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Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment

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INTRODUCTION

The word "feminism" means different things to its many supporters (and undoubtedly, to its detractors). For some, it refers to the historic struggle: first to realize the right of women to vote and then to eliminate explicit discrimination against women from the nation's laws.[1] For others, it is a political movement, the purpose of which is to raise awareness about and to overcome past and present oppression faced by women.[2] For still others, it is a philosophy—a system of thought—and a community of belief[3] centering on attaining political, social, and economic equality for women, men, and people of any gender.[4]

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1. *See, e.g.*, NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 3 (1987) (describing early adoption of the term "feminism" during the peak of the woman suffrage movement in the early 20th century).
2. *See, e.g.*, LISA YOUNG, FEMINISTS AND PARTY POLITICS 4–5 (2000) (describing the influence of feminism on political institutions).
3. *See* Rosemary Hunter, *Can* Feminist *Judges Make a Difference?*, 15 INT'L J. LEGAL PROF. 7, 8 (2008).
4. Roger Scruton, *Feminism*, THE PALGRAVE MACMILLAN DICTIONARY OF POLITICAL THOUGHT (Palgrave Macmillan 3d ed. 2007) (1982) (defining feminism as "advocacy of the *rights of women and of their social, political and economic equality with men"). A more contemporary understanding of feminism also accounts for multiple genders and gender fluidity; for that reason, we include "people of any gender" in our definition. On multiple genders and gender fluidity, see Diane Richardson, *Conceptualising Gender*, *in* INTRODUCING GENDER & WOMEN'S STUDIES 3, 19–20 (Victoria Robinson & Diane Richardson eds., 4th ed. 2015).

For us, the editors of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*,[5] feminism is all of those things and more. Feminism is both a movement and a mode of inquiry. In its best and most capacious form, feminism embraces justice for all and seeks to ally itself with rights-based movements for people of color, the poor, immigrants, refugees, religious minorities, disabled individuals, LGBTQ+ people, and other historically marginalized groups.

This essay presents feminism as the foundation for a developing form of rich, complex, and practical legal scholarship—the lens and the means through which we may approach and resolve many legal problems.[6] First, this essay explores the intellectual foundations of feminist legal theory and situates the United States and international feminist judgments projects within that scholarly tradition.[7] It next considers how the feminist judgments projects move beyond traditional academic scholarship to bridge the gap between the real-world practice of law and feminist theory,[8] a move that made the publication of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* an especially fitting topic for the 10th Annual Conference held at the University of Baltimore Center on Applied Feminism.[9]

When they write feminist judgments (using feminist perspectives or methods to produce revised versions of actual court opinions), feminist authors translate feminist theory into the language of law practice and judging.[10] Their translations demonstrate the potential for lawyers to incorporate feminist theory and methods into oral and written arguments,[11] for law students to gain deeper insights from and to learn the practical utility of feminist theory,[12] and for judges to recognize how incorporating feminist perspectives may transform the reasoning or outcome of a case without changing the law or the facts

5. FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016).
6. *See infra* notes 7–14, 87–90 and accompanying text.
7. *See infra* Parts I–II.
8. *See infra* Parts III–IV.
9. *See 10th Annual Feminist Legal Theory Conference - Applied Feminism and Intersectionality: Examining the Law Through Multiple Identities*, U. BALT. CTR. ON APPLIED FEMINISM, http://law.ubalt.edu/centers/caf/pdf/Schedule%202017%20final4_logos.pdf (last visited Dec. 30, 2017).
10. *See* Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U.S. Feminist Judgments Project*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, *supra* note 5, at 3, 5.
11. *See id.* at 4–5 ("Feminist consciousness broadens and widens the lens through which we view law . . . .").
12. *See id.* at 22 (explaining the benefits of learning and studying feminist legal theory).

of the underlying lawsuit.[13] Finally, this essay uses contemporary examples of feminist judging to illustrate that the gap between feminist theory and judicial decision making is narrowing, a real-world advance that suggests a widening judicial audience for *Feminist Judgments*.[14]

I. THE INTELLECTUAL FOUNDATIONS OF FEMINIST LEGAL THEORY

Feminist legal theory is a twentieth-century innovation that involves a synergistic intersection of legal scholarship, law practice, and law teaching.[15] Its origins lie in the work of the very few female law professors (and their male supporters) who came together to form the Women in Legal Education Section of the Association of American Law Schools (AALS) in 1970.[16] Members of this group supported each other's research and advocated for law school curriculum development, including the creation of courses in "Women and the Law," which were offered by fewer than ten schools in 1970.[17] In 1967, women represented only 1.7% of all tenure-track professors in law schools; Ruth Bader Ginsburg became the first female tenured professor at Columbia Law School in 1972.[18] By 1970, women represented only 8.6% of all J.D. students,[19] 2.2% of

13. *See* Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Preface* to FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, *supra* note 5, at xxix, xxix (illustrating the potential and actual impacts of the incorporation of feminist theory in judicial reasoning).
14. *See, e.g.*, Stanchi, Berger & Crawford, *supra* note 10, at 4 (illustrating the relationship and expansion of the use of feminist theory in judicial reasoning); *infra* Part IV (providing examples of real-life feminist judgments).
15. *See* Carrie Menkel-Meadow, *Feminist Jurisprudence: Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1494, 1533–40 (1992) (discussing the origins and development of feminist legal theory).
16. *See* Elizabeth F. Defeis, *Women in Legal Education Section*, 80 UMKC L. REV. 679, 679 (2012).
17. Ruth Bader Ginsburg, *In the Beginning . . .*, 80 UMKC L. REV. 663, 663 (2012); *see also* Defeis, *supra* note 16, at 679–80 (describing the formation of the AALS Women in Legal Education Section and the first course on "Women and the Law" at Seton Hall Law School in 1973).
18. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 219–20 (Univ. of Ill. Press 2d ed. 1993) (1981) (citing the percentage of full-time tenure-track female law professors in 1967); CLARICE FEINMAN, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 129 (3d ed. 1994).
19. *First Year and Total J.D. Enrollment by Gender: 1947 - 2011*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf (last visited Dec. 30, 2017).

tenure-track faculty,[20] and 4% of all attorneys.[21] As the women's movement of the 1970s gained influence, the numbers of female professors, students, and attorneys increased.[22] The increases meant more feminist scholarship to educate the academy and more feminist teaching to educate students who would then carry those ideas with them to law practice.[23]

Around the same time, feminist law practice was also thriving outside the academy.[24] Title VII and Title IX were added to the Civil Rights Act of 1964, prohibiting sex discrimination in employment and education.[25] Ruth Bader Ginsburg, together with Pauli Murray and Dorothy Kenyon, started the Women's Rights Project of the American Civil Liberties Union (ACLU) to strengthen the ACLU's approach to women's rights.[26] The Women's Rights Project became a formidable force for women's rights.[27] By the beginning of the 1980s, women had achieved significant equal protection victories in the courts, such as *Reed v. Reed*[28] and *Frontiero v. Richardson*,[29] as well as suffering legal setbacks, such as the failure of the Equal Rights Amendment.[30] By 1980, women represented 34.2% of all

20. Donna Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903, 906.
21. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 15 (2009).
22. *See, e.g.*, *id.*; Fossum, *supra* note 20, at 906; *First Year and Total J.D. Enrollment by Gender: 1947 - 2011*, *supra* note 19.
23. *See* Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the* California Law Review, 100 CALIF. L. REV. 381, 426–27 (2012).
24. *See* Bowman, *supra* note 21, at 15.
25. GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 2 (2016) (discussing the passage of Title VII); SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 3–4 (2007) (discussing the passage of Title IX).
26. *See Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff (last visited Dec. 30, 2017).
27. *See* Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 158, 239 (2002) (describing Ruth Bader Ginsburg's work with the Women's Rights Project as bringing about "profound change . . . in the law").
28. 404 U.S. 71, 73, 76–77 (1971) (invalidating an Idaho law that gave preference for a male administrator of an intestate decedent's estate, as between equally related individuals).
29. 411 U.S. 677, 678–79, 690–91 (1973) (invalidating a federal law that required married female service members to prove dependency of spouse in order to receive certain financial benefits but automatically provided the benefit to married male service members).
30. *See, e.g.*, MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 70–85 (Ind. Univ. Press 1988) (1986) (discussing the failure of states to ratify the Equal Rights Amendment).

