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USING FEMINIST THEORY TO ADVANCE EQUAL JUSTICE UNDER LAW

Linda L. Berger, Bridget J. Crawford, and Kathryn M.
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Progress toward gender justice faces multiple and growing challenges, not only in the United States Supreme Court but at every level of political and cultural debate and decision making. Within this context, feminist theory and methods are more necessary than ever.

It is therefore timely and fitting that more than 200 hundred lawyers, judges, professors, students, and members of the public gathered for *The U.S. Feminist Judgments Project: Writing the Law, Rewriting the Future*, a two-day conference hosted by the Center for Constitutional Law at The University of Akron School of Law. The conference had several purposes. First and foremost was to celebrate the publication of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court*.¹ Both this volume, the first in a series, and its organizing focus, the United States Feminist Judgments Project, grew out of the work of the Women's Court of Canada and the U.K. Feminist Judgments Project.² These successful efforts inspired us to embark on a similar project of applied feminist scholarship—to rewrite from a feminist perspective key United

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

² For information about the Women's Court of Canada, see Diane Peters, *The Women's Court of Canada*, U. AFF., (Sept. 12, 2011), <http://www.universityaffairs.ca/features/feature-article/the-womens-court-of-canada/> [<https://perma.cc/V7K7-W728>]. For information about the U.K. Project, see *Welcome to the Feminist Judgments Project*, FEMINIST JUDGMENTS PROJECT <https://www.kent.ac.uk/law/fjp/> [<https://perma.cc/U579-SW48>] (last visited Apr. 20, 2017). See also Rosemary Hunter et al., FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (2010).

States Supreme Court decisions on issues of gender justice. As we had hoped, the resulting opinions and commentaries demonstrated that judges applying feminist perspectives could bring about change in the development of the law, even within the constraints of existing doctrine and precedent.

The United States Feminist Judgments Project started as many feminist movements do—with a small group of committed feminists, including the three editors of the project, getting together to discuss the feasibility of rewriting United States law. Our first task was to choose a body of law; the possibilities in United States law were numerous and daunting. We ended up deciding to focus on United States Supreme Court opinions as the best forum for the first volume because of the influence and significance of the decisions coming out of that Court.

After the first few preliminary discussions, our small group of feminists reached out for help from many others and, in true feminist tradition, we received it. The final book represents a feminist collaboration of close to one hundred people. First, in choosing the cases to be rewritten, we as editors relied on a distinguished group of American constitutional and feminist scholars who helped us select from among the many Supreme Court cases ripe for feminist re-imagining.³ We then turned to the task of securing authors for our chosen cases. We received more than 100 applications in response to our solicitation.

As editors of a volume of “feminist judgments,” we thought it crucial to establish an inclusive process that would assure diversity among the book’s authors. We wanted this to be a feminist project not just in name and substance, but also in process and method. And we wanted the “feminist” perspectives in *Feminist Judgments* to be feminisms that are committed not only to gender justice, but also to principles of equality and full participation for all Americans who seek to overcome entrenched discriminations based on race, ethnicity, class, and sexual orientation. We were committed as well to overcoming the arbitrary hierarchies embedded in the legal academy by including not just tenured full professors, but also more junior faculty, clinical faculty, legal writing faculty, and practicing lawyers. We wanted the project to showcase a wide array of voices. When we finished our lengthy selection process, we had an impressive and diverse group of more than fifty authors for the twenty-five opinions and accompanying commentaries.⁴

The collaboration did not stop there. Each author went through at least three rounds of edits, followed by a long production process. Many of the

³ A full list of our advisory panel members is available on our website. *Advisory Panel*, U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/home-2/advisory-panel/> [<https://perma.cc/DR3G-LCBU>] (last visited Apr. 27, 2017).

⁴ To see our full list of authors, visit our website. *Authors and Cases: U.S. Feminist Judgments Invited Authors*, U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/authors-and-cases/authors-and-cases/> [<https://perma.cc/CGZ2-ANUN>] (last visited Apr. 27, 2017).

book's contributors (and we, as editors) relied throughout the process on the advice and guidance of colleagues, student researchers, librarians, and administrative assistants. The conference presented a public opportunity to recognize the work of all who came together to create what we think is a unique contribution to the scholarly discourse about gender and judging. We are so grateful to all who contributed to this book and to this conference.

