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## Introduction to the U.S. feminist judgments project

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How would U.S. Supreme Court opinions change if the justices used feminist methods and perspectives when deciding cases? That is the central question that we sought to answer by bringing together a group of scholars and lawyers to carry out this project. To answer it, they would use feminist theories to rewrite the most significant gender justice cases decided by the U.S. Supreme Court from the passage of the final Civil Rights Amendment in 1870 to the summer of 2015.

As an initial matter, we provided no guidance to our contributors on what we meant by “feminism.” We wanted our authors to be free to bring their own vision of feminism to the project. Yet it would be disingenuous to suggest that we ourselves do not have a particular perspective on what “feminism,” “feminist reasoning,” or “feminist methods” are. Indeed, without such a perspective, we would not have undertaken the project.

We recognize “feminism” as a movement and perspective historically grounded in politics, and one that motivates social, legal, and other battles for women’s equality. We also understand it as a movement and mode of inquiry that has grown to endorse justice for all people, particularly those historically oppressed or marginalized by or through law.<sup>1</sup> We believe that “feminism” is not the province of women only, and we acknowledge and celebrate the multiple, fluid identities contained in the category “woman.”<sup>2</sup> Within this broad view, we acknowledge that feminists can disagree (and still be feminist) and that there are no unitary feminist methods or reasoning processes. So when we refer to feminist methods or feminist reasoning processes, we mean

<sup>1</sup> So-called “third-wave” feminists particularly see feminism as a broader social justice issue. See, e.g., Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 *Mich. J. Gender & L.* 99, 102 (2007); Kristen Kalsem and Verna L. Williams, *Social Justice Feminism*, 18 *UCLA Women’s L.J.* 131, 169–72 (2010).

<sup>2</sup> See Katharine T. Bartlett, *Feminist Legal Methods*, 103 *Harv. L. Rev.* 829, 830 (1990).

“methods” and “reasoning processes” *plural*, all the while acknowledging that there is a rich and diverse body of scholarship that has flourished under the over-arching label “feminist legal theory.” Indeed, those are the methods and reasoning processes examined and employed by many of the authors represented in the book.

Nevertheless, in shaping the project from its early stages through the finished pages, we as editors have been motivated by a broad and expansive view of what “feminism” is. This capacious understanding undoubtedly shaped the project in many ways, including our choice of cases, our selection of authors, and our edits, even if we did not define feminism for our contributors. We leave it to readers to explore the varieties of feminism that are reflected in these pages.

Feminist legal theory and scholarship have developed and even thrived within universities over the last thirty to forty years. Feminist activists and lawyers are responsible for major changes in the law of employment discrimination, sexual harassment, marital rape, reproductive rights, family relationships, and equitable distribution, to name just a few areas. Feminism has had a less discernable impact on judging, however, and it is relatively rare to see explicitly feminist reasoning in judicial decisions. More common are judicial reliance on the doctrine of *stare decisis* and judicial use of the language of apparent neutrality. Both of these moves tend to obscure embedded and structural biases in the law, making it difficult to recognize that feminism offers a critical expansion of the field for judicial decision making.

The twenty-five opinions in this volume demonstrate that judges who are open to feminist viewpoints could have arrived at different decisions or applied different reasoning to reach the same (or different) results in major decisions of the U.S. Supreme Court. As the authors reworked their opinions related to gender, they applied feminist theory or methods. The resulting feminist judgments demonstrate that neither the initial outcome nor the subsequent development of the law was necessary or inevitable. Feminist reasoning expands the judicial capacity for equal justice and can help make more attainable political, economic, and social equality for women and other disadvantaged groups.

#### GOALS OF THE PROJECT

Although the project has a number of goals, one priority is to uncover that what passes for neutral law making and objective legal reasoning is often bound up in traditional assumptions and power hierarchies. That is, all legal actors – judges, juries, litigants, lawyers – engage in their decision making within

a situated perspective that is informed by gender, race, class, religion, disability, nationality, language, and sexual orientation. For judges, that (often unacknowledged) situated perspective can be crucial to the reasoning and the outcome of cases. The situated perspective of the decision maker may drive American jurisprudence as much as – if not more than – *stare decisis* does. A judge’s worldview may inform the choices that the judge makes about the doctrinal basis for an opinion. For example, a judge may need to choose whether a lawsuit should be decided as a substantive due process case about privacy rights or as an equal protection case about gender equality. Recognizing that all decision making involves a situated perspective reveals that decision makers are affected by assumptions and expectations of norms relating to gender, race, class, sexuality, and other characteristics. Despite the alleged neutrality of the rules and processes of decision making within the U.S. judicial system, values and beliefs shaped by experience may exert a significant, if difficult-to-see, influence on the judges’ interpretation and application of the law.

