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**TEACHING WITH FEMINIST JUDGMENTS: A  
GLOBAL CONVERSATION**

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# Teaching with Feminist Judgments: A Global Conversation

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## Abstract

This conversational-style essay is an exchange among fourteen professors—representing thirteen universities across five

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countries—with experience teaching with feminist judgments. Feminist judgments are ‘shadow’ court decisions rewritten from a feminist perspective, using only the precedent in effect and the facts known at the time of the original decision. Scholars in Canada, England, the U.S., Australia, New Zealand, Scotland, Ireland, India, and Mexico have published (or are currently producing) written collections of feminist judgments that demonstrate how feminist perspectives could have changed the legal reasoning or outcome (or both) in important legal cases.

This essay begins to explore the vast pedagogical potential of feminist judgments. The contributors to this conversation describe how they use feminist judgments in the classroom; how students have responded to the judgments; how the professors achieve specific learning objectives through teaching with feminist judgments; and how working with feminist judgments—whether studying them, writing them, or both—can help students excavate the multiple social, political, economic and even personal factors that influence the development of legal rules, structures, and institutions. The primary takeaway of the essay is that feminist judgments are a uniquely enriching pedagogical tool that can broaden the learning experience. Feminist judgments invite future lawyers, and indeed any reader, to re-imagine what the law is, what the law can be, and how to make the law more responsive to the needs of all people.

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### **Introduction**

(Linda L. Berger, Bridget Crawford, and Kathryn M. Stanchi)

The very idea of re-imagining and rewriting judicial opinions from a feminist perspective arises from the sense that the original

judicial opinions did not “do justice” in either process or outcome.<sup>1</sup> Nearly a dozen feminist judgments projects around the world have addressed this sense of injustice by demonstrating how a judgment’s reasoning or result (or both) would have been different if the decision makers had applied feminist perspectives, theories, and methods.<sup>2</sup> Using the resulting re-imagined feminist judgments in the classroom can help students in a myriad of ways, but especially in developing their own roles in addressing what they perceive to be the gaps between law and justice.<sup>3</sup> Reading the

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1. See, e.g., Rosemary Hunter, *Feminist Judgments as Teaching Resources*, 2 OÑATI SOCIO-LEGAL SERIES 47, 56 (2012) (providing overview of feminist judgments projects’ aims and methods and discussing feminist judgments as pedagogical tools for cultivating critical-thinking skills in law students).

2. See, e.g., AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW (Heather Douglas et al. eds., 2014) [hereinafter AUSTRALIAN FEMINIST JUDGMENTS] (introducing Australian feminist judgments); FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010) [hereinafter ENGLISH/WELSH FEMINIST JUDGMENTS] (introducing English and Welsh feminist judgments); FEMINIST JUDGMENTS IN INTERNATIONAL LAW (Loveday Hodson & Troy Lavers eds., forthcoming 2019) [hereinafter FEMINIST JUDGMENTS INTERNATIONAL] (introducing international feminist judgments); FEMINIST JUDGMENTS OF AOTEAROA NEW ZEALAND: TE RINO; A TWO-STRANDED ROPE (Elisabeth McDonald et al. eds., 2017) [hereinafter AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS] (introducing Aotearoa New Zealand feminist judgments); FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn M. Stanchi et al. eds., 2016) [hereinafter U.S. FEMINIST JUDGMENTS] (introducing U.S. feminist judgments); NORTHERN/IRISH FEMINIST JUDGMENTS: JUDGES’ TROUBLES AND THE GENDERED POLITICS OF IDENTITY (Máiréad Enright et al. eds., 2017) [hereinafter NORTHERN/IRISH FEMINIST JUDGMENTS] (introducing Northern and Irish feminist judgments); SCOTTISH FEMINIST JUDGMENTS: (RE)CREATING LAW FROM THE OUTSIDE IN (Sharon Cowan et al. eds., forthcoming Dec. 2019) [hereinafter SCOTTISH FEMINIST JUDGMENTS] (introducing Scottish feminist judgments); Diana Majury, *Introducing the Women’s Court of Canada*, 18 CAN. J. WOMEN & L. 1, 4 (2006) (introducing Canadian judgments published in 2008, although dated 2006 because of a backlog at the journal); see also *The African Feminist Judgments Project*, CARDIFF LAW AND GLOBAL JUSTICE, <https://www.lawandglobaljustice.com/the-african-feminist-judgments-project/> (last visited July 9, 2019) (discussing feminist judgments projects occurring in Africa); Jhuma Sen et al., *Call for Papers*, THE FEMINIST JUDGMENTS PROJECT: INDIA, <https://fjpiindia.wixsite.com/fjpi/call-for-papers> (last visited July 9, 2019) [hereinafter *India Feminist Judgments Project*] (discussing feminist judgments projects occurring in India); *Sentencias con Perspectiva de Género México [Sentences with a Gender Perspective Mexico]*, FEMINISMOS GÉNERO Y JUSTICIA (Mar. 15, 2018), <https://feminismosgeneroyjusticia.blogspot.com> (discussing feminist judgments projects occurring in Mexico).

3. See, e.g., Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives from the Money Law Clinic*, 12 CLINICAL L. REV. 203, 238 n.127 (2005) (conveying students’ frustration at perceived excessive focus on doctrine in first year of U.S. legal education and positing that exposure to clinical legal educators “might help bridge the gap between law and justice, and help integrate theory and practice early on.”); 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 law school pedagogy unduly emphasizes doctrine over skills, theory, and critical thinking).

rewritten feminist judgments introduces students to often-neglected problems of gender and racial justice, provides templates and resources for making social justice arguments, and helps students think critically and creatively.<sup>4</sup>

As re-imagined and rewritten by the worldwide feminist judgments projects, the re-envisioned opinions enrich students' understanding of judicial decision-making. They do so, first, by comparison with the original opinions because the rewritten opinions demonstrate that judges, like other human beings, draw on what has been embedded in their intuitions and reasoning processes by culture and history, as well as by their own backgrounds, experiences, and education.<sup>5</sup> The feminist judgments do so, second, by providing the tools for students to understand how persuasion and explanation work effectively within the significant conventions and constraints of legal practice.<sup>6</sup>

The feminist judgments movement has emerged from an informal, international collaboration of feminist scholars and lawyers who decided to use feminist reasoning and methods to write 'shadow,' or alternate, judicial opinions.<sup>7</sup> The purpose of the feminist judgments projects has been to rethink and show what a difference a feminist perspective can have on legal reasoning and analysis.<sup>8</sup> Although their historical, cultural, and socio-legal settings differ, the projects share similar methods.<sup>9</sup> Each requires contributors to grapple with the facts and law in existence at the time of the original opinion. All projects share a commitment to

4. See *infra* Part III.B (comments of Kathy Stanchi).

5. See, e.g., John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 2 (2010) ("[I]n recent years the subject of implicit bias—unconscious or subconscious influences on decision-making—has reemerged in a variety of psychological and social science venues and has potentially significant ramifications in judicial decision-making.").

6. See, e.g., *infra* Part I.A (comments of Teri McMurtry-Chubb) (teaching students that narrative and interpretation are used by jurists to frame their decisions); *infra* Part I.A (comments of Vanessa Munro) (demonstrating to students how authorities interpret and apply the law, and the limits of judicial competence).

7. See Majury, *supra* note 2, at 1, 5, & 7 (describing origins of the first feminist-rewriting project conducted by a group of Canadian law professors and practicing attorneys).

8. See Kathryn M. Stanchi et al., *Introduction to the U.S. Feminist Judgments Project*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 3, 5 [hereinafter Stanchi et al., *Introduction*] ("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.").

9. See, e.g., Kathryn M. Stanchi et al., *The Necessity of Multi-Stranded Feminist Judicial Opinions*, 44 AUSTL. FEMINIST L.J. 245, 249–53 (2018) (discussing specific historical context of the feminist judgments project in New Zealand).

engaging participants who are more diverse and representative of the country's population than real-world judges.<sup>10</sup>

Beginning with the Women's Court of Canada, this first organizing group of law professors and activists began their project in 2004 and published an initial set of six rewritten decisions based on section 15 of Canada's Charter of Rights and Freedoms in 2008.<sup>11</sup> That collection was followed in 2010 by the English/Welsh collaboration, which included twenty-three rewritten opinions originally issued by the House of Lords, the Court of Appeal, or the Privy Council.<sup>12</sup> The next published feminist judgments project came from Australia, encompassing twenty-four opinions from courts ranging from trial courts to the High Court.<sup>13</sup> The U.S. feminist judgments project, rewriting twenty-five opinions of the Supreme Court of the United States, was published in 2016 (with the three of us as co-editors).<sup>14</sup> The Northern/Irish and Aotearoa New Zealand feminist judgments projects followed in 2017.<sup>15</sup> *Feminist Judgments in International Law* was published in September 2019 and the Scottish project will follow soon thereafter.<sup>16</sup> Projects are under way in India, Africa, and Mexico.<sup>17</sup>

For the most part, participants in the various global feminist judgment projects have worked independently from the other projects, although loosely aware of their global counterparts.<sup>18</sup> In May 2017, a group of representatives of several feminist judgments projects met in person for the first time for a two-day workshop at the International Institute for Sociology of Law in Oñati, Spain,

10. See, e.g., ENGLISH/WELSH FEMINIST JUDGMENTS, *supra* note 2, at 7–9 (describing importance of producing rewritten opinions that would be plausible to lawyers and judges and providing an illustration of what difference greater diversity in the judiciary might make).

11. See Majury, *supra* note 2 (introducing the purpose, methods, and work-product of the Women's Court of Canada).

12. See ENGLISH/WELSH FEMINIST JUDGMENTS, *supra* note 2, at 9–13 (describing scope of cases and range of courts covered in book).

13. See AUSTRALIAN FEMINIST JUDGMENTS, *supra* note 2, at 1, 14–15 (describing scope of cases and range of courts covered in book).

14. See Stanchi et al., *Introduction*, *supra* note 8, at 8 (explaining process for selection of twenty-five cases).

15. See AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS, *supra* note 2; NORTHERN/IRISH FEMINIST JUDGMENTS, *supra* note 2.

16. See FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2; SCOTTISH FEMINIST JUDGMENTS, *supra* note 2.

17. See *The African Feminist Judgments Project*, *supra* note 2; *India Feminist Judgments Project*, *supra* note 2; *Sentencias con Perspectiva de Género México [Sentences with a Gender Perspective Mexico]*, *supra* note 2.

18. The exception is Rosemary Hunter; she served as a co-convenor of two projects. See AUSTRALIAN FEMINIST JUDGMENTS, *supra* note 2; ENGLISH/WELSH FEMINIST JUDGMENTS, *supra* note 2.

convened by the three of us.<sup>19</sup> In addition to the ideas generated by the workshop itself, that meeting in Oñati laid the foundation for increased communication among scholars worldwide who are working on feminist judgments.<sup>20</sup>

As the feminist judgments projects have grown and developed,<sup>21</sup> a small group of faculty members are using feminist judgments as teaching tools at the undergraduate and graduate levels.<sup>22</sup> We have spoken informally with many people in the United States and beyond about using feminist judgments in the law school (or other) classroom. This essay extends those dialogues in a written

19. See *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice*, Oñati International Institute for the Sociology of Law Workshop (May 11–12, 2017). Out of that workshop came an issue of the Oñati Socio-Legal Series of the same name. See also *Feminist Judgments: Comparative Socio-Legal Perspectives on Judicial Decision Making and Gender Justice*, 8 OÑATI SOCIO-LEGAL SERIES 1215 (2018) (including an introduction and nine essays from workshop participants on the methods, impact, and reach of various feminist judgments projects).

20. See, e.g., @WorldFJJScholars, TWITTER, <https://twitter.com/WorldFJJScholars/> media (last visited Sept. 19, 2019) (“A group Twitter account for anyone involved as an author or editor in Feminist Judgments projects worldwide.”).

21. For example, Cambridge University Press is publishing a U.S. Feminist Judgment Series, with individual volumes focused on particular subject matters. See, e.g., *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS* (Bridget J. Crawford & Anthony C. Infanti eds., 2017) (existing as the first subject matter-specific book in the series). Volumes are forthcoming in the areas of Reproductive Justice Law, Family Law, Employment Discrimination Law, Tort Law, Trusts and Estates Law, and Property Law. See also *Series Projects*, U.S. FEMINIST JUDGMENTS PROJECT, <https://sites.temple.edu/usfeministjudgments/projects/> (last visited Sept. 19, 2019). Other subject matter volumes may follow.

22. See *infra* Parts I–IV; see also Hunter, *supra* note 1 (reflecting on classroom use of feminist judgments); Jennifer Koshan et al., *Rewriting Equality: The Pedagogical Use of Women’s Court of Canada Judgments*, 4 CAN. LEGAL EDUC. ANN. REV. 121 (2010) (describing experiences teaching with feminist judgments). In 2012, *The Law Teacher*, the U.K.-based journal of the Association of Law Teachers, published a “Special Issue on the Feminist Judgments Project” including four articles on the use of feminist judgments in law teaching. See Rosemary Auchmuty, *Using Feminist Judgments in the Property Law Classroom*, 46 LAW TCHR. 227 (2012) (describing use of feminist judgment writing as teaching about the law of co-ownership); Helen Carr & Nick Dearden, *Research-Led Teaching, Vehicular Ideas and the Feminist Judgments Project*, 46 LAW TCHR. 268 (2012) (reporting results of survey of law teachers about the concept of “research-led” instruction, such as teaching with feminist judgments, and the need to develop students’ critical thinking skills in connection with research-led teaching); Anna Grear, *Learning Legal Reasoning While Rejecting the Oxymoronic Status of Feminist Judicial Rationalities: A View from the Law Classroom*, 46 LAW TCHR. 239 (2012) (exploring deployment of feminist judgments in undergraduate courses devoted to critical reasoning and legal reasoning); Caroline Hunter & Ben Fitzpatrick, *Feminist Judging and Legal Theory*, 46 LAW TCHR. 255 (2012) (detailing use of feminist judgments in teaching a legal philosophy course); Rosemary Hunter, *Introduction: Feminist Judgments as Teaching Resources*, 46 LAW TCHR. 214 (2012) (introducing methodological parameters of feminist judgments projects).

'conversation' format that includes multiple colleagues from the United States, New Zealand, Australia, Scotland, and England. The purpose of this written conversation is to continue to share knowledge with each other and future instructors who may want to teach with feminist judgments. We developed a set of questions broadly applicable to those who teach with feminist judgments and asked each conversation participant to choose a small number to answer.

In Part I, the contributors describe their own experiences teaching with feminist judgments. In Part II, the participants detail students' reactions to working with the feminist judgments. In Part III, the contributors articulate their pedagogical goals in using feminist judgments and the intended learning outcomes, in terms of developing students' ability to think critically and hone their advocacy skills. Part IV invites law faculty (and students) to consider how teaching with feminist judgments could be expanded or broadened in the future, including the possibility of cross-border collaborations with students simultaneously undertaking parallel studies in multiple jurisdictions. Part V discusses feminist judgements as a blend of activism, pedagogy, and scholarship. Finally, the conversation concludes by suggesting that more instructors consider teaching with feminist judgments because of their positive impact on students' learning and professional development.

## I. Using Feminist Judgments in the Classroom

### A. *How have you used one or more of the feminist judgments as a teaching tool in a classroom or formal pedagogical setting?*

Elisabeth McDonald

As a New Zealand-based criminal law professor, I have primarily used one of the rewritten judgments, *R v. Wang*, and accompanying commentary from *Aotearoa New Zealand Feminist Judgments*.<sup>23</sup> This decision and the discussion it inspires are

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23. See Lexie Kirkconnell-Kawana & Alarna Sharratt, *Commentary on R v. Wang: Finding a Plausible and Credible Narrative of Self-Defence*, in AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS, *supra* note 2, at 497, 497–509. Compare *R v. Wang* [1990] 2 NZLR 529 (N.Z.) (affirming criminal manslaughter conviction of victim of domestic violence who killed her sleeping husband), with Brenda Midson, *R v. Wang—Judgment*, in AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS, *supra* note 2, at 504 (finding that the jury should have evaluated defendant's state of mind for purposes of determining whether self-defense should be considered in manslaughter



powerful for use in the criminal law course that all New Zealand law students are required to take. In that course, I teach the case law, including *Wang*, and statutory provisions relating to a range of defenses. I have always taught these defenses by critiquing their application with reference to the victims and/or survivors of family violence. The feminist judgment draws on facts from the original case file that the actual Court of Appeal decision omitted, and those details really engage the students. The reason for the engagement is the richness of the facts of the feminist judgment, which provide extensive background and context for the abuse suffered by Mrs. Wang.<sup>24</sup> These were not present in the appeal decision.<sup>25</sup> The feminist judgment highlights how the common law can develop in a way that overlooks, does not recognize, or fails to acknowledge the experiences of those from different communities and life experiences. It opens the students up to the notion that judgments can be criticized and that judges do not necessarily always reach the most just decision.<sup>26</sup>

Gabrielle Appleby and Rosalind Dixon

We have been teaching from our edited collection, *The Critical Judgments Project: Re-reading Monis v. The Queen*,<sup>27</sup> for three years now in Federal Constitutional Law, a compulsory LLB and JD course at the University of New South Wales in Australia. Ours is not formally a ‘feminist judgment’ project, but it has related methodologies and commitments.