J.D. candidates,[31] 13.7% of all full-time faculty,[32] and 8.1% of all attorneys.[33]

Coinciding with increased numbers of female law students, faculty, and practicing attorneys, feminist theory and practice became mutually intertwined.[34] The National Conference on Women and the Law, held annually from 1970 to 1990, provided a crucial gathering place for practicing lawyers, academics, and students, and served to "provide a framework for feminist lawyers and theorists to learn from each other or to share information about the real life problems of a broader group of women, e.g., poor women, disabled women, working class women."[35] Feminist attorneys shared their work with women who had a variety of needs for legal assistance related to poverty, immigration status, imprisonment, sexual abuse, and estate planning, to name just a few areas, and feminist academics shared their new ideas about how to approach legal problems.[36] The term "feminist jurisprudence" first came into scholarly use in the 1980s.[37]

New legal concepts and claims emerged from these intense interactions between feminist legal academics and feminist practitioners.[38] For example, sexual harassment as a form of sex-based discrimination would not exist in its current robust form but for the work of feminist legal theorist Catharine A. MacKinnon, who grounded her findings and recommendations in what she had learned through listening to and believing the stories that individual women

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31. *First Year and Total J.D. Enrollment by Gender: 1947 - 2011*, *supra* note 19 (citing data for the 1980–1981 academic year).
32. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988).
33. BARBARA CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 10 tbl.1.3.1 (1985).
34. *See* Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249, 249 (1998) (arguing that the study of feminist legal theory and substantive cases taken by feminist practitioners "reveals a spiral relationship in which feminist practice has generated feminist legal theory, theory has then reshaped practice, and practice has in turn reshaped theory").
35. Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 WIS. WOMEN'S L.J. 367, 368 (1997).
36. *See id.* at 378–81 (providing a first-hand account of the first National Conference on Women and the Law and subsequent conferences). Attendance rates increased significantly from the first conference, which had fifty participants, to the fourteenth conference, which had over 2,600 attendees. *Id.* at 379.
37. *See, e.g.*, Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 376 (1981).
38. *See infra* notes 39–50 and accompanying text.

told about their experiences in the workplace.[39] Professor MacKinnon was co-counsel for Mechelle Vinson, whose sexual harassment claim reached the Supreme Court of the United States in 1986.[40] In *Meritor Savings Bank v. Vinson*, the Supreme Court recognized that plaintiffs should be allowed to pursue claims for sexual harassment in situations beyond the "quid pro quo" arrangements previously included.[41] In Vinson's case, the Court recognized that the creation of a hostile work environment constituted sexual harassment.[42]

And it was a law professor, Anita Hill, who courageously spoke out about her own experiences of sexual harassment while working as an attorney for the Equal Employment Opportunity Commission under then-director Clarence Thomas.[43] Her testimony during Justice Thomas's Supreme Court confirmation hearings raised national awareness of workplace sexual harassment and motivated a new generation of feminist activists.[44]

Feminist scholarship also helped counteract the result in *Geduldig v. Aiello*,[45] the Supreme Court decision upholding a California

39. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 4 (1979) [hereinafter MACKINNON, SEXUAL HARASSMENT] (explaining that sexual harassment is discrimination based on sex); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83, 86 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY] ("[Consciousness-raising is a method in which] [w]omen's lives are discussed in all their momentous triviality, that is, as they are lived through. The technique explores the social world each woman inhabits through her speaking of it, through comparison with other women's experiences, and through women's experiences of each other in the group itself."). The first case that recognized sexual harassment as sex discrimination was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). *See* MACKINNON, SEXUAL HARASSMENT, *supra*, at 64.

40. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

41. *See id.* at 65 ("[S]exual misconduct constitutes prohibited 'sexual harassment,' whether or not it is directly linked to the grant or denial of an economic *quid pro quo*.").

42. *Id.* at 65–67.

43. David A. Kaplan, *Anatomy of a Debacle*, NEWSWEEK (Oct. 20, 1991, 8:00 PM), http://www.newsweek.com/anatomy-debacle-204540.

44. *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, 107–08 (2007) (describing the impact of the Thomas confirmation hearings, specifically Rebecca Walker's call for a "third wave," generational-specific feminist response to resist misogynist behavior, such as that exhibited by Clarence Thomas and the members of the Senate Judiciary Committee who undermined Professor Hill's credibility). *See generally* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (detailing the societal impact of the Hill-Thomas hearings on feminism and awareness of sexual harassment).

45. 417 U.S. 484 (1974).

disability insurance program that failed to include coverage for pregnancy-related disabilities.[46] The majority had reasoned that the program's distinction between "pregnant women" and "nonpregnant persons" was not sex-based discrimination.[47] Feminist students, scholars, and lawyers responded quickly and uniformly, criticizing the Supreme Court majority for failing to comprehend that only women were in one of the two categories established by the program, making the categorization inherently sex-based.[48] In 1978, Congress

46. *Id.* at 496–97.

47. *See id.* at 496 n.20.

48. *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 n.107 (1984) (citing more than two dozen law review articles written shortly after the *Geduldig* decision and criticizing the result, including Nancy S. Erickson, *Equality Between the Sexes in the 1980's*, 28 CLEV. ST. L. REV. 591, 598 (1979); Constance Frisby Fain, *Pregnancy and Sex Discrimination*, 5 TEX. S.U. L. REV. 54, 66, 69–70 (1978); Ruth M. Ferrell, *The Equal Rights Amendment to the United States Constitution—Areas of Controversy*, 6 URB. LAW. 853, 862 (1974); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 37–38, 41–42 (1975); Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 8–13; John D. Johnston, Jr., *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. REV. 617, 678 (1974); David L. Kirp & Dorothy Robyn, *Pregnancy, Justice, and the Justices*, 57 TEX. L. REV. 947, 948–51 (1979); Arthur Larson, *Sex Discrimination as to Maternity Benefits*, 1975 DUKE L.J. 805, 811–12; Mitchel E. Ostrer, General Electric Co. v. Gilbert*: Defining the Equal Opportunity Rights of Pregnant Workers*, 10 COLUM. HUM. RTS. L. REV. 605, 614–17 (1978–1979); Kathleen Peratis & Elisabeth Rindskopf, *Pregnancy Discrimination as a Sex Discrimination Issue*, 2 WOMEN'S RTS. L. REP. 26, 28–29 (1975); Scales, *supra* note 37, at 379–81; Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1532–36 (1974); Rhoda Bunnell, Note, *The Impact of* Geduldig v. Aiello *on the EEOC Guidelines on Sex Discrimination*, 50 IND. L.J. 592, 601 (1975); Phillip Nollin Cockrell, Comment, *Pregnancy Disability Benefits and Title VII: Pregnancy Does Not Involve Sex?*, 29 BAYLOR L. REV. 257, 257–58, 264 (1977); Harriet Hubacker Coleman, Comment, *Barefoot and Pregnant—Still: Equal Protection for Women in Light of* Geduldig v. Aiello, 16 S. TEX. L.J. 211, 211–12 (1975); Gary E. Dunton, Case Note, *Under a Compulsory Unemployment Disability Insurance System, a State May Permissibly Exclude from Coverage Disability Resulting from Normal Pregnancy.* Geduldig v. Aiello, *___ U.S. ___, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974).*, 52 J. URB. L. 591, 600–01 (1974); Sheila Nolan Flick, Comment, *The 1978 Amendment to Title VII: The Legislative Reaction to the* Geduldig-Gilbert-Satty *Pregnancy Exclusion Problem in Disability Benefits Programs*, 27 LOY. L. REV. 532, 586 (1981); Mariko Gushi, Comment, *Three Cases Against Motherhood*, 2 GLENDALE L. REV. 313, 315–16 (1978); Gerry L. Holden, Comment, *Sex Discrimination in the 1970's: The Supreme Court Decisions*, 6 TEX. TECH L. REV. 149, 164–65 (1974); Joyce Langenegger, Comment, *Pregnancy and Employment Benefits*, 27 BAYLOR L. REV. 767, 774, 776 (1975); Joanne L. Levine, Note, *Pregnancy and Sex-Based Discrimination in Employment: A Post-*Aiello *Analysis*, 44 U. CIN. L. REV. 57, 58 (1975); Mark A. Lies II, Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DEPAUL L. REV. 127,

enacted the Pregnancy Discrimination Act (PDA), which defined discrimination on the basis of pregnancy as discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964.[49] The PDA itself sparked feminist disagreement over whether pregnancy should be treated like any other disability or whether it should receive "special treatment" because of its unique effects on women.[50]

As feminist scholarship grew and matured, it became apparent that there was not, nor could there be, a single feminist legal theory.[51] Rather, there are multiple feminist theories and perspectives that emerge as women's lived experiences are the starting point for legal analysis.[52] Feminist legal practice informs feminist legal theory, and feminist legal theory informs legal practice.[53] The theories adapt to

134–36 (1974); John D. Nagy, Recent Development, Geduldig v. Aiello, 3 HOFSTRA L. REV. 141, 143 (1975); Joyce E. Reback & David M. Reicher, Note, *Title VII, Pregnancy and Disability Payments: Women and Children Last*, 44 GEO. WASH. L. REV. 381, 383–84, 389–95 (1976); Barbara Ungar Royston, Note, *Pregnancy Disability Benefits Denied: Narrowing the Scope of Title VII*, 32 U. MIAMI L. REV. 173, 180 (1977); Sally Barker Spitzer, Comment, *The Supreme Court 1974 Term and Sex-Based Classifications: Avoiding a Standard of Review*, 19 ST. LOUIS U. L.J. 375, 391 (1975); Jane Swanson, Note, *Exclusion of Pregnancy from Coverage of Disability Benefits Does Not Violate Equal Protection*, 12 HOUS. L. REV. 488, 494 (1975); Virginia Voorhees, Comment, *Pregnancy Disability Benefits Under State-Administered Insurance Programs*, 24 CATH. U. L. REV. 263, 263–64, 275–79 (1975); Diane L. Zimmerman, Comment, Geduldig v. Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442–48 (1975); Case Note, *Equal Protection — Discrimination Against Pregnancy Is Not Sex Discrimination* — Geduldig v. Aiello*, 417 U.S. 484 (1974)*., 1975 BYU L. REV. 171, 175–78).