The U.S. Feminist Judgments Project turns attention to the U.S. Supreme Court. Contributors to this volume challenge the formalistic concepts that U.S. Supreme Court opinions are, or should be, written from a neutral vantage point and that they are, or should be, based on deductive logic or “pure” rationality. When the project’s authors brought their own feminist consciousness or philosophy to some of the most important (and supposedly “neutral”) decisions and assertions about gender-related issues, the judicial decisions took on a very different character. Feminist consciousness broadens and widens the lens through which we view law and helps the decision maker overcome the natural tendency to see things the same way or do things “the way they’ve always been done.” Through this project, we hope to show that systemic inequalities are not intrinsic to law, but rather may be rooted in the subjective (and often unconscious) beliefs and assumptions of the decision makers. These inequalities may derive from processes and influences that tend to reinforce traditional or familiar approaches, decisions, or values. In other words, if we can broaden the perspectives of the decision makers, change in the law is possible.

In addition to exposing the contextual nature of judicial decision making, another goal of the project was to learn what “feminist” judging and decision making would look like, both from a substantive and rhetorical standpoint. What would the world look like if women and men with self-identified feminist consciousness were judges? With regard to substance, we wondered which of the many feminist theories would have practical application in judging and decision making and which laws contained the greatest potential for

feminist application. Would we see some feminist theories or methods more frequently used than others? Which ones?

In terms of language, we wondered whether some feminist judges might use language or rhetorical strategies that differed from the original opinions in describing the facts or issue of a case, or the applicable law or reasoning.<sup>3</sup> To some scholars, the very label “feminist judgments” will suggest a particular feminist language, but the idea that feminists might speak in a “different” language or voice is a controversial one.<sup>4</sup> As our sister-editors in the U.K. observed, law is “a powerful and productive social discourse that *creates* and reinforces gender norms ... [L]aw does not simply operate on pre-existing gendered realities, but contributes to the construction of those realities.”<sup>5</sup> We wanted our book to open a small vista on what law might look like if feminists were able to contribute, in a meaningful way, to that powerful, constitutive discourse.

#### INTELLECTUAL ORIGINS OF THE PROJECT

The U.S. Feminist Judgments Project is inspired by a similar project in the United Kingdom. In 2013, Kathy Stanchi attended the Applied Legal Storytelling Conference in London where she heard Professor Erika Rackley speak about the U.K. Feminist Judgments project, a volume of rewritten decisions from the House of Lords and Court of Appeal. The U.K. Project, itself inspired by the Women’s Court of Canada,<sup>6</sup> united fifty-one feminist professors, practitioners, and research fellows to supply the “missing” feminist voice in British jurisprudence by rewriting, using feminist reasoning, key cases on parenting, property and markets, criminal law, public law, and equality. The

<sup>3</sup> Some legal scholars have criticized certain traditional aspects of the judicial voice as intertwined with the class, race, and gender bias in the law. See, e.g., Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 888 (1989); Kathryn M. Stanchi, *Feminist Legal Writing*, 39 *S.D. L. Rev.* 387, 402–03 (2002).

<sup>4</sup> Compare Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 *Berkeley Women’s L.J.* 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *Va. L. Rev.* 543, 592–613 (1986) with Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 45 (1987) (“take your foot off our necks, then we will hear in what tongue women speak”).

<sup>5</sup> *Feminist Judgments: From Theory to Practice* 6–7 (Rosemary Hunter, Clare McGlynn and Erika Rackley eds., 2010) (referencing Carol Smart, *Feminism and the Power of Law* (1989)).

<sup>6</sup> The Women’s Court of Canada brought together a group of academics and practitioners who rewrote several cases involving section 15 (the equality clause) of the Canadian Charter of Rights and Freedoms. Their opinions are now online. *Decisions of the Women’s Court of Canada*, TheCourt.ca (Sept. 9, 2015, 12:52 PM), [www.thecourt.ca/decisions-of-the-womens-court-of-canada/](http://www.thecourt.ca/decisions-of-the-womens-court-of-canada/).