In contrast to the plurality of objectives that underpin the feminist judgments projects, *The Critical Judgments Project* was written specifically as a teaching tool.<sup>28</sup> The book contains reimagined critical judgments of a single case, an important one concerning freedom of political communication decided by the High Court of Australia: *Monis v. The Queen*.<sup>29</sup> The critical perspectives

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case).

24. See Midson, *supra* note 23.

25. See *R v. Wang* [1990] 2 NZLR 529 (CA).

26. See Elisabeth McDonald & Paulette Benton-Greig, *Accessing Court Files as a Feminist Endeavor: Reflections on ‘Feminist Judgments of Aotearoa-Te Rino: A Two-Stranded Rope’*, 8 ONATI LEGAL SERIES 1241 (2018).

27. See THE CRITICAL JUDGMENTS PROJECT: RE-READING *Monis v. The Queen* (Gabrielle Appleby & Rosalind Dixon eds., 2016) [hereinafter CRITICAL JUDGMENTS PROJECT].

28. See *id.* at v (introducing law students to various perspectives on a leading case).

29. See *Monis v. The Queen* [2013] 249 CLR 92 (Austl.) (*‘Monis’*).

covered in the book include a number of feminist critiques, but also extend the critical project, including perspectives such as a law and literature, critical race theory, capabilities, political liberalism, restorative justice, preventative justice, deliberative democratic theory, and law and economics approach.<sup>30</sup> Each theory is introduced in the book with canonical readings, supplemented, if necessary, by a short commentary explaining the approach, for students to first understand the key tenets.<sup>31</sup> The book's focus on a single case was also part of its design as a teaching tool. With only one set of factual circumstances and legal principles to grasp, the commentaries encourage students to engage more directly and immediately with the theory presented. Applying different theories to the same case allows students to more easily identify those aspects of commonality and difference across the perspectives.

The case of *Monis* is an ideal vehicle for the book's teaching objective. It engages a foundational constitutional law principle (which Australian students must study in Federal Constitutional Law) that raises, in tension, multiple values of free speech, freedom of religion and the desirability of civility in political discourse.<sup>32</sup> Further, it is the first case that split the Australia High Court along gender lines, bringing to the fore the possible saliency of the identity of the judges.<sup>33</sup>

We have adapted *The Critical Judgments Project* for one class in a twelve- or ten-week teaching term, with an optional assessment for students in the final exam. Midway through the course, after

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30. See CRITICAL JUDGMENTS PROJECT, *supra* note 27 (containing an introductory chapter and fourteen additional chapters, with each additional chapter presenting a critical perspective that differs in some way from the others in the book).

31. See, e.g., Megan Davis, *Intersectional Theory: Where Gender Meets Race, Ethnicity and Violence*, in CRITICAL JUDGMENTS PROJECT, *supra* note 27, at 103–05 (excerpting Kimberlé Crenshaw's canonical work on intersectionality). See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989) ("Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated."); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252 (1991) ("Because women of color experience racism in ways not always the same as those experienced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.").

32. See *Monis* [2013] 249 CLR 92.

33. See *Monis* [2013] 249 CLR 92. (3-3 split decision in which the three male justices found that freedom of political communication made unconstitutional a criminal prohibition against sending offensive material via the postal service and the female justices found no constitutional violation).

studying the ‘races power’ in the Australian Constitution,<sup>34</sup> students are asked to read Chapter 1 of the book<sup>35</sup> and select a critical perspective through which they would like to rewrite a judgment in the races power case of *Kartinyeri v. Commonwealth*.<sup>36</sup> *Kartinyeri* raises highly contested questions around the role of the government in protecting culturally important indigenous sites and the supervisory role of the court in relation to parliamentary choice under the races power.<sup>37</sup>

Having chosen a critical perspective from the introduction, students must then read the chapter in *The Critical Judgments Project* on that perspective, and attempt to rewrite the opening paragraph of one judgment in *Kartinyeri*.<sup>38</sup> Students are then asked to reflect on a number of questions (which are drawn from the book).<sup>39</sup> Students prepare to discuss these in the upcoming class. These questions relate to differences in the style, narrative, and voice of their rewritten judgment, the substantial reasoning and result of their rewritten judgment, as well as reflecting on the value of the rewriting exercise.<sup>40</sup>

As teachers, we prepare for the class by collating the rewritten opening paragraphs received from students and selecting a number of exemplars to start the in-class discussion. We then guide the students through each of the exemplars, asking them to reflect on the tenets of the theoretical approach, and the differences these lead to in style, reasoning, and results. We also try to generate a

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34. *Australian Constitution* s 51 (xxvi) (delineating the ‘races power’ provision allowing the Parliament to make “special laws” for the people of “any race”). See also Rosalind Dixon & George Williams, *Drafting a Replacement for the Races Power in the Australian Constitution*, 25 PUB. L. REV. 83 (2014) (explaining extant constitutional races power and possible alternatives to it).

35. See Gabrielle Appleby & Rosalind Dixon, *Critical Thinking in Constitutional Law and Monis v. The Queen*, in CRITICAL JUDGMENTS PROJECT, *supra* note 27, at 1, (providing background to the case, the legal issues the case raises, the book’s inspiration and organization, and suggestions for how to evaluate each theoretical perspective presented in the different chapters).

36. See *Kartinyeri v. Commonwealth* [1998] 195 CLR 337 (Austl.) (*Hindmarsh Bridge Case*) (detailing the issue in this case, also called the “Hindmarsh Bridge Case,” of whether section 51(xxvi), the races power, allowed the Parliament to enact laws that covered aboriginal peoples).

37. See, e.g., Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous Peoples—Australian Case Studies*, 22 PAC. RIM L. & POL’Y J. 391 (2013) (evaluating protection for spiritual practices of indigenous people under Australian law).

38. See *Hindmarsh Bridge Case* 195 CLR at 337; CRITICAL JUDGMENTS PROJECT, *supra* note 27.

39. Appleby & Dixon, *supra* note 35, at 15 (including such questions as, “Do you think the [rewritten] judgment results in a more ‘just’ decision than those reached by the High Court judges in *Monis*, either in terms of its reasoning or outcome?”).

40. Appleby & Dixon, *supra* note 35.

conversation about whether some or all chosen perspectives are in tension with established legal norms in Australia. We discuss with students the degree to which some modes of reasoning might increase support for the court and its jurisprudence from some sections of the community, while reducing it among others. We also discuss the relative importance of support for the court from political and legal elites versus ordinary citizens or disadvantaged members of the community. Finally, a key part of the exercise is to get students to reflect on the value of exploring different perspectives, from the perspective of understanding the contingency to legal decision-making and judicial choice.

Andrea McArdle

I have used *U.S. Feminist Judgments* in an advanced four-credit lawyering seminar called Writing from a Judicial Perspective, which immerses students in a pending U.S. Supreme Court case on an issue of public law and ultimately asks them to produce an opinion deciding it.<sup>41</sup> My course description begins by asking what we would lose if we no longer had the benefit of a court's written analysis of its reasoning. How would litigants and their advocates gain access to the basis for judicial decision-making? What would be the effects on the development of legal doctrine? Beyond these practical, process-based questions, the description also asks students how the "practice" of judicial writing can foreground social-justice perspectives.

After years of teaching the seminar without the benefit of the feminist judgments, I now offer the rewritten opinion model to encourage reflection specifically on what makes an opinion justice-serving. This is another way of asking, 'What makes an opinion feminist?'<sup>42</sup> In framing, scope, and methodology, an opinion rewritten through a feminist lens can offer a broad canvas for exploring questions of substantive and procedural justice. It can unlock legal and factual narratives that often remain buried within the opinions that casebooks and commentary enshrine as

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41. See U.S. FEMINIST JUDGMENTS, *supra* note 2.

42. The editors of the U.S. Feminist Judgments project specifically took no position on what constitutes a 'feminist' opinion, although they acknowledge their own views and identify common themes and methods in the feminist judgments. See Stanichi et al., *supra* note 8, at 3 ("[W]e provided no guidance to our contributors on what we meant by 'feminism.' . . . 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.").

‘canonical.’ The feminist judgments I have assigned—to date, five or six *U.S. Feminist Judgments* opinions in a semester—are linked doctrinally or thematically to the U.S. Supreme Court case the class is excavating. Students thus see multiple exemplars of what an intentional re-visioning of a judicial opinion might entail. Because there is no formula, the sheer range of feminist approaches encourages students to understand the work of opinion writing not only as a pathway to justice, but also as creative and deeply rewarding.

Sharon Cowan

I have used feminist judgments from the Scottish Feminist Judgments Project in my teaching of an undergraduate law course at the University of Edinburgh called Criminal Law: Harm, Offence and Criminalization.<sup>43</sup> The enrollment is around twenty-five students. The stand-alone session on feminist judging comes right at the end of the two-semester course. The timing is not ideal because students suffer from semester fatigue and pre-exam jitters. In the future, I aim to integrate feminist judging more fully into individual sessions as the course progresses. The benefit of doing it at the end of the course, though, is that the students have already studied a wide range of topics. I can then offer in one session several feminist judgments from across those topics. By showing more than one feminist judgment at a time, it is possible to give more of a sense of the weight of the whole body of feminist judgments and their legacy, so it is still an interesting and worthwhile exercise.

Ross Astoria

*U.S. Feminist Judgments* is one of the texts in my undergraduate course on Law, Politics, and Society at the University of Wisconsin-Parkside.<sup>44</sup> This course is a sustained exercise in normative jurisprudence for which feminism provides the particular normative perspectives. We also use *Feminist Legal Theory: A Primer*<sup>45</sup> and *Invitation to Law & Society*.<sup>46</sup> Further, this course introduces students to the canon of legal sociology, such as

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43. See SCOTTISH FEMINIST JUDGMENTS, *supra* note 2.

44. See U.S. FEMINIST JUDGMENTS, *supra* note 2.

45. See NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* (2d ed. 2016).

46. See KITTY CALAVITA, *INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW* (2d ed. 2016).

Henry Maine's *Ancient Law*,<sup>47</sup> Émile Durkheim's *The Division of Labor in Society*,<sup>48</sup> and works by Karl Marx<sup>49</sup> and Max Weber.<sup>50</sup>

Each of these social theories posit a different role for law in constituting a particular social form, and we use the feminist judgments as 'data points' to illustrate and critique these theoretical perspectives. The feminist rewrites are hence a central aspect of the course.

When reading a feminist judgment in this course, I prompt students with a suite of questions. The questions vary depending upon the material, but the first set revolves around the case's internal legal and moral reasoning, contrasted with the original: What is the doctrinal foundation of the judgement? What is the moral reasoning of the judgment? How do these differ from the original decision? Does the holding expand liberty and equality for women (and others)? Which opinion would you sign on to and why? With the second grouping of questions, we then use the feminist judgment to test one or more of the sociological perspectives. Students deliberate on these questions in small groups and then report back to the whole class. The questions and conversations allow students to identify and evaluate how different legal holdings impact and reflect the organization of society.

For instance, Maine's theory is that the social form has "progressed" (his term) from one based upon status to one based upon contract.<sup>51</sup> One of his central examples of this progression is marriage.<sup>52</sup> The class reads the feminist rewrites of *Stanley*,<sup>53</sup>

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47. See HENRY JAMES SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION TO THE HISTORY OF EARLY SOCIETY* (Pinnacle Press 2017) (1917).

48. See ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., Digireads 2013) (1893).

49. *E.g.*, KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (1845), reprinted in *CLASSICAL SOCIOLOGICAL THEORY* 142 (Craig Calhoun et al. eds., Wiley-Blackwell 3d ed. 2012).

50. *E.g.*, Max Weber, *The Protestant Sects and the Spirit of Capitalism* (1905), reprinted in *ESSAYS IN ECONOMIC SOCIOLOGY* 168 (Richard Swedberg ed. 1999).

51. See, *e.g.*, MAINE, *supra* note 47, at 101 ("[T]he movement of the progressive societies has hitherto been a movement from *Status to Contract*.") (emphasis in the original).

52. *Id.* at 146–90.

53. Compare *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding unconstitutional a state statute that treated an unmarried mother, but not an unmarried father, as a "parent," and so the state must afford both an unmarried woman and an unmarried man a hearing on parental fitness before taking custody of either's children), with Karen Syma Czpanskiy, *Rewritten Opinion in Stanley v. Illinois*, in *U.S. FEMINIST JUDGMENTS*, *supra* note 2, at 142–45 (reaching same result in a concurring opinion, but reasoning that only parents who can show that they have willingly assumed certain parental responsibilities are entitled to a hearing on parental fitness before the state can take custody of their child).

*Frontiero*,<sup>54</sup> and *Loving*.<sup>55</sup> After comparing their doctrinal foundations and moral reasoning to the originals, we ask whether these cases confirm or conflict with Maine's theory. Students identify *Loving*<sup>56</sup> as an instance of society's moving from statuses assigned by White patriarchy to ones configured around contracts (reciprocal agreements).

The feminist judgments also play a central role in the final project. Students either compare and contrast a feminist rewrite with the original or use the cases (both rewrites and originals) as examples in support of either a social or philosophical theory. With respect to the compare and contrast assignment, almost all students in the course I taught during the last academic year found the feminist rewrites to be superior. Students disagreed somewhat more, however, as to whether this was because they were feminist per se, because the authors were better writers, or because the authors were released somewhat from various institutional constraints, such as the compromises sometimes required to form a majority. Many students, for instance, preferred the moral clarity of the rewrite of *Griswold* (no "penumbras") but thought its explicitness would disqualify it from securing a majority.<sup>57</sup>

Kathy Stanchi

I have used *U.S. Feminist Judgments*<sup>58</sup> in a stand-alone seminar on judicial opinion writing for social justice at Temple

54. Compare *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding unconstitutional under a strict scrutiny analysis a military benefit program that automatically extended spousal benefits to certain married male military personnel, but not to married female personnel, absent a showing that the husband was financially dependent on the military spouse), with Dara Purvis, *Rewritten Opinion in Frontiero v. Richardson*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 173, 175 (reaching same conclusion but "holding that classifications based on sex must be assessed under strictest judicial scrutiny").

55. Compare *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring unconstitutional a state-law prohibition on interracial marriage), with Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 119–36 (reaching same result but using different reasoning that emphasizes historical role of White supremacy and patriarchy in shaping marriage laws).

<sup>56</sup>*Loving v. Virginia*, 388 U.S. 1 (1967).

57. Compare *Griswold v. Connecticut*, 81 U.S. 479 (1965) (declaring unconstitutional a state-law prohibition on contraception by married couples on the grounds that a right to privacy could be found within the "penumbra" of the various provisions of the Bill of Rights), with Laura Rosenbury, *Rewritten Opinion in Griswold v. Connecticut*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 103–13 (reaching same result but using different reasoning that emphasizes sexual liberty and equality).

58. U.S. FEMINIST JUDGMENTS, *supra* note 2.

University Beasley School of Law. I have also used some of the feminist judgments in independent study and guided research situations to help students who were writing on issues of social justice. For example, I assigned Leslie Griffin's feminist rewrite of *Harris v. MacRae*<sup>59</sup> to a student who was writing a law review note on the fetal burial laws some states have passed.<sup>60</sup>

Teri McMurtry-Chubb

I have used the *U.S. Feminist Judgments*<sup>61</sup> in my Social Justice Lawyering course at Mercer University School of Law. Throughout the course, students consider how lawyers and jurists use judicial narrative and interpretation as tools to support or oppose existing power structures. Key components of their study are motion briefs and appellate briefs drafted in foundational social justice litigation. We dissect each brief through genre analysis, which serves as our theoretical framework.<sup>62</sup> Genre analysis, the analysis of a particular type of writing in a discipline, provides us entrée into how each part of the brief functions to advance each

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59. Compare *Harris v. MacRae*, 448 U.S. 297 (1980) (upholding a ban on the use of federal funding to provide abortions to Medicaid recipients), with Leslie C. Griffin, *Rewritten Opinion in Harris v. MacRae*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 247–56 (striking down a ban on the use of federal funding to provide abortions to Medicaid recipients as violative of the U.S. Constitution's Fifth Amendment Equal Protection Clause and Due Process Clause as well as the First Amendment's Establishment Clause).

60. See, e.g., Manny Fernandez, *Texas Fetal Burial Law Struck Down in Another Blow to Abortion Restrictions*, N.Y. TIMES (Sept. 5, 2018), <https://nyti.ms/2NfLIft> (reporting on Texas federal court's holding unconstitutional a law requiring abortion providers and health care facility to provide burial or cremation of fetal tissue).

61. U.S. FEMINIST JUDGMENTS, *supra* note 2.

62. See, e.g., Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text, and Context*, 49 J. LEGAL EDUC. 156, 167 n.81 (1999) (arguing that instruction in conventions of legal writing is not the only domain of legal writing and rhetoric teachers). On the function of genres, see Bret Rappaport, *A Lawyer's Hidden Persuader: Genre Bias and How it Shapes Legal Texts by Constraining Writers' Choices and Influencing Readers' Perceptions*, 22 J.L. & POL'Y 197, 198 (explaining that genres are "a cognitive process of classification that channel thinking and thereby influence individuals' communicative actions. Genres are also central to human communication, understanding, and persuasion."); see also Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 412 (recognizing importance of understanding cognitive function, including propensity to categorize items by genre, because "[t]he art of persuasion requires empathy as well as a deep understanding of human psychology and the complex emotional and intellectual processes that result in perception and attitude change"); see also Karen J. Sneddon, *In the Name of God, Amen: Language and Last Wills and Testaments*, 29 QUINNIAC L. REV. 665, 674 (2011) (asserting that genre analysis "is applicable to legal documents" and applying that methodology to last wills and testaments).



party's theory of the case, and into how the U.S. Supreme Court adopts or rejects a party's framing and reasoning. Additionally, we contextualize each social justice case culturally and theoretically.

