested the trimester approach to pregnancy that was included in the *Roe* opinion. The answer is, "No, I did not." Justice Harry Blackmun, who wrote the majority opinion, was the counsel to Mayo Clinic before he joined the Supreme Court. I cannot give you a source that proves this, but I know for a fact that he spent time at Mayo Clinic the summer before *Roe v. Wade* was announced. I presume that he spent time talking to doctors there, and that part of their discussions involved suggestions for how the opinion could best be written, taking into account the development of pregnancy.

Also, the Supreme Court Justices were not unanimous in *Roe*. There were substantial divisions regarding how the opinions should be written. In fact, I argued it twice. The Supreme Court first heard the case on December 13, 1971 with seven Justices but did not issue its opinion at the end of that session. Instead the Court

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* Sarah Weddington is an American attorney, a former member of the Texas House of Representatives, law professor, and the attorney who, with Linda Coffee, represented Norma McCorvey (better known as "Jane Roe") in *Roe v. Wade*, 410 U.S. 113 (1973), before the U.S. Supreme Court. She is a graduate of the University of Texas Law School (1967) and a former assistant to the President of the United States (President Jimmy Carter). This Essay is based on remarks made by Ms. Weddington at a panel discussion held at Temple University Beasley School of Law on November 13, 2017. She thanks John FitzGerald, Michael Kubik, Colleen O'Connor, and Abby Timmons for spending innumerable hours editing over the summer and all the members of the *Notre Dame Law Review* for their revisions.

¹ FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].

² 410 U.S. 113 (1973).

³ Kimberly M. Mutcherson, *Rewritten Opinion in Roe v. Wade*, in FEMINIST JUDGMENTS, *supra* note 1, at 151, 151–67.

noted that the case should be set for reargument. The second argument was set for October 11, 1972 with nine Justices. The decision was announced on January 22, 1973.

I have been told that after the first argument, Justice William O. Douglas was opposed to setting the case for reargument. He believed that the move to set the case for reargument was intended to attract votes to generate a very different opinion in *Roe v. Wade* than the one we finally received (and certainly not a more feminist version, along the lines of what Professor Mutcherson has written). When the majority set the case for reargument, Justice Douglas filed a dissent. I have been told by Court insiders that it was at first a very long dissent, but that by the time he was ready to file it, and after other Justices had talked to him, his dissent was simply “I Dissent.”

In looking back on the period when *Roe* was argued and decided, I want to mention two other considerations. One is that I am feeling the disadvantages of age. It has been forty-five years since I received the Supreme Court’s decision. When I look at a group like you who are law students, younger students, college students, and young adults, I think you all are going to be front and center in the future on women’s reproductive issues. I am happy to share what I know, what I have experienced, and what I have been through with this group because I think you are in the future going to be central to what happens on these issues.

The second is that I feel that you are beginning to take your places in the continuous line of people who have had central roles in regard to the issues we are considering. For example, some of you have probably read the story of the seventeen-year-old woman from Mexico who came across the border into Texas and was immediately picked up by legal authorities. It turned out she was pregnant. Our media called her Jane Doe. Everything possible was done by federal officials to keep her from having an abortion even though she made it very clear that her choice was to abort and a court held that she should be allowed to have the abortion if that was what she wanted.⁴ Additionally, the head of the particular part of federal health and human services is someone who is personally very opposed to abortion and who flew to where Jane Doe was being held to try to talk her into choosing to continue the pregnancy. The people at the particular place where Jane Doe was being held would often say to her, “What’s the name of your child?” and exert all kinds of other strategies to try to intimidate her, none of which worked. She was a very strong individual; she eventually received the abortion procedure that she wanted.