49. 42 U.S.C. § 2000e(k) (2012). For the legislative history of the Pregnancy Discrimination Act, see STAFF OF S. COMM. ON LABOR & HUMAN RES., 96TH CONG., LEGIS. HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978 (Comm. Print 1980). The PDA affected only Title VII, however. *See* 42 U.S.C. § 2000e(k). As a matter of constitutional jurisprudence, *Geduldig* has never been explicitly overruled.

50. *See, e.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1163–80 (1986) (critiquing both equality analysis and special treatment and arguing that responsibility analysis would better address issues of systemic and subtle gender subordination); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 34–35, 37–38 (1985) (suggesting that an appropriate comparison for discrimination purposes is women versus men, as only women can become pregnant from exercising their reproductive choices); Law, *supra* note 48, at 1008–09, 1010, 1029 (arguing for heightened scrutiny in pregnancy discrimination cases); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 332 (1984–1985) (asserting that the party defending law that disproportionately impacts one sex must bear the burden of justification).

51. *See* Bowman & Schneider, *supra* note 34, at 251–53.

52. *See id.* at 254–55.

53. *See id.* at 254 ("[I]t is important to appreciate the critical way in which feminist legal theory emerged from practice, and the way in which new theoretical insights

recognize and shed light on the multiple challenges of women and other historically disadvantaged groups.[54]

By 1990, there was a large enough body of feminist-informed law reform efforts and legal scholarship that it became possible to talk about feminist legal theory as a distinct mode of inquiry with unique concerns and methodologies.[55] In 1990, Professor Katharine T. Bartlett published *Feminist Legal Methods* in the *Harvard Law Review*.[56] In that article, Bartlett identified three methodologies commonly found in feminist scholarship and legal practice: (1) "asking the woman question . . . designed to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups"; (2) "feminist practical reasoning . . . mak[ing] legal decisionmaking more sensitive to the features of a case not already reflected in legal doctrine"; and (3) "consciousness-raising . . . a means of testing the validity of accepted legal principles through the lens of the personal experience of those directly affected by those principles."[57] By 1997, Martha Chamallas had identified three "feminist moves": (1) "suspicion of sex-based distinctions and generalizations"; (2) "uncovering implicit male bias in neutral legal standards"; and (3) "placing high value on women's experience."[58] In 1999, Professor Chamallas published her book *Introduction to Feminist Legal Theory*.[59] Now in its third edition fourteen years later, Chamallas's excellent overview of the field has expanded to include six "opening moves" that feminist legal scholars make and three different "generations of feminist legal theory": moving from the equality stage of the 1970s, to the "[g]eneration of [d]ifference" in the 1980s, and then to the

formulated by litigators and academics continue to reshape practice. Indeed, feminist legal theory, understood generically, has been the intellectual means for argument and debate about issues of equality that first emerged in law reform practice and continue to resonate both in practice and in the world at large.").

54. *See id.* at 252–55.

55. *See infra* notes 56–59 and accompanying text.

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

57. *Id.* at 836–37.

58. Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389, 389–92 (1997) ("Despite the great diversity in feminist thinking and the multiple schools of feminist thought, there are a few recurring 'moves' that feminists often use in their analyses of the law. These moves place women at the center rather than at the margin of the study of law. You will know you have learned to think like a feminist when these moves feel as natural to you as distinguishing a case.").

59. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (1999).

"[g]eneration of [c]omplex [i]dentities" in the 1990s and thereafter.[60] Over this period, feminist scholars sought to accommodate new complexities: becoming more aware of intersectionalities in order to guard against the assumption that all women have shared or essential common experiences;[61] recognizing "that change is not inherently progressive";[62] and acknowledging that women are able to make choices without denying the constraints placed on them.[63]

The United States Feminist Judgments Project openly embraces its connection to the rich tradition and history of feminist legal theory as a sub-discipline within legal scholarship.[64] This scholarly work actively relates to and interacts with legal practice.[65] Because of this history and interrelationship, we consciously and deliberately chose the word "feminist" in our book's title.[66] This choice recognizes and honors the feminist scholarship and lawyering that has been instrumental in achieving equality and justice for women, men, and people of any gender.[67] Rather than accept the argument that the word "feminism" is too extreme or too political to gain traction with lawyers and judges,[68] we think it is difficult to be a feminist "while accepting and perpetuating . . . negative characterisation[s] of feminism."[69] If we were to follow the suggestion that an alternative title such as "Gender and Judging" might be less threatening (or more attractive) than "Feminist Judgments,"[70] we would detach the project

60. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4–15, 17–26 (3d ed. 2013). The six "opening moves" are (1) a focus on women's experiences; (2) exploration of how factors other than gender (such as race, class, etc.) impact women's experiences; (3) uncovering male bias and norms in the law; (4) exploring "[d]ouble [b]inds and [d]ilemmas of [d]ifference"; (5) recognizing that change may lead to reproduction of male dominance; and (6) unpacking women's choices. *Id.* at 4–15.

61. *Id.* at 6–7.

62. *Id.* at 12.

63. *Id.* at 13–15.

64. *See* Stanchi, Berger & Crawford, *supra* note 10, at 3–4.

65. *See id.*

66. *See generally id.* at 3 (offering the authors' perspective on the meaning of "feminism" as it pertains to the United States Feminist Judgments Project).

67. *See supra* notes 34–50 and accompanying text.

68. *See* Hunter, *supra* note 3, at 9. We recognize that some objections to the term "feminism" are based on the apparent exclusion of marginalized groups other than women. The definition we have used in our work, as discussed earlier, aims to include all marginalized individuals and groups. *See supra* notes 1–14 and accompanying text.

69. Hunter, *supra* note 3, at 9.

70. Nienke Grossman, Assoc. Professor & Deputy Dir. of Ctr. for Int'l & Comparative Law, Univ. of Balt. Sch. of Law, Remarks at the University of Baltimore Center on Applied Feminism 10th Annual Feminist Legal Theory Conference - Applied Feminism and Intersectionality: Examining the Law Through Multiple Identities

from the distinct methodologies, principles, and litigation strategies that brought women formal equal opportunity under the law in the first place. We embrace our attachment to this history, and we hope the tone, methodology, and inclusivity of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* will encourage others to think deeply about their own relationship with the word "feminism."[71]

II. THE GLOBAL PHENOMENON OF FEMINIST JUDGMENTS

Part I briefly described the history and development within the United States of the theoretical and practice-based foundation for *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*.[72] But that foundation is significantly interwoven with international developments in feminist thought.[73] In 2004, the first feminist judgments project was launched by a collective of Canadian lawyers and scholars who called themselves the Women's Court of Canada.[74] Hoping to begin "to work out what a constitutional theory of equality should look like," the Women's

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Panel Discussion on Feminist Judgments: From Theory to Practice (Mar. 30, 2017) (transcript available from the University of Baltimore School of Law).

71. We also note here some optimism about the future of feminism. Approximately two-thirds of all women and one-third of all men self-identify as feminists. Weiyi Cai & Scott Clement, *What Americans Think About Feminism Today*, WASH. POST (Jan. 27, 2016), https://www.washingtonpost.com/graphics/national/feminism-project/poll/. There are judges who embrace a feminist identity, most notably, of course, Justice Ruth Bader Ginsburg. *See* Elinor Marsh Stormer, *Perspectives from the Bench on Feminist Judgments*, 8 CONLAWNOW 81, 83 (2016) ("So I can tell you that I was a feminist always. I am a feminist now and I am becoming more of a radical feminist as I get older, probably because of what I see happening on the national scene."). And we live in a time when feminism is openly embraced by a diverse cross-section of popular figures such as Beyoncé, Amy Schumer, John Legend, and Aziz Ansari, not to mention political figures Barack Obama, Michelle Obama, and Justin Trudeau. *See, e.g.*, Jaclyn Anglis, *11 Celebs Who Have Defended Feminism with Powerful Words*, BUSTLE (Sept. 23, 2015), https://www.bustle.com/articles/102888-11-celebs-who-have-defended-feminism-with-powerful-words; Emma Gray, *Justin Trudeau: I'll Keep Saying I'm a Feminist Until There's No Reaction*, HUFFPOST (Mar. 25, 2016, 10:05 AM), https://www.huffingtonpost.com/entry/justin-trudeau-feminism-fatherhood_us_56f448a1e4b014d3fe22a29f; Annika Reno, *A Look at Obama's Legacy on Women's Rights*, GLOBAL CITIZEN (July 29, 2016), https://www.globalcitizen.org/en/content/white-house-legacy-on-womens-rights/; Stav Ziv, *Why It Matters When Obama Calls Himself a Feminist*, NEWSWEEK (Aug. 4, 2016, 2:04 PM), http://www.newsweek.com/why-it-matters-when-obama-calls-himself-feminist-487380.