One of the cases we study is *Loving v. Virginia*.<sup>63</sup> Prior to our discussion of *Loving*, I ask the students to read each party's brief, the original U.S. Supreme Court opinion, and the rewritten opinion.<sup>64</sup> To open the class discussion about *Loving*, I provide students with archival documents contemporaneous to the case to further immerse them in the world as it was when the case was litigated. We then turn to a discussion of how each of the litigators chose to frame the arguments in their briefs, the authorities they chose to use in crafting the analytical frameworks in their briefs, possible reasons for their choices, and the scope of materials they incorporated. Our next endeavor is to evaluate the U.S. Supreme Court decision along the same axes: how the majority chose to frame the issues presented by the parties, the authority it chose in crafting the majority opinion, possible reasons for its choices, and the scope of materials it incorporated. The feminist judgment for *Loving* serves as a point to problematize student thinking about the realm of what is possible in judicial narrative and interpretation.<sup>65</sup>

Susan Appleton

I have used *U.S. Feminist Judgments*<sup>66</sup> in a seminar that I entitled "Feminist Theories, Feminist Judgments." At my home institution, Washington University School of Law, every upper-level student must take at least one seminar. Seminars require substantial student writing with feedback from the instructor, and class meetings typically run for two hours per week, although students earn three credits, with the extra credit merited because of time and effort devoted to writing. This particular seminar has multiple purposes: to acquaint students with feminist legal theory, to illuminate how to discover and apply such theory in the rewritten opinions, and to emphasize the students' own writing experiences in drafting opinions and commentary—following the pattern used in the book. Weekly readings for the seminar come principally from

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63. *Loving v. Virginia*, 388 U.S. 1 (1967)..

64. McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, *supra* note 55, 119–36.

65. *See id.*

66. U.S. FEMINIST JUDGMENTS, *supra* note 2.

two sources: Martha Chamallas's treatise, *Introduction to Feminist Legal Theory*,<sup>67</sup> and *U.S. Feminist Judgments*.<sup>68</sup>

Key elements of the seminar include the following: a few initial sessions using some introductory materials from both books along with readings designed to highlight the differences between writing a scholarly paper or article and a judicial opinion;<sup>69</sup> thereafter, weekly reading and class discussion of one to three rewritten opinions along with relevant pages from the Chamallas book;<sup>70</sup> a guest appearance by the author of one of the rewritten opinions in *U.S. Feminist Judgments* to discuss the experience, including techniques and challenges; and writing requirements, specifically, a first draft and final version of both a feminist judgment for a case that the student selects with my approval and a comment on a classmate's feminist judgment.

For purposes of the writing assignments, I pair students based on the subject matter of the cases they chose to rewrite. For example, in a recent semester I matched together two students who chose cases on domestic violence and two students who chose employment law cases. Such matching allows students to stay in one substantive area for both their feminist judgment and their commentary. I encourage students to be ambitious and not necessarily limit themselves to cases in which gender might be an explicit issue—and some of the most fascinating projects have featured cases on topics such as campaign finance law, eminent domain, and public employee unions.<sup>71</sup>

I taught this seminar for three successive fall semesters: Fall 2016, Fall 2017, and Fall 2018. Beginning in Fall 2018, I supplemented the reading with a few excerpts from a new book,

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67. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (3d ed. 2013).

68. *U.S. FEMINIST JUDGMENTS*, *supra* note 2.

69. To contrast judicial opinions, real and rewritten, with scholarly papers, for the second or third class meeting of the semester I assign the original, unedited (but relatively short) opinions in two cases, *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), along with Laura Rosenbury's feminist rewrite of *Griswold*, *supra* note 57, and a scholarly examination of *Eisenstadt* that I published. Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 *YALE J.L. & FEMINISM* 1 (2016). These materials, which include the only 'real opinions' I assign, invite conversation about both the freedom and constraints of the different genres. In addition, Laura Rosenbury's rewritten *Griswold* majority opinion and my *Eisenstadt* article exhibit provocative symmetries, in part growing out of the conversations she and I had while working on these projects.

70. CHAMALLAS, *supra* note 67.

71. *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (affirming decision below by an equally divided court); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

*Research Handbook on Feminist Jurisprudence*.<sup>72</sup> A guest speaker, although still an option for bringing in new perspectives, has become less essential for me now that I have my own rewriting experience to recount, based on my opinion in *Dandridge v. Williams*, which I prepared for the forthcoming volume in the U.S. Feminist Judgments Series, *U.S. Feminist Judgments: Rewritten Family Law Cases*.<sup>73</sup>

Separately from the seminar, in a different course, “Regulating Sex: Historical and Cultural Encounters” (which also emphasizes feminist themes), I have assigned my feminist judgment in *Dandridge v. Williams*.<sup>74</sup> Beyond these courses, in several faculty presentations to alumni of my law school (which recently celebrated the 150th anniversary of its admission of women),<sup>75</sup> I have talked about the various feminist judgments projects, my use of the feminist judgments in teaching, and my contribution to the Family Law volume in the U.S. Feminist Judgments Series.<sup>76</sup>

Troy Lavers

My co-editor Loveday Hodson and I co-teach on an LLM module at the University of Leicester called Feminist Perspectives on International Law. We have been using a feminist rewritten judgment from *Feminist Judgments in International Law*.<sup>77</sup> The judgment is *Bozkurt*.<sup>78</sup> It is a rewritten version of the famous *Lotus* case, which gets its name from the Turkish ship involved in a

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72. RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Robin West & Cynthia Grant Bowman eds., 2019).

73. Compare *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding constitutionality of mandatory cap on certain federal benefits for families with dependent children, without regard to family size), with Susan Frelich Appleton, *Rewritten Opinion in Dandridge v. Williams*, in FEMINIST JUDGMENTS: REWRITTEN FAMILY LAW OPINIONS (Rachel Rebouché ed., forthcoming 2020) (finding cap to be unconstitutional).

74. See Appleton, *Rewritten Opinion in Dandridge v. Williams*, *supra* note 73.

75. Karen L. Tokarz, *A Tribute to the First Women Law Students*, 68 WASH. U. J.L. & POL'Y 1 (1990) (recounting the stories of Phoebe Couzins and Lemma Barkeloo, the school's first female law students when they began their studies at Washington University in 1869); see, e.g., RALPH E. MORROW, WASHINGTON UNIVERSITY IN ST. LOUIS: A HISTORY 57 (Tim Fox, Duane Sneddeker, and Herb Weitman eds., 1996) (“[T]he law school was the first baccalaureate division of the University to admit women and perhaps the first of its kind in the country to do so.”).

76. FEMINIST JUDGMENTS: REWRITTEN FAMILY LAW OPINIONS, *supra* note 73.

77. FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2.

78. Case C-434/93, *Bozkurt v. Staatsecretaris Van Justitie*, 1995 E.C.R. I-1475, I-1492 (rejecting Turkish national's right to stay in a European Community state, even though worker permanently incapacitated while working for Dutch employer).

collision at sea.<sup>79</sup> The authors of this judgment are Christine Chinkin, Gina Heathcote, Emily Jones and Henry Jones.<sup>80</sup> We ask our students to read both judgments and then compare and contrast. We invite students not only to identify weaknesses and strengths but also to question whether they feel *Bozkurt*, the feminist rewritten judgment, is persuasive and valid. In that sense, they are judging the rewritten judgment: Is it believable? We chose this judgment because it is well known by students of international law and it touches upon foundational issues such as sovereignty and the power in international relations.<sup>81</sup> The feminist rewritten judgment offers a different perspective on the dispute and rejects the Western view of state sovereignty.<sup>82</sup>

Pam Wilkins

I have used *U.S. Feminist Judgments*<sup>83</sup> in a Feminist Legal Theory course taught during a two-week May intersession at the University of Detroit Mercy School of Law. We read the rewritten opinions for the various cases about birth control and abortion (*Griswold v. Connecticut*,<sup>84</sup> *Roe v. Wade*,<sup>85</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>86</sup>). We also read the feminist

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79. The Case of the S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (allowing Turkey to exercise criminal jurisdiction over officers of French ship, the S.S. *Lotus*, that collided with a Turkish ship, the *Boz-Kourt*, but declining to address whether Turkey had the right to assert passive personal jurisdiction over the French officers, finding jurisdiction on other grounds).

80. See Christine Chinkin et al., *Bozkurt Case, aka the Lotus Case (France v. Turkey): Ships that Go Bump in the Night*, in FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2.

81. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1950 n.48 (2002) (referring to the “famous S.S. Lotus case”).

82. See Chinkin et al., *supra* note 80.

83. U.S. FEMINIST JUDGMENTS, *supra* note 2.

84. Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding unconstitutional a state law prohibiting contraceptive use by married individuals, on the grounds of marital privacy), with Laura A. Rosenbury, *Rewritten Opinion in Griswold v. Connecticut*, *supra* note 57, at 103–13 (reaching same result but using reasoning grounded in sexual liberty and equality).

85. Compare *Roe v. Wade*, 410 U.S. 113 (1973) (declaring unconstitutional a state criminal ban on abortion as violation of right to privacy under Due Process Clause of Fourteenth Amendment, and establishing a trimester framework that permits increasing restrictions on a woman’s right to choose an abortion with each trimester), with Kimberly M. Mutcherson, *Rewritten Opinion in Roe v. Wade*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 151–67 (reaching same result but grounding opinion in both Due Process Clause and Equal Protection Clauses of Fourteenth Amendment and rejecting both trimester framework and any restrictions on woman’s right to choose an abortion).

86. Compare *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505

judgment in *Lawrence v. Texas*.<sup>87</sup> Students are invited to respond to the opinions in a daily journal entry, and we then discuss the opinions in class. Given that most students in my Feminist Legal Theory class have just finished their first year and that Constitutional Law is a required second-year course at my institution, most students actually read the feminist judgments for these cases *before* they read the actual U.S. Supreme Court opinions. That makes for very interesting discussion. Several students have told me that they later reread the feminist judgment opinions on their own when they covered the cases in their second-year Constitutional Law course.

Vanessa Munro

I have used the judgment I co-wrote in the English/Welsh project, *R v. Dhaliwal*,<sup>88</sup> in two different types of classes: first, in a session on feminist legal methods and theory as part of an optional undergraduate module on Contemporary Legal Theory at Nottingham University; and second, in seminars in our compulsory undergraduate module on Criminal Law at the University of Warwick. (As many know, law is mostly an undergraduate degree in the U.K.) In both instances, students read the original and feminist judgments side by side.

In the first instance, the legal theory course, the aim was to question the universality and inevitability of the conclusions in the original case, how authorities were interpreted and applied, what constitutes relevant information and appropriate expertise, and the extent to which the limits of judicial (as opposed to legislative) competence is relied upon strategically. We then explored alternative routes through the process using a feminist approach.

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U.S. 833 (1992) (upholding state restrictions on abortion that required, among other things, a mandatory waiting period and parental notification for minors seeking abortions), *with* Lisa R. Pruitt, *Rewritten Opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 365–83 (declaring unconstitutional various restrictions as unreasonable restrictions on woman’s interests in liberty and equal protection).

87. *Compare* *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state anti-sodomy law on privacy grounds), *with* Ruthann Robson, *Rewritten Opinion in Lawrence v. Texas*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 488–503 (reaching same result but on grounds of due process and equal protection rights to sexual autonomy and sexual equality and apologizing for one of the Court’s prior anti-LGBT decisions).

88. *See* Vanessa Munro & Sangeeta Shah, *Rewritten Opinion in R v. Dhaliwal*, in ENGLISH/WELSH FEMINIST JUDGMENTS, *supra* note 2, at 261–72 (concerning liability of husband for suicide of wife).

We discussed challenges in securing a ‘better’ outcome in an individual case without opening floodgates to potentially less desirable outcomes in other contexts.<sup>89</sup>

In the second instance, the Criminal Law course, the focus of the seminar was liability for manslaughter, causation and constructive liability. The focus was more on the substance of the arguments put forward in the feminist judgments, rather than the methods, and what those illuminated about the broader approach to judging.

Most recently, as a result of talking with so many people around Scotland about the Scottish Feminist Judgments Project, I have some more general teaching experience regarding the overall project and its aims. We have used the artwork and poetry that accompany the project in particular as a route for people to become interested and involved in the project.<sup>90</sup> In addition, in Fall 2019, we undertook a “roadshow” of our project to Scottish universities to run bespoke sessions on feminist judging with undergraduate students.

*B. Have you had any reactions from colleagues not involved with Feminist Judgments projects who are curious about how you are using the work in the classroom?*

Ross Astoria

I was recently discussing one of my department’s courses with the Women’s, Gender, and Sexuality Studies Director and we realized that my new course should probably be cross-listed. Feminist judgments might also be of interest to other faculty in the Women’s, Gender and Sexuality Studies program.

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89. See *R v. Dhaliwal* [2006] All ER 1139 (EWCA Crim) (Eng.) (deciding whether an abusive husband could be liable for manslaughter when his wife committed suicide after a prolonged period of psychological abuse and at a time that pre-dated coercive control legislation in England and Wales).

90. See, e.g., Artists, SCOTTISH FEMINIST JUDGMENTS PROJECT, <https://www.sfjp.law.ed.ac.uk/artists> (“This input [of artistic collaborators] will allow us to explore how non textual and non academic images and interpretations of legal processes and decisions can help us understand the power and reach of law, as well as its ethical impact. . . . [T]he artistic outputs . . . engage a broader and more diverse audience than we could by producing textual resources alone.”).

Gabrielle Appleby and Rosalind Dixon

We have now shared our experience teaching with *The Critical Judgments Project*<sup>91</sup> with our group of teachers in Federal Constitutional Law, as well as our peers at the University of New South Wales, and with other teachers in Australia and across the world. We have had a very positive response from all, including interest in developing a similar teaching tool in other jurisdictions. We have had to work closely with our teachers to support them through the exercise, including providing them with detailed instructions, and inviting them to sit in on our classes. While initially skeptical or nervous, their final responses having taught the courses have always reinforced to us the benefit of the exercise. For instance, Charlotte Steer, one colleague teaching with the book, wrote to us after the class:

I feel like we jumped to a whole different level of engagement with [Federal Constitutional Law]—it made me feel a real sense of connection with the students and that it truly harnessed their enormous brainpower—which is not so obvious when they are struggling to master the content of each class.

. . . .

I also think that deconstructing a judgment so they can write one of their own . . . is such a marvellous way to introduce them to the analytical skills we need as practicing lawyers grappling with the case law.<sup>92</sup>

Bridget Crawford

At my home institution, Pace Law School (in the United States), I have had several colleagues say of a particular feminist judgment, “Oh, that would be interesting to have students read for my class,” but I am not aware of any of my immediate institutional colleagues who have used a feminist judgment in a traditional first-year class. I attribute that to the general pressures of doctrinal coverage in the first year. Although, I do think that teaching with a feminist judgment might be a good way of exposing students to different legal philosophies. Gabrielle Appleby and Ros Dixon do that with multiple perspectives in the *Critical Judgments Project*.<sup>93</sup>

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91. CRITICAL JUDGMENTS PROJECT, *supra* note 27.

92. E-mail from Charlotte Steer, Teaching Fellow, Faculty of Law, University of New South Wales Law, to Gabrielle Appleby, Professor, University of New South Wales Law (Apr. 17, 2018, 16:48 AEST) (on file with the recipient).

93. CRITICAL JUDGMENTS PROJECT, *supra* note 27.

By showing that one case can be interpreted through multiple theoretical lenses, *The Critical Judgments Project* shows plainly how theory and philosophy matter, and that there is no one ‘right’ way to approach a case.

## II. Student Responses to Feminist Judgments

A. *How have students responded to reading a feminist judgment for the first time? Describe any favorable reactions and/or challenges students have had or faced.*

Gabrielle Appleby and Rosalind Dixon

The response we have had from students to the *Critical Judgments Project* exercise in Federal Constitutional Law has been overwhelmingly positive, although mixed across a cohort of up to 450 students in a compulsory course. Some students find the exercise extremely challenging, as it is often the first time they are asked to take such an overtly critical engagement with the law. For instance, Trent Ford, one of our students, was open about his initial skepticism to “the idea of a ‘critical judgment,’” that it was “somehow breaching the judicial method, or was undignified, for a judge to explicitly engage with the sort of references I would use in my essays.”<sup>94</sup> However, having read through the book’s Capabilities Approach chapter,<sup>95</sup> he said, “I realised that the Capabilities were a useful way of articulating *why* I already felt that the complainants deserved protection and that their needs outweighed Monis’ freedom of expression.”<sup>96</sup> He would eventually come to see critical judgment writing as “a very useful tool,”<sup>97</sup> with the potential for “[improving] the judicial method, by allowing broader consideration of society and the impacts that the decision could have.”<sup>98</sup> Critical judgment writing also can “upend the orthodox judicial method,” or

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94. E-mail from Trent Ford to Gabrielle Appleby and Rosalind Dixon, Professors, University of New South Wales Law (Apr. 26, 2019, 1:49AM AEST) (on file with the recipient).

95. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 69–70 (2006) (describing the “capabilities approach” as “the philosophical underpinnings for an account of core human entitlements that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.”); see Rosalind Dixon, *A Capabilities Approach*, in *CRITICAL JUDGMENTS PROJECT*, *supra* note 27, at 135–49.

96. E-mail from Trent Ford to Gabrielle Appleby and Rosalind Dixon, *supra* note 94.

97. *Id.*

98. *Id.*



simply serve as one of many tentative considerations to be had when a legalist method “runs out.”<sup>99</sup> Thinking of critical judgments in this way “can make incremental steps to include critical dialogue in real judgments seem less of an overreach.”<sup>100</sup>

Other students found the exercise liberating from the start, having found the strictures of the doctrinal method challenging, but previously not lacking the tools for understanding these challenges, or to deconstruct and reconstruct it. For instance, one of our students, Eloise Kneebone, said:

I was really enthusiastic about the concept. It was the first time in any of my law classes that feminist theory had not been an ‘other’ theory quietly addressed at the end of a theories class, as only a critique, and instead put front and centre, as a theoretical framework that was used to build a judgment and show the potential of feminism to *shape* the law.<sup>101</sup>

Another student, Noah Bedford, expressed genuine excitement about the exercise:

I believe this excitement was in response to a harsh reality that I had never been afforded opportunities to develop my legal education through understandings of myself as an Indigenous person. That is, understandings of my identity were to date seemingly irrelevant to the overwhelming focus of my degree—the application of ‘objective’ legal doctrine. Gebler’s *[sic]* judgment encouraged me to contemplate how I could use my knowledge and experience as an Indigenous legal scholar to tear away this veneer of legal objectivity, one that has so often served to sanitise the laws *[sic]* violent operation on my people. From here, I could reimagine a new world of Indigenous law reform.<sup>102</sup>

Overwhelmingly, we have found that all students across the cohort have engaged with the exercise with an impressive level of commitment (this might be related to the fact that we include participation in the exercise in our overall class participation mark,

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99. *Id.*

100. *Id.*

101. E-mail from Eloise Kneebone to Gabrielle Appleby and Rosalind Dixon, Professors, University of New South Wales Law (Apr. 23, 2019, 8:24PM AEST) (on file with the recipients).

102. E-mail from Noah Bedford to Gabrielle Appleby, Professor, University of New South Wales Law (Apr. 17, 2019, 2:33AM AEST) (on file with the recipient). “Gebler’s judgment” refers to Chapter 6 in the Critical Judgments Project. See Katharine Gelber, *Critical Race Theory and the Constitutionality of Hate Speech Regulation*, in CRITICAL JUDGMENTS PROJECT, *supra* note 27, at 88–102.

and there is an optional exam question related to the exercise). This level of commitment is demonstrated by Bedford, who indicated that he approached the class with some concern, but that “my peers handled some areas of scholarship sensitively.”<sup>103</sup> He also observed that the critical reflections of other students

provided fascinating insights into how the lived experiences and ideological positions of my peers interacted with their interpretations of the law. At the end of the sharing session, I was overwhelmed with the sense of admiration I had for my classmates as well the hope I had for future of the legal profession.<sup>104</sup>

Sharon Cowan

I give my University of Edinburgh students three feminist judgments to read alongside the original cases. The cases all deal with topics we previously discuss in the course: *Ruxton v. Lang*, a necessity defense case involving domestic violence;<sup>105</sup> *McKearney v. HMA*, a rape case;<sup>106</sup> and *Drury v. HMA*, a murder case involving a man’s claim of provocation by sexual infidelity on the part of his ex-partner.<sup>107</sup> I ask the students to think about what a feminist legal method might do to change the reasoning or outcome of the case, what other sorts of feminist goals we might have in re-judging cases (such as accessibility of the judgment, and telling the untold stories) and what makes a judgment feminist. Some of the students have previously taken courses on gender but many have not. It is exciting to see how they respond to reading these original and rewritten cases side by side—particularly the case of *Drury*,<sup>108</sup> since the law on provocation by sexual infidelity in Scotland is (incredibly) still in place.

In teaching, I am also able to use other materials—namely, artistic work—to talk about the importance of feminist judgments projects. What makes the Scottish Feminist Judgments Project different from others thus far is its art strand.<sup>109</sup> We engaged eight Scottish artists to respond to individual cases, or the idea of a

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103. E-mail from Noah Bedford to Gabrielle Appleby, *supra* note 102.

104. *Id.*

105. *Ruxton v. Lang* (1998) SCCR 1 (Scot.).

106. *McKearney v. HMA* (2004) SCCR 251 (Scot.).

107. *Drury v. HMA* (2001) SLT 1013 (Scot.).

108. *Id.*

109. *But see* Julie McCandless, Máiréad Enright & Aoife O’Donohue, *Introduction: Troubling Judgment*, in *NORTHERN/IRISH FEMINIST JUDGMENTS*, *supra* note 2, at 18 (“Of particular import to this project was the engagement of poets and visual and performance artists.”).

feminist judgments project more generally, in their own medium.<sup>110</sup> This has led to wonderful creative work including poetry, photography, illustrations, a choral work, a filmed theatre piece, textile sculptures, and a short story.<sup>111</sup> I show the class some of this work to further highlight the difference that perspective makes, and to have a different set of tools to engage them in conversation about empathy, ethics, and equality. Watching the students understand the difference that asking questions about perspective can make is an incredibly satisfying teaching moment!

Troy Lavers

Generally Leicester students' reactions have been positive to the comparison of the two judgments and they have commented favorably on the *Bozkurt* judgment of the dispute.<sup>112</sup> Specifically students really enjoy the judgment's discussion on the gendered nature of the state and of western state sovereignty. Students always comment on the renaming of the case and the newly founded renamed *Bozhurt* principle putting emphasis on state cooperation in the international system as opposed to state consent.<sup>113</sup>

They very much enjoy the re-imagining aspect of the case.

However, recently, one of our groups—which was very small in number—was brutally honest and stated that all participants found the judgments to be tedious reading and sometimes difficult to wade through, preferring the use of more plain-speaking articles that highlighted a point or argument to the use of a judgment. As I mentioned, this opinion came from a small number of students, but since these were law students, it was interesting how adverse some of them were to judgments in general.

Teri McMurtry-Chubb

The feminist judgment for the *Loving* opinion<sup>114</sup> takes my Mercer students by surprise, because the original U.S. Supreme Court opinion 'got it right' by eliminating barriers to interracial

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110. See Artists, SCOTTISH FEMINIST JUDGMENTS PROJECT, *supra* note 90 (describing role of artists in Scottish Feminist Judgments Project).

111. *Id.*

112. See generally Chinkin, *supra* note 80.

113. *Id.*

114. Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 119–36.

marriage.<sup>115</sup> Prior to reading the rewritten opinion, students see no need for it. They are unprepared for the depth of the feminist judgment and how it uncovers layers of White supremacy, patriarchy, and capitalism not addressed by the Court.<sup>116</sup>

The rewritten opinion reframes the issue in the *Loving* opinion as: “Do laws governing marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution when they are based on gender classifications that serve as a conduit for preferential racial benefits?”<sup>117</sup> My rewritten opinion in *Loving* responds in the affirmative, stating that “such classifications perpetuate invidious racial discrimination based on [W]hite patriarchal privilege.”<sup>118</sup> Consistently students react to the reframed issue and respond with incredulity, and often explain that their Constitutional Law course has not challenged them to think about structural, systemic barriers to legal equality. As we delve deeper into the rewritten opinion, students express anger and sadness at not being able to have open discussions in their required law school courses about White supremacy, patriarchy, and capitalism as they relate to judicial reasoning and interpretation. Most importantly, students in the class see their experiences as members of marginalized groups as relevant to resolving heady constitutional issues. They see themselves and their possibilities in the feminist judgment.

#### Ross Astoria

In my class at the University of Wisconsin, undergraduate students’ responses to the feminist judgments have been largely positive. Some students in the Law, Politics, and Society course are majoring in the law concentration, but others are philosophers, sociologists, or general-credit seeking students who have little or no experience with the law. The law concentration students have read many of the original opinions, and they largely find the rewrites to be more doctrinally coherent, to be based upon clearer moral reasoning, and to have better prose than the originals.

The other students have little experience with legal writing or legal institutions, but the feminist rewrites seem to be a fairly gentle introduction. The feminist rewrites’ less convoluted legal

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115. See *Loving v. Virginia*, 388 U.S. 1 (1967).

116. See Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 119–36.

117. *Id.* at 122.

118. *Id.* at 122 (alteration added).

reasoning and more concise connections between doctrine and holding, make it easier for students to follow. Some of this ease is because the students find the feminist moral foundation more intuitive than the moral foundation of the original. A good portion is because the rewrites can avoid some of the complexity and compromise that arise in forming a majority coalition of judges.<sup>119</sup> In this respect, the feminist rewrites are an excellent introduction to legal reasoning. The commentary to each feminist rewrite (which includes a summary of the original) is absolutely critical to this group of undergraduate students.

The students at my school hold fairly diverse political beliefs, and the course was not advertised as one in feminist jurisprudence, so I was a little worried about the reaction to the course's 'feminist' focus. However, the plurality of feminist perspectives reflected in the feminist judgments opens a non-dogmatic pedagogical space that can accommodate such ideological diversity. Feminism turns out to be an excellent theme for focusing our extended exercise in normative jurisprudence.

Elisabeth McDonald

It is hard to get a sense of reaction in a class of over 200 to the requirement that they read an extract from a book that has 'feminist' in its title. I am sure that not all the students do read the assigned judgment and commentary—but there are enough that do, so that the discussion in class of the new information from the readings piques the interest of others. Certainly, I see many shiny, enlivened faces from young women who, after the classes, start to get a sense of place.

Although a rewritten judgment is clearly a piece of feminist scholarship, I tend to emphasize that any feminist judgment is also an exercise in being aware and alive to the possibility of silencing of the Other that can occur within the criminal justice system, not only for women. A further significant aspect of the *Wang* case is that the defendant was an Asian immigrant woman, who not only struggled with the language and culture of her new home, but also with knowing who would actually offer her help and a real alternative to the violence.<sup>120</sup> It was also a case that unfolded in a

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119. The editors acknowledge this factor in the introduction to the *U.S. Feminist Judgments*. See Stanchi et al., *Introduction*, *supra* note 8, at 9 ("A major practical difference between this project and real judging is that our authors were not constrained by the necessity of persuading other justices.").

120. See *R v. Wang* [1990] 2 NZLR 529 (CA) (N.Z.).

suburb of Christchurch, New Zealand, where in March, 2019, there was a shooting at two local mosques.<sup>121</sup> The isolation that Wang Xiao Jing undoubtedly experienced we can but hope is not repeated as we re-evaluate our relationships with our neighbors and fellow citizens.

Susan Appleton

In my seminar at Washington University in St. Louis, the students and I undertake a critical analysis of each of the rewritten opinions that I assign. We discuss what impressed us, what shortcomings we discovered, and what we might have done differently. We also speculate about what might have prompted the authors to write a majority opinion, a concurring opinion, or a dissenting opinion. We consider the advantages and disadvantages of each of these options.

Vanessa Munro

On the whole, students have really embraced the feminist judgments. They have described the judgments as empowering, challenging and engaging. Even those who have been more reluctant, and have pointed to the ‘jumps in logic’ in the feminist rewrite (as the students saw them), when pushed to do so could reflect on, and begin to identify, what might also be seen to be jumps in logic in the original judgment. I think the ways in which stories are presented and packaged differently in many feminist judgments have made them particularly powerful teaching tools, even aside from the issues around legal framing and interpretation.

*B. How do the students respond to the idea of a ‘feminist judgment’—whether the ‘feminist’ part, the ‘judgment’ part, or the entire concept?*

Gabrielle Appleby and Rosalind Dixon

In Australia, we had some skepticism from students about the idea of a critical rewriting of a case, either because, as Trent Ford explained, it was “somehow breaching the judicial method,”<sup>122</sup> or

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121. See, e.g., Charlotte Graham-McLay, *Death Toll in New Zealand Mosque Shootings Rises to 51*, N.Y. TIMES (May 2, 2019), <https://nyti.ms/2IYHLK7> (describing aftermath of attacks on New Zealand mosques).

122. E-mail from Trent Ford to Gabrielle Appleby and Rosalind Dixon, *supra* note

because, as Noah Bedford explained, the rewriting must still “remain[] within the traditional strictures and structures of the law.”<sup>123</sup> This echoes the comments of two of the authors of the queer/post-structural feminist perspective in *The Critical Judgments Project*, Anne MacDuff and Wayne Morgan, that “it is not really possible to write a ‘queer’ or ‘poststructural’ judgment. It would either not be ‘queer’, or it would not be a ‘judgment’. It is, however, possible to write a judgment informed by queer theory and poststructural feminism.”<sup>124</sup>

For other students, the writing of the critical judgment was exactly what gave the exercise its value. For instance, student Amelia Loughland reflected on reading her rewritten judgment taking an intersectional lens. She said that this method

was the most enriching way to unsettle the otherwise positivist conviction of my legal education that there is a ‘correct’ answer to legal questions. In this way, the exercise helped reinforce just how deep the (masculine) norm of detached impartiality as the standard for judicial excellence had been ingrained in my reading of law. While I had already appreciated this idea from other critical theory reading, I think the power of the critical judgment projects is its explicit co-opting of the judgment format, which forces you to become cognisant of its difference from what you would expect from a typical judgment.<sup>125</sup>

Bridget Crawford

Working with something explicitly labeled a ‘feminist’ judgment opens the door to having a conversation about the role of perspective in judicial decision making. For the most part, I think students intuit that a judge’s individual perspective or theoretical commitments inform the way the judge decides the case. Depending on the stage in their legal education, students may not have the vocabulary to describe what they see as, for example, a ‘law and economics perspective’<sup>126</sup> or an ‘originalist approach to

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123. E-mail from Noah Bedford to Gabrielle Appleby, *supra* note 102.

124. Anne Macduff & Wayne Morgan, *Queer Theory and Poststructuralist Feminism*, in CRITICAL JUDGMENTS PROJECT, *supra* note 27, at 73.

125. E-mail from Amelia Loughland to Gabrielle Appleby, Professor, University of New South Wales Law (Apr. 20, 2019, 1:59 AM AEST) (on file with the author).

126. *See, e.g.*, Carole M. Billiet, *Formats for Law and Economics in Legal Scholarship: Views and Wishes from Europe*, 2011 U. ILL. L. REV. 1485 (providing overview of ways that law and economics approaches and concepts have been adopted by European law schools and legal scholars).

constitutional interpretation,<sup>127</sup> but my U.S. students readily accept the notion that perspective matters and that feminism is just another perspective. What seems less clear to them is whether a commitment to feminism leads to a certain result. If my experience in working on the U.S. Feminist Judgments Project is any guideline, I would say that there is no such thing as a singular ‘feminist’ approach to decision making (but rather, that there are multiple ideas that can be drawn from feminisms plural).<sup>128</sup> Feminist judging happens against the backdrop of this discernible body of feminist legal scholarship, informed by distinct methods and themes. But a ‘feminist’ perspective does not dictate a particular result. This is the concept that is more difficult to convey to students.

Susan Appleton

The students in my classes have reacted positively, but that is not surprising, given that they chose to enroll in an elective course with explicit feminist content. They have described the experience of writing their own feminist judgment as “empowering.”<sup>129</sup>

Troy Lavers

We share the same experience of positive reviews, probably because our course has explicit feminist content, like Susan’s. The students seem to welcome the presence of a feminist judgment as

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127. See LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* (2019) (describing historical trajectory of judicial efforts to translate U.S. Constitution to contemporary cases). See also *Law to Fact: Prof. Lawrence Lessig Discusses His Book, Fidelity and Constraint*, LAW TO FACT (May 14, 2019), <https://www.buzzsprout.com/138309/1131005> (discussing how judicial interpretation of U.S. Constitutional rights has evolved).

128. See Stanchi et al., *Introduction*, *supra* note 8, at 3–4 (“[W]hen we refer to feminist methods or feminist reasoning processes, we mean ‘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.’”).

129. On the course evaluations (which students complete anonymously), one student in the seminar in Fall 2016 wrote: “I have recommended this class to multiple classmates for next year. It was well paced and intellectually stimulating. I often had before and after class discussions with classmates and other law students about the subject because of the questions posed by the opinions, professor, and classmates. The papers are demanding, but very interesting. Writing as a judge was empowering.” Washington University in St. Louis School of Law Instructor Report for Susan Appleton, FL2016W.W76.829S.01--Feminist Theories, Feminist Judgments (Appleton) (on file with the author).



another way of using feminist methodology in a ‘real world’ situation, like an actual legal judgment. It seems attractive to students because it is a practical application of feminist theories and something they can try for themselves when they choose their own judgment to rewrite as part of preparation for this particular class. Not all our students found the task of rewriting their own judgment to be an experience they enjoyed. Some found it to be a bit of an uphill climb requiring more reflection than they could accomplish in a limited time. It might be useful to consider having the task of judgment writing spread out over a longer period of time or by groups of students, just as we did it in groups or chambers for our edited collection.<sup>130</sup>

### III. Pedagogical and Student Development Goals Achieved with Feminist Judgments

*A. What might teaching with feminist judgments accomplish that is not readily achieved with published, decided cases or other kinds of typical, traditional legal texts?*

Andrea McArdle

Working with feminist judgments can open a door for students who have come to dis-identify with the substance of law or who feel alienated and excluded by its formal structures and language. First, feminist judgments demand more of the law. Because they are justice-serving, they exemplify what the law is capable of accomplishing, reaching far beyond, many times, where the law currently stands. A rewritten feminist judgment demonstrates that law as presented in casebooks is not inevitable, but often the product of a judicial author’s choice of analytic framework, limited openness to considering context, and inclination to adhere to formalist categories of law. Recognizing that law does present opportunities to make other choices can be both revelatory and inspiring to a student who feels disillusioned by law’s inherent conservatism, but sees in a feminist judgment law’s potential. Second, feminist judgments’ frequent use of narrative and reliance on language that is direct, forthright and accessible can be more inviting to students who find the forms of law confusing or unwieldy.