U.K. Project has spawned similar projects covering Irish, Australian, and New Zealand law, as well as a project devoted to the field of international law.<sup>7</sup>

Having long wondered why feminist legal theory, despite its rich and vibrant academic history in the U.S., had not made greater inroads into American jurisprudence, we realized that the body of U.S. common law was overdue for feminist rewriting. Kathy Stanchi, Linda Berger, and Bridget Crawford agreed to serve as the project's editors, and a group of informal advisors organized by Kathy Stanchi met at the 2014 Annual Meeting of the Association of American Law Schools to discuss how many and which cases to choose for rewriting. Searching for a unifying theme that would tie the cases together, Bridget Crawford suggested limiting the selection to U.S. Supreme Court cases because of the Court's influence on the legal knowledge and awareness of the American public. Although restricting the project to U.S. Supreme Court cases limited the doctrinal coverage and excluded important state and lower court cases, the benefit of a unifying focus outweighed the detriments.

The editors realized early on that this could be the first of many U.S. feminist judgment projects. Like the U.K. project, the U.S. project might inspire feminist treatment of the decisions of other courts or other subject matters. For example, future projects might focus on decisions of state courts, appellate courts, and administrative agencies. Alternatively, future projects might be organized by following traditional subject-matter lines (e.g., torts, criminal law, property, civil procedure), or by developing areas of interest (e.g., entertainment law, farming law), or by applying additional critical theories (e.g., critical race theory, Lat Crit, critical tax theory). We welcome and invite such future work.

#### METHODOLOGY

Even after deciding to limit the project to decisions of the U.S. Supreme Court, we still had to narrow the scope. Beginning with the active duty of Chief Justice John Jay in 1789, the U.S. Supreme Court has decided more than 1,700 cases. In keeping with the impetus for the project, we decided to limit our pool of potential cases to those related to gender, although we all agreed that many other cases could benefit from a feminist rewriting. Our initial list contained nearly sixty cases.

<sup>7</sup> See Feminist Judgments Project, [www.kent.ac.uk/law/fjp/](http://www.kent.ac.uk/law/fjp/) (last visited Sept. 9, 2015); Northern/Irish Feminist Judgments Project, [www.feministjudging.ie/](http://www.feministjudging.ie/) (last visited Sept. 9, 2015); Australian Feminist Judgments Project, [www.law.uq.edu.au/the-australian-feminist-judgments-project](http://www.law.uq.edu.au/the-australian-feminist-judgments-project) (last visited Sept. 9, 2015).

To minimize the influence of personal preferences and to benefit from the views of a range of diverse and knowledgeable experts, we assembled an Advisory Panel to help us select the cases most appropriate for rewriting. The panel included twenty-three scholars with expertise in feminist theory, constitutional law, or both. Its members were diverse in race, gender, sexuality, and academic background. We were honored to have the advisory participation of Kathryn Abrams, Katharine Bartlett, Devon Carbado, Mary Anne Case, Erwin Chemerinsky, April Cherry, Kimberlé Crenshaw, Martha Albertson Fineman, Margaret Johnson, Sonia Katyal, Nancy Leong, Catharine MacKinnon, Rachel Moran, Melissa Murray, Angela Onwuachi-Willig, Nancy Polikoff, Dorothy Roberts, Daniel Rodriguez, Susan Deller Ross, Vicki Schultz, Dean Spade, Robin West, and Verna Williams. We asked them to evaluate all sixty cases for possible feminist rewriting. Their feedback was surprisingly consistent, and we narrowed our initial list of sixty to thirty potential cases.

Having decided to follow the U.K. model of publishing a rewritten opinion accompanied by an expert commentary that would frame and provide context for the revision, we next issued a public call inviting potential authors to apply to rewrite one of the thirty cases or to comment on a rewritten opinion. Providing commentary for each rewritten opinion was important because the original opinions would not be included in the volume. The commentary describes the original decision, places it within its historical context, and assesses its continuing effects. Equally important, the commentary analyzes the rewritten feminist judgment, emphasizing how it differs both in process and effect from the original opinion. By following this format of matching rewritten opinion and commentary throughout the writing and editing process, we were able not only to include additional voices but also to gain the benefits of productive collaboration among opinion writers, commentators, and editors.

In response to the call for authors, we received more than one hundred applications, mostly from law professors, but also from practitioners, clerks, and others. Our applicants represented a range of subject-matter specialties, expertise, and experience. They were well-known feminist legal theorists of established reputation and standing as well as more junior scholars, both tenured and untenured. Some were firmly grounded in theory while others were more familiar with the substance and methods of law practice, including practicing attorneys, clinicians, and legal writing professors.

As editors, we were committed to diversity on many levels. In terms of cases, our almost-final list of twenty-four cases was chosen to represent a range of gender-related issues. In terms of authors, we sought contributors who were diverse in perspective, expertise, and status as well as race, sexuality, and gender.