A second purpose of the conference at the Center for Constitutional Law was to provide a forum for asking (and attempting to answer) a series of discrete questions about judges and the judicial function. Prime among these questions is whether judicial diversity matters—that is, whether it is important to have judges who are representative of many different groups of people as well as many different ways of thinking. On a simplistic level, our reaction might be that *of course diversity on the bench matters*. As Sally Kenney, our conference keynote speaker, eloquently argues, diversity in positions of power in all branches and all levels of government, including representation by women, is a reflection of the health of our nation's democracy. In Kenney's view, diversity on the bench is a requirement of a representative democracy—it is a civic right and responsibility.⁵

The conference also sought to raise the “woman question”—the baseline feminist question of the 1980s and 1990s. The “woman question” asks whether women are represented in decision-making positions and how the law affects women.⁶ As Catharine MacKinnon has explained, “Feminists have this nasty habit of counting bodies and refusing not to notice their gender.”⁷ This question continues to be critical today. As one “counts bodies,” it is important to take into account the multiple identities and intersectionalities contained in the category “woman.” In the judicial context, for example, judges who understand or experience the intersecting relationships among race, ethnicity, class, sexual orientation, physical abilities, and many other factors will be more attuned not only to their own view of the world but also to the more complex perspectives that grow out of these intersectionalities.⁸

Thus, we must simultaneously “count bodies” and recognize diversity among women based on their multiple identities. It is of course true that all women, like all men or all of any particular group of people, do not necessarily share the same experiences or viewpoints. Binary designations of sex and gen-

⁵ See, e.g., SALLY J. KENNEY, *GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* (2013).

⁶ See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1989).

⁷ Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 35 (1984).

⁸ See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 482 STAN. L. REV. 821 (1989); Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKLEY WOMEN'S L.J. 191 (1988).

der no longer fit.⁹ More than ever, then, the categories “woman” and “man”—not to mention other categories once taken as set in stone—are evolving and subject to challenge, with gender fluidity increasingly more fitting and relevant for many human beings.¹⁰

All the same, many of us intuitively sympathize with Justice Sotomayor’s comment that “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”¹¹ We accept the common wisdom that judges of different backgrounds and experiences will understand the facts and law before them differently, at least in part because they are seeing the facts and law through the unconscious filters and frames they have acquired from experience. And if that is true, it can only be helpful to the judiciary as a whole to add the perspectives of judges whose backgrounds and experiences have been little represented in the past. At the very least, as Sally Kenney argues, more diversity on the bench—and in other political offices—legitimizes our democracy by making our political systems truly representative of the populace.

If our intuitive understanding is correct, then what is the relationship between personal identity and judicial perspective? The conference brought that question to the forefront. As co-editors of *Feminist Judgments*, we believe that the book stands for the proposition that including feminist perspectives will contribute to a richer, more contextual, more nuanced, and fairer jurisprudence. We have argued that what makes a “feminist judgment” is its attention to facts and context, its willingness to rely on a broad range of authorities, including social science data, and its concern for how law can reinforce or challenge existing hierarchies, stereotypes, or beliefs.¹²

The third purpose of the conference was to showcase the work of an international group of professors, attorneys, and other researchers who rely on, challenge, complicate, or extend feminist legal theory. The panels at the conference represented a dazzling array of subject matters, methodologies, and inquiries. Evident throughout the conference presentations were what Martha Chamallas

⁹ See, e.g., Sarah Marsh, *The Gender-Fluid Generation: Young People On Being Male, Female or Non-Binary*, GUARDIAN (Mar. 26, 2016, 5:52 PM) <https://www.theguardian.com/commentisfree/2016/mar/23/gender-fluid-generation-young-people-male-female-trans> [<https://perma.cc/6J7H-4CGP>]; Richard A. Friedman, *How Changeable Is Gender?*, N.Y. TIMES (Aug. 22, 2015), https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html?_r=0 [<https://perma.cc/HN7P-N239>].