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130. See FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2 (organizing contributors to work together in different “chambers”).

Ruthann Robson's rewritten *Lawrence v. Texas*<sup>131</sup> is a feminist judgment that can reach students alienated by the law's substance or its form. Substantively, the rewritten version pushes past prevailing doctrine by centering the concept of sexual autonomy over the more conventional use of privacy justifications.<sup>132</sup> The judgment also highlights, and apologizes for, the corrosive effects of criminalizing same-sex activity—the law *Lawrence* replaced—on gay people.<sup>133</sup> This willingness to address law's impact directly and powerfully shows the potential for law to be more inclusive and humanizing in its reach and in its expression.

Pam Wilkins

I think Andrea summed it up well: feminist judgments teach students that law is neither *neutral* nor *inevitable*. Of course, many students realize law is not neutral, but all too often they do believe outcomes are inevitable given existing precedent, etc. Students also fail to see the creative potential within law. I have found that students who have read feminist judgments begin to see that law, like so much of our reality, is constructed. As Elisabeth said, this kind of lesson can be both troubling and liberating. Much of students' sense of liberation comes from the realization that they can—must—have a voice in constructing law and in shaping the legal theories and doctrines that will address the pressing issues of the next hundred or more years. Finally, the realization that law can be a creative profession comes as a great relief to students who feel stifled by the traditional law school classroom and by their early perceptions of legal doctrine.

Susan Appleton

As Andrea and Pam noted, reading and writing feminist judgments help students to see that nothing in law is inevitable. Each week that my seminar meets, we enter an 'alternative universe' that becomes as plausible as the one we ordinarily inhabit in law school and in the legal profession. Put differently, studying feminist judgments makes clear that every opinion students read in

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131. Ruthann Robson, *Rewritten Opinion in Lawrence v. Texas*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 488–503.

132. *Id.*

133. *Id.* at 501 (“It is appropriate that we not only overrule *Bowers v. Hardwick*, but that we apologize. We regret our decision in *Bowers v. Hardwick* because its consequences, both direct and indirect, have been devastating.”).

law school or will encounter thereafter rests on a particular perspective. For the long term, moreover, some of today's students will become tomorrow's judicial clerks and judges—and they might well bring to these roles insights gained from studying feminist judgments.

In addition, I have found that a seminar centered on feminist judgments offers several advantages compared to seminars built around the many other topics I have used over the years. First, we can have much to discuss in class with very manageable reading assignments. Second, I am now convinced that writing a feminist judgment (although a 'fictional' exercise) offers students an experience of greater practical value than writing a traditional, scholarly seminar paper. Finally, the commentaries that the students produce for my seminar become useful writing samples, especially when a prospective employer wants something short that showcases writing style and analytical skills.

Troy Lavers

I agree with Andrea, Pam, and Susan about feminist judgments' highlighting the reality of the law not being neutral or free from being gendered. I would also add that students seem to enjoy the story of the individual with whom they can identify, and they are drawn into the issues of context and their own sense of justice through the story of the individual or group. Whether it is the right to choose to wear a headscarf, the right to choose one's gender identity, or the potential to review a security council resolution, all these examples have a context too often ignored in a traditional judgment.<sup>134</sup> But when examined in a feminist judgment, the judgment can bring a different perspective on what the outcome can be. Student engagement with the context of the legal issues creates a broader legal critique and, as Susan mentioned, maybe a more feminist judicial clerk or judge in the future.

Elisabeth McDonald

As we all know from re-imagining the law in the way that rewriting judgments allows us to do, the very powerful message is

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134. See *Rewritten Opinion in Leyla Şahin v. Turkey*, in FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2; *Rewritten Opinion in Christine Goodwin v. the United Kingdom*, in FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2; and *Rewritten Opinion in Libyan Arab Jamahiriya v. United States*, in FEMINIST JUDGMENTS INTERNATIONAL, *supra* note 2.

that alternative legitimate, thoughtful, well-reasoned decisions that draw on the available precedent are possible on the same facts. And the decision can legitimately be the opposite to the original one. That I think is the key—this is not rewriting with the benefit of new awareness, better science, or changing social mores—but rather an exercise that proves a wholly different outcome could have been reached. That is an immensely significant (and challenging) message—and is clearly and compellingly delivered by all the feminist judgment collections. I am sure this is a troubling concept for very many law students who do not like to contemplate the option of not just *one* answer. “What will I write in the exam?” they wonder. Many will not take this lesson into their other studies and their careers in the law, or at least not immediately. While it is a troubling message, it is also a validating and liberating one. Arguing for changing an existing law or approach, which many graduates will do in their careers, knowing that there was never only one position to take, or one answer to a legal issue, is empowering.

Teri McMurtry-Chubb

As I was drafting my rewritten opinion, the feminist judgment in *Loving*,<sup>135</sup> for *U.S. Feminist Judgments*, I was teaching a course in Critical Race Theory/Critical Race Feminism at Mercer Law School. One afternoon when I was writing in my office at school, one of the students knocked on my door for an impromptu meeting. I asked him to wait while I was finishing up a thought. This particular student, always intellectually inquisitive, began to read over my shoulder. The sentences I had written were my reframing of the issue for the U.S. Supreme Court. When I noticed he was reading, I turned in my chair to witness his eyes grow wide and his hand rise to cover his mouth. He said to me “Professor M-C! I had no idea we could do this!”<sup>136</sup> My student is an African American male. By “we” he meant African Americans; by “this,” he meant act as autonomous knowledge producers to push for inclusive inquiry in U.S. Supreme Court jurisprudence.<sup>137</sup>

This interaction epitomizes the accomplishment of the feminist judgment projects. Instead of relegating scholarly and

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135. See Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 119–36.

136. See e-mail from David Stokes to Teri McMurtry-Chubb, Professor, Mercer University School of Law (July 1, 2019, 19:11 EDT) (on file with the author) (confirming details of interaction in Professor McMurtry-Chubb’s office).

137. See *id.*

practical inquiry of white supremacy, patriarchy, heteronormativity, capitalism, and imperialism to upper-division electives, the projects provide vehicles for integrating the same into the required law school curriculum. As long as our engagement with issues about race, class, gender and sexuality in the law school curriculum remains separate from the 'real' law school classes, our disjointed approach to teaching about them sends the message that these issues are tangential and therefore optional in legal education. The strategies that the projects employ are key to making social justice a priority for law schools, law students, and consequently practicing attorneys.

Vanessa Munro

For me, the beauty of teaching with feminist judgments is the applied and concrete nature of the process. The close reading of the same case from different perspectives really calls into question the decisions that are made, the silences, the sleights of hand. These can be talked about in other texts, of course (and often are), but there is something about the very applied and specific nature of it in feminist judgments that really engages students and others.

*B. In using feminist judgments in your teaching, what has been your goal? Do you think you accomplished it? How do you measure that?*

Ross Astoria

Few of my students, who are U.S. undergraduates, will go to law school. So as a general matter, both in this course and others, I tend to emphasize a set of skills that one develops with a liberal arts education such as critical thinking, writing, and synthesis, rather than content knowledge. In the undergraduate course on Law, Politics, and Society, we use particular laws and court holdings to start a dialogue with social theory and normative theory (in this class, feminism). We pay attention to the structure and tone of writing and think about how moral language grounds different types of decisions and how that language resonates or does not resonate with different audiences. Students' final papers suggest that the course refines students' moral reasoning, attunes them to rhetorical style, and helps them develop a synoptic perspective on law and society.

Kathy Stanchi

I have taught several of the rewriting opinions from *U.S. Feminist Judgments* in my judicial opinion writing course. We read the feminist judgment side by side with the original. One of my explicit goals, described in the syllabus, is to teach students to think critically about the original decision and how it forms and shapes our cultural attitudes toward justice. My other goal is to show students, in judicial language, how an opinion oriented primarily around social justice looks and sounds. That is, the opinion would look and sound like a ‘real’ opinion, but advance the law in a way that students might not have conceived by reading just the original. It is, of course, hard to measure whether students ‘get it,’ but I think they do, based on listening to them and reading their own judgments later.

I watch so many of my students be astonished and heartened by seeing a judicial opinion written to achieve social justice. I see them try to do this in their own writing, in a way that I think would not have been possible without the model of the feminist judgments. This is particularly important to my students who come from backgrounds traditionally not represented in the judiciary—for example, African American students, students from poor or working-class families, and students who are members of sexual minorities. I have had more than one student tell me how freeing, empowering and eye-opening it was to see their identities addressed and respected in legal reasoning. In my view, that validation alone proves the worth of assigning the feminist judgments.

With the guided research student, my goal was to show the student how to make a credible argument that fetal burial laws violated the Establishment Clause of the First Amendment.<sup>138</sup> This was a somewhat unique take on the Hyde Amendment that Leslie Griffin masterfully articulates in her feminist judgment.<sup>139</sup> Reading Leslie’s judgment showed me that the Establishment Clause was underutilized in the context of abortion laws. Leslie’s judgment is also astonishing in its use of supporting materials to show the clear

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138. U.S. CONST. amend. I (“Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof. . . .”). See also Fernandez, *supra* note 60 and accompanying text (describing law passed by the Texas state legislature but invalidated by a federal court that required burial or cremation of fetal tissue).

139. Leslie C. Griffin, *Rewritten Opinion in Harris v. MacRae*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 247–56.

religious basis for the law. It was so helpful to the student to see how Leslie's arguments were organized, supported and written.

Bridget Crawford

With the *Feminist Judgments: Rewritten Tax Opinions* book,<sup>140</sup> my co-editor Tony Infanti and I really wanted to challenge the notion that statutory interpretation and application are mechanical exercises. In thinking about whether a particular item is tax deductible under U.S. law, for example, some items are crystal clear. A taxpayer may, for example, deduct all "ordinary and necessary expenses paid or incurred" in carrying on a trade or business.<sup>141</sup> But what exactly is "ordinary"? What is "necessary"? The statute does not answer these questions.

The same is true with medical expenses. U.S. taxpayers are allowed in some circumstances to deduct expenses for "medical care of the taxpayer."<sup>142</sup> But what constitutes "medical care"? In *O'Donnabhain v. Commissioner*, the United States Tax Court took up that question in the context of gender confirmation surgery and reached different results than did our colleague David Cruz in his feminist judgment.<sup>143</sup> The feminist judgment uses a radically different vocabulary even to discuss the basic facts of the case. David Cruz elegantly begins his feminist judgment with the words, "Rhiannon O'Donnabhain is a taxpayer."<sup>144</sup> The original opinion struggled in deciding what pronouns to use for the taxpayer, even though the taxpayer herself had been clear in all of her filings.<sup>145</sup> The feminist rewrite does not. Nothing about the way we talk about

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140. FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 21.

141. 26 U.S.C. § 162(a) (2017).

142. 26 U.S.C. § 213(a) (2017).

143. Compare *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010), *acq.*, 2011-47 I.R.B. (permitting some deductions associated with taxpayer's gender confirmation surgery and associated transition care, on grounds that the taxpayer suffered from the "disease" of gender identity disorder, while also stumbling over pronoun usage and discomfort with discussing transgender issues), with David B. Cruz, *Rewritten Opinion in O'Donnabhain v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 21, at 274–96 (2017) (permitting all deductions associated with taxpayer's gender confirmation surgery and associated transition care, cautiously adopting the "disease" label in order to secure the taxpayer's right to a deduction but writing with noticeable respect for the taxpayer).

144. David B. Cruz, *Rewritten Opinion in O'Donnabhain v. Commissioner of Internal Revenue*, in FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS, *supra* note 21, at 274 (2017).

145. *O'Donnabhain*, 134 T.C. at 35 n.3 (explaining in a clumsy manner and 'justifying' use of a female pronoun in referring to the taxpayer).

the law or make legal decisions—whether the common law or statutory law—is preordained. Down to the pronouns a judge uses, there are multiple values-based choices the judge makes.

Pam Wilkins

Frankly, one of my goals in assigning cases from *U.S. Feminist Judgments* is simply to be an evangelist for the projects. Of course, there are sound pedagogical and social justice-related reasons. I second the comments of Kathy, Bridget, and Ross. That being said, one of my principal goals is to let students know about the global feminist judgments projects. Someday our students will be lawyers and judges, and as the volumes in the projects increase (more subjects and more countries),<sup>146</sup> there will be a body of creative scholarship that may inform the arguments they make or adopt.

*C. In your experience, can feminist judgments be a vehicle for teaching knowledge (i.e., substance and procedure) and/or expanding students' understanding of the law? Or a vehicle for teaching skills (e.g., ascertaining relevant facts, analyzing and applying relevant facts)? Or both?*

Andrea McArdle

Teaching from feminist judgments can increase students' knowledge base, in the sense that feminist approaches can both expand their understanding of what unlawful discrimination is—as a matter of substantive law—and demonstrate—from an evidentiary or lawyering standpoint—how discrimination can be established. For example, Martha Chamallas's rewritten concurrence in *U.S. Feminist Judgments in Price Waterhouse v. Hopkins* connects sex stereotyping in the workplace to gender discrimination actionable under Title VII.<sup>147</sup> It uses expert social science evidence that was available to the U.S. Supreme Court in the original case to examine stereotypes. The opinion demonstrates how stereotypes operate in workplace culture to devalue women's contributions and hinder their advancement in an organization.<sup>148</sup>

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146. See *supra* note 21 (describing forthcoming subject-matter specific volumes in the U.S. Feminist Judgments Series).

147. See Martha Chamallas, *Rewritten Opinion in Price Waterhouse v. Hopkins*, in *U.S. FEMINIST JUDGMENTS*, *supra* note 2, at 345–60.

148. Martha Chamallas, *Rewritten Opinion in Price Waterhouse v. Hopkins*, in



By making social science central to its reasoning, and focusing on context (here, workplace practices), this feminist judgment develops relevant evidence of the day-to-day, insidious ways in which workplace discrimination often biases assessment of female employees and keeps women in subordinate positions. Similarly, Ann Bartow's dissent in *Gebser v. Lago Vista Independent School District* effectively uses an expanded factual narrative to reframe a male high school teacher's sexual 'relationship' with a female student as sexual abuse and harassment that meet the standard of sex discrimination actionable under Title IX.<sup>149</sup>

Both Martha's and Ann's opinions rely on identified feminist methods (use of social science and narrative) to illuminate the corrosive realities of sex discrimination and would support learning in classes on civil rights law or sex discrimination. But, in their attention to facts and context, these approaches point to the lawyering work needed, including fact investigation and analysis, and fact-based advocacy, for developing and proving the elements of sex discrimination. So I believe that feminist judgments also can be helpful in skills-based classes for sensitizing students to facts and the way facts are used to build cases.

#### Bridget Crawford

In the tax classroom, feminist judgments can be a vehicle for teaching both substantive knowledge and the importance of perspective in statutory interpretation. The case I mentioned earlier that addresses the deductibility of expenses for gender confirmation surgery can be read and understood by anyone, regardless of familiarity with the tax law.<sup>150</sup> And by reading the case—either the feminist judgment or the original opinion—in connection with the statute, one can begin to pick apart the prongs of the statute. “[M]edical care” means amounts paid for the diagnosis, cure, mitigation, treatment or prevention of a disease, or for the purposes of affecting any structure or functioning of the

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U.S. FEMINIST JUDGMENTS, *supra* note 2.

149. Compare *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (holding that teenage girl had no cause of action against the school district after being raped by a teacher repeatedly over a period of two years, on the grounds that the district had no actual notice of the actions of the teacher), with Ann Bartow, *Rewritten Opinion in Gebser v. Lago Vista Indep. Sch. Dist.*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 430–46 (writing dissenting opinion that would permit recovery to teenage victim because actual notice standard allows schools to fail to investigate allegations of teacher crime or misbehavior).

150. See *supra* notes 143–145 and accompanying text.

body.<sup>151</sup> In rewriting the opinion, David Cruz had to make the difficult decision of whether he was going to associate the “disease” label with the transgender taxpayer, and risk pathologizing her in order to have the payments associated with gender confirmation surgery qualify as “medical expenses.”<sup>152</sup> So in teaching with the opinion, one also has the opportunity to look closely at the statutory language.