In addition to the forty-eight authors selected to write the twenty-four opinions and their matching commentaries, we invited Professor Berta Esperanza Hernández-Truyol to write a chapter that would provide an overview of feminist legal theory and an account of feminist judging. The project was well underway in June 2015 when the U.S. Supreme Court decided *Obergefell v. Hodges*,<sup>8</sup> a landmark case on the constitutionality of same-sex marriage. We immediately added that case, along with the authors of *Obergefell's* rewritten opinion and commentary, to the book. The final volume thus includes twenty-five cases and represents the contributions of fifty-one authors and the three editors.

#### GUIDELINES FOR THE OPINIONS AND COMMENTARY

The purpose of the U.S. Feminist Judgments Project is to show, in a practical and realistic way, that U.S. Supreme Court decisions could have been decided differently had the justices approached their decisions from a more complex and contextualized vantage. To illustrate this point, we asked the opinion writers to engage in a re-envisioning of the decision-making process, drawing on their own knowledge of feminist methods and theories, but bound by the facts and law that existed at the time. Opinion authors were limited as well to 8,000 words (far less than many U.S. Supreme Court opinions) but were free to choose to write a majority opinion, a dissent, or a concurrence, depending on their goals. A major practical difference between this project and real judging is that our authors were not constrained by the necessity of persuading other justices. It would have been unrealistic to require, across the board, that the authors speculate (in some uniform way) about what might have been accomplished through the formal (but not uniform) give-and-take that traditionally happens between justices at conference and in the more informal discussions among peers in the halls and chambers.

Authors were limited in the sources they could use in writing their opinions. They could draw only on facts and law in existence at the time of the original opinion. Many of our authors chafed at this constraint. But we felt strongly that such a source constraint, one of the hallmarks of the U.K. project, was essential to the legitimacy and goals of the U.S. project. To make the point that law may be driven by perspective as much as *stare decisis*, it was critical that the feminist justices be bound, just as the original justices were, to the law and precedent in effect at the time.

<sup>8</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

In terms of materials other than the facts and law in existence at the time of the opinion, we recognized that our opinion writers likely would be unable to avoid using feminist arguments and critiques that emerged after the original opinion. This was especially true with respect to cases decided before the 1970s, when the modern women's liberation movement gained traction in the United States. Opinion writers could draw upon theories and philosophies that became familiar and widely used after the original decision, but they were required to cite only to contemporaneous sources. This struck us as a fair compromise. After all, we believe that it is an inherent and unavoidable aspect of judging that the decision makers bring to the law their own cultural and social assumptions (often uncited). So like any judges, our authors could espouse cultural or social views and bring their perspectives to their interpretation and application of the law.

As it turned out, these restrictions on sources of authority were less inhibiting than expected. Many of our authors reported that, to their surprise, the feminist analyses, social theories, and arguments that they wished to rely on were in circulation at the time of the original decision, and sometimes even well represented in the amicus briefs before the Court. This was true even of our oldest decision in *Bradwell v. Illinois*,<sup>9</sup> a U.S. Supreme Court case denying a woman admission to the bar. Professor Phyllis Goldfarb, the author of the revised opinion in *Bradwell*, reports that advocates of women's rights in the late 1800s had introduced into the mainstream public discourse feminist egalitarian ideals about women's participation in professional and public life, and they made strong arguments within the existing legal framework to advance these ideals. Reports like this from our authors confirm that our initial hypothesis had been correct: it is not that feminist arguments did not exist at the time of particular decisions, but rather that feminist consciousness has often been ignored or erased in U.S. Supreme Court jurisprudence.

We asked the opinion rewriters to employ a judicial voice and to observe the conventions of appellate opinion writing. Accepting the limitations of the genre, we wanted the opinions to sound like opinions – not like legal scholarship or advocacy, which is what most of our authors are accustomed to writing. This was important to the project's realism. Some of our authors found this requirement to be both liberating and constraining.<sup>10</sup> While the judicial voice is powerful, commanding and declarative, it is also a public voice in which

<sup>9</sup> *Bradwell v. Illinois*, 83 U.S. 130 (1873).