¹⁰ The change is perhaps exemplified by the fact that the “Word of the Year” in 2015 was the use of “they” as a singular pronoun as an acknowledgement of gender fluidity. Katy Steinmetz, *This Pronoun Is the Word of the Year for 2015*, TIME (Jan. 8, 2016), <http://time.com/4173992/word-of-the-year-2015-they/> [<https://perma.cc/R63Z-REAH>]. See generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

¹¹ Sonia Sotomayor, *Judge Mario G. Olmos Memorial Lecture: A Latina Judge’s Voice*, 13 BERKLEY LA RAZA L.J. 87, 92 (2002).

¹² Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, *Introduction to the U. S. Feminist Judgments Project*, in FEMINIST JUDGMENTS, *supra* note 1, at 13–22.

has called some of the recurring “moves” of feminist legal theory: treating women’s experiences as an appropriate subject for legal scholarship, exploring complex identities, challenging implicit bias, and unpacking women’s choices.¹³

These “moves” are well represented in the articles included in this Symposium issue. First, Sally Kenney presents what she calls “a principled and consistent position for feminists about the nature of judging and . . . judicial selection” in her contribution to the Symposium, *Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream*.¹⁴ In *Equality Writ Large*, Phyllis Goldfarb describes the nineteenth century intellectual origins of a multidimensional and intersectional feminist theory.¹⁵ Shoshanna Ehrlich’s *Ministering (In)Justice: The Supreme Court’s Misreliance on Abortion Regret in Gonzalez v. Carhart*, focuses on the gender bias implicit in what she calls the Supreme Court’s “abortion regret trope.”¹⁶ Teri McMurtry-Chubb explores the gendered aspects of the public constructions of Black parenthood, violence against African-Americans, and political movements for Black civil rights in her article, “*Burn This Bitch Down!*”: *Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*.¹⁷ JoAnne Sweeny’s article, *Trapped in Public: The Regulation of Street Harassment and Cyber-Harrassment Under the Captive Audience*, asks what role law can play in addressing public intimidation of women by men.¹⁸ Andrea Orwoll challenges the linguistic erasure of women in *Pregnant “Persons”: The Linguistic Defanging Of Women’s Issues And The Legal Danger Of “Brain-Sex” Language*.¹⁹

In each of these articles, the authors invite engagement with what it means to be an autonomous person with a complex personal identity who is also deeply connected to others. Each author asks about the disconnect between the law’s promise of equality and life as it is lived on the ground.

The fourth and final goal of the conference—and one that extends to the pages of this issue of the *Nevada Law Journal*—is to create a community. For two days in Akron, Ohio, the assembled group came together to think in a sustained way about the highest and best aspirations for what the law could be, es-

¹³ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4–7, 13–15 (3d ed. 2013).

¹⁴ Sally Kenney, *Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream*, 17 NEV. L.J. 549 (2017).

¹⁵ Phyllis Goldfarb, *Equality Writ Large*, 17 NEV. L.J. 565 (2017).

¹⁶ Shoshanna Ehrlich, *Ministering(In)Justice: The Supreme Court’s Misreliance on Abortion Regret in Gonzalez v. Carhart*, 17 NEV. L.J. 599 (2017).

¹⁷ Teri McMurtry-Chubb, “*Burn This Bitch Down!*”: *Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*, 17 NEV. L.J. 619 (2017).

¹⁸ JoAnne Sweeny, *Trapped in Public: The Regulation of Street Harassment and Cyber-Harrassment Under the Captive Audience Doctrine*, 17 NEV. L.J. 651 (2017).

¹⁹ Andrea Orwoll, *Pregnant “Persons”: The Linguistic Defanging Of Women’s Issues And The Legal Danger Of “Brain-Sex” Language*, 17 NEV. L.J. 667 (2017).

pecially as the law relates to the unfinished promise of economic, social, and political equality between and among women, men, and people of all gender identities. In creating an inclusive conference atmosphere, we were acting on our own feminist belief that how, when, and where we talk about justice matters. It is an urgent epistemic and democratic priority that we do so as part of an engaged and respectful community. This is not to say that we expected agreement at the conference or beyond about feminism generally (or any topic in particular). As academics, we celebrate differences of opinion as worthy of further discussion and inquiry. And as co-convenors of the United States Feminist Judgments Project, we are especially gratified that the conference provided opportunities to begin many conversations. In these pages, it is a privilege to continue these conversations and engage with each other on the important role that feminist theory plays in legal reasoning—in scholarship, on the bench, in the classroom, and in our daily lives.