72. *See supra* Part I.

73. *See infra* notes 74–85 and accompanying text.

74. *See* Diana Majury, *Introducing the Women's Court of Canada*, 18 CANADIAN J. WOMEN & L. 1, 1–2 (2006).

Court of Canada published a series of six "'shadow' judgments," rewritten opinions of the Canadian Supreme Court interpreting the Canadian Charter of Rights and Freedoms from a feminist perspective.[75] The model of rewriting original court opinions from a feminist perspective was taken up in 2010 by a group of English scholars in *Feminist Judgments: From Theory to Practice*.[76] They rewrote significant cases (from a variety of courts) on parenting, property, criminal law, public law, and equality.[77] The English book was the direct inspiration for the United States book[78] as well as for similar projects in Australia,[79] Ireland,[80] and New Zealand.[81] In addition, an international-based project is well under way.[82] Nascent projects focus on Scotland,[83] India, [84] and Mexico.[85] In the United

75. *Id.* at 4–6, 11; Rosemary Hunter, Clare McGlynn & Erika Rackley, *Feminist Judgments: An Introduction*, *in* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE 3, 3 (Rosemary Hunter, Clare McGlynn & Erika Rackley eds., 2010). The Canadian Charter of Rights and Freedoms is within the Constitution Act of 1982. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

76. *See* Hunter, McGlynn & Rackley, *supra* note 75, at 3.

77. *See Table of Contents* to FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE, *supra* note 75, at ix, ix–xi.

78. *See* Stanchi, Berger & Crawford, *supra* note 10, at 6–7 (describing how the United States editors became acquainted with the U.K. volume and decided to focus on rewriting Supreme Court decisions).

79. *See* Heather Douglas, Francesca Bartlett, Trish Luker & Rosemary Hunter, *Introduction: Righting Australian Law*, *in* AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW 1, 2 (Heather Douglas, Francesca Bartlett, Trish Luker & Rosemary Hunter eds., 2014).

80. *See* Julie McCandless, Máiréad Enright & Aoife O'Donoghue, *Introduction: Troubling Judgment*, *in* NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES' TROUBLES AND THE GENDERED POLITICS OF IDENTITY 3, 3 (Máiréad Enright, Julie McCandless & Aoife O'Donoghue eds., 2017).

81. *See* Rhonda Powell, Elisabeth McDonald, Māmari Stephens & Rosemary Hunter, *Ko Ngā Muka o Te Rino: Threads of the Two-Stranded Rope*, *in* FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND – TE RINO: A TWO-STRANDED ROPE 3 (Elisabeth McDonald, Rhonda Powell, Māmari Stephens & Rosemary Hunter eds., forthcoming 2017).

82. *See* Loveday Hodson, *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 Dec. 30, 2017).

83. *See* @sharoncowan22, TWITTER (May 31, 2017, 9:35 AM), https://twitter.com/sharoncowan22/status/869955448346202113 ("Totally fab 1st #ScottishFeministJudgmentsProject @UoELawSchool with @VMunro_Law @McGlynnClare @ChloeJSKennedy @lizjcampbell @DrSChoudhry").

84. @FJP_India, TWITTER (May 31, 2017, 6:29 AM), https://twitter.com/FJP_India/status/869908729335959553 ("Our FIRST workshop-'Feminist Judgment Project: Gendering Judicial Decision Making in India.'Reading judgments, envisioning FJP India.").

States, editors and authors already have begun work on a series of subject-matter-specific *Feminist Judgments* volumes, including rewritten feminist judgments in tax, reproductive justice, family law, torts, employment discrimination, trusts and estates, and corporations.[86]

Viewed as a global initiative, the feminist judgments projects are significant from an intersectional as well as a practical legal standpoint.[87] Rewriting judicial opinions from a feminist perspective should be understood as a global sociolegal movement that holds tremendous appeal across continents, countries, systems of jurisprudence, and areas of the law. Feminism, as defined in this essay, requires us to question the privileges and advantages that arise in certain situations and contexts and to work to understand the perspectives of human beings whose lives and experiences are different from ours. Similar to its rejection of "essential" characteristics that accompany race or gender, our version of feminism rejects the nationalist tunnel vision that assumes the inherent merit of the beliefs, conventions, and values of developed countries or focuses only on the laws and judicial processes of our own nation.[88] But beyond that, as a practical matter, our world is increasingly interrelated and international.[89] Modern feminism must grapple with issues that do not observe country borders, such as immigration, human trafficking, economic inequality, war, and

85. *See* E-mail from Trish Luker, Co-Editor, AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW, to Kathryn Stanchi et al. (July 7, 2017, 12:38 AM EDT) (on file with authors).

86. *See, e.g.*, Bridget J. Crawford & Anthony C. Infanti, *Introduction to Feminist Judgments: Rewritten Tax Opinions* (Univ. of Pittsburgh Sch. of Law, Working Paper No. 2017-05, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951327. Other volumes in formation include those that focus on Reproductive Justice (edited by Kimberly Mutcherson), Family Law (edited by Rachel Rebouché), Torts (edited by Lucinda Finley and Martha Chamallas), Employment Discrimination (edited by Ann C. McGinley), Trusts & Estates (edited by Carla Spivack, Browne C. Lewis, and Deborah S. Gordon), and Corporate Law (edited by Anne M. Choike and Cheryl L. Wade). *See generally* Bridget Crawford, *Announcing the Publication of Feminist Judgments: Rewritten Opinions of the United States Supreme Court*, FEMINIST L. PROFESSORS (Sept. 16, 2016), http://www.feministlawprofessors.com/2016/09/announcing-publication-feminist-judgments-rewritten-opinions-united-states-supreme-court/ (announcing the subject areas of forthcoming *Feminist Judgments* books).

87. *See* Stanchi, Berger & Crawford, *supra* note 10, at 21.

88. *See generally id.* at 15 (describing the emphasis on the "outsider" in feminist practical reasoning).

89. *See* Roman Terrill, *What Does "Globalization" Mean?*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217, 218–19 (1999) (discussing a decline in national border significance).

environmental degradation. We must increasingly look outside traditional boundaries to confront legal problems of import to feminists. For this reason, organizers of the various feminist judgments projects from around the world recently convened at the Oñati International Institute for the Sociology of Law to begin a conversation about how to coordinate and collaborate to advance feminism globally.[90] That ongoing conversation is one of the next steps in the future development of the feminist judgments projects and promises both theoretical and practical gains.

III. THE PRACTICAL RELEVANCE OF FEMINIST JUDGMENTS FOR ADVOCACY, EDUCATION, AND JUDGING

As a genre of legal scholarship, feminist judgments open up an alternative for scholars—one that reaches outside the perceived dichotomy of either advocating for reform through direct action or criticizing the law and legal developments through passive scholarship.[91] This advance in feminist scholarship demonstrates that there is real potential for change despite current constraints, provides models for feminist lawyering,[92] encourages law students to more critically engage with law and society,[93] strengthens feminist arguments and feminist theory,[94] and supports judicial reflection.[95]

First, the turn toward *showing*—rather than just describing—how cases could be decided differently if informed by feminist perspective and methodology is significant.[96] The rewritten feminist judgments concretely demonstrate that the development of the law or the outcome of a lawsuit is not inevitable or predetermined, whether one is talking about constitutional interpretation or statutory analysis.[97] Any particular feminist judgment is "not a work of academic fiction .

90. *See Workshop Calendar 2017*, OÑATI INT'L INST. FOR SOC. L., http://www.iisj.net/en/workshops/workshop-calendar/2017 (last visited Dec. 30, 2017) (providing a calendar posting for "11 May - 12 May 2017" titled "Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice").

91. *See* Stanchi, Berger & Crawford, *supra* note 10, at 15–17.

92. *See id.* at 36–39.

93. *See* Erika Rackley, *Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales*, 24 CANADIAN J. WOMEN & L. 389, 392–93 (2012).

94. *See infra* notes 106–19, Part IV and accompanying text.

95. *See infra* notes 131–37 and accompanying text.

96. *See* Rackley, *supra* note 93, at 390–91.

97. *See id.* at 392, 408.