<sup>10</sup> As noted in the U.K. Feminist Judgments Introduction, “writing a judgment imposes certain expectations and constraints on the writer that inevitably affect – even infect – her theoretical purposes.” *Feminist Judgments*, *supra* note 5, at 5.

the judge speaks not just for herself but also for her office. This public, official characteristic has traditionally required a certain dignity and forbearance in tone as well as a writing style that conveys candor, fairness, and dispassion. And while we wanted our authors to have the freedom to write as feminists, however they defined the term, we also asked them to honor legal conventions such as procedural rules and traditions. For example, while the authors could expand on the factual narrative contained within the original opinion, they had to limit themselves to the legal record before the Court, unless it was appropriate to use judicial notice for an easily verifiable fact.<sup>11</sup>

The authors of the commentaries had a formidable task, one perhaps even more difficult than that of the authors of rewritten opinions. Besides providing a summary of and context for the original opinion, the commentary also had to shed light on the feminist and theoretical underpinnings of the rewritten feminist judgment. Thus, when the feminist justice implicitly relied on non-precedential authority, such as theories or studies that were published after the date of the opinion, we encouraged the commentary author to discuss and cite those works to give credit to the feminist thinkers who made the reasoning possible. The commentators had to accomplish all this in 2,000 words.<sup>12</sup>

Within these guidelines, the contributors were free to pursue their particular feminist visions. Mindful of the many diverse feminist views, as noted above we did not define what “feminism” is or what the preferred feminist view of a particular case should be. While our edits occasionally suggested that authors consider the implications of certain works or theories, we did not interfere with their freedom to see the case, and its importance, in their own ways. Again within the constraints of the judicial opinion writing style already noted, we allowed authors to use the argument frameworks, wording choices, and writing style that they determined were most consistent with their feminist approach to the case.

In some cases, we as editors disagreed strongly with a contributor’s approach. And, in several cases, the opinion writer and the commentator disagreed with each other. We expressed views in multiple rounds of edits, but each

<sup>11</sup> This also was potentially constraining, as feminist legal theorists have argued that the law often dismisses as irrelevant facts, circumstances, and contexts relevant to an outsider perspective. See Kim Lane Scheppelle, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 *N.Y.L. Sch. L. Rev.* 123 (1992). We recognized this problem, of course, but, on balance, decided that any project could not address every problem of outsider invisibility.

<sup>12</sup> The Australian Feminist Judgments Project offered an interesting alternative: opinion and commentary together could be 7,000 words, and the author and commentator could split that up however they saw fit.

contribution reflects its author's view and choices. The reader will see occasional evidence of disagreements between opinion writers and commentators, or might detect a failed compromise between the editors, on the one hand, and a particular contributor, on the other, with respect to a piece's substance, tone or style. Rather than suppress these disagreements, though, we celebrate them as part of, and a worthy extension of, the rich and diverse debate that marks a dynamic field like feminist legal theory.

#### TOPICS AND ORGANIZATION OF CASES

The twenty-five cases cover a wide range of doctrinal areas, but a majority concern constitutional law doctrines, such as equal protection and due process, or interpretation of federal statutory law such as Title VII and Title IX. Nearly half raise equal protection issues, and six address Title VII claims. The cases touch on numerous legal issues related to justice and equality, including reproductive rights, privacy, violence against women, sexuality, and economic and racial justice. Included are core cases related to gender and feminism that are familiar and expected (like *Roe*,<sup>13</sup> *Meritor*,<sup>14</sup> *Geduldig*<sup>15</sup>), but also some less well-known cases that were nevertheless worthy of feminist attention, in part to demonstrate that issues of subordination can arise indirectly as well as directly. Thus, we also included cases on immigration (*Nguyen*<sup>16</sup>), the Commerce Clause (*Morrison*<sup>17</sup>), and pensions (*Manhart*<sup>18</sup>), to name just three.

The cases appear in the volume in chronological order from the earliest (1873, *Bradwell*) to the most recent (2015, *Obergefell*). This will allow readers to consider the evolution of feminism and feminist thought, both in the types of legal issues that the Court addressed and the manner in which the issues are approached. We considered alternatives for organizing the cases, such as by doctrinal categories (e.g. "Equal Protection" and "Substantive Due Process") or by traditional areas of feminist inquiry (e.g. "Reproductive Freedom" or "The Regulation of Sexuality"). We determined that these divisions were artificial for most of the innovative rewrites in the volume.<sup>19</sup> Most of the feminist

<sup>13</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>14</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>15</sup> *Geduldig v. Aiello*, 417 U.S. 484 (1974).

<sup>16</sup> *Nguyen v. INS*, 533 U.S. 53 (2001).

<sup>17</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>18</sup> *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

<sup>19</sup> The cases in the U.K. feminist judgments book are separated into traditional doctrinal categories such as "Parenting," "Property and Markets," and "Criminal Law and Evidence."