

FEMINIST JUDGMENTS & #METOO

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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-tweedenn-on-senator-al-franken/>.

8 Carolyn Grose, *Wisdom and Hope from a Law Student*, PAY ATTENTION BLOG (Nov. 7, 2017), <http://profgrose.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.