. . . Rather, it is better seen as an alternative history, an exercise in the 'art of the possible.'"[98]

By using only the facts that were established and the precedents in effect at the time of the original decision, the shadow opinion writers demonstrate that the perspective of the deciding judge is a *key factor* throughout the reasoning process.[99] A feminist judge is more likely to make decisions within context, to take into account detailed individual facts about a case, and to consider more broadly how the decision will impact women and other historically disadvantaged groups.[100] This is not to say that all feminist judges will reach the same conclusion; rather, feminist judges are likely to bring a particular set of sensibilities to the decision-making process.[101]

Second, because the rewritten feminist judgments use judicial language and tone—with all of the concomitant constraints and peculiarities—to give voice to feminist resistance, they provide lawyering models for law students, practicing lawyers, and judges.[102] The translation of feminist thought into judicial language is no small achievement. The language of legal decision making is often both substantively and linguistically male.[103] This characteristic of legal discourse made it easier, over the centuries, to ignore issues of import to women: many harms against women were literally indescribable in legal terms. Before the phrase "sexual harassment" entered the legal lexicon, for example, there was no word for the distinctive harm that women were experiencing in the workplace—and if the body of legal doctrine contains no word for an injury or a wrong, the law cannot and will not recognize what happened as a harm.[104]

Because feminist judgments translate feminist theory into practical legal writing, the opinions construct a feminist judicial language.[105] As they create a feminist judicial language, the judgments show how careful attention to issues of gender, race, sexuality, and other aspects of individual identity can be incorporated into judicial decisions

98. *Id.* at 392 (footnotes omitted).
99. *See* Stanchi, Berger & Crawford, *supra* note 10, at 4–5.
100. *See id.* at 15–17.
101. *See id.* at 18–22.
102. *See id.* at 17, 22.
103. *See* Berta Esperanza Hernández-Truyol, *Talking Back: From Feminist History and Theory to Feminist Legal Methods and Judgments*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, *supra* note 5, at 24, 51.
104. *See* Lua Kamál Yuille, *Liberating Sexual Harassment Law*, 22 MICH. J. GENDER & L. 345, 379–80 (2015).
105. *See* Stanchi, Berger & Crawford, *supra* note 10, at 22.

while still following precedent.[106] The feminist judgments are the source of both feminist judicial language and the ideas behind the words.[107] Both language and ideas can be adopted and used by judges and lawyers in a more direct way than typical legal scholarship.[108] The judgments thus provide a powerful lawyering tool, especially for those writing amicus briefs.[109]

Consider, for example, Deborah Rhode's elegant rewrite of *Johnson v. Transportation Agency*,[110] a case about gender-based affirmative action.[111] In *Johnson*, the employer evaluated candidates for the open position of road dispatcher using a scoring process based on a number of factors, including relevant experience, seniority with the agency, performance at interviews, and work evaluations.[112] Diane Joyce achieved a score only two points lower than plaintiff Paul Johnson, while enduring frequent sex discrimination and harassment at the Agency.[113] In fact, two of Joyce's interviewers and evaluators for the promotion *were men who had participated in the harassment of Joyce*.[114] Rhode's rewritten majority opinion criticized the seeming objectivity of the scoring system, noting that what looks like merit is usually wholly subjective and often biased:

> In effect, Joyce had compiled an outstanding performance record, almost equivalent to that of her male rival, under far more difficult conditions and biased evaluation processes. . . . [T]hese concerns . . . underscore a broader point about "merit-based" evaluation criteria. Often ostensibly objective criteria mask subjective processes that open the door to bias. . . . [A]s the brief for the American Society for Personnel Administration notes, "[i]t is a standard tenet of

106. *See id.*
107. *See id.*
108. *See id.* at 22–23.
109. Garret Epps, Professor of Law, Univ. of Balt. Sch. of Law, Remarks at the University of Baltimore Center on Applied Feminism 10th Annual Feminist Legal Theory Conference - Applied Feminism and Intersectionality: Examining the Law Through Multiple Identities Panel Discussion on Feminist Judgments: From Theory to Practice (Mar. 30, 2017) (transcript available from the University of Baltimore School of Law).
110. 480 U.S. 616 (1987). For Deborah Rhode's rewrite of *Johnson v. Transportation Agency*, see Deborah L. Rhode, *Johnson v. Transportation Agency, 480 U.S. 616 (1987)*, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, *supra* note 5, at 322, 327–40.
111. *Johnson*, 480 U.S. at 620–21.
112. *See id.* at 624–25.
113. *Id.* at 623–24, 624 n.5.
114. *Id.* at 624 n.5.

> personnel administration that there is rarely a single 'best qualified' person for a job. . . . [F]inal determinations as to which candidate is 'best qualified' are at best subjective."[115]

Rhode's feminist critique fits seamlessly into the original opinion in *Johnson*, parts of which she left intact.[116] The effect of this pastiche of feminist rewrite combined with the original opinion is noteworthy in that it is difficult, if not impossible, to tell which sections of the feminist rewrite of *Johnson* are the words of the original Court and which are Rhode's.[117] Indeed, one law professor told us that she challenges her students to discern whether they are reading the original decision or the feminist rewrite—and students often cannot distinguish between the two.[118] This is the source of the power of feminist judgments: they enact feminist theory into law through the means and force of judicial language.

Third, this quality of feminist theory written as *law* makes the rewritten feminist judgments a uniquely effective educational tool. The judgments help law students connect what might otherwise appear to be abstract theory with real-world practice, and they encourage students to become more critically engaged with law and society. In law school, students often must choose between courses that are largely theory-based and courses that are primarily practical; frequently, there is little connection between the two.[119] This "telegraphs" to students that theory and practice are wholly separate—theory is for professors and not for practicing lawyers.[120] The feminist judgments projects undermine that message by providing a blueprint for applying theory in practice.[121] Only a year after the publication of the United States book, at least two stand-

115. *See* Rhode, *supra* note 110, at 332.
116. *See id.* at 327 n.8.
117. *Compare id.* (rewriting the original judgment on the same factual grounds with a feminist perspective), *with Johnson*, 480 U.S. 616 (1987) (stating the original disposition, factual grounds, and reasons for the decision).
118. Interview with Rosemary Hunter, Professor of Law & Socio-legal Studies, Queen Mary Univ. of London Sch. of Law, in Oñati, Spain (May 11–12, 2017).
119. *See generally* Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611 (2008) (arguing that the "segregation" between doctrinal courses and those that focus on theory in law school education is pedagogically unsound).
120. *See id.* at 611.
121. *See generally* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT, *supra* note 5 (writing opinions of the United States Supreme Court from a feminist theoretical perspective, thus combining feminist theory with the doctrinal reasoning of the decisions of the Supreme Court, and undermining the problematic tradition in legal education of separating theory from practice).

alone *Feminist Judgments* courses were taught in United States law schools[122] and several professors reported using *Feminist Judgments* in both doctrinal and skills classes to show how judges and lawyers can bring a social justice sensibility to their work.[123] A *Feminist Judgments* course is being taught at the Jindal Global Law School at O.P. Jindal Global University in the 2017–2018 academic year.[124]

Rather than taking everything that judges write in their opinions as normal, natural, and inevitable, law students who read feminist judgments become more critical readers.[125] By reading the original opinion and the feminist judgment and comparing the two, students are able to look beyond the implicit authority that attaches to the original judgment simply because it is the opinion of a court.[126] This critical distance helps students understand that much of the world within which the case took place may have been overlooked by the original decision because the process of exercising judgment necessarily reflects the judges' personalities and perspectives as well as their backgrounds and experiences.[127] As one professor put it, "*Feminist Judgments* was . . . really apt for thinking about this question [about writing opinions for social justice] because it offered provocative examples of opinions that are inclusive, expansive, [and] more responsive to justice concerns."[128]

Fourth, engaging in the process of writing a feminist judgment carries intellectual and academic weight for the feminist scholar-

122. Kathryn Stanchi taught a class at Temple University Beasley School of Law in the Spring 2017 semester called "Legal Research and Writing III: Judicial Opinions: Critical Drafting and Analysis." *See* Course Description for *Legal Research and Writing III: Judicial Opinions: Critical Drafting and Analysis*, TEMP. U. BEASLEY SCH. L., https://www4.law.temple.edu/courseinfo/CourseDesc.aspx?id=23837&year = (last visited Dec. 30, 2017) ("The book we use is called 'Feminist Judgments' but the critical reasoning of the course focuses not just on gender, but also on race, class, sexuality, economic class and masculinity. The course requires a desire to learn a new style of writing, a willingness to be deliberate and conscious about how to write law, and an open mind."). At Washington University in St. Louis, Susan Frelich Appleton taught a seminar called "Feminist Theories, Feminist Judgments" in the Fall 2017 semester. *See Course Listings*, WASH. U. ST. LOUIS, https://courses.wustl.edu/Faculty/Faculty.aspx/ (last visited Dec. 30, 2017) (enter "Appleton, Susan" into the Search bar to access course description).

123. *See, e.g.*, E-mail from Andrea McArdle, Professor of Law, CUNY Sch. of Law, to Kathryn Stanchi et al. (May 19, 2017, 12:06 PM EDT) [hereinafter E-mail from Andrea McArdle] (on file with authors).

124. Jhuma Sen, *Feminist Judgment Project: Reading and Writing Workshop*, ACADEMIA, https://www.academia.edu/33604771/Feminist_Judgment_Project_Reading_and_Writing_Workshop (last visited Dec. 30, 2017).

125. *See* Stanchi, Berger & Crawford, *supra* note 10, at 5.

126. *See id.*

127. *See id.* at 4–5.