Teri McMurtry-Chubb

As Andrea and Bridget said, the feminist judgments serve as teaching tools for both substance and skills. Each commentary and opinion provides additional context and nuance for the substance and procedure in each case. Each also expands students’ understanding of how legal reasoning and analysis are malleable constructs that can be used in the service of justice. Drafters of the rewritten opinions play with narrative, point of view, and otherwise resituate the subject of the opinion. By employing these strategies, they shift perspective on whom and what is important in the opinion, as well as on whom and what is at issue. For example, the feminist rewrite of *Loving* opinion is, in part, an indictment of marriage as an exclusive patriarchal structure that perpetuates White supremacy and capitalism.<sup>153</sup> It goes beyond an explanation of Virginia as a bad actor, an individualist view of race and gender discrimination, to impugning an institution that is arguably patriarchal, White supremacist, and capitalist in origin and tradition.

Likewise, each opinion invites students to reconsider how each part of a particular genre (in the *Loving* case, the briefs working behind the scenes and judicial opinions that address them) advance a litigator’s theory of the case and oppose seemingly innocuous, neutral reasoning and analytical structures. By examining how each rewritten opinion reframes the issues, constructs new analytical frameworks, and uses those frameworks to build arguments using facts previously deemed irrelevant, students

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151. See 26 U.S.C. § 213(d)(1)(A) (2017) (defining “medical care”) (alteration added).

152. David B. Cruz, *Rewritten Opinion in O’Donnabhain v. Commissioner of Internal Revenue*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS*, *supra* note 21, at 284 (“Were we assured that transgender persons would be entitled to deduct from their income the often high expenses that transition care can necessitate, we would be more moved by the concern not to stigmatize them with an ‘illness’ label . . . But we are not necessarily the last word here.”).

153. Teri McMurtry-Chubb, *Rewritten Opinion in Loving v. Virginia*, in *U.S. FEMINIST JUDGMENTS*, *supra* note 2, at 119–36.

receive modeling on how to use these same tools in their social justice advocacy.

Vanessa Munro

Like Andrea, Bridget, and Teri, I think the feminist judgments are vehicles for teaching substance and skills. Those things go together. My emphasis is really on each of these components in turn—so in the theory class, the emphasis was on methods, and in the criminal law class, it was much more on substantive concepts.<sup>154</sup> But the two obviously cannot be divorced. It is from the interaction between them that the most powerful discussions often emerged. So far the reactions to the artwork in the Scottish project has been really strong.<sup>155</sup> This is something that I intend to use much more in my teaching to get students to think in different registers about the process of judging, feminist judging, and feminism.

*D. From your perspective, how does becoming acquainted with the Feminist Judgments projects or any particular feminist judgment contribute to a student's professional formation?*

Sharon Cowan

For me, using feminist judgments and the art that has been created as a response to feminist judgments has a real role to play in cultivating empathy and a sense of the “ethical imagination” in students.<sup>156</sup> Hopefully they will take this forward into their professional lives. The judgments and art enable students to see more clearly the ethical complexities of trying to understand the whole range of human experience within law, and to understand the impact of the law in a more grounded way. The judgments and art encourage students to challenge the supposed neutrality and objectivity of law, to see the contingent nature of law, and to undertake their own creative interpretations of law more mindfully.

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154. *See supra* Part I.A (comments of Vanessa Munro).

155. *See supra* notes 109–111 and accompanying text.

156. Ethical imagination refers to “an intellectual process that tries to infer conclusions from converging data rather than from merely deductive logic.” Gerard Magill, *Using Excess IVF Blastocysts for Embryonic Stem Cell Research: Developing Ethical Doctrine, Secular and Religious*, 37 HOFSTRA L. REV. 447, 453 (2008). *See also* MARTHA C. NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION (1997) (on intersection of ethics and law) and MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004) (same).

Being exposed to critical projects such as feminist judgments projects gives students—and everyone else who engages with them, including the feminist judges themselves—more tools with which to develop professional and life skills that can make us better lawyers, teachers, and friends.

Gabrielle Appleby and Rosalind Dixon

In the first chapter of *The Critical Judgments Project*, we write that students must learn the craft of positivist-based legal methods, but doing so is not enough.<sup>157</sup> We also want students to graduate from law school with an ability to identify and assess the influence of personal, social, political, and economic factors in legal methods, and to interrogate assumptions within legal rules, institutions, and processes. We emphasize that we want all law graduates to develop these capacities and that they will all go on to be intellectual leaders of the community. A capacity for critical thinking is vital to engage with political and legal institutions and take the law forward into the future.

In this respect, we are buoyed by the responses of our students to the exercise. For instance, Ganur Maynard, an Indigenous student, was skeptical at first about the benefits of the exercise, but concluded that as a result of the exercise, he found that his conception of “proper” or “correct” legal analysis necessarily excludes other perspectives, in the exact manner against which James Boyd White and Robin West exhort.<sup>158</sup>

Maynard suggests that his own reaction may signify “a broader problem with the practice of law and the legal profession more generally.”<sup>159</sup>

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157. Appleby & Dixon, *Critical Thinking in Constitutional Law and Monis v. The Queen*, in CRITICAL JUDGMENTS PROJECT, *supra* note 27, at 1 (“Law school must expose students to the concepts of indeterminacy and subjectivity in judicial decision-making . . . It must teach students to identify and assess the influence of personal, social, political and economic factors in the development of legal doctrine.”).

158. E-mail from Ganur Maynard to Gabrielle Appleby, Professor, University of New South Wales Law (Apr 1, 2017, 2:53 AM) (on file with the authors). *See also* JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 33–34 (1985) (“[L]ike any rhetorician, the lawyer must always start by speaking the language of his or her audience . . . [T]he lawyer’s work has a second essential element, the creative process . . . . The third aspect of legal rhetoric is what might be called its ethical or communal character, or its socially constitutive nature.”), and ROBIN WEST, CARING FOR JUSTICE 217 (1997) (“[L]aw and literature scholarship is often moved by a passion for justice that is explicitly conjoined with a distrust of dominant, property-obsessed conceptions for virtue . . . . Feminist writing reveals the same ambivalence.”).

159. E-mail from Ganur Maynard to Gabrielle Appleby, *supra* note 158.

Noah Bedford reflected on the value of the exercise to his legal education with a visual image:

Instead of swimming around the surface of settled doctrine, which has been the overwhelming experience during my time at law school, the critical judgments exercise made me dive deep into examining how different values and ideologies can inform what rules ends [*sic*] up bubbling to the surface. After the exercise, I felt as though my understanding of the law, a system that I may well spend the rest of my life participating in, had truly expanded.<sup>160</sup>

Student Eloise Kneebone said that the critical judgments exercise fueled her interest in judges as individuals:

I think the critical judgments exercise gave me an appreciation of the impact of personal experiences that lie beneath seemingly objective or neutral judgments, and an appreciation of how the experiences of a privileged few with similar life experiences has been very influential in shaping the law.<sup>161</sup>

Teri McMurtry-Chubb

The tangible existence of a bound, hardcover book titled *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (and similar titles from other countries) in a sea of ubiquitous law school casebooks is not to be underestimated. By titles like this, students' suspicions are confirmed that perhaps they are not receiving a legal education that interrogates inequality. The feminist judgments projects provide them a path to do so. Legal education normalizes as 'neutral' Western epistemologies—ways of knowing—that are White, male, and heteronormative. Students who are social justice minded when they enter law school come into direct conflict with these ways of knowing, which often results in their feeling inadequate and demoralized. As Kathy said, the feminist judgments projects help students—especially those marginalized by race, class, gender, and sexuality—to see themselves in the law school curriculum, body of court jurisprudence (including the U.S. Supreme Court), and the legal profession as legitimate sources of knowledge and knowledge production. The projects reaffirm for students that their

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160. E-mail from Noah Bedford to Gabrielle Appleby, *supra* note 102.

161. E-mail from Eloise Kneebone to Gabrielle Appleby and Rosalind Dixon, *supra* note 101.

commitment to social justice is possible through the skillset that they are being taught and reintroduce them to what is possible.

When students see themselves in what they aspire to be, as reflected in the curriculum, they are empowered to continue boldly toward their vision for their careers, rather than being discouraged from pursuing what they envision. The rewritten opinions serve as a touchstone, a validation of a journey towards justice advocacy. In studying them, students not only ask questions about their creation (the impetus for the rewritten opinion), but also about their creators (the legal scholars who wrote the rewritten opinions), and the subjects of their creation (the original litigants and their attorneys). Students' study of the rewritten opinions normalizes social justice advocacy by making it accessible.

Kathy Stanchi

I think this question is so important. It is the critical foundation of how we see law training. For literally a century, we have focused on doctrine, doctrine, doctrine. This is so misguided in my view. Yes, doctrine is important, but who among us would recommend that newly-minted lawyers give advice to a client, write a brief, or go to an oral argument solely on the strength of the doctrine they learned in law school? None of us, I imagine. Lawyers have to research and update the law, of course. So, why not make substantial room for critical thinking in law school—not just in seminars, but in the first year, in those doctrinal core courses? To me, this is essential to students' professional development. We need to graduate students who not only know the basics of the law (doctrine), but also how to use the law, how to be critical of it, and how to change it when it needs to be changed. In other words, we need to teach students not just what the law is, which is so limiting, but what the law *could be*; its vast, and largely unrealized, potential for social change. Too often, I hear students grumble about needing to know the black-letter law, as if that is all they are in law school to learn. We are at fault for that grumbling because we are not adequately communicating to students what it is they need to learn to be excellent lawyers. To me, feminist judgments are tools that help us re-envision what law school is and should be.

Another very important part of student professional development is the ability to communicate with and understand people of all different backgrounds. We are doing a pretty poor job of teaching students this essential skill. Those who have the opportunity to participate in clinics (and choose to do so) are being

taught this critical skill, but this group is usually a fraction of the students enrolled in (U.S.) law schools. Because legal doctrine, both decisional and statutory, represents the perspective of an exceedingly narrow segment of U.S. society, it is our duty to teach other perspectives—if for no other reason than our students will certainly have clients with those perspectives. If you read Clark Cunningham’s article that likens the lawyer to a translator,<sup>162</sup> you can see the great divide between doctrine and the lived experience of so many people whose daily lives depend on lawyers. When lawyers have no exposure to perspectives other than those of the creators of the doctrine, lawyers are tone-deaf to their clients’ problems and concerns. Feminist judgments allow students to see other perspectives on the law, which for many students is truly showing them another world.

Andrea McArdle

Lawyers in formation need to see demonstrations of law operating in service of justice, and feminist judgments projects provide models of an explicitly justice-oriented approach to law. The disparity between the law as it is and as it could be is sobering, to echo Kathy, but also galvanizing. Exposure to feminist judgments projects gives students a way of thinking about legal institutions, about the potential for judges, and also legislators, to move the law with scholar-advocates, such as the feminist judgments authors, pointing the way. I think exposure to exemplars of how the law can be imagined differently and articulated is essential for students to avoid the disillusionment or, worse, cynicism that can take over when their sense of the law is limited to a body of rules that seems unfair and unresponsive to changing needs and circumstances.

Feminist judgments are also powerful reminders of the importance of taking creative approaches to legal analysis. Asking oneself, ‘What if the law were different?’—drawing on one of educator Jenerra Williams’ generative habits of mind<sup>163</sup>—is how fresh perspectives of law begin to take root. Animated by that question, the feminist judgment authors model creative analyses

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162. Clark D. Cunningham, *Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

163. Jenerra Williams, *The Struggle for Justice: U.S. History Through the Eyes of African Americans*, in TEACHING IN THEMES: AN APPROACH TO SCHOOLWIDE LEARNING, CREATING COMMUNITY, & DIFFERENTIATING INSTRUCTION 61, 62 (Deborah Meier et al. eds., 2015) (naming “Evidence, Connections, Viewpoint, Conjecture, Relevance” as the five “essential habits [of mind] to develop in becoming a true critical thinker and productive member of a democratic society”).

that our students can learn from and seek to internalize as part of their professional mindset.

Further, feminist judgments embody an interdisciplinary approach to law that legal education generally undervalues. To guard against a further narrowing of the legal mind, law schools should encourage (if not require) students to examine how law works in conjunction with other disciplines. Exposure to feminist judgments can help students understand law in a broader frame and to appreciate how access to other domains of knowledge and theoretical frameworks offers tools to support their work as lawyers.

Ross Astoria

I think most students (and perhaps most people generally) tend to get in a routine with the categories and discourse they use in both everyday life and their professional careers. I think feminist judgments provide a nice introduction to alternative modes of thinking about the social world. My students will be able to transfer this more ‘critical’ point of view into other aspects of their lives, including their professional careers.

I teach two standard undergraduate courses in constitutional law: structure and civil liberties. Mostly, I focus in these courses on mastering the material and legal writing, but part of the craft of law is recognizing how a decision could have been different, and what those differences might have meant for the organization of society. The feminist judgments make the demonstration of these difference much easier to do. The feminist rewrites of *Roe*<sup>164</sup> and *Casey*,<sup>165</sup> in particular, are highly effective articulations of alternative perspectives. I also think the *Bradwell/Slaughter-House* combination<sup>166</sup> provides a stark and moving contrast to how different a direction the U.S. Supreme Court might set the country on with its first interpretation of the Fourteenth Amendment.<sup>167</sup>

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164. See *supra* note 85 and accompanying text.

165. See *supra* note 86 and accompanying text.

166. *Bradwell v. Illinois*, 83 U.S. 130 (1873) (denying Myra Bradwell admission to the bar, on the grounds that the right to obtain a law license is not protected by the Fourteenth Amendment); *Slaughter-House Cases*, 83 U.S. 36 (1873) (holding that state law creating a monopoly for a single slaughterhouse does not violate Thirteenth or Fourteenth Amendment). *But see* Phyllis Goldfarb, *Rewritten Opinion in Bradwell v. Illinois*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 60–77 (finding equal protection right to obtain law license and distinguishing the *Slaughter-House Cases*, because Bradwell, unlike the butchers, otherwise had no right to pursue her profession).

167. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall



## Bridget Crawford

By studying the feminist judgments, students can begin to evaluate the relative persuasiveness that different arguments have, even if the arguments are grounded in the same law. Also, some of the judgments challenge us to think about what ‘counts’ as part of a legal argument. In *Feminist Judgments: Rewritten Tax Opinions*, for example, our colleague, Mary Louise Fellows, rewrites an iconic U.S. case involving business deductions.<sup>168</sup> She makes an extended analogy to the historic distinction between the commercial marketplace and the private sphere of the home by referring to Mary Shelley’s *Frankenstein*.<sup>169</sup> Fellows is not suggesting that *Frankenstein* is legal authority, but rather that the story can frame commerce in a way that is helpful for interpreting and applying the tax rules that apply to business deductions. I find the analogy to be incredibly creative—something I would have never considered, but for encountering the analogy in the feminist judgment.

Also, every time I read any feminist judgment from any jurisdiction, I am reminded of the importance of providing factual context and providing enough detail about a client, for example, so that a court can fully understand the client’s complete humanity. So often, in tax cases and other areas too, we tend to look at the ‘deal,’ the ‘transaction,’ or the ‘incident.’ But every breach of the law, every harm, happens in some sort of context. Who the client is matters very much to how the client experiences that breach. It is important as lawyers that we continue to present the full stories of our clients. The narrative and the doctrinal law are important; we need to master both.

## Susan Appleton

Like others, I feel hopeful that we will see the impact in the years to come, once students who have become acquainted with feminist judgments take on positions as judicial clerks and possibly judges, as I said earlier and as echoed by Troy.<sup>170</sup> Beyond that, however, I think the worldwide reach of the feminist judgments idea and the significant number of scholars and attorneys who have

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any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

168. Mary Louise Fellows, *Rewritten Opinion in Welch v. Helvering*, in *FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS*, *supra* note 21, at 103–20.

169. MARY SHELLEY, *FRANKENSTEIN* (Bantam Classic 2003) (1818).

170. *See supra* Part III.A (comments of Troy Lavers).

contributed to the various volumes reveal that legal feminists have achieved a ‘critical mass.’ We have become a force to be reckoned with!

Troy Lavers

I agree with everyone’s points on the importance of teaching and encouraging our students to critique the law through various lenses. This is particularly important to us in England and Wales at the moment, as we will be moving to a different system of legal qualification brought about by the Solicitors Regulatory Authority in 2021; students will need to pass a new set of practical exams before moving onto work experience.<sup>171</sup> These new exams will not require a law degree beforehand, so looking down the road, it may result in U.K. law schools teaching a much more practical perspective of law (and less liberal arts-oriented, as an undergraduate degree). The aim of the change is to diversify the practice of law and the judiciary, but in the attempt for greater diversity, I fear a new more doctrinal, practical law degree is what will emerge. We might be forced to stop teaching feminist judgments in the wake of competition for law students, and as a result, we turn to the practical side of law where there is little room for any valuable critique. Hopefully not, but at this point it is difficult to see what the future will hold in terms of legal education for England and Wales.

#### **IV. Teaching with Feminist Judgments in the Future**

- A. *If you have any experience guiding students in writing their own feminist judgments, what advice would you have for others making the same assignment?*

Andrea McArdle

In my experience, this assignment unfolds in stages. Students first need to grasp the functions and conventions of judicial writing (including the attributes of judgment voice). It is authoritative, but also justifying, explanatory, and analytic. Ultimately it must be persuasive jurisprudentially. Students should appreciate (hear) the

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171. See, e.g., *Solicitors Qualifying Examination*, SOLICITORS REGULATION AUTHORITY, <https://www.sra.org.uk/home/hot-topics/Solicitors-Qualifying-Examination.page> (last visited Sept. 21, 2019) (explaining practical legal skills component of Solicitors Qualifying Examination, effective fall 2021).

contributions of other voices in any judgment—the voices of concurring and dissenting colleagues, advocates’ voices, and the written voices of clerks who work closely with judicial authors to define the scope of an issue and follow the pathways of doctrine. The judgment writing seminar I teach offers this grounding in judicial rhetoric and voice and then raises the question of what a feminist judicial voice is, and how it serves a feminist vision of the law. Inviting students to compare closely an original and feminist rewritten judgment also can help them recognize specific ways that a feminist judgment author responds to the ‘official’ judgment’s treatment of the law, narrative of the facts, and its interpretive framework.