As we contemplate the capacity of feminist theory to advance justice, we identify several questions for the future that merit extended attention. First, what precisely is feminist judging? How can it be defined and recognized? We have already emphasized that feminist judgments are possible and that the feminist consciousness that marks such judgments can be acquired rather than being an innate characteristic.²⁰ Nonetheless, feminist judging—no matter how it is defined—appears more likely to occur when the judiciary looks more like America in its diversity of persons, backgrounds, and perspectives. In other words, judges should represent the full spectrum of sexes and gender identities, races and ethnicities, sexual orientations, economic classes, physical abilities, and cultural backgrounds.

Like the default fonts and automatic correction assumptions built into word-processing programs, the default positions in the judicial system are established by the system's designers and managers. It should come as no surprise when the default positions in the justice system fail to take into account the full range of human-ness. By asking the feminist question about various judicial default positions—what does this law or this opinion or this policy mean for children, the poor, people on every point of the gender spectrum, people of color, persons with disabilities, residents of rural areas, oil workers, farmers, and labor union members—we have a shot at unearthing those assumptions and default positions that treat some Americans as less deserving of the law's protection for their fundamental rights and liberties. In the coming months and years, this question will be asked more frequently and more customarily if the judges (and lawyers) who argue and decide these issues look more like more of us.

²⁰ See Rosemary Hunter, *Can *Feminist* Judges Make a Difference*, 15 INT'L J. LEGAL PROF. 7 (2008).

Beyond a diverse judiciary, we argued in *Feminist Judgments* that feminist judging is, among other things, the result of applying feminist practical reasoning. That is, feminist judging recognizes that both the framing of legal issues and the construction of solutions depend on “the intricacies of each specific factual context.”²¹ This kind of reasoning brings together individual voices with broader contextual information drawn from history, psychology, and the political and social sciences. It is reasoning that consciously seeks outsider voices and is open to recognizing unconscious bias. But feminist practical reasoning is not without pitfalls. During the conference, several presentations cast doubt on the value of some of the so-called *Brandeis briefs* and *stories briefs* filed in recent cases before the U.S. Supreme Court.²² Researched and drafted by partisan supporters of one side or the other, there is no guarantee that these amicus briefs drawing on individual stories and social science research findings will provide complete or objectively well-supported information. One of the continuing questions then is how to present contextual information to judges so that it can be effectively tested and weighed by those who have the inclination to look beyond their own experience or perspective.

This question of context naturally leads to a discussion about the role of lawyers. What is the relationship between feminist judging and lawyering? The rewritten opinions in *Feminist Judgments* demonstrate that the law would have developed very differently had feminist perspectives been applied at critical moments in time. Even though the opinion writers worked within the law and the facts that existed at the time of the original opinions, they asked new questions, applied new reasoning methods, and turned to new sources of authority. The rewritten opinions thus revealed the incremental way in which constitutional interpretation—like the common law—is built one precedent at a time. Although it is possible to wish for a cohesive and coherent body of law to spring forth all at once on a particular subject matter, the decentralized and organic approach taken by *Feminist Judgments* reveals the richness and strength of diverse thinking that changes over time.

To support feminist judging, practicing lawyers can and should take the lead in expanding the possibilities for multiple or alternative judgment perspectives, first by developing various approaches to diversify the bench. In some states, for example, elections are thought to be better than the merit appointment system for bringing about a more diverse judiciary, but that likely depends on local conditions. Next, the lawyers in each individual case are the key to widening the opportunities for broader judicial understanding of complex situations by providing the materials that may empower judges to go about their decision making more reflectively. If gender consciousness is not a component of biological identity but instead may be acquired through personal experiences

²¹ Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 851 (1990).