The person who came up with the legal strategy in that case is one of my former students, Susan Hays, who is a very talented lawyer and one who is absolutely dedicated to winning for young women the right to make their own decisions, rather than letting the government make key personal decisions. I believe that Ms. Hays is going to be a person with increasingly important influence. Another former student of mine is Dilen Kumar. Mr. Kumar graduated from law school and got a wonderful

4 *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017) (per curiam) (Judge Brett M. Kavanaugh was one of three circuit judges on this case); *see also* Manny Fernandez, *U.S. Must Let Undocumented Teenager Get an Abortion, Appeals Court Says*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/undocumented-immigrant-abortion.html>.

job in the Dallas office of a big firm headquartered in New York City. He called me one day and said: “The firm that hired me upon law school graduation has told several of us that they hired too many people this year, so they need some of the new hires to begin work at the firm a year from now. The firm has offered me a good sum to do that, so I’m inclined to accept. However, a condition of that offer is that I must find something interesting to do for a year.” I helped him get hired by the White House Counsel’s office. He was put in charge of three other young lawyers in that office, and the four of them together were given the responsibility of getting Justice Elena Kagan confirmed as a U.S. Supreme Court Justice. As you know, they were successful in accomplishing that task.

I have another former student who started a program called Unlocking Doors. It helps people who have been in prison to have a place to stay when they are released, a place to work, and to have all kinds of things that people who have returned to public life need.⁵ In essence, she is working to open doors for released prisoners. I have another former student who has already argued a case in the U.S. Supreme Court. Seth Kretzer did a great job and I was very proud of him.

I believe that you all, like these former students of mine, are going to have a great deal of impact on the world. I am glad you have the U.S. Feminist Judgments Project as a model for how to reimagine justice as you want to see it in the world. That work tells us that the precedent is there for us to use. The arguments can be made. But we need creative young people like you to be the ones who take up the mantle of the Feminist Judgments Project and lead the way on reproductive justice and many other issues.

Kathryn “Kitty” Kolbert has been a friend of mine for years. I was in the Supreme Court while she was arguing *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁶ Kitty did a great job in arguing that case, even though all the abortion restrictions in that case were upheld.⁷ But the provision that she won—spousal notification—was critically important.⁸ Professor Lisa Pruitt’s reimagined feminist majority opinion provides inspiration to any attorney who seeks to persuade a court that a law is unjust, with her opinion’s emphasis on the law’s impact on women who are poor, rurally isolated, or Native American (or perhaps a member of two or three of these groups).⁹

Roe started because of a group of people about your age, who looked a lot like you, who were graduate students at the University of Texas in Austin. These students were upset because the University of Texas Health Center did not provide information about contraception and did not provide contraceptive methods. That group of students decided that they would organize a volunteer effort and that they would start offering counseling regarding contraception. They arranged to use space in a building that was right across the street from the University of Texas. They functioned in part of the upper story there; people could go there and get

⁵ UNLOCKING DOORS, <https://www.unlockingdoors.org/index.html> (last visited Sept. 13, 2018).

⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁷ *Id.* at 901.

⁸ *Id.* at 896–98.

⁹ Lisa R. Pruitt, *Rewritten Opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey*, in *FEMINIST JUDGMENTS*, *supra* note 1, at 365, 365–83.

contraceptive information. One of the things the students did was to go to New York City and get a copy of *Our Bodies, Ourselves*.¹⁰ The information was thought to be so scandalous that they read it in closets with flashlights (now, I exaggerate slightly). But those students were working hard to have the best information to share as part of their efforts to help others. Now, of course, you go and get a book or contraceptive counseling without thinking anything about how prior students had to work hard to have that information and to share it with others.

It happened that women began to come to the contraceptive counseling center and say they were already pregnant and that they did not want to continue the pregnancy. The volunteers were often asked by people seeking information, “Where can I go for an abortion?” The volunteers began to research the answer to their questions. In California, abortion was legal. There was a flight that left every Thursday evening from Dallas going to California for women seeking an abortion; often ten women were on that flight. New York became legal during the time that *Roe v. Wade* was pending. Colorado was partially legal. There were also a number of people who were illegally providing abortion services. For example, there were some really fine doctors who were doing abortions in New Mexico. My guess is that those doctors paid the police, but I cannot prove that. There were a variety of people providing abortion services in Texas or other states, but most of them were not skilled. Judy Smith, who was head of the volunteer group, died recently; I am feeling the loss of a lot of the people who were most important in that effort. Under Judy’s leadership, the volunteer group started telling people where to go for abortions and raising money so that people who did not have the means could get the services they needed.