128. E-mail from Andrea McArdle, *supra* note 123 (emphasis added).

participant. In order to develop, draft, present, and defend her reasoning and to write about what should happen in the form of a judgment, the author will be required to test the strength and persuasiveness of her arguments. She must examine how well her theories and commitments hold up when it becomes necessary to decide an actual case, taking into account all of its complications and history, not to mention the effects of the judgment on the future development of the law. Done well, the rewritten judgment not only shows the possibilities of alternative reasoning and results, but it strengthens and validates the theories relied upon and the arguments made. Requiring a scholar to present her thinking in the form of a judgment shapes the thinking itself.[129]

Finally, we hope that some judges who read the rewritten feminist judgments will be influenced by them, even if the experience results only in added questioning and reflection. In the words of one of the judges who participated in the English project, reading the rewritten judgments should be a "chastening experience for any judge who believes himself or herself to be both true to their judicial oath and a neutral observer of the world."[130]

At a conference marking the publication of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* at the Center for Constitutional Law at the University of Akron School of Law, a panel of federal and state judges discussed the relevance of the book to their work.[131] Many more practitioners and judges attended the conference as audience members.[132] These audiences are crucial to the continuing influence of the feminist judgments projects. As Patricia Cain has pointed out: "Courts and legislatures are more likely than the academy to produce real change in individual people's lives. And if the ultimate goal of feminist work in the academy is to make real changes in women's lives, then feminist legal theory needs to be useful to the practice of law in real cases."[133]

The discussion during a judges panel at the Akron conference suggested that a self-reflective judge reading one of the feminist

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129. *See* Rackley, *supra* note 93, at 397–98.
130. Brenda Hale, *Foreword* to FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE, *supra* note 75, at v, v.
131. *See The U.S. Feminist Judgments Project: Rewriting the Law, Writing the Future*, U. AKRON SCH. L. (Oct. 3, 2016), https://www.uakron.edu/law/docs/U%20S%20Feminist%20Judgments%20Program%20with%20moderators%20-%2010.03.16.pdf (listing a "Judicial Perspectives on Feminist Judgments" panel discussion scheduled for October 20, 2016).
132. *See id.*
133. Cain, *supra* note 35, at 371.

judgments might begin to question whether her decision making is as unbiased as she previously thought.[134] After all, the perspective that any judge brings to a case is informed by life experience, educational and professional background, personal beliefs, and the social context in which the case arises.[135] These shadow feminist judgments challenge judges to understand these influences and consider perspectives other than their own.[136]

IV. EXAMPLES OF REAL-LIFE FEMINIST JUDGMENTS

Apart from the "shadow opinions" being written by feminist professors and lawyers world-wide, real-life judgments reflecting feminist theory and methods are routinely issued by courts of all levels and all jurisdictions.[137] In this part, we explore recent examples of feminist (and not so feminist) opinions from the Supreme Court of the United States: Justice Sotomayor's dissent in *Utah v. Strieff* in 2016,[138] Justice Ginsburg's majority opinion in *Sessions v. Morales-Santana* in 2017,[139] and Justice Gorsuch's dissent in *Perry v. Merit Systems Protection Board* in 2017.[140] Although we will classify these opinions as more or less feminist, they reflect feminist theory in different ways and using different "moves" or methodologies.[141]

A. *Justice Sotomayor's Dissent in* Utah v. Strieff

In *Utah v. Strieff*,[142] Edward Strieff challenged the admissibility of evidence obtained after a police officer illegally detained him.[143] Strieff had visited a house that was under police surveillance because of an anonymous tip about narcotics activity.[144] He was stopped for that reason alone.[145] After making the illegal stop, the police officer relayed Strieff's identification information to a dispatcher and discovered that Strieff had an outstanding arrest warrant for a traffic

134. *See The U.S. Feminist Judgments Project: Rewriting the Law, Writing the Future*, *supra* note 131.
135. *See* Stanchi, Berger & Crawford, *supra* note 10, at 4–5.
136. *See supra* notes 130–35 and accompanying text.
137. *See infra* Sections IV.A–C.
138. 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting).
139. 137 S. Ct. 1678, 1686–1701 (2017).
140. 137 S. Ct. 1975, 1988–94 (2017) (Gorsuch, J., dissenting).
141. These examples are not intended to imply that only women judges may issue feminist opinions.
142. 136 S. Ct. 2056.
143. *Id.* at 2060.
144. *Id.* at 2059–60.
145. *See id.*

violation.[146] The police officer then conducted a search of Strieff and found drugs and drug paraphernalia.[147] Strieff sought to suppress this evidence on the grounds that it was derived from an illegal stop, arguing that the police officer lacked reasonable suspicion for the stop.[148] Although the Utah Supreme Court agreed with Strieff, the Supreme Court of the United States reversed.[149] The majority opinion, written by Justice Thomas, reasoned that the "discovery of the arrest warrant attenuated the connection between the unlawful" arrest and the obtaining of the evidence, and therefore that the drugs and drug paraphernalia were admissible into evidence against Strieff.[150] Justice Thomas was joined by Justices Roberts, Kennedy, Breyer, and Alito.[151] Justice Sotomayor wrote a dissent in which Justice Ginsburg joined in part.[152] Justice Kagan wrote a separate dissent in which Justice Ginsburg joined.[153]

In her dissent, Justice Sotomayor gave a number of reasons for her conclusion that the police should not be permitted to conduct with impunity unreasonable searches and seizures.[154] For Justice Sotomayor, the discovery of the arrest warrant did not constitute a sufficient attenuation or "intervening surprise" between the illegal stop and the discovery of the drugs and drug paraphernalia.[155] The brief filed on Strieff's behalf pointed out that police officers across the country routinely used the discovery of outstanding arrest warrants to later justify searches that initially were conducted without probable cause.[156] Drawing a connection between this routine practice and a particular circumstance that exacerbated its effects, Justice Sotomayor noted that in the town of Ferguson, Missouri, 16,000 of the town's 21,000 people had outstanding warrants against them.[157] Given such overwhelming numbers, the majority opinion was essentially handing the police permission to conduct illegal stops, as long as the detained individual was discovered to have an outstanding warrant and then was searched.[158]

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146. *Id.* at 2060.
147. *Id.*
148. *Id.*
149. *Id.* at 2060, 2064.
150. *Id.* at 2064.
151. *Id.* at 2059.
152. *Id.*
153. *Id.*
154. *Id.* at 2065–66 (Sotomayor, J., dissenting).
155. *Id.* at 2066.
156. Brief for Respondent at 10–11, *Strieff*, 136 S. Ct. 2056 (No. 14-1373).
157. *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).
158. *See id.* at 2067–68.

In the part of the dissent that was not joined by Justice Ginsburg, Justice Sotomayor wrote from her "professional experiences" about the deleterious impact of unlawful stops of pedestrians.[159] As she explained, "[w]hen we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens."[160] Justice Sotomayor cited law review articles and scholarly books to explain the challenges those with arrest records must overcome in securing housing and employment.[161] Further, she explicitly brought race to the forefront of the discussion.[162] Acknowledging that Strieff was white, Justice Sotomayor pointed out that "it is no secret that people of color are disproportionate victims of this type of scrutiny," and that many parents of color have "the talk" with their children about how to stay safe from the police, "instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger."[163] To support her statements about the dangers people of color experience in encounters with police, Justice Sotomayor moved beyond traditional legal authorities and cited to W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates.[164]

Justice Sotomayor's reasoning in the *Strieff* dissent bore the hallmarks of the feminist methods and "moves" discussed earlier, beginning with her inclusion of contextual facts related to race and her decision to speak from "professional experience[]."[165] Justice Sotomayor employed feminist practical reasoning to reveal understandings broader than current legal doctrine when she explained the implications of the majority's decision: "It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[166]

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159. *Id.* at 2069.
160. *Id.*
161. *Id.* at 2070 (citing Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805 (2012); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 33–51 (2015); Kathryne M. Young & Joan Petersilia, *Keeping Track: Surveillance, Control, and the Expansion of the Carceral State*, 129 HARV. L. REV. 1318, 1341–57 (2016)).
162. *Id.* (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 96–136 (2010)).
163. *Id.*
164. *Id.*
165. *Id.* at 2069; *see also supra* notes 57–58 and accompanying text (discussing the three common methodologies Bartlett identified in feminist scholarship and Chamallas's three "feminist moves").
166. *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting).