²² See, e.g., Ehrlich, *supra* note 16.

and encounters with information that unsettles prior assumptions, the lawyers in a particular case are the primary means for presenting those additional views.

To fulfill this charge, lawyers must themselves be able to think differently and more expansively about both the law and the facts. As the *Feminist Judgments* project demonstrates, many things in a lawsuit are “givens,” but not all facts and law are as fixed or static as they might appear. For example, a number of the rewritten opinions use different sources of law to reason to a different result. Phyllis Goldfarb used the long-ignored privileges and immunities clause to argue that Myra Bradwell was denied a right fundamental to federal citizenship when Illinois rejected her right to practice law.²³ Leslie Griffin turned to the Establishment Clause to strike down the Hyde Amendment on the basis that the Amendment’s restriction on abortions enacted a personal moral principle into law and amounted to an establishment of religion.²⁴

Other rewritten opinions looked at the facts and saw reality differently than the original decision makers. In *Gebser v. Lago Vista Independent School District*, for example, the feminist judgment pointed out that when a teacher has sex with a fourteen-year-old student, that is not a “relationship” but instead is rape.²⁵ In *Loving v. Virginia*, the feminist judgment made the historical case that laws constituting interracial marriage a crime are inextricably linked to and the result of hundreds of years of enacting and enforcing laws aimed at controlling black bodies.²⁶ These examples illustrate that distinctive and stereotype-challenging characterizations of the facts can help determine the outcome of the case.

Finally, in considering the relationship of feminist theory to justice, what avenues *besides* feminist judging show promise for advancing social justice in the law? When lawyers and judges think about pursuing social change, they naturally turn to filing suit or seeking new or amended legislation. But there are other avenues—both complementary and different. As an example, Nan Hunter has suggested that the litigation victory for same-sex marriage in the U.S. Supreme Court was advanced by a hybrid political-litigation-public-relations strategy that brought about change much more quickly than litigation alone might have.²⁷ In 2004, a majority of the proposed ballot measures that opposed same-sex marriage were approved. Only twelve years later, the national consensus had shifted, and the Supreme Court’s decision in favor of same-sex mar-

²³ See Phyllis Goldfarb, *Rewritten Opinion in Bradwell v. Illinois*, 83 U.S. 130 (1873), in FEMINIST JUDGMENTS, *supra* note 1, at 55.

²⁴ Leslie Griffin, *Rewritten Opinion in Harris v. McCrae*, 448 U.S. 297 (1980), in FEMINIST JUDGMENTS, *supra* note 1, at 242.

²⁵ Ann Bartow, *Rewritten Opinion in Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), in FEMINIST JUDGMENTS, *supra* note 1, at 426.

²⁶ Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, 388 U.S. 1 (1967), in FEMINIST JUDGMENTS, *supra* note 1, at 114.

²⁷ Nan A. Hunter, Professor of Law, Georgetown Law, Faculty Enrichment Presentation at UNLV William S. Boyd School of Law (Oct. 14, 2016).

Summer 2017]

USING FEMINIST THEORY

547

riage seemed like just one more falling domino. That decision was the result not of litigation alone but of a well-planned and consistent public relations and political campaign. This is just one of many possible examples.

Applying this question to future *Feminist Judgments* projects, what avenues show particular promise? In the *Feminist Judgment Series*, we anticipate that the editors of specific topical volumes will take on new subject matters both horizontally and vertically and that they will encompass different levels of judicial decision making. Because prevailing processes are as hard to overcome as prevailing assumptions, we hope that future projects will examine other possibilities. For example, if there is feminist judging, surely there is a feminist civil procedure, feminist clinical work, and feminist mediation and negotiation. And if there is feminist judging, surely there are other rhetorical methods, perhaps even other genres, in which to express the results.

The articles in this issue of the Nevada Law Journal play an important part in developing our understanding of the relationship between feminist theory and equal justice. They explore significant questions about the history and current legal construction of sex, gender, and many other aspects of individual identities. We hope that you will find them as engaging as we do. We look forward to continuing the conversations.