It is also helpful to encourage students to identify what they see as ‘feminist’ in the feminist judgments they read. For example, a number of my students have absorbed insights about voice, empathy, elaboration of facts, and a judgment’s attention to the material and psychic impacts of law on society. Because the course focuses closely on process and method, students have tended to concentrate on these manifestations of feminist writing.

We can also prompt students to look for evidence of how a judgment specifically makes visible, and more central, the experiences and perspectives of women and other marginalized members of society. When students begin to see that a range of perspectives and approaches are compatible with feminism and its justice-serving aims, they are at least in a good starting position to tackle writing a feminist judgment.

Ross Astoria

I contemplated an assignment for undergraduates to rewrite an opinion, but a little reflection made it apparent that learning law, social theory, and a new normative theory was more than enough for undergraduates, without also having to learn how to write like a judge. However, I do think this could make a wonderful undergraduate senior thesis or independent study project.

Kathy Stanchi

My advice is to be prepared to do a lot of foundational work on how to write an opinion, and then do even more work on top of that to show how to write a feminist or social justice opinion. One aspect I really like about using feminist judgments is that it makes the transfer of skills smoother—students do not have to ‘translate,’

entirely on their own, scholarly articles into judicial language. Such translation can be difficult because the language of academia can be quite far removed from law practice language. With the feminist judgments, students can see the social justice analysis and reasoning in judicial language. This gives them a good model to follow. But it is still hard for them. I was teaching mostly third-year law students in my seminar, and ‘mainstream’ law already had a firm grip on them. They had already read hundreds of opinions that contain no feminist or social justice reasoning, as well as many opinions that explicitly denigrate that reasoning. The students have been indoctrinated to think that is what law is—and that is all that law is and can be. It is hard to undo that with a few feminist opinions, but we can start the process by having them read feminist judgments and then write their own. The writing process is, of course, transformative in cementing the use of feminist reasoning, so I encourage professors to have students write their own feminist judgments.

The other caveat I would add is to choose carefully the opinions your students are to rewrite. I tried to choose opinions that had ample records and plenty of diverse scholarly commentary so that the students would not have to completely re-invent the wheel. It is really helpful to have a good number of law review articles as well as a chapter about the case from one of the volumes in the Foundation Press *Law Stories* series.<sup>172</sup> The *Law Stories* help a great deal in showing the students how many facts were left out of the original opinion, especially if the original record is not available.<sup>173</sup>

Susan Appleton

I would emphasize the importance of case selection. Some cases lend themselves to feminist rewriting more successfully than others. For this reason, I am not entirely excited about the proliferation of new feminist judgments volumes because I will not let my students choose a case once it has been used for a published feminist judgment. I worry that the U.S. Feminist Judgments Project, as I have used it, is becoming a victim of its own success, as more and more cases are becoming ‘off limits’ for student rewriting!

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172. See, e.g., *Law Stories Series* (Paul Caron ed., Foundation Press), <https://subscription.westacademic.com/Search?seriesFilter=22> (listing thirty-seven subject-matter specific volumes that provide historical context and a ‘behind-the-scenes’ discussion of details, including some previously unknown, for well-known U.S. cases in the field).

173. See *id.*

*B. What might be some ways to think about teaching with feminist judgments across borders of subject-matter, disciplines, nations, legal traditions?*

Teri McMurtry-Chubb

I envision an interdisciplinary, intergenerational space that welcomes students and professors from graduate programs and professional schools, as well as members of the community who are interested in examining and obliterating inequity. In this space, participants would be encouraged to study the limits of the jurisprudence that exists for our most pressing social issues, to imagine what it could be, and to create it. Historically, impact litigation has incorporated interdisciplinary knowledge to make legal arguments. Students and scholars from interdisciplinary and lay backgrounds would operate as a think tank in real time, offering disciplinary knowledge and perspectives to develop solutions to societal problems.

Consider, for example, a course called “Feminisms.” This course would engage in different conceptualizations of many specialists, including feminist historians; African diasporic, Asian diasporic, Latinx, and Indigenous studies scholars; social scientists; scientists; humanitarians; business, medical and legal professionals; and the non-academic/non-professional childfree, parents, grandparents, actual and fictive kin networks, and community activists. Feminist judgments would anchor the course, as well as readings in feminist and womanist theories.<sup>174</sup> Both would be integrated as the theoretical framework to examine issues in reproductive justice, employment equity, sexual assault and harassment, career advancement, among many others.

Ideally, this course would have counterparts in at least three universities—two in different regions of the United States, and one in another country. All of the courses would have a common syllabus. Once a month over the course of a year, the classes would

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174. Writer Alice Walker explains that “Womanist is to feminist as purple to lavender.” ALICE WALKER, *IN SEARCH OF OUR MOTHERS’ GARDENS* xii (1983). According to the Stanford Encyclopedia of Philosophy, Alice Walker proposed in 1990 that “womanism’ provides a contemporary alternative to ‘feminism’ that better addresses the needs of Black women and women of color more generally. But given more recent work on trans issues such a gender-specific term would today raise many more problems than it would solve.” *Feminist Philosophy, 2.2 Normative and Descriptive Components*, STAN. ENCYCLOPEDIA OF PHIL. (June 28, 2018), <https://plato.stanford.edu/entries/feminist-philosophy>.

meet on a visual, digital platform to discuss the readings and brainstorm strategies. The final projects for the course would be local and activist in nature. Students would partner with their communities to address problems that the community members identify. The class would end with presentations by the course participants to community stakeholders, and a plan to implement their social justice reforms.

Bridget Crawford

At least from the perspective of a U.S.-based law teacher, I would say that our students do not get much exposure to the substantive law or interpretive traditions of other countries, even other common law jurisdictions. My (admittedly) limited interaction with scholars and teachers based in other jurisdictions leaves me with the impression that Canadian and Australian legal education is different in that respect. The Canadian and Australian students (and their teachers) seem to be more conversant with U.S. cases and legal methods than U.S. students (and their teachers, myself included) are with Canadian and Australian law.

I do wonder whether the various feminist judgments projects might be a way to bridge some of those gaps. First, to the extent we were ever able to coordinate logistically, I think U.S. students would enjoy being 'paired' with counterparts from another jurisdiction. We might be able to develop an assignment that invites the students to identify a case in each jurisdiction that addresses a similar issue. Instead of trying to rewrite the opinions, the students would jointly read both original opinions. After identifying similarities and differences (and the reasons for those) the students could work collaboratively on developing a narrative description of the types of questions, approaches, or emphases that, if grounded in feminist jurisprudence, might have changed the result or reasoning in the case. Students would identify an important text, scholar, line of thinking, or method in the feminist legal theoretical tradition of their home jurisdictions and explain how that could apply in both cases, domestically and across borders.

The purposes of an assignment like this would be to ask not only what difference a feminist perspective might make in judicial opinions, but also to learn about different articulations of feminisms and the cultural, historical, and political forces that contribute to shaping the context in which a case arises. This type of course would be logistically challenging, but could be intellectually enriching for all involved. And even better if the course could combine with

reciprocal visits by each group of students to the other jurisdiction and university. Especially in the United States, I think that we need to expand our jurisprudential view to include greater knowledge of, and sensitivity for, other legal traditions.

Pam Wilkins

I love this question about borders. My institution is in Detroit, about one-quarter mile away from the tunnel that separates the United States and Canada, and we have a dual degree program with the University of Windsor Faculty of Law, an Ontario law school. The program allows students to earn both a Canadian law degree and U.S. law degree in three years.<sup>175</sup> Our student body is roughly 40% Canadian, and our faculty also has fairly regular interaction with our Canadian counterparts. It is absolutely true, as Bridget said, that the Canadian law faculty and Canadian students are much more attuned to legal trends and doctrines in other countries. Any country with a common law heritage is part of the conversation, and there is also greater awareness of and openness to the legal perspectives of Indigenous peoples. Moreover, many of my Canadian students are extremely enthusiastic about the feminist judgments project.

I see several ways we could teach across national borders with feminist judgments. One suggestion for the United States and Canada might be to offer a seminar focused on feminism and comparative constitutional law.<sup>176</sup> As many readers of this dialogue probably know, Canadian lawyers, academics, and activists have worked as part of the Women's Court of Canada project to rewrite from a feminist perspective the equality jurisprudence of the Canadian Charter of Rights and Freedoms.<sup>177</sup> I can envision a very rich dialogue that would follow from a class in which students compare portions of the U.S. Constitution and Canadian Charter of

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175. *Canadian and American Dual JD Program*, DETROIT MERCY LAW, <http://www.law.udmercy.edu/academics/degrees-offered/dual-jd.php> (last visited Sept. 22, 2019) (detailing school's joint degree program whereby students can earn both Canadian and U.S. law degrees in three years).

176. Across a greater distance, Professor Heather Roberts of Australia National University and Professor Heather Elliott of the University of Alabama Hugh F. Culverhouse Jr. School of Law engage in a five-week exchange devoted to comparing jurisprudence of the High Court of Australia and the Supreme Court of the United States. *See News & Events*, AUSTRALIA NATIONAL UNIVERSITY COLLEGE OF LAW (Apr. 17, 2019), <https://lawschool.anu.edu.au/news-and-events/news/sweet-home-alabama-studying-law-deep-south> (describing experiences of Australian students participating in exchange program).

177. *See* Majury, *supra* note 2 and accompanying text.

Rights and Freedoms, compare 'official' judicial opinions on various constitutional topics, and then examine the rewritten U.S. and Canadian feminist opinions and commentary. Comparative constitutional law, to be sure, but also comparative feminism—wow!

Troy Lavers

As a teacher of international law, this question about borders is an easy one. International law crosses boundaries already and incorporates the issues of individuals and states from around the world. The teaching of the international feminist judgments means feminist methodologies can be translated into international judgments that are accessible to every international lawyer. The creation and expansion of the numerous feminist judgments projects around the world in different domestic jurisdictions lends support to each new project. We are a growing collective.

My co-editor Loveday Hodson and I hope that other international law projects will emerge. Perhaps phase two of these projects can be more comparative work.

As international law teachers, we ourselves have not yet touched upon domestic judgments that discuss international law. That would make for an interesting perspective on states as well.

Vanessa Munro

One of the great joys of the Scottish Feminist Judgments Project's coming after many of the other projects is that we have been able to feel part of a global conversation. We have really benefited from the insights and development of pre-existing projects, each of which speaks in its own distinctive register from its own unique perspective, but also engages and plays around with the confines of feminist judging in innovative ways. We have been particularly inspired in the Scottish project by some of the steps taken in the Aotearoa New Zealand and Northern/Irish projects to disrupt certain conventions of mainstream judging. This is what inspired us to develop the creative strand of the project, and it has been such a revelation to us throughout!<sup>178</sup>

In Edinburgh, in July 2019, we hosted a workshop with representation from Scottish, African, and Indian Feminist

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178. See, e.g., *supra* Part II.A (comments of Sharon Cowan) (discussing the Scottish Feminist Judgments Project engagement with artistic work).



Judgment Projects,<sup>179</sup> building on a post that we did together for the *Social and Legal Studies* blog.<sup>180</sup> We are really excited to see where that dialogue takes us.

*C. What questions do you have for other people who are teaching with feminist judgments?*

Ross Astoria

I would be grateful for any recommendation on other texts to accompany the feminist judgments. I use Nancy Levit's *Feminist Legal Theory*,<sup>181</sup> Kitty Calavita's *Invitation to Law and Society*,<sup>182</sup> excerpts from the sociological canon, Silvia Federici's *Caliban and the Witch*,<sup>183</sup> and Ruth Schwartz Cowan's *More Work for Mother*.<sup>184</sup> Most of these are pretty complicated reads for undergraduates, so any undergraduate-appropriate suggestions are welcome.

*D. Is there a course in which you have not yet used feminist judgments, but you think there might be some pedagogical promise for doing so?*

Troy Lavers

I use feminist judgments in an LLM module called Feminist Perspectives on International Law, but I struggle to get colleagues to agree to add feminism as a topic in the undergraduate LLB course on international law, perhaps because some on the teaching

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179. *Meeting at the Intersections of Feminist Judgments: The Indian, African and Scottish FJP Workshop*, THE UNIVERSITY OF EDINBURGH, [https://www.research.ed.ac.uk/portal/en/events/meeting-at-the-intersections-of-feminist-judgments-the-indian-african-and-scottish-fjp-workshop\(0620f33d-9446-4544-b9d0-433c6c69bc48\).html](https://www.research.ed.ac.uk/portal/en/events/meeting-at-the-intersections-of-feminist-judgments-the-indian-african-and-scottish-fjp-workshop(0620f33d-9446-4544-b9d0-433c6c69bc48).html) (last visited Sept. 22, 2019). See also *Scottish Feminist Judgments Project – Tour*, THE UNIVERSITY OF EDINBURGH, <https://www.law.ed.ac.uk/news-events/events/scottish-feminist-judgment-project-tour-3> (last visited Sept. 22, 2019) (listing upcoming workshop dates and explaining the details of the sessions).

180. Sharon Cowan et al., *Feminist Judging: From Margin to Centre*, SOC. AND LEGAL STUD. BLOG, (Nov. 21, 2018), <https://socialandlegalstudies.wordpress.com/2018/11/21/feminist-judging-margin-centre/> (exploring commonalities and differences among Indian, Scottish, and African Feminist Judgments Projects).

181. LEVIT & VERCHICK, *supra* note 45.

182. CALAVITA, *supra* note 46.

183. SILVIA FEDERICI, *CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION* (2004).

184. RUTH SCHWARTZ COWAN, *MORE WORK FOR MOTHER: THE IRONIES OF HOUSEHOLD TECHNOLOGY FROM THE OPEN HEARTH TO THE MICROWAVE* (1983).

team may prioritize a more ‘black-letter’ approach to international law. Last time I argued for it I was turned down flat. Now that our collection is published, I have added a feminist judgment to the reading list for the section I teach, International Criminal Law. I will try to convince the team to add feminist judgments to their part of the reading lists. This may be easier to achieve than adding feminism as a topic.

I think it is really important to expose students to a representative of feminism methodologies in the mainstream curriculum. It is inspiring to read how many other people are using feminist judgments in their teaching, especially large group teaching. I would love to get feminist judgments integrated into the majority of the sections of our mainstream course.

Elisabeth McDonald

I am so very keen to use *Vuletich v. R*, the evidence law feminist judgment from the Aotearoa New Zealand project which concerns the admissibility of similar fact or propensity evidence in a rape case.<sup>185</sup> The difficulty is that to understand and properly engage with the nuanced critique in that decision, students need to be operating at quite a sophisticated level, which many do not reach, given the amount of class time and the breadth of material to cover. It may have to wait for a graduate class.

I would also very much like to wrestle off one of my colleagues the consent portion of our criminal law course, so as to use the rewritten version of *R v. Brown*.<sup>186</sup> It is of concern to me that the case is still taught to second-year law students in a mostly uncritical way—and I really wonder how safe they feel reading and discussing the kinds of pronouncements made by the House of Lords

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185. Compare *Vuletich v. R* [2010] NZCA 102 (N.Z.) (unanimous decision that the defendant’s alleged sexual offending against another woman on a different occasion was inadmissible as propensity evidence and the two charges were to be tried separately) with Carissa Cross, *Rewritten Opinion in Vuletich v. R*, in AOTEAROA NEW ZEALAND FEMINIST JUDGMENTS, *supra* note 2, at 469–78 (dissenting judgment asserting that the primary issue at trial was the credibility of both the complainants, stressing the similarities of both alleged offences, and concluding the charges should be joined and the propensity evidence cross-admissible).

186. Compare *R v. Brown* [1992] UKHL 7, [1994] 1 AC 212 (Eng.) (dismissing on policy grounds by a 3-2 vote charges of actual and grievous bodily harm against members of group of gay men who engaged in consensual sadomasochistic sex over a period of years, where no police complaint ever filed) with Robin Mackenzie, *Rewritten Opinion in R v. Brown*, in ENGLISH/WELSH FEMINIST JUDGMENTS, *supra* note 2, at 247–54 (reaching same result but for different reasons, notably recognizing a consent defense in cases of consensual sadomasochistic sexual activity).

(regarding sexuality and choice).<sup>187</sup> There will be young people for whom university is their first opportunity to start to feel comfortable with their own identities and, in my view, we have an obligation to not only be aware of the impact of the cases we teach, but to provide a balance to the debate in highly contestable and personally triggering areas. The reimagined judgment and beautifully-crafted commentary really are essential additions to any law school consideration of the *Brown* case.<sup>188</sup>

Teri McMurtry-Chubb

My goal is to integrate the feminist judgments projects into the required (compulsory) legal writing curriculum. The legal academy is a colonized space that normalizes Western (White) epistemologies (ways of knowing) and ontologies (ways of being). If legal educators continue to contextualize legal knowledge in colonial rhetoric, then students will perpetuate it without the tools to problematize it.