Judy came to me one day and said, “Sarah, we’re really worried that one day we will be prosecuted as accomplices to the crime of abortion. We think the only way to not feel afraid is to get the law overturned.” I was then a licensed attorney and was working at the University of Texas School of Law. So, they said, “Would you please do a case challenging the Texas statute?” First, I tried to convince them that I was not the best lawyer to do so. I told them they needed to get someone with more federal litigation experience than I had. I had done uncontested divorces, wills for people with no money, and one adoption for my uncle. That was not exactly the best background for a federal litigator. I explained all that to them. They said “How much would you charge us to do this case?” And I said, “Oh, I’ll do it for free.” And they said, “YOU are our lawyer.” So, I became their lawyer. Several of the people in that group were law students who volunteered to help me with research and writing.

Luckily, I had access to the professors at the University of Texas School of Law. One of them was Charles Alan Wright, one of the foremost professors

10 BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *OUR BODIES, OURSELVES: A BOOK BY AND FOR WOMEN* (1973). Extolled as the most important work to come out of the women’s movement, *Our Bodies, Ourselves*, when first published, was a revolutionary book that spoke frankly about women’s medical issues and bodies, including the then-controversial topics of contraception and abortion. The book began as a stapled pamphlet in 1970, when abortion was still widely illegal. Because of its controversial content, it passed from woman to woman largely by underground channels and by word of mouth. See *History*, *OUR BODIES OURSELVES* <https://www.ourbodiesourselves.org/history/> (last visited July 8, 2018).

nationally on civil procedure. When I began law school he would not admit women in his class; he started out saying he would be putting a lot of time and effort into people who would probably never use that training. Then it got to where women could be in his class, but, as I remember, he would only ask them questions one day a semester. He imposed several other restrictions on women students, but after he had daughters who became lawyers, he changed his attitudes and became more welcoming to women students by the end of his life.

Bernie Ward was our top professor of procedure; he really helped me with the whole issue of a class action and how to set one up. Jane Roe was pregnant at the time she came to us as the plaintiff. I was worried that no woman could stay pregnant long enough for me to get the case through the various court procedures. Pursuant to Professor Ward's advice, Linda Coffee and I filed the case as a class action on behalf of all women who were or might become pregnant and want an abortion. Our first hearing was before a three-judge federal court in Dallas. The decision of that court was that the Texas law was unconstitutional, but the court refused to grant an injunction to keep Henry Wade, the District Attorney of Dallas who had been reelected many times, from prosecuting doctors. Linda and I worried about whether Wade would continue to prosecute doctors; if he did, we could not get doctors to help women. Well, Henry Wade the next day had a press conference. He said he did not care what any federal court said, he would continue to prosecute. I do not think he meant to help us; it was not in his character, but he did help us. The announcement of his press conference gave us a direct appeal to the U.S. Supreme Court.

We filed a protective appeal to the Fifth Circuit, but we did not argue there. Instead we filed an appeal to the U.S. Supreme Court. Our first argument in the U.S. Supreme Court was December 13, 1971.

There were many different issues to deal with regarding a Supreme Court hearing. One issue was: Who is going to argue the case? Kathy Stanichi explained that she had read that when you are going to the Supreme Court, lots of firms will offer to argue it for you because that has become a big money-raiser and attention-getter for firms. She asked whether this had happened to me. Well, it did. I called the Supreme Court when I had been notified of a hearing date (which was October 11, 1972) and said, "I'm trying to decide who should argue this case." The person in the clerk's office said, "We know who's going to argue it." I said, "You do? Who is it?" And they said Mr. Lucas has sent a letter saying he would be arguing the case. Oh, that made me mad because I did not get a copy of such a letter, and I was not happy about it. So, I called the clerk's office again and said, "Who decides who will argue a case?" The response I received was, "the plaintiffs." Lucas did not know the plaintiffs, but I did. So, I called the plaintiffs, John and Mary Doe, and they said, "We want you to argue it." I was certainly willing to do that.