Feminist practical reasoning also was evident in Justice Sotomayor's bringing together of individual lived experiences (reflected in quotations from individual defendants in prior cases) with the broader historical and social contexts in which illegal police stops are made.[167] She reflected a concern for individual autonomy and the multiple axes along which discrimination may occur,[168] both of which we identified as common among several of the rewritten opinions in *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*.[169]

As already noted, Bartlett and Chamallas view speaking from "professional experience" as a feminist move.[170] And finally, citing to law review articles, books, and sources other than traditional legal authority is one of the distinctive characteristics that we identified among the opinions in *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*.[171] Because she uses these feminist methods so effectively, the reader of Justice Sotomayor's dissent takes away a much greater understanding of the context in which this problem presented itself and an increased empathy for less-privileged members of our society.[172]

B. *Justice Ginsburg's Majority Opinion in* Sessions v. Morales-Santana

In *Sessions v. Morales-Santana*,[173] the Supreme Court invalidated several sections of the Immigration and Nationality Act that treated mothers better than fathers.[174] Together, 8 U.S.C. §§ 1401(g) and 1409 (a) and (c) extended citizenship under some circumstances to children born abroad to unmarried parents when one parent was a United States citizen.[175] When the United States citizen-parent was the child's father, the child could obtain United States citizenship if the parent had lived in the United States for five years prior to the child's birth and after the parent had attained the age of fourteen.[176] When the United States citizen-parent was the child's mother, the

167. *Id.* at 2070.
168. *Id.*
169. *See* Stanchi, Berger & Crawford, *supra* note 10, at 21–22.
170. *See supra* notes 57–58, 165 and accompanying text.
171. *See* Stanchi, Berger & Crawford, *supra* note 10, at 12–13.
172. *See Strieff*, 136 S. Ct. at 2064–71 (Sotomayor, J., dissenting).
173. 137 S. Ct. 1678 (2017).
174. *Id.* at 1700–01; 8 U.S.C. §§ 1401(g), 1409(a), (c) (2012), *invalidated by* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).
175. 8 U.S.C. §§ 1401(g), 1409(a), (c).
176. *Id.* §§ 1401(g), 1409(a).

child could obtain United States citizenship if the parent had lived in the United States for one year prior to the child's birth.[177]

The adult child in this case, Luis Ramón Morales-Santana, was the son of an American father who had fallen twenty days short of the five-year, post-age-fourteen requirement for living in the United States.[178] After the federal government sought to deport Morales-Santana for robbery, attempted murder, and other violations of the New York State Penal Law,[179] Morales-Santana argued that he was entitled to citizenship as a matter of equal protection under the Fifth Amendment.[180] More precisely, Morales-Santana alleged that his father (who died in 1976)[181] was a victim of constitutionally impermissible gender-based discrimination.[182] The Court permitted Morales-Santana to assert the claim on his father's behalf citing the "close relationship with the person who possesses the right" and "a hindrance to the possessor's ability to protect his own interests."[183]

Justice Ginsburg's majority opinion began by providing the significant historical context for the applicable provisions of the Immigration and Nationality Act: they "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[184] She then took the reader on a virtual tour through the core equal protection cases on gender from the 1970s[185]—several of which she litigated[186]—and determined that the *Morales-Santana* case equally offended the Constitution.[187] "Prescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we declared unconstitutional in *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*, and *Wescott*. . . . Successful defense of legislation that differentiates on the basis of gender . . .

177. *Id.* § 1409(c).
178. *Morales-Santana*, 137 S. Ct. at 1687.
179. *Id.* at 1688; Adam Liptak, *Supreme Court Bars Favoring Mothers over Fathers in Citizenship Case*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/us/politics/supreme-court-citizenship-ginsburg-gorsuch.html?_r=0 (providing background on Morales-Santana's criminal violations).
180. *Morales-Santana*, 137 S. Ct. at 1686.
181. *Id.* at 1688.
182. *Id.*
183. *Id.* at 1689 (quoting Kowalski v. Tesmer, 543 U.S. 125, 130 (2004)).
184. *Id.*
185. *Id.* at 1689–90.
186. *E.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).
187. *Morales-Santana*, 137 S. Ct. at 1700–01.

requires an 'exceedingly persuasive justification.'"[188] In *Morales-Santana*, Justice Ginsburg found no such justification.[189]

Justice Ginsburg applied the feminist method of looking beneath the surface of existing legal rules as she developed a lengthy explanation that § 1409 of the Immigration and Nationality Act was promulgated at a time when marriages were presumed to be between dominant men and subservient women, and when an unmarried mother was thought to be "the natural and sole guardian of a nonmarital child."[190] Such presumptions, Justice Ginsburg said, traded on "[s]tereotypes about women's domestic roles . . . [and] creat[ed] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver."[191]

At this point, the opinion appeared to be leading toward a positive outcome for Morales-Santana.[192] If his father were eligible to be treated the same as a mother would be treated in the same situation, the son would be eligible for citizenship (and could avoid deportation). In earlier cases like *Frontiero v. Richardson*,[193] when confronted with explicit statutory discrimination between men and women, the Court had granted relief that equalized the treatment of men and women at the more favorable level (a remedy that came to be called "leveling up").[194] For example, in *Frontiero*, the first case Ruth Bader Ginsburg argued before the Court, the Court was faced with a law that required a married female service member to prove the economic dependence of her spouse in order to receive certain benefits, while male service members received the benefits automatically.[195] After *Frontiero*, married female service members automatically received the same benefits that married male service members received.[196]

But instead of adopting the "leveling up" remedy in *Morales-Santana*, Justice Ginsburg's opinion took a surprising turn.[197] Stating

188. *Id.* at 1690 (quoting United States v. Virginia, 518 U.S. 515, 531 (1996)). Justice Ginsburg, herself, authored the majority opinion in *United States v. Virginia*. *See* 518 U.S. at 519.
189. 137 S. Ct. at 1690.
190. *Id.* at 1690–91.
191. *Id.* at 1693 (quoting Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003)) (internal quotation marks omitted).
192. *See id.* ("Correspondingly, such laws may disserve men who exercise responsibility for raising their children.").
193. 411 U.S. 677 (1973).
194. *See id.* at 690–91.
195. *Id.* at 678; 10 U.S.C. § 1072(2) (1970); 37 U.S.C. § 401 (1970).
196. *See Frontiero*, 411 U.S. at 690.
197. *See infra* notes 198–201 and accompanying text.

an obligation to inquire into legislative intent, Justice Ginsburg discerned a congressional recognition of "the importance of residence in this country as the talisman of dedicated attachment."[198] Because of this, she decided that the remedy should be to "level down," making unmarried mothers and their children subject to the same five-year rule that applied to unmarried fathers and their children.[199] She concluded that "[g]oing forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender. In the interim . . . [the] five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers."[200] Thus, Morales-Santana got the ruling he was seeking—a declaration that the law was unconstitutional—but the result left him subject to deportation.[201]

Chief Justice Roberts, and Justices Kennedy, Breyer, Sotomayor, and Kagan joined Justice Ginsburg's majority opinion.[202] Justice Thomas and Justice Alito concurred in the holding, but not in the judgment, claiming that Justice Ginsburg had addressed irrelevant issues.[203] Justice Gorsuch took no part in the case, as oral arguments occurred before he took the bench.[204] A few commentators suggested that Justice Ginsburg's remedy of "leveling down" may have been the only way she could attract the votes of Justices Roberts, Thomas, and Alito.[205] Ian Samuel decried Justice Ginsburg's decision as "an early contender for the worst thing . . . [she] has ever written for the Court,"[206] citing in particular the uncertainties inherent in Justice Ginsburg's statement that the new rule would apply prospectively.[207] Some feminist organizations and progressive law professors, on the other hand, lauded the decision

198. Sessions v. Morales-Santana, 137 U.S. 1678, 1700 (2017) (quoting Rogers v. Bellei, 401 U.S. 815, 834 (1971)) (internal quotation marks omitted).
199. *Id.* at 1700–01.
200. *Id.* at 1701.
201. *See id.*
202. *Id.* at 1685.
203. *Id.* at 1701 (Thomas, J., concurring).
204. *See id.* (majority opinion).
205. *See, e.g.*, Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supreme-court.html; Ian Samuel, *SCOTUS Symposium:* Morales-Santana *and the "Mean Remedy,"* PRAWFSBLAWG (June 12, 2017, 5:04 PM), http://prawfsblawg.blogs.com/prawfsblawg/2017/06/scotus-symposium-morales-santana-and-the-mean-remedy.html.
206. Samuel, *supra* note 205.
207. *Id.* (calling Ginsburg's remedy "the mean remedy" as opposed to the "nice remedy," referring to earlier comments made by him and Dan Epps in the podcast *First Mondays*).

shortly after its issuance.[208] Others questioned Justice Ginsburg's remedy for its potential to harm women or impede future equality arguments made by women or other disadvantaged groups.[209] Supreme Court commentator Linda Greenhouse speculated that Justice Ginsburg's "over to you, Congress" action "may seem naïve in the present political climate, but it conforms with her deepest beliefs about the appropriate judicial role."[210] In other words, Justice Ginsburg's remedy was consistent with her view that gender equality is the work of all branches of government.[211]

Feminist disagreement about the reasoning or implications of Justice Ginsburg's decision in *Sessions v. Morales-Santana* does not make the opinion less feminist.[212] Justice Ginsburg's opinion embraced the same strict formal equality principle that frequently undergirds a variety of feminist judgments.[213] That feminists disagree about the usefulness and practicality of that approach in different situations is the reason that we talk about feminist theories and methods in the plural.[214] There is no one correct way of writing a "feminist" judgment. We celebrate disagreement among feminists

208. *E.g.*, @AnthonyMKreis, TWITTER (June 12, 2017, 7:24 AM), https://twitter.com/AnthonyMKreis/status/874271122124148736 ("!! Justice Ginsburg, in sex discrimination case, cites Obergefell along with US v. Virginia & Mississippi Univ. for Women v. Hogan. #SCOTUS"); @JoannaGrossman, TWITTER (June 12, 2017, 7:58 PM), https://twitter.com/JoannaGrossman/status/874460852442812416 ("The gender stereotypes in the prior cases were so overblown and dated--that approach was not good for women."); @nwlc, TWITTER (June 12, 2017, 10:05 AM), https://twitter.com/nwlc/status/874311616954806273 ("Good news: #SCOTUS affirms Constitution's protections against sex discrimination in strong Ginsburg opinion").