Starting in the 2018-2019 academic year, in the first-semester legal writing course at Mercer, I introduced first-year students to multicultural rhetorics (Indigenous, African and Asian diasporic, and Latinx rhetorics).<sup>189</sup> I used these rhetorics as oppositional to the Western rhetorical discourse that has been taught as ‘neutral’ in legal writing pedagogy and practice.<sup>190</sup> In the future, I plan to integrate multicultural rhetorics completely into my writing

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187. See, e.g., *R v. Brown* [1993] 1 AC 212 (HL) 97 Cr. App. R. 44, 51 (Eng.) (“There was no evidence to support the assertion that sado-masochist activities are essential to the happiness of the appellants or any other participants, but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. . . . The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.”).

188. See Mackenzie, *supra* note 186; Matthew Weait & Rosemary Hunter, *Commentary on R v. Brown*, in *ENGLISH/WELSH FEMINIST JUDGMENTS*, *supra* note 2, at 241.

189. See, e.g., Cynthia Fabrizio Pelak, *Teaching and Learning About Settler-colonial Racism: A Case for “Unsettling” Minoritizing and Multicultural Perspectives*, 5 *SOC. OF RACE & ETHNICITY* 294 (2019) (discussing anti-racist and decolonizing teaching methods).

190. The ways that ostensibly neutral rhetoric disguises particular viewpoints has long been a critique of critical legal scholars. For an early articulation of this view, see generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976). For a critique focused on legal writing and legal methods pedagogy, see generally Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 *DICKINSON L. REV.* 7 (1998).

courses. This will include various opinions from *U.S. Feminist Judgments*, as they also serve as oppositional discourse to Western legal rhetorical practices.<sup>191</sup> Ultimately, I wish to center these rhetorics and teach students how to use them effectively to create oppositional discourse as they develop various genres necessary for law practice.

Gabrielle Appleby and Rosalind Dixon

We have been speaking to colleagues teaching criminal law and property law about the value of a critical judgments exercise in their compulsory courses. We do not think it would be limited to these areas, and can see the possibility of a dedicated critical judgments exercise in a much wider range of compulsory courses, including torts law and corporate law. Indeed, we would like to see a critical exercise introduced more widely across the curriculum, and across traditionally public and private areas of law, lest students gain the (wrong) impression that critical perspectives are relevant only to certain areas of law.

Bridget Crawford

I generally teach what Alice Abreu has affectionately called “money law” courses.<sup>192</sup> I am excited about the U.S. Feminist Judgments Series of subject-matter specific books.<sup>193</sup> There is one in the works for Trusts & Estates and (possibly) Corporations. The Trusts & Estates cases seem to be an easy fit for feminist judgments, in some way, because they involve how we think about families, relationships, power, and expressions of intimacy. Feminist legal scholars have been interested historically in all of these topics. But I think corporate law is ripe for re-envisioning as well. Sure, there are certain state corporation statutes, but might a

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191. See, e.g., Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 THE SCHOLAR: ST. MARY'S L. REV. ON RACE AND SOC. JUST. (forthcoming 2019) (exploring multicultural rhetorical practices); Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L. J. 531 (2019) (exploring feminist rhetorical practices).

192. See Alice G. Abreu, *Tax Counts: Bringing Money-Law to LatCrit*, 78 DENV. U. L. REV. 575, 575 n.1 (2001) (“By ‘money-law,’ I mean the areas traditionally viewed as comprising the business curriculum: tax, corporations, securities, commercial law (UCC), securities, banking, antitrust and the like.”).

193. See *supra* note 21.

feminist judge articulate a corporate director's fiduciary duty differently than a non-feminist judge? Maybe. Maybe not. But it is something I think about quite often. And we might also understand partnerships, especially family limited partnerships, differently through feminist lenses. Limited partnership agreements give rise to so much more than the legal structure that is captured by the document. They also can change family dynamics, preserve wealth, and serve as vehicles for retaining control while involving the next generation of a family in a business, for example.<sup>194</sup> Feminists should be (and hopefully are) interested in the way that these vehicles operate.<sup>195</sup> There are questions about equality, equity, sameness and difference, gender, and power in so many areas of the law.

*E. What advice do you have for colleagues who might be interested in teaching with feminist judgments, but are not sure where to start?*

Bridget Crawford

I would say start small and dive in. Take one case that you cover in a course, but do not assign it from the casebook. Use an unformatted version, perhaps from an online source, and present it to the students side-by-side with the feminist judgment, also in an unformatted version. Ask the students to identify the strengths and weaknesses of each opinion. Ask which opinion gets the law 'right' and why. Ask the students whether they can perceive any theoretical or methodological commitments that undergird the opinion. It is that simple. This allows us to teach 'the law,' in the sense of the black-letter holding of the case, while also talking about how decisions get made, how to structure legal arguments, and how to be most persuasive as advocates.

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194. See, e.g., Mitchell M. Gans & Jonathan G. Blattmachr, *Family Limited Partnerships and Section 2036: Not Such a Good Fit*, 42 ACTEC L.J. 253 (2017) (describing use of family limited partnerships in estate planning); Brad M. Kaplan, *Best Practices in Succession Planning for the Closely-Held Business*, in FAMILY AND BUSINESS SUCCESSION PLANNING STRATEGIES 7 (2009), WL 2029273 (explaining how family limited partnership can play a role in both business and succession planning).

195. See also Geri Stengel, *How to Put Your Money Where Your Feminism Is*, FORBES.COM (Dec. 6, 2017, 11:17 AM), <https://www.forbes.com/sites/geristengel/2017/12/06/how-to-put-your-money-where-your-feminism-is/#5678f16b79fd> (encouraging women to become active investors, especially through women-owned vehicles, noting that "[m]any women-owned funds are finding that women have an increasing interest in becoming limited partners in private equity funds").

Elisabeth McDonald

Like Bridget, I would also advocate diving in, but in a selective way. Choose a case that you might already cover, or one in your area of interest that has been reimagined. Maybe you will even have a different rewrite to offer your students—this is part of the learning, of course. There are many ways to craft a decision that has legal validity. How you *use* the case will very much depend on the class—its size, the age and experience of the students, how much front-loading you will need to do, as Kathy explained, so that the participants can understand the significance and value of the feminist judgment. To get the best pedagogical value from a feminist judgment, I believe, students have to be working at a level that they understand the method and are open to engaging with critical analysis. That said, it is possible, as I have done in my criminal law class, to focus on an *aspect* of a judgment to make the points of significance.

Of course, whatever you do, reading a feminist judgment will not be appealing to all students as an exercise or as a learning experience. We know that there are students who are not ready or willing to embrace legal education as essentially (and importantly) involving questioning and critique. That should not at all deter you from diving in. You will, I promise, awake and inspire students who will then come to accept that advocating for social and legal reform will be an integral part of their life in the law.

Ross Astoria

For the undergraduate course called Law, Politics, and Society, I wanted to integrate social theory, normative theory, and law. Feminist judgments greatly facilitate that integration, but it takes a long time to design the assignments and readings for undergraduates. If you do not have the time to do this, I recommend using individual feminist judgments to compare and contrast with the originals and to build that exercise into an undergraduate constitutional law course.

Gabrielle Appleby and Rosalind Dixon

First, read articles like this about teaching with critical judgments and talk to others who have had experiences teaching with critical judgments to get an idea of what might work for you.

Second, like Elisabeth said, start with a small exercise (maybe one class in the teaching term). Do not be afraid that it might fall a bit flat initially, or that you will have to tweak it, this is always the way when you start something new that is worthwhile! Third, make sure you set the students up for it well. Give the students advance warning, explain the objectives of the activity, make sure your instructions are clear, and set out your expectations of them in approaching an often-sensitive exercise. This is often the first time they are engaging in such an exercise, and they will be feeling anxious as well. Fourth, have courage that the students will respond with genuine engagement. That has always been our experience.

*E. If you have any publicly available teaching materials that relate to your teaching use of feminist judgments, where are the materials accessible?*

Kathy Stanchi

I am happy to share my syllabus for the course in Drafting Social Justice Judicial Opinions. Just email me!

Teri McMurtry-Chubb

Feel free to DM me on Twitter—@genremixtress—for access to my teaching materials and assessment tools, and to continue this conversation.

Ross Astoria

The course attracted quite a large number of students, so I will be revising it and teaching it again. I would be happy to pass along the syllabus and other course materials, as well as discuss with anyone interested in using this material in an undergraduate course.

Andrea McArdle

I would be happy to share my syllabus for the course “Writing from a Judicial Perspective” and the writer’s memo questions I ask students to answer about their use of feminist judgments. I will also be developing a variation of the course that I plan to launch in Spring 2020, a two-credit seminar focused on rewriting an opinion (and thus closer in its scope and work product to the feminist judgments projects). I am envisioning that the class will work with

a final judgment from a federal or state court, and I hope to involve students in nominating a short list of opinions as candidates for rewriting. Although the course assignment will not require a feminist rewriting, we will use *U.S. Feminist Judgments*<sup>196</sup> as a text providing exemplars of judgments rewritten from a justice-oriented, feminist perspective. I will encourage students to draw from feminism or another perspective that is justice-enhancing. I plan to offer students an additional credit if they take on a judicial-writing placement during the same semester. I will arrange the placements and coordinate students' experience in both components of the class, to promote reflection on practical applications of classroom learning.

Gabrielle Appleby and Rosalind Dixon

Our book *The Critical Judgment Project*<sup>197</sup> contains in Chapter 1 a number of the teaching tools that we draw upon in our Federal Constitutional Law class in Australia. In addition, we are developing a *Critical Judgments Project* website, on which we will be making available to other teachers our teaching guide for the class, as well as other materials from feminist judgments and other critical judgments projects around the world. In the meantime, certainly email us for a copy of our teaching guide!

Troy Lavers

I am also happy to share our syllabus and reading lists if anyone would like them. Or, if you would like to comment on anything included here, please feel free to email me.

## V. Feminist Judgments as a Form of Teaching, Scholarship and Service

*A. Given the way you use feminist judgments, would you classify them as a form of legal scholarship, a pedagogical tool, an exercise in activism, or something else?*

Andrea McArdle

I would say “all of the above”! As I have used feminist judgments in my “Writing from a Judicial Perspective” class at

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196. U.S. FEMINIST JUDGMENTS, *supra* note 2.

197. CRITICAL JUDGMENTS PROJECT, *supra* note 27.



CUNY Law School, the rewritten opinions are certainly teaching tools. They are exemplars of intentional judicial writing, resources that students can draw from as they draft an opinion in the pending U.S. Supreme Court case we are studying.

These judgments are also engaged scholarship, melding the conventions of judicial writing and close analysis of law and facts with a vision of what the law should cover and protect. The judgments thus embed a scholarly thesis, or claim, that otherwise might appear in a law review article critiquing existing doctrine and offering a revised understanding of the law.

The judgments are a form of activism because they apply pressure to constricted understandings of the social realities that law should take into account. For example, Laura Rosenbury's forthright, feminist version of *Griswold v. Connecticut* argues for a broader view of what individual liberty encompasses; because consensual sexual activity can encourage personal identity formation and interpersonal relations, laws banning contraception impede the full experience of personal liberty that the Fourteenth Amendment's Due Process Clause protects.<sup>198</sup> Similarly, Val Vojdik's expanded equal protection rationale for striking down Virginia Military Institute's males-only admissions policy in *United States v. Virginia* argues both for fundamental changes to the Institute's culture of aggressive masculinity and for adopting a strict scrutiny standard for assessing gender classifications.<sup>199</sup> Both measures are needed to ensure that women are fully incorporated into the Institute's program. Because these feminist judgments push back against societal norms and practices that oppress women, and show how the law can be a tool for enhancing women's liberty and equality, they are activist in intent and effect.

Bridget Crawford

I agree with Andrea. A feminist judgment is a teaching tool, scholarship, and activism all at once.<sup>200</sup> For the person who is

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198. See Rosenbury, *supra* note 84.

199. Compare *United States v. Virginia*, 518 U.S. 515, 534 (1996) (holding that males-only admission policy lacked an "exceedingly persuasive justification") with Valorie K. Vojdik, *Rewritten Opinion in United States v. Virginia*, in U.S. FEMINIST JUDGMENTS, *supra* note 2, at 389–407 (reaching same result but employing strict scrutiny for gender-based classifications).

200. See also Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 197 (2017) ("If our work on any of the *Feminist Judgments* projects contributes to solving problems of gender equality and advancing

rewriting a case, the judgment is an exercise in legal argumentation at its core. Using the facts and law in effect at the time of the initial opinion, how might the feminist judgment writer reach a different conclusion or use different reasoning to reach the same conclusion as the original opinion writer? To participate in that process is to study the law and explain it to others. But feminist judgments do so by *showing*, not telling. It is scholarship in an alternate format. Non-traditional scholarship has not always been eagerly received by the legal academy.<sup>201</sup> I think, for example, of some of the early criticism launched at work in the critical race theory area.<sup>202</sup> But critical race theory shows us—does not just tell us—that the language of law is not just the language of traditional law review articles.<sup>203</sup> It can be the language of personal experience, history, or other narratives.<sup>204</sup> So, too, feminist judgments show that judicial opinions and judicial language can rely on a range of sources, deploy a wide range of language, explicitly embrace a theoretical lens, and deploy multiple legal methods in deciding cases.

Vanessa Munro

I agree with Andrea and Bridget. To my mind, rewriting judicial opinions from a feminist perspective is a combination of a teaching tool, scholarship, and activism—or at least it has this potential. The feminist judgments have the capacity to be of interest to policy-makers, judges, and practitioners (even if only out of curiosity); to make students understand and challenge legal methods and concepts; to promote reflection on feminist approaches and gender equality; and to agitate for change by raising public consciousness (*e.g.*, through art exhibitions but also through things like our coverage in mainstream media).

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justice, we gladly embrace the multiple labels of scholars, activists, and educators.”).

201. *See, e.g.*, Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 907 (discussing negative reactions to critical race theory writing).

202. *Id.*

203. *See, e.g.*, PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146–48 (1991) (recounting her personal experience renting an apartment in New York with that of a white male colleague to illustrate how the presence or absence of a written rental contract can take on different meanings, based on the relative power positions, including those linked to race, gender, and historical practices of the contracting parties).

204. *See, e.g.*, Bell, *supra* note 201, at 899–902 (surveying different forms of critical race theory writing).

## Conclusion

(Linda L. Berger, Bridget J. Crawford, and Kathryn M. Stanchi)

At law schools and in undergraduate courses in the United States and law schools internationally, professors are using feminist judgments in seminars, courses in brief and opinion writing, jurisprudence courses, and subject-matter specific courses such as tax and criminal law.<sup>205</sup> Other instructors may want to experience for themselves the benefits that are obtained from using feminist judgments in the classroom. First and foremost, by reading the alternative judgments in comparison with the original judgments, students learn more about the use of language and how variations in word choice and style affect writers and readers.<sup>206</sup> Through reading the feminist judgments, students encounter voices and aspects of history that are often neglected.<sup>207</sup> They see how other writers have transformed theory into practice and how experienced brief writers have pursued their own social justice goals.<sup>208</sup> Especially in courses where students write all or part of their own alternative judgments, students begin to understand how they may participate in crafting persuasive arguments using a range of sources.<sup>209</sup>

In addition, using feminist judgments in the classroom introduces students to feminist theory and feminist history, illustrates the application of theory to practice in the form of the rewritten judicial opinions, helps students recognize the obstacles posed to social justice activism by precedent, and exposes the contingency of judicial decision-making by helping students see that the original opinions were often only one option.<sup>210</sup> The feminist judgments highlight techniques of persuasion while illuminating constraints on opinion writing. They provide models for writing opinions and briefs, applying feminist and critical theory and methods, in social justice contexts, that expand student understanding of available legal theories, and demonstrate the use of feminist methods including practical reasoning and narrative.

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205. *See supra* Part I.A.

206. *See, e.g.*, LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 6 (2017) (“The key to rhetorical situation analysis is to precisely identify the trigger or prompt for the advocacy. Difference prompts evoke different audiences and impose different constraints on the rhetorical response.”).

207. *See supra* Part II.

208. *See supra* Part II.

209. *See supra* Part II.

210. *See supra* Parts II and III.

Finally, they illustrate the power of comparative learning by encouraging students to contrast opinions decided from different perspectives as well as from different jurisdictions.<sup>211</sup>

For all of these reasons, feminist judgments are unique teaching tools that can accomplish multiple goals through a seemingly simple exercise of comparing an original opinion with one rewritten using all of the same facts and law, but coming to a different conclusion (or reaching the same conclusion for different reasons).<sup>212</sup> We are excited about using feminist judgments in the classroom and hope that teachers from all levels—secondary education, colleges, law schools, and other graduate and professional programs—will experiment with different ways of teaching and learning. There is a global community waiting to assist and support anyone who would like to try.

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211. *See supra* Parts II and III.

212. *See* Stanchi et al., *Introduction*, *supra* note 8, at 9 (explaining that opinion authors “could draw only on facts and law in existence at the time of the original opinion” and that authors “were free to choose to write a majority opinion, a dissent, or a concurrence, depending on their goals”). Of the twenty-five opinions in the book, the eight re-imagined majority opinions were roughly evenly divided between those that changed the ruling and that those that changed the reasoning only. *Id.*