The day before oral arguments in the Supreme Court, the lead attorney—a woman—for the national Planned Parenthood organization pulled together many of the lawyers from across the country who were litigating similar cases in order to conduct a moot court of our argument. A moot court refers to a situation where lawyers play like they are U.S. Supreme Court justices. They ask questions of the counsels who will be arguing in the U.S. Supreme Court and make suggestions about a better way to phrase something or indicate something they left out. The moot was

held in the Press Club in D.C. Those lawyers played like they were the Supreme Court Justices, which they loved, and they would ask the plaintiffs' attorneys for *Roe* and *Doe*¹¹ questions, and then they would say, "We think you should emphasize this a little bit more, or that a little bit more." The session was very helpful to me.

We also had several amicus curiae briefs from women's organizations, and these were helpful in terms of getting ready. We also had the support of doctors and medical organizations. Part of the reason we had the fervent support of the American Medical Association and the Texas Medical Association was that most of the doctors in Texas had been interns or residents in Dallas at John Peter Smith Hospital, which was the leading trauma hospital in Texas. It was where U.S. President John F. Kennedy was taken when he was shot. All of those doctors had worked in a ward there called the I.O.B.—Infected Obstetrics—ward. Their job was to save the lives and the fertility of women who had had illegal abortions, bad abortions, self-abortions or similar issues. Those doctors knew that if abortion were made illegal, it did not prevent abortions, it often resulted in very serious medical problems for women.¹² Another group supporting us was the American College of Obstetricians and Gynecologists.

I got to the Supreme Court, and I argued the case against the Texas law.¹³ I had no idea what the Justices were going to decide—very seldom can an attorney tell. You can hear the oral arguments online.¹⁴ I decided to run for the Texas Legislature because I did not know if I was winning or losing in the Supreme Court. I felt I had to do something to get into a position where I could try to change the law in Texas if we did not win *Roe* in the Supreme Court. I had been sworn in a couple of weeks earlier. The rumor was going around that President Nixon did not want the Court to decide the case while he was running for re-election.¹⁵ He had appointed Warren Burger as the Chief Justice. Justice Burger and Justice Blackmun were very close. In fact, Justice Blackmun had been the best man at Justice Burger's wedding.

On the 20th of January, Nixon was reinstated as President. On the 22nd, I was over at the Texas Capitol, and I got a call from the *New York Times*. The *Times* reporter said, "Does Ms. Weddington have a comment today about *Roe v. Wade*?" My assistant said, "Should she?" The reporter said, "It was decided today." My assistant said, "How was it decided?" The reporter answered, "She won it, 7–2."

11 *Doe v. Bolton*, 410 U.S. 179 (1973) (a Georgia case challenging the validity of a Georgia abortion statute which became a companion case to *Roe*).

12 The law in Texas at the time made it a crime to "procure an abortion" except for "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." *Roe v. Wade*, 410 U.S. 113, 117–18 (1973). Yet no one knew exactly when the exception applied. As a result, almost no doctor would do an abortion. SARAH WEDDINGTON, *A QUESTION OF CHOICE* 45 (The Feminist Press ed. 2013).

13 "Supreme Court personnel were referring to December 13 as 'Ladies' Day.' Three of the four attorneys who would be arguing on that day were women." WEDDINGTON, *supra* note 12, at 118.

14 Recordings of the arguments are available at OYEZ, <https://www.oyez.org/cases/1971/70-18> (last visited Sept. 13, 2018).

15 The case was ultimately decided with nine justices with two new justices, Lewis Powell and William Rehnquist, confirmed at the end of the 1971 Term. MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 279 (Cooper Square Press ed. 2001).

Soon after that I got a telegram from the Supreme Court saying a copy of the opinion would be faxed, and then I would receive a copy of the entire opinion later via express mail. Now you know you cannot send a telegram today—they do not even exist anymore. You would not wait until you got an airmail copy with the opinion. You would go to your smartphone or computer and look up the opinion. I called a friend and asked her to go to the Supreme Court and read the opinion, then to call me and tell me in detail what it said. I had to know the decision in detail in order to be able to take press questions.

I look back on that day, and if you had said to me then—I had started working on *Roe* in 1969 and got the opinion on January 22, 1973, or forty-five years ago—that I would still be working on the choice issue this much later, I would never have believed that. I have been working on this for a long time, and now it is your turn. I am excited that there are a lot of people, women and some men too, who are helping to work on these issues. The book *Feminist Judgments: Rewritten Decisions of the United States Supreme Court* helps us see, in a real and practical way, that feminist reasoning and arguments can make a difference.