209. *E.g.*, @ProfBCrawford, TWITTER (June 13, 2017, 5:42 AM) (on file with author) ("@JoannaGrossman Stereotypes could have been eliminated by making men subject to the same rule as women. Who is harmed by RBG's remedy? Women & their kids."); @ProfTracyThomas, TWITTER (June 13, 2017, 9:08 AM), https://twitter.com/ProfTracyThomas/status/874659675974897665 ("SCOTUS Denial of Equal Protection Remedy Jeopardizes Equality Law: What was Justice Ginsburg Thinking?").

210. Greenhouse, *supra* note 205.

211. *Id.*

212. *See* 137 S. Ct. 1678 (2017); *see also supra* notes 209, 211–12 and accompanying text (demonstrating that some feminist organizations and activists celebrated the decision).

213. Stanchi, Berger & Crawford, *supra* note 10, at 18 ("Formal equality is among the earliest of feminist legal philosophies. . . . Formal equality seeks to fix explicit sex discrimination by asserting that similarly situated people should be treated the same regardless of sex or gender and that invidious use of a sex classification is presumptively unlawful.").

214. *Id.* at 3–4.

as worthy of further conversation and inquiry in service of the goal of political, social, and economic equality of all.[215]

C. *Justice Gorsuch's Dissent in* Perry v. Merit Systems Protection Board

In *Perry v. Merit Systems Protection Board*,[216] the Court was asked to decide the proper forum for judicial review when a federal civil service employee complains that an adverse employment action was based on a prohibited form of bias.[217] Because such a claim involves both the Civil Service Reform Act of 1978 (CSRA)[218] and federal antidiscrimination laws, the Court referred to these complaints as "mixed cases."[219] Judicial review for non-mixed cases is fairly straightforward: claims brought only under the CSRA go first to the Merit Systems Protection Board and are subject to judicial review only in the Federal Circuit.[220] Claims brought under federal antidiscrimination law go to a federal district court and the Federal Circuit lacks authority to review the results.[221] The difference matters because the Federal Circuit's review of decisions by the Merit Systems Protection Board is deferential, while the review of a claim in the district court is de novo.[222]

On the basis that "review rights should be read not to protract proceedings, increase costs, and stymie employees, but to secure expeditious resolution of the claims employees present,"[223] the majority determined that the federal district court was the proper review forum for a mixed case that had been dismissed on jurisdictional grounds.[224] In reaching the conclusion, Justice Ginsburg, the author of the majority opinion, engaged in a fairly lengthy discussion of the statutory language and the precedent cases.[225] She determined that Perry had advanced "the more sensible reading of the statutory prescriptions."[226] In contrast, she wrote that the government's argument—echoed by the dissent—would involve "the expense, delay, and inconvenience of requiring employees to

215. *See* Hunter, *supra* note 3, at 9–10.
216. 137 S. Ct. 1975 (2017).
217. *Id.* at 1979.
218. 5 U.S.C. § 1101 (2012).
219. *Perry*, 137 S. Ct. at 1979.
220. *Id.*; 5 U.S.C. § 7703(b)(1) (2012).
221. *Perry*, 137 S. Ct. at 1979; 5 U.S.C. § 7703(c).
222. *See* 5 U.S.C. § 7703(c).
223. *Perry*, 137 S. Ct. at 1980 (footnote omitted).
224. *Id.* at 1988.
225. *Id.* at 1980–82.
226. *Id.* at 1984.

sever inextricably related claims, resorting to two discrete appellate forums, in order to safeguard their rights."[227] Countering the dissent's contention that the Court had been asked by Perry to "tweak" the statute,[228] Justice Ginsburg wrote that Perry had instead asked only for a sensible reading, one that would "refrain from reading into it the appeal-splitting bifurcation sought by the Government."[229] Justice Ginsburg's opinion for the majority might be viewed as reflective of feminist practical reasoning because of its combination of careful consideration of the statutory language and the case precedent, as well as the attention it afforded to the question of whether taking a narrow view of the language would undermine legislative intent and preclude affected litigants, who often proceed *pro se*, from seeking a remedy.[230]

In dissent, Justice Gorsuch insisted that the opposite answer was clearly the correct answer. As for his method of reaching this conclusion, he stated: "I . . . would . . . just follow the words of the statute as written."[231] If the majority thought that the statute needed to be changed, Justice Gorsuch suggested another simple solution: "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."[232] Continuing in a similar tone, Justice Gorsuch further explained, presumably to the majority, that "the difficulty of making new laws isn't some bug in the constitutional design: it's the point of the design, the better to preserve liberty."[233] The dissenting opinion concluded by accusing the majority of "offer[ing] little in the way of a traditional statutory interpretation. It does not explain how the result it reaches squares with the statute's text and structure."[234]

During oral argument in *Perry*, Justice Gorsuch had pursued a similar line of questioning, asking one of the advocates to propose a solution that simply followed the language of the statute.[235] At that point

> Justice Elena Kagan intervened, arguing that the court's decision in *Kloeckner v. Solis* and cases from all courts

227. *Id.* at 1987.
228. *Id.* at 1987–88.
229. *Id.* at 1988.
230. *See id.* at 1980–84.
231. *Id.* at 1988 (Gorsuch, J., dissenting).
232. *Id.* at 1990.
233. *Id.*
234. *Id.* at 1993.
235. Transcript of Oral Argument at 46–47, *Perry*, 137 S. Ct. 1975 (No. 16-399).

> dating back to 1983 establish that full merits review in mixed cases rests with the district court. To change course, she insisted, "would be kind of revolution, I mean, in – in – to the extent that you can have a revolution in this kind of case."[236]

This dissenting opinion, Justice Gorsuch's first since taking his seat on the Supreme Court,[237] further reveals the contours of why feminist theory and methods matter in the process of reaching judgments. Rather than an exclusive focus on the statutory language, a feminist judgment would ask how the statutory language disguises or submerges its impact on less-privileged litigants.[238] Moreover, a feminist judgment would be sensitive to the ways in which a narrow interpretation of the statutory language might ignore both the larger context and the effects on individual employees.[239] And a feminist judgment would pay attention not only to the statute, but also to the complementary case law and the expectations of litigants as the path of the law continued to develop through the accretion of precedent.[240]

In addressing difficult issues of legal interpretation and application, feminist judges examine the problem from many angles.[241] They look back, ahead, and around; they tend to pick up the rock and look underneath.[242] In contrast, the dissent written by Justice Gorsuch examines only the rock's smooth surface—the language of the statutes—treating it as both the entirety of the problem and its complete solution.[243]

CONCLUSION

As editors of the United States Feminist Judgments Project, we are asked from time to time whether we consider the writing of shadow opinions to be academic or activist. This is a false dichotomy.[244] To the extent that the rewritten opinions demonstrate that the path of the law's development is hardly inevitable, and that feminist theory and

236. Howard M. Wasserman, *Argument Analysis: Pulling Wings off Flies and Other Efforts to Make Sense of the Civil Service Reform Act*, SCOTUSBLOG (Apr. 17, 2017, 8:41 PM), http://www.scotusblog.com/2017/04/argument-analysis-pulling-wings-off-flies-efforts-make-sense-civil-service-reform-act/.
237. *Id.*
238. *See supra* notes 57–58 and accompanying text.
239. *See supra* note 230 and accompanying text.
240. *See supra* notes 225–30 and accompanying text.
241. *See supra* notes 214–15 and accompanying text.
242. *See supra* note 100 and accompanying text.
243. *See supra* notes 231–34 and accompanying text.
244. *See supra* note 91 and accompanying text.

method can bring about different reasoning and results than occurred in the past, writing feminist judgments is hands-on scholarship that goes beyond pronouncements about what the law *should* be and shows what the law *could* be.[245] To the extent that the rewritten opinions seek to change minds and draw attention to the continued need to work on all fronts for gender equality, then the rewritten opinions are a form of activism.[246] But of course, all scholarship—except of the most bland and descriptive variety—is activist (or political) because legal scholars are always identifying problems and proposing solutions to them.[247] If our work on any of the *Feminist Judgments* projects contributes to solving problems of gender equality and advancing justice, we gladly embrace the multiple labels of scholars, activists, and educators.

245. *See supra* notes 96–101 and accompanying text.
246. *See supra* notes 105–06, 128, 168–69 and accompanying text.
247. *See supra* note 6 and accompanying text.