

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

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*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.