Recently, I heard from a student who attended an institutional dinner of sorts at which Justice Ruth Bader Ginsburg was present. The student was assuring us that Ruth Bader Ginsburg is really spry. You probably know that you can buy the book that reveals that she has a personal trainer come to her chambers three times a week. It is called *The RBG Workout* by Bryant Johnson. Exercise helps keep her in good shape so she will be able to continue as a Justice. I do not think she wants to leave at all, and—thankfully—she usually does what she wants.

For all of the young people who care about reproductive justice, I hope to see your name in print sometime in the future. That may be as a lawyer on an important brief or a piece of fantastic scholarship or a contribution to a creative blueprint for future litigation, like the *Feminist Judgments* book.

FEMINIST JUDGMENTS & #METOO

*Margaret E. Johnson**

The *Feminist Judgments* book series¹ and the #MeToo movement share the feminist method of narrative.² *Feminist Judgments* is a scholarly project of rewriting judicial opinions using feminist legal theory. #MeToo is a narrative movement by people, primarily women, telling their stories of sexual harassment or assault. Both *Feminist Judgments* and #MeToo bring to the surface stories that have been silenced, untold, or overlooked. These narrative collections can and do effectuate gender-justice change by empowering people, changing perspectives, opening up new learning, and affecting future legal and nonlegal outcomes.

Narrative's power is evidenced by the #MeToo movement, which resurged on October 16, 2017. People posted their personal stories of being subjected to sexual harassment or assault—often contradicting previously assumed or accepted narratives told by powerful people. Within twenty-four hours, there were more than twelve million #MeToo posts on Twitter, Facebook, and other social media platforms.³ And people listened to the en masse telling of how (generally) men had exercised the power and control of sexual assault, harassment or misconduct. The listening shifted power structures. In less than two months, these narratives led to the removal of influential men from their previously vaunted positions.

The repudiated men were previously seen as authoritative storytellers who constructed narratives—and excluded alternative narratives—from the public

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1 See FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 15 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS] (the narrative feminist method is “the use of narrative to illuminate the effects of the law on individual plaintiffs”).

2 *Id.* at 15–16. #MeToo was founded more than ten years ago by Tarana Burke to “empower[] [survivors of sexual assault] through empathy,” especially youth of color. Zahara Hill, *A Black Woman Created the “Me Too” Campaign Against Sexual Assault 10 Years Ago*, EBONY (Oct. 18, 2017), <http://www.ebony.com/news-views/black-woman-me-too-movement-tarana-burke-alyssa-milano#axzz4viv2XCUH>; see Tarana Burke, *The Inception*, JUSTBEINC., <http://justbeinc.wixsite.com/justbeinc/the-me-too-movement-cmml> (last visited Sept. 13, 2018).

3 *More than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS (Oct. 17, 2017), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/>.

square.⁴ With their downfall, the men's previously constructed stories have been examined in a new light. Consider two examples. The first involves Matt Lauer, the NBC Today host, terminated due to his sexual misconduct. Before Lauer's sexual misconduct came to light, NBC declined to air Ronan Farrow's investigative story of women's narratives recounting Harvey Weinstein's serial sexual assaults and harassment of them. Questions remain as to whether it was Lauer who nixed Farrow's piece.⁵ The second involves Garrison Keillor, whom Minnesota Public Radio fired for his "inappropriate behavior."⁶ Prior to his termination, Keillor penned an op-ed in the Washington Post declaring that (now former) Senator Al Franken's alleged sexual assault on Leeann Tweeden was only "low comedy" and did not merit Franken's resignation.⁷ Without disclosing that he was the subject of an investigation for similar misconduct, Keillor used his position to marginalize alternative narratives of assault while promoting a masterplot of women as hypersensitive.

Lauer and Keillor, along with many others, are no longer positioned to endorse one narrative while screening, silencing, or demonizing others. #MeToo women insist on raising their voices and being heard. From the #MeToo movement, we learn the power of telling one's narrative and having it be heard.

The Feminist Judgments Project questions the assumption that published court opinions are the only acceptable narrative of a judicially addressed conflict. In rewriting landmark opinions from a feminist perspective, the project brings to the surface untold, ignored, and suppressed alternative narratives of those conflicts. The project examines court opinions and rewrites them using the same facts and case precedent as the original opinion—but in a new light. That new light is feminist legal theory. With the new perspective, or what Professor Carolyn Grose calls "goggles,"⁸ in place, different facts and precedent may come into view.

4 Jessica Bennett, *The #MeToo Moment: When the Blinders Come Off*, N.Y. TIMES (Nov. 30, 2017), <https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html>.

5 Michael Starr, *Matt Lauer's Firing Casts NBC's Call on Ronan Farrow in a Whole New Light*, N.Y. POST (Nov. 29, 2017), <https://nypost.com/2017/11/29/matt-lauers-fall-from-grace-raises-a-lot-of-questions-about-nbc/>.

6 Jayme Deerwester, *Garrison Keillor Fired for Alleged 'Inappropriate Behavior' by Minnesota Public Radio*, USA TODAY, (Nov. 29, 2017), <https://www.usatoday.com/story/life/people/2017/11/29/garrison-keillor-fired-alleged-improper-behavior-minnesota-public-radio/905491001/>.

7 See, e.g., Garrison Keillor, *Al Franken Should Resign? That's Absurd*, WASH. POST (Nov. 28, 2017), https://www.washingtonpost.com/opinions/al-franken-should-resign-thats-absurd/2017/11/28/d33e2d8a-d482-11e7-a986-d0a9770d9a3e_story.html?utm_term=.3f1252d9eca6;

Sheryl Gay Stolberg et al., *Al Franken to Resign from Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html>;

Leeann Tweeden, *Senator Al Franken Kissed and Groped Me Without My Consent, and There's Nothing Funny About It*, 790 KABC (Nov. 16, 2017), <http://www.kabc.com/2017/11/16/leeann-tweeden-on-senator-al-franken/>.

8 Carolyn Grose, *Wisdom and Hope from a Law Student*, PAY ATTENTION BLOG (Nov. 7, 2017), <http://profgröse.com/wisdom-and-hope-from-a-law-student/>.

For instance, the feminist judgment for *Oncale v. Sundowner Offshore Services, Inc.*⁹ offers an alternative narrative by providing a more complete story of the underlying events and other legal rationales for the decision.¹⁰ In *Oncale*, the plaintiff was a male working with other men on an oil rig in the Gulf of Mexico. From the original opinion, we learn that coworkers and a supervisor subjected Mr. Oncale to “sex-related, humiliating actions.”¹¹ The question before the Court was whether male-on-male sexual harassment violated Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination “because of . . . sex” in an employee’s “terms” or “conditions” of employment.¹² The Supreme Court ruled that it did. The Court did not expand the definition of sex-based discrimination under Title VII to include discrimination on the basis of sexual orientation or gender identity. Rather, the Court relied on its male-on-female sexual harassment precedent, which largely emphasized situations where unwelcome sexual desire motivated the harassment.

The rewritten opinion by Professor Ann McGinley uses the same precedent and facts but with a shifted perspective.¹³ As a result, it provides an alternative factual and legal reasoning narrative, while keeping the same holding that male-on-male sexual harassment is actionable under Title VII. Whereas the original opinion refused to detail the facts of harassment for the sake of “brevity and dignity,” Justice McGinley relays Mr. Oncale’s story in detail.¹⁴ The facts are that Mr. Oncale’s male coworkers restrained Oncale while his supervisor Lyons placed his penis on the back of Oncale’s head on one occasion, and on his arm on another; Lyons and supervisor Phippen threatened to rape Oncale; and Lyons forced a bar of soap between Oncale’s buttocks while Phippen restrained Oncale as he took a shower. The feminist judgment facts inform us that these same men had harassed another supervisor by picking on him and labeling him with unwelcome names such as “Rig Queen,” a name suggesting homosexuality. And we learn that Mr. Oncale complained and then left his employment with an official statement that his departure was due to the harassment. The feminist judgment’s telling of a more complete story helps to avoid essentializing sexual harassment. The masterplot of sexual harassment at the time was primarily male-on-female, focused on desire, not policing others’ conformity to gendered masculinity roles, and involving only targeted individuals who are passive. The feminist judgment’s narrative counters all of these stereotypes with its more complete story and thus supports a rich portrait of Oncale, his dignity and his pursuit of gender justice.

The *Oncale* feminist judgment also redefines the legal narrative of “because of sex.”¹⁵ Justice McGinley includes gender identity and sexual orientation harassment

9 523 U.S. 75 (1998).

10 Margaret E. Johnson, *Commentary on Oncale v. Sundowner Offshore Servs., Inc.*, in FEMINIST JUDGMENTS, *supra* note 1, at 408, 408–14; Ann C. McGinley, *Rewritten Opinion in Oncale v. Sundowner Offshores Servs., Inc.*, in FEMINIST JUDGMENTS, *supra* note 1, at 414, 414–25.

11 *Oncale*, 523 U.S. at 77.

12 42 U.S.C. § 2000e-2(a)(1) (2012).

13 McGinley, *supra* note 10, at 414–25.

14 *Id.* at 415–16.

15 *Id.* at 419–21.

in the definition of “because of sex.” The feminist judgment also includes “sex” as intersectional of biological sex, gender performance, gender identity, and sexual orientation and therefore, encompasses all of these identity characteristics. Finally, the feminist judgment requires that courts include not only harassment that is based on unwelcome desire but also that which is based on hostility in the definition of discrimination “because of sex.” As a result, this alternative narrative importantly provides expanded legal recourse for discrimination.

Both the Feminist Judgments Project and the #MeToo movement evidence how different narratives can be constructed using the same facts but changed perspectives.¹⁶ As the editors of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* explain, “how the decision maker sees the story, what that person sees as relevant and irrelevant, and what inferences the decision maker draws from the facts often drive the ultimate decision.”¹⁷ The Feminist Judgments series and the #MeToo movement bring the power of narrative into legal scholarship and activism in tangible and effective ways. For instance, in the #MeToo movement, the stories counter prevailing master plot narratives of workplaces free of sexual misconduct, harassment, or assault. The new alternative narratives make us listen, challenge our unspoken assumptions, and require us to understand the reality of the workplace. In response, companies, organizations, and governments are making changes to eradicate sexual harassment and hopefully, work toward gender justice.¹⁸ Scholars are constructing alternative narratives by rewriting court opinions in *The Feminist Judgments* series, showing the power of a change of perspective. As a result, the new narratives change the outcome of judicial decision making, showing a path to changing lawyering and judging for more gender-just outcomes as well.

16 See CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 3–23 (2017).

17 FEMINIST JUDGMENTS, *supra* note 1, at 15.

18 Some changes that have already occurred as a result of #MeToo include (1) private sector elimination of forced arbitration agreements with employees claiming sexual harassment; (2) proposed federal law outlawing these forced arbitration agreements; (3) federal court examination of its response to sexual harassment complaints; (4) creation of a legal defense fund, Time’s Up, for low-income women subjected to workplace assault and harassment; and (5) proposed legislation making federal legislators personally liable for sexual harassment. See, e.g., Cara Buckley, *After #AskHerMore and #MeToo, Time’s Up*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/style/golden-globes-times-up-me-too.html?rref=collection%2Ftimestopic%2FSexual%20Harassment&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=4&pgtype=collection; Adam Liptak, *Courts Must Better Police Themselves on Harassment, Chief Justice Says*, N.Y. TIMES (Dec. 31, 2017), https://www.nytimes.com/2017/12/31/us/politics/john-roberts-courts-sexual-harassment.html?_r=0; Heidi M. Przybyla, *House Unveils Bill to Combat Sexual Harassment on Capitol Hill*, USA TODAY (Jan. 18, 2018), <https://www.usatoday.com/story/news/politics/2018/01/18/house-unveils-bill-combat-sexual-harassment-capitol-hill/1045099001/>; Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html?rref=collection%2Ftimestopic%2FSexual%20Harassment&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=67&pgtype=